

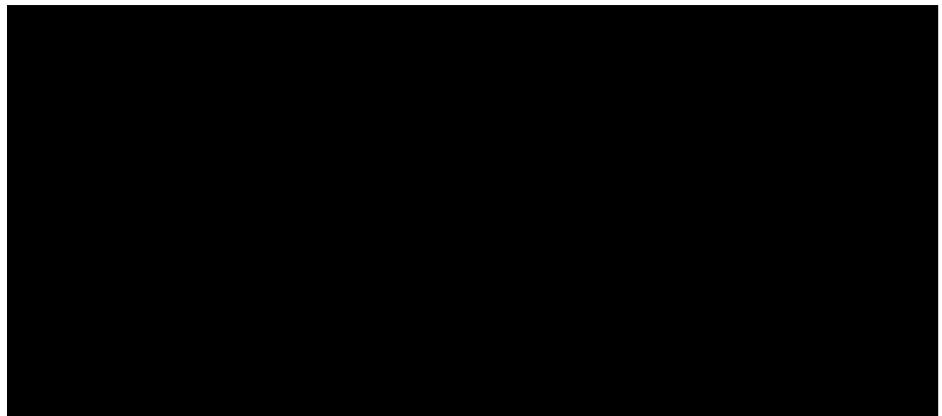
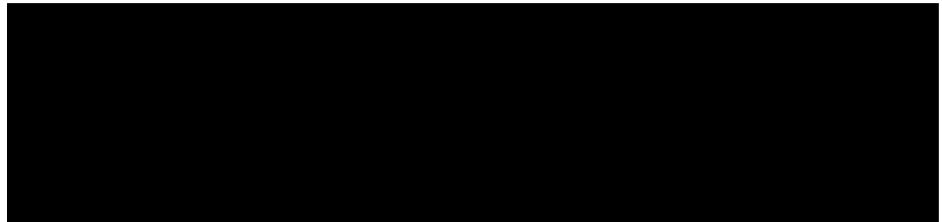
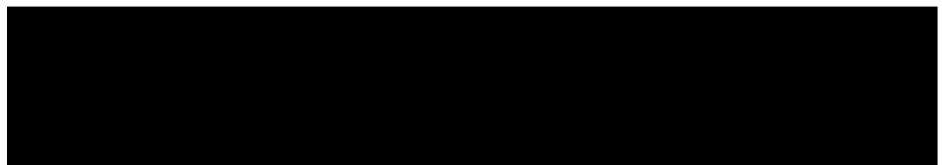
[No. B259538. Second Dist., Div. Six. Aug. 3, 2016.]

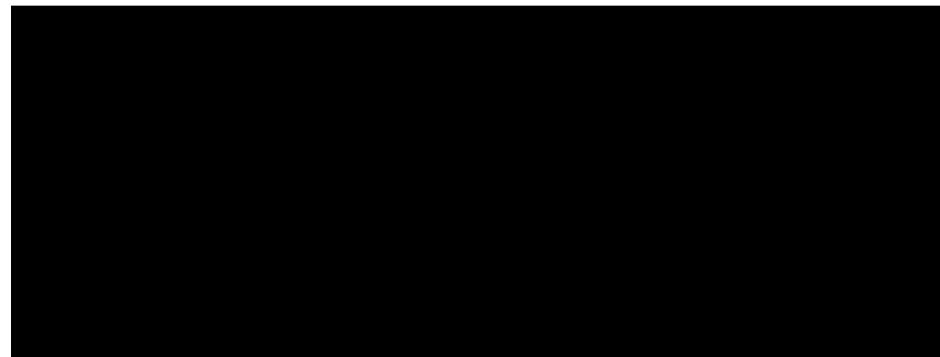
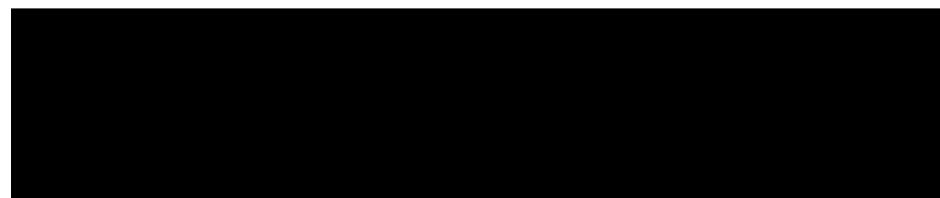
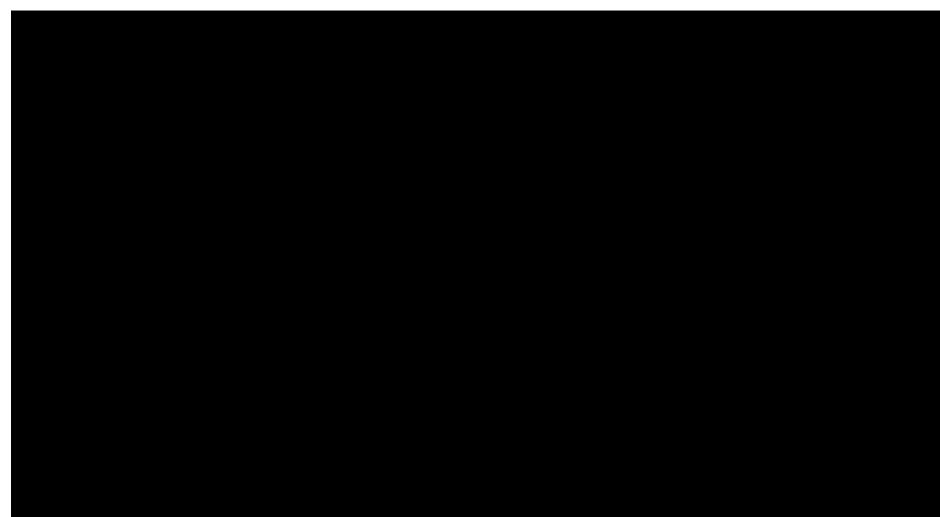
GERARDO ALDANA, Plaintiff and Appellant, v.
MIKE STILLWAGON, Defendant and Respondent.

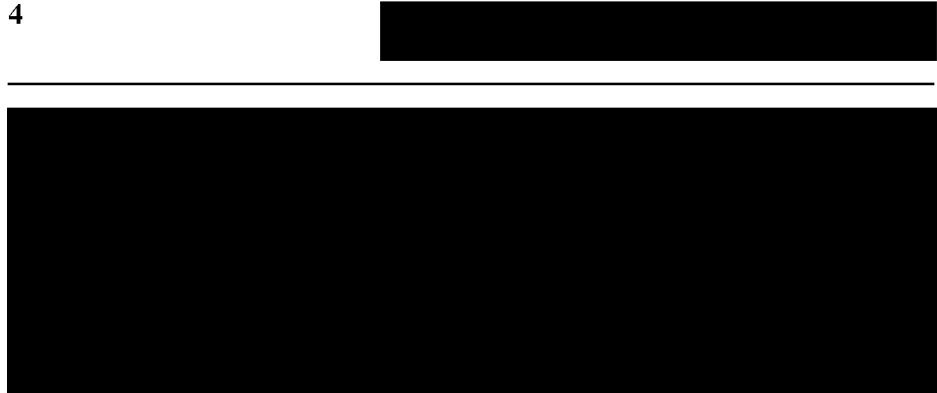
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COUNSEL

Law Office of Herb Fox, Herb Fox; and Katherine Lipel for Plaintiff and Appellant.

Loskamp & Wohlgemuth and Edwin K. Loskamp for Defendant and Respondent.

OPINION

PERREN, J.—

INTRODUCTION

Mike Stillwagon, a paramedic supervisor, was driving his employer's pickup truck. He was en route to the location of an injured fall victim to supervise the responding emergency medical technicians (EMTs) and, if necessary, provide assistance. At an intersection in Oxnard, he collided with a vehicle being driven by Gerardo Aldana. A year and a half later, Aldana sued him for negligence.

■ The Medical Injury Compensation Reform Act (MICRA) limits the time to file suit against a health care provider for professional negligence to one year from the date the injury is discoverable.¹ (Code Civ. Proc.,

¹ MICRA "creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first 'discovers' the injury and the negligent cause of that injury. Secondly, she must file within three years after she first experiences harm from the injury." (*Ashworth v. Memorial Hospital* (1988) 206 Cal.App.3d 1046, 1054 [254 Cal.Rptr. 104], italics omitted.) Only the one-year limit is at issue here.

§ 340.5.)² The trial court found that Aldana's suit was subject to MICRA's one-year statute of limitations rather than the two-year limitations period for general negligence (§ 335.1), and therefore was time-barred.

■ After briefing was complete and before we heard oral argument, our Supreme Court decided *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75 [201 Cal.Rptr.3d 449, 369 P.3d 229] (*Flores*), which clarified the issue. *Flores* held that "the special statute of limitations for professional negligence actions against health care providers applies only to actions alleging injury suffered as a result of negligence in rendering the professional services that hospitals and others provide by virtue of being health care professionals: that is, the provision of medical care to patients." (*Id.* at p. 88.)

■ Aldana contends that the trial court erred in applying MICRA because he had no connection to the professional services being rendered and because Stillwagon was not rendering professional services at the time of the accident. We agree with the latter contention. While Stillwagon's status as a paramedic may demonstrate that he was a medical professional, the automobile collision remains a "garden-variety" accident not resulting from the violation of a professional obligation but from a failure to exercise reasonable care in the operation of a motor vehicle. (*Flores, supra*, 63 Cal.4th at p. 87, fn. 4; see *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].) The obligation was one that he owed to the general public by virtue of being a driver and not one that he owed to a patient by virtue of being a paramedic. Therefore, we reverse.

FACTS AND PROCEDURAL HISTORY

Stillwagon was on duty as a paramedic supervisor at the Gold Coast Ambulance station. Around 1:30 a.m., he heard on his radio scanner that an ambulance had been dispatched in response to a 911 call regarding an unconscious fall victim. He decided to respond to the call as an additional resource due to the indeterminate nature of the victim's condition and because he "was up and ready to go, and sometimes those calls are the best calls to provide a little evaluation on how the crews are performing in the early hours of the morning."

Stillwagon was certified as an ambulance driver. He got into the supervisor's vehicle, a Ford F-150 truck. It had an emergency vehicle permit but was not an ambulance and could not transport patients. At an intersection in Oxnard, Stillwagon failed to come to a complete stop at a red light. Aldana

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

was driving through the intersection from the direction with the green light when he collided with Stillwagon's vehicle.³

Approximately 17 months later, Aldana sued Stillwagon for damages sustained in the collision, alleging a single cause of action for negligence. The trial court granted Stillwagon summary judgment. Relying on *Canister v. Emergency Ambulance Service, Inc.* (2008) 160 Cal.App.4th 388 [72 Cal.Rptr.3d 792] (*Canister*), the trial court applied MICRA's one-year statute of limitations for professional negligence.

■ *Canister* held that EMTs "are health care providers and negligence in operating an ambulance qualifies as professional negligence when the EMT is rendering services that are identified with human health and for which he or she is licensed." (*Canister, supra*, 160 Cal.App.4th at p. 392.) Here, the trial court extended *Canister* to apply to a nonambulance vehicle driven by a paramedic supervisor on the way to a victim requiring medical care. The trial court ruled that "[t]raveling to the location of a patient/victim is an integral part of the services provided by an ambulance driver" and "there is no strict requirement that a health care provider actually be providing services to a patient/victim at the time the negligent act occurred."

DISCUSSION

■ This appeal presents an issue of statutory construction, which we review de novo. (*Canister, supra*, 160 Cal.App.4th at p. 394.) "In interpreting section [340.5], we seek to determine the Legislature's intent in order to effectuate the purpose of the law. [Citation.] We begin with the words of the statute, because generally they are the most reliable indicator of legislative intent. [Citation.] If the statutory language is clear and unambiguous, we end our inquiry, since ‘ “[i]f there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.” ’ [Citation.] When the text of a statute is susceptible of more than one reasonable interpretation, we consider ‘ “ ‘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.’ ” ’ [Citation.]” (*Id.* at pp. 399–400.)

³ The parties dispute whether Stillwagon activated his vehicle's emergency lights and "yelp siren" before entering the intersection. For the purpose of determining MICRA's applicability, this is not a material fact.

■ MICRA's one-year statute of limitations applies to "an action for injury or death against a health care provider based upon such person's alleged professional negligence." (§ 340.5.) A "health care provider" is "any person licensed or certified pursuant to" various statutory schemes including, as relevant here, the Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act. (*Id.*, subd. (1); Health & Saf. Code, §§ 1797 et seq., 1797.4.) MICRA defines "professional negligence" to mean "a negligent act or omission to act by a health care provider *in the rendering of professional services*, which act or omission is the proximate cause of a personal injury or wrongful death, *provided that such services are within the scope of services for which the provider is licensed* and which are not within any restriction imposed by the licensing agency or licensed hospital." (§ 340.5, subd. (2), italics added.)

The dispositive question here is whether driving to the accident victim constitutes "professional services." It does not.

■ *Canister* concluded that both the EMT driving the ambulance and the EMT attending the patient were rendering professional services. (*Canister, supra*, 160 Cal.App.4th at p. 407.) In light of *Flores*, it is questionable whether this conclusion was correct. The Supreme Court recognized that MICRA is not limited "only to those specific tasks that require advanced medical skills and training" (*Flores, supra*, 63 Cal.4th at p. 85), but explained that MICRA does not apply to a medical professional's negligent act or omission "merely because it violates a state licensing requirement." (*Flores, supra*, at p. 86.) The plaintiff in *Canister* was a passenger accompanying the patient who "alleged [that] the ambulance was being driven negligently" and that he had not been "informed . . . that seatbelts were available." (*Canister*, at p. 393.)

■ Even if *Canister* was correctly decided, it is distinguishable. The regulation governing a paramedic's "scope of practice" provides that "a licensed paramedic" may perform certain specified procedures and administer various enumerated medicines "while caring for patients in a hospital as part of his/her training or continuing education . . . , or while at the scene of a medical emergency or during transport, or during interfacility transfer."⁴ (Cal.

⁴ In addition, a licensed paramedic may perform any of the procedures that an EMT or advanced EMT is authorized to perform, but those are similarly limited. (See Cal. Code Regs., tit. 22, §§ 100063, subd. (a) [EMT duties are "[d]uring training, while at the scene of an emergency, during transport of the sick or injured, or during interfacility transfer"], 100106, subd. (b) [advanced EMT duties are "while caring for patients in a hospital as part of their training or continuing education . . . or while at the scene of a medical emergency or during transport, or during interfacility transfer"].)

Code Regs., tit. 22, § 100146, subd. (c); see Health & Saf. Code, § 1797.170 [directing EMS Authority to establish minimum standards and promulgate regulations for EMT's training and scope of practice].) This includes the situation (if not the actions and omissions at issue) in *Canister*—a patient being transported from the scene of an accident to a hospital—but not the situation here. Driving a nonambulance vehicle to the scene of an injured victim is outside the scope of the duties for which a paramedic is licensed. Under *Canister*, MICRA would not apply. (See *Canister, supra*, 160 Cal.App.4th at p. 407 [“An EMT’s operation of an ambulance qualifies as professional negligence when the EMT is rendering services for which he or she is licensed or when a claim for damages is directly related to the provision of ambulance services by the EMT”].)

Stillwagon asserts that “[w]hen responding to the emergency call, [he] was acting within the course and scope of his employment as a licensed health care provider.” It is not the scope of his employment, however, that matters. If MICRA applied merely because a health care provider acted within the scope of his or her employment, then it would apply to any claim against a health care provider based upon services he or she performed on the job. MICRA is limited, however, to claims arising from “*professional services*,” and even then only “such services . . . for which the provider is licensed.” (§ 340.5, subd. (2), italics added.) We cannot ignore the Legislature’s proviso as surplusage. (See *PaciFiCare of California v. Bright Medical Associates, Inc.* (2011) 198 Cal.App.4th 1451, 1468 [130 Cal.Rptr.3d 756]; see also *Flores, supra*, 63 Cal.4th at p. 86 [rejecting construction of MICRA “covering essentially every form of ordinary negligence that happens to occur on hospital property”].)

■ More importantly, while MICRA is not limited to suits by patients (*Hedlund v. Superior Court* (1983) 34 Cal.3d 695, 703 [194 Cal.Rptr. 805, 669 P.2d 41]), it “applies only to actions alleging injury suffered as a result of negligence in . . . the provision of medical care to patients.” (*Flores, supra*, 63 Cal.4th at p. 88.) Driving to an accident victim is not the same as providing medical care to the victim. A paramedic’s exercise of due care while driving is not “necessary or otherwise integrally related to the medical treatment and diagnosis of the patient” (*ibid.*), at least when the patient is not in the vehicle. Accordingly, MICRA does not apply here. A contrary rule “would . . . sweep in not only negligence in performing the duties that [health care providers] owe to their patients in the rendering of medical diagnosis and treatment, but negligence in performing the duties that [they] owe to all . . . simply by virtue of operating [in public].” (*Flores, supra*, at p. 86.)

DISPOSITION

The judgment is reversed. Costs to appellant.

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

Respondent's petition for review by the Supreme Court was denied October 26, 2016, S237135.

[No. A144823. First Dist., Div. Two. Aug. 3, 2016.]

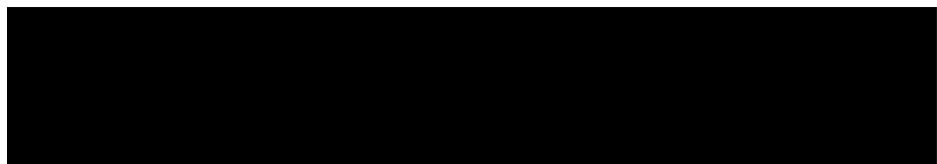
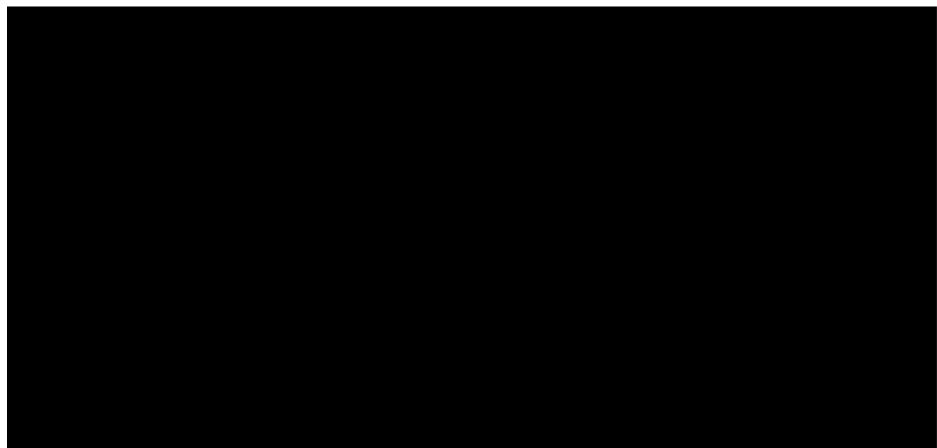
TRACY HAYWARD, Petitioner, v.
THE SUPERIOR COURT OF NAPA COUNTY, Respondent;
JOSE OSUCH, Real Party in Interest.

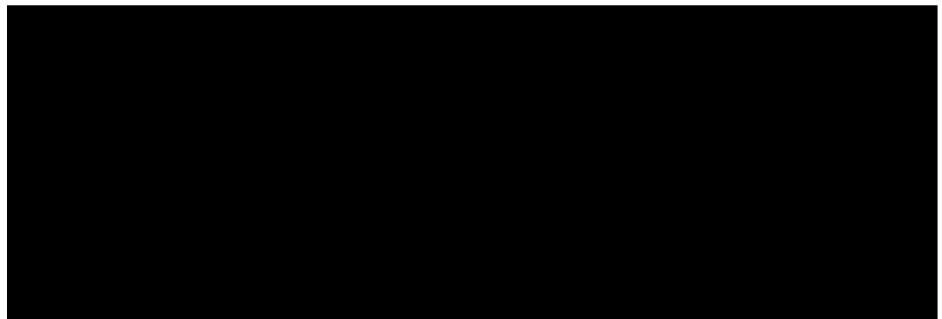
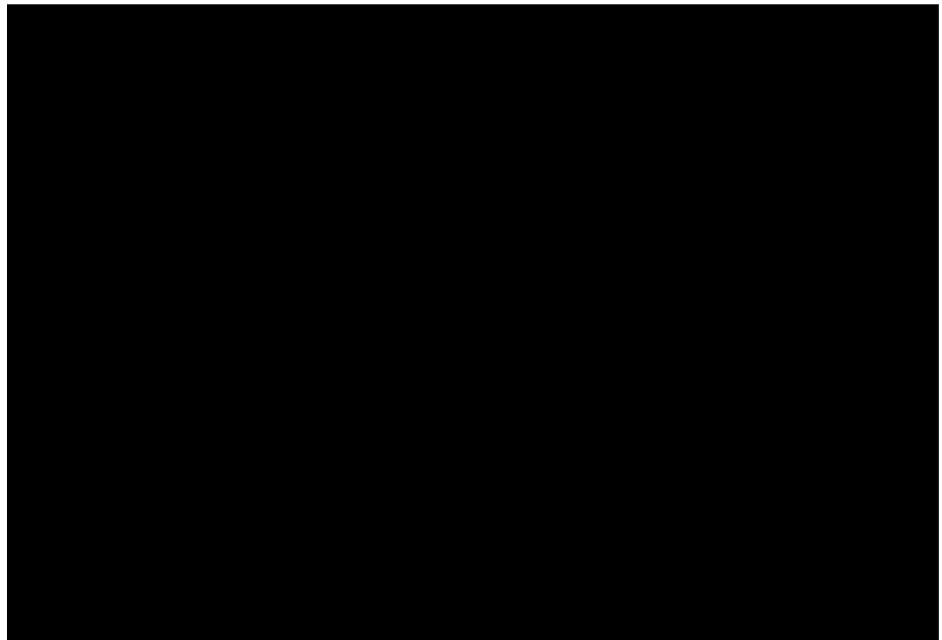
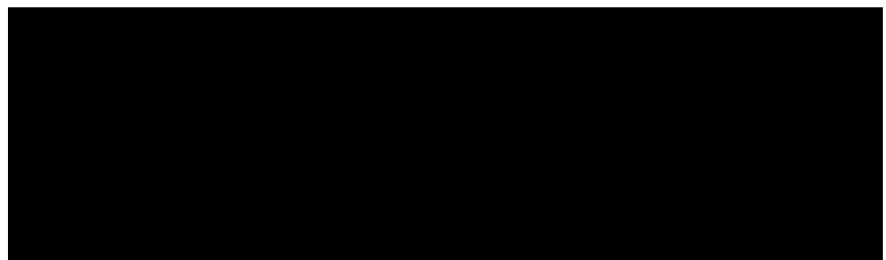
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) November 4, 2016, S237174.

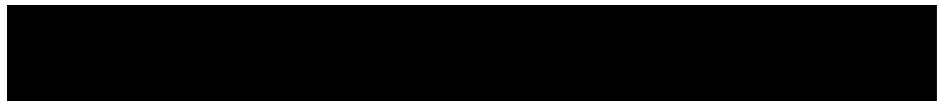
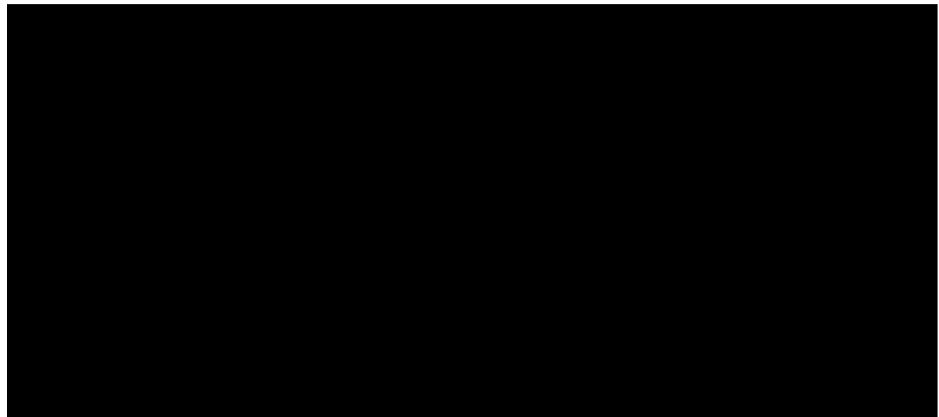
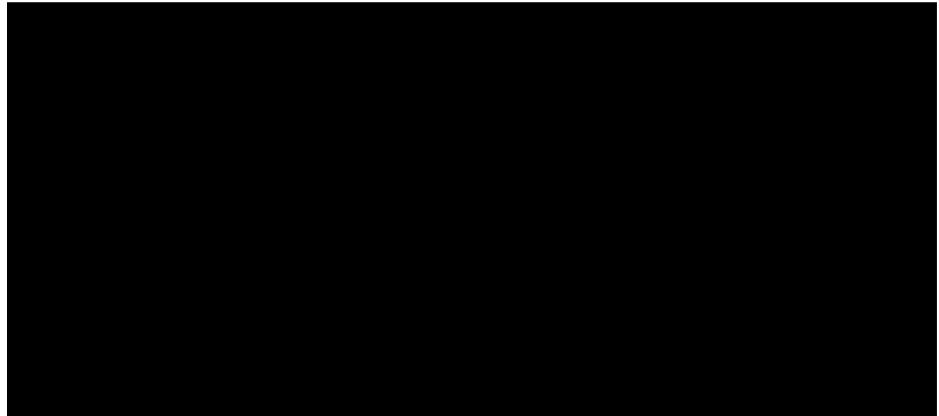
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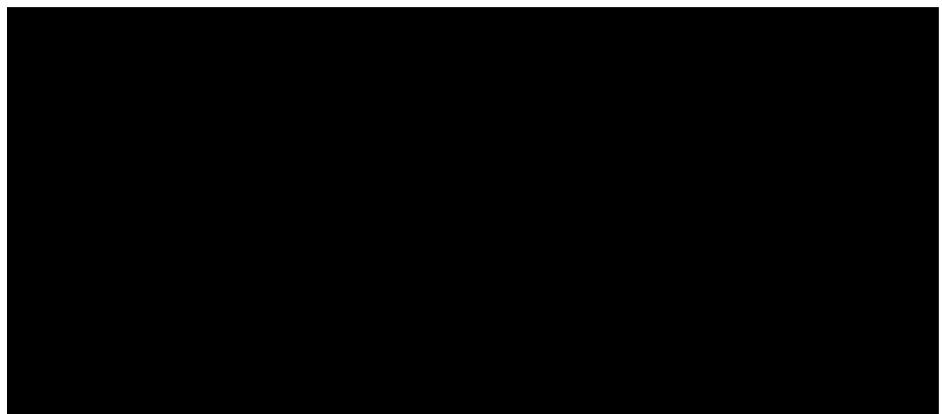
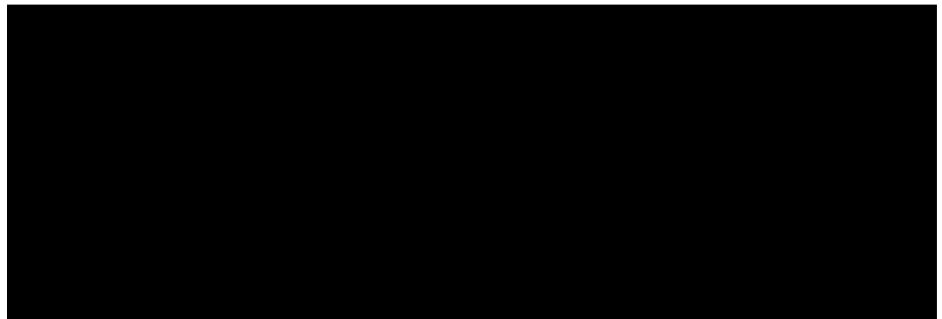
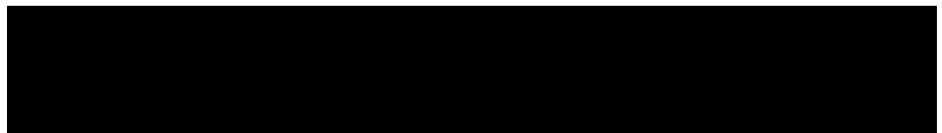
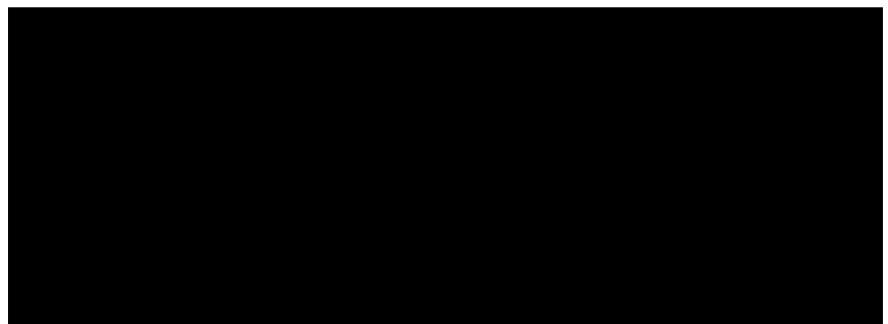
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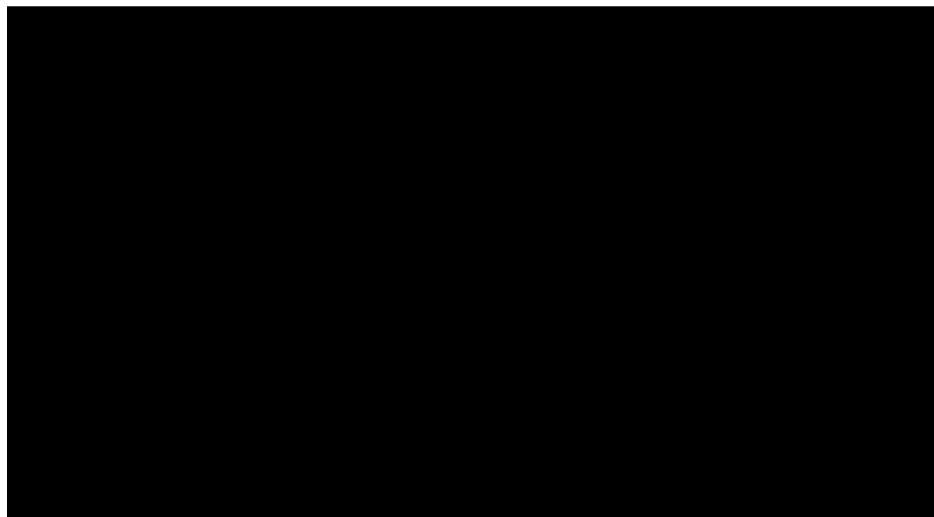
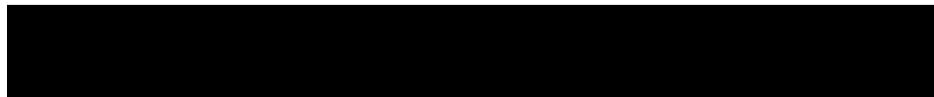
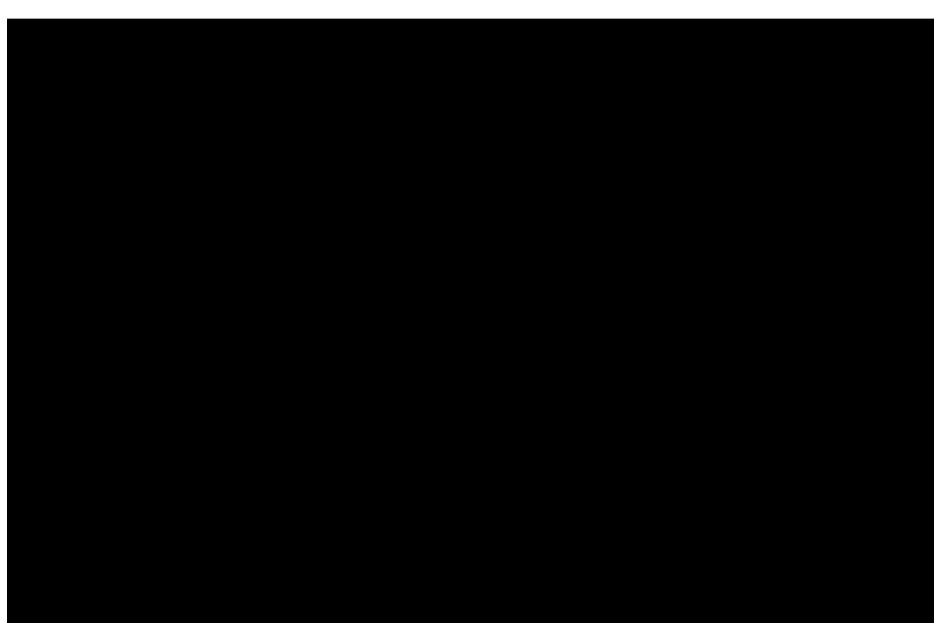
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COUNSEL

Law Offices of Keith E. Dolnick, Keith E. Dolnick; Berger Kahn Law Corporation and David B. Ezra for Petitioner.

No appearance for Respondent.

Blevans & McCall, Robert E. Blevans and Vanessa K. Wills for Real Party in Interest.

OPINION

KLINE, P. J.—The issues in this matrimonial case arise from the failure of an attorney serving as a temporary judge pursuant to article VI, section 21,¹ of the California Constitution to disclose grounds for her disqualification in the manner required by a canon of the Code of Judicial Ethics² applicable specifically to temporary judges. After the temporary judge had served for about two years, petitioner wife first learned that the judge had not disclosed “in writing or on the record” professional relationships she had had with lawyers in the present proceeding, as required by canon 6D(5)(a) and rule 2.831(d) of the California Rules of Court.³ Petitioner filed in the superior court a statement alleging grounds for disqualification, to which the temporary judge failed to respond in accordance with statutory procedure. The presiding judge of the superior court ordered the temporary judge disqualified, holding that she was deemed to have consented to her disqualification as a result of her failure to file a consent or verified answer. The case was reassigned to a superior court judge and discovery proceeded.

The present writ petition was filed to challenge certain of the trial court’s discovery orders and its decision to delay a hearing on petitioner’s motion to set aside orders previously made by the disqualified temporary judge. Pursuant to our order, proceedings in the trial court have been stayed. The questions presented to us all relate to whether the rulings made by the temporary judge prior to her disqualification are void or voidable and, if so, the legal consequences.

¹ Article VI, section 21 of the California Constitution provides that “On stipulation of the parties litigant the court may order the cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.”

² Unless otherwise indicated, all subsequent citations to canons refer to the California Code of Judicial Ethics.

³ Unless otherwise indicated, all subsequent citations to rules refer to the California Rules of Court.

As will be seen, our resolution rests heavily on the temporary judge's failure to either consent to disqualification or answer the statement of disqualification. The temporary judge's failure to contest the claims that she failed to disclose in writing or on the record, and also that she was biased and prejudiced against petitioner, means that those factual allegations must be taken as true, and she was therefore automatically disqualified. (See discussion, *post*, at pp. 37–41.)

We shall find that (1) the rulings and orders issued by the temporary judge are all void and must be vacated; (2) the settlement agreement signed by the parties prior to disqualification of the temporary judge was tainted by the disqualifying conduct of the temporary judge and therefore may not be enforced pursuant to Code of Civil Procedure section 664.6;⁴ and (3) the conduct of the disqualified temporary judge did not taint the proceedings before the superior court judge who replaced her. Finally, we shall decline to decide whether the fees paid the temporary judge for services rendered in violation of ethical obligations must be refunded, because the temporary judge is not a party to this proceeding.

FACTS AND PROCEEDINGS BELOW

Petitioner, Tracy Hayward, and real party in interest, Jose Osuch, married in 1996.⁵ Tracy is the owner of The Perfect Puree of Napa Valley (PPNV), a fruit pureeing business in Napa County; Jose was employed by PPNV and in 2006 Tracy made him a 1 percent owner. The parties later separated and Tracy filed this petition for dissolution in 2011. Initially, Tracy was represented by Roger Lewis, but after she learned he was formerly the law partner of Robert Blevans, who represented Jose, she replaced Lewis with Attorney John Munsill.

In January 2012, the superior court ordered Tracy to pay Jose \$12,748 per month in temporary spousal support and, as additional temporary spousal support, 40 percent of any distributions or withdrawals from her businesses other than salary and other specified taxable income attributed to Tracy. The order also provided that if Tracy's tax payments exceeded her taxable obligations, she was required to claim a refund and pay 40 percent of the refunded overpayment to Jose as additional temporary spousal support.

⁴ All statutory references are to the Code of Civil Procedure unless otherwise indicated.

⁵ As is customary in marital dissolution actions, we refer to the parties to the marriage hereinafter by their first names. (*In re Marriage of James & Christine C.* (2008) 158 Cal.App.4th 1261, 1264, fn. 1 [70 Cal.Rptr.3d 715].) All other parties and counsel will be referred to solely by their last names. No disrespect is intended.

Appointment of the Temporary Judge

In March 2012, the parties decided not to further litigate the case in the superior court and to stipulate to the appointment of Attorney Nancy Perkovich as judge pro tempore—commonly referred to as a “private judge”⁶—pursuant to rules 2.830 through 2.834, which apply to attorneys appointed temporary judges at the request of the parties pursuant to article VI, section 21, of the California Constitution.

The stipulation provided that, subject to approval of the presiding judge of the superior court, Perkovich “may be designated as Temporary (‘Private’) Judge of the Superior Court for all purposes, including, without limitation, conducting settlement conferences and case management conferences, hearing any pretrial motions/Orders to Show Cause, and sitting as trial/long cause judge in this proceeding. The parties waive any conflict that may exist because Perkovich conducts settlement conferences and thereafter serves as the hearing and/or trial judge.” The parties and their attorneys all signed the stipulation on March 28, 2012, and Perkovich signed an oath of office the next day; the order designating her temporary judge was signed by the Honorable Robert G. Stone, Presiding Judge of the Napa County Superior Court, on April 3, 2012, and filed on April 5, 2012.⁷

The Rules of Court provide that “[i]n addition to any other disclosure required by law, no later than five days after designation as a temporary judge . . . a temporary judge must disclose to the parties any matter subject to disclosure under the Code of Judicial Ethics.” (Rule 2.831(d).) As Perkovich was designated a temporary judge on April 5, 2012, her disclosure was required to be made no later than April 10.

Canon 6D(5)(a), provides that in “all proceedings” temporary judges must “disclose in writing or on the record information as required by law, or information that is reasonably relevant to the question of disqualification under Canon 6D(3), *including personal or professional relationships known to the temporary judge . . . that he or she or his or her law firm has had with a party, lawyer, or law firm in the current proceeding, even though the temporary judge . . . concludes that there is no actual basis for disqualification.*” (Italics added.)

⁶ The term “private judge” refers to a nonjudicial officer who exercises judicial power and is selected and compensated by the parties either as a “temporary judge” pursuant to article VI, section 21, of the California Constitution, or as a “referee” pursuant to Code of Civil Procedure section 638.

⁷ Under the stipulation and order appointing Perkovich, the trial date set for May 21, 2012, was vacated and discovery was deemed closed as of April 21, 2012, except that either party could depose the other; after April 21, either party could file a motion to reopen discovery.

Perkovich failed to comply with the foregoing requirement: She failed to disclose “in writing or on the record” any ground for disqualification even though she knew she, Blevans, and Munsill, had in the past served as private judges in each other’s cases, i.e., that she or her law firm had professional relationships with lawyers in the proceeding before her. (Canon 6D(5)(a).) This information was required to be disclosed even if Perkovich concluded that these relationships provided “no actual basis for disqualification,” and the disclosure was required to be made “in writing or on the record.” (Canon 6D(5)(a).)

Section 170.3, which applies to temporary judges, allows the parties and their attorneys to waive a disqualification after a judge determines himself or herself to be disqualified and discloses the basis of the disqualification. (§ 170.3, subd. (b)(1).) Such a waiver must “recite the basis for the disqualification, and is effective only when signed by all parties and their attorneys and filed in the record.” (*Ibid.*) Because Perkovich failed to disclose any grounds for disqualification in writing or on the record, much less to determine herself to be disqualified, neither party was called upon to waive or waived the disqualification.

Perkovich also failed to comply with a provision of the Rules of Court requiring a temporary judge to certify (in his or her oath of office or otherwise) “that he or she is aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and the California Rules of Court.” (Rule 2.831(b).)

Although the stipulation and proposed order assigning Perkovich temporary judge was signed by the parties and their counsel late in March 2012, and filed with the court on April 5 of that year, the parties did not actually meet with Perkovich until seven months later, at the first settlement conference on October 30, 2012. As will be seen, Perkovich maintains that she verbally disclosed her personal and professional contacts with both Blevans and Munsill at the beginning of this conference, including that she had hired each of the attorneys as temporary judges in the past, and each of them had hired her. Tracy maintains that she did not hear or understand any such verbal disclosures, and did not learn of Perkovich’s failure to disclose “in writing or on the record” until almost two years later, when her present counsel came into the case and requested information including Perkovich’s disclosures, and Perkovich informed them of her verbal disclosures.

Relations Between the Parties and Counsel Deteriorate

On March 26, 2013, Tracy replaced Munsill with Trevor Jackson, a younger lawyer who did not limit his practice to family law.⁸ Jackson was unaware Perkovich and Blevans designated each other as private judges in matrimonial cases in which one of them represented a party. Perkovich did not disclose her professional relationship with Blevans at any time during which Jackson represented Tracy.

Shortly after Jackson entered the case, relations between the parties worsened. The contentiousness was most evident at a July 30, 2013, hearing on Jose's motions requesting attorney and expert witness fees, payment of spousal support arrearages and restraints on Tracy's ability to take distributions from PPNV without Jose's consent or a court order. Assuming testimony and other evidence would be received at the hearing, Jackson brought Kevin Ziegler, the chief operating officer of PPNV, to testify as to the adverse effect on PPNV of the restraints Jose sought to impose on its distributions and Tracy's corporate decisionmaking, and expected to be able to cross-examine Darlene Elmore, Jose's expert, regarding her declaration. Jackson had given advance notice Ziegler would testify by naming him on his witness list, and he and Tracy were surprised when Perkovich refused to allow Ziegler or any other person to testify and stated her intention to rule on Jose's motions solely on the basis of the declarations, exhibits and pleadings. Perkovich barred testimony on the erroneous ground that the hearing was analogous to a law and motion proceeding.⁹ Jackson objected repeatedly during the hearing, but to no avail.

Jackson also complained that though Tracy was the founder and owner of PPNV, whose assets Jose sought to examine and encumber, neither she nor the chief operating officer of the company were allowed to testify at the hearing regarding its operations, cash flow, tax situation, or any other relevant matters. Instead, Perkovich allowed Blevans to submit a declaration determining the disputed financial issues based on his analysis of the company's tax returns. Additionally, with respect to attorney and expert witness fees, Perkovich appeared willing to rely solely on the declaration of Blevans, who (self-servingly in Jackson's view) characterized himself an expert on the subject, and to award fees to compensate for the costs of what in Jackson's

⁸ The substitution of attorneys was apparently Tracy's choice, not initiated by Munsill. When asked at his deposition why he was substituted out of the case, Munsill stated that he did not remember, but he recalled being surprised that he was being substituted out of the case.

⁹ The rule of court defining "law and motion" excepts causes arising under the Family Code (rule 3.1103(a)(1)), and subdivision (a) of Family Code section 217, which provides that, with exceptions not here pertinent, on a motion brought pursuant to the Family Code "the court shall receive any live, competent testimony that is relevant and within the scope of the hearing."

view were unnecessary depositions and “law and motion” proceedings that had been pursued instead of negotiating an expeditious settlement. Jackson objected to requiring Tracy to pay Jose’s attorney and expert witness fees before Jose was compelled to disclose the extent and nature of his independent assets.

Perkovich ordered Tracy to pay Jose \$13,335 for his attorney fees, to advance him attorney fees in the amount of \$100,000 payable in 60 days, and to pay expert witness fees of \$35,000 to Darlene Elmore. After Jackson objected to the “abbreviated manner” in which the proceeding had been held, Perkovich went on to find that in 2011 and 2012 Tracy had taken distributions of \$605,576 in excess of taxes attributable to PPNV and Hayward Enterprises, Inc. (HEI), another company she controlled, which provided sizable tax refunds that pursuant to court order should have been shared with Jose; ruled that Jose was entitled to 40 percent of this amount, or \$242,230; and directed Tracy to pay him this amount, plus interest at 10 percent, as additional spousal support. Finally, Perkovich restrained Tracy from allowing or causing the withdrawal of any sums from PPNV or HEI for payment to her for her personal benefit.

Toward the end of the hearing, Jackson remarked on his “shock” at Perkovich’s unexpected refusal to accept testimony he had planned to present. When he subsequently reiterated his objection to the lack of notice, Tracy interjected that Perkovich’s failure to allow testimony “made you look like an idiot,”¹⁰ adding that “[m]y COO is sitting right here and he could have cleared up many of these issues. How in the hell do you absolutely allow—.” Perkovich cut Tracy off, stating “Your conduct is in contempt of court. You’re disrespectful. You’re in contempt.” A colloquy ensued in which Perkovich complained that “in presenting your case . . . you see things only your own way,” and Tracy heatedly insisted that Perkovich “never asked the questions” that needed to be asked “for the truth to be made known” about the manner in which she ran PPNV.

In a ruling she filed with the superior court less than two weeks later, on August 12, 2013, Perkovich belatedly recognized that, under Family Code section 217, subdivision (c), Tracy was entitled to an evidentiary hearing on some of the motions heard and decided on July 30. Perkovich vacated portions of her earlier decision and ordered that the motions for spousal

¹⁰ The “you” in this remark leaves ambiguous whether Tracy was saying Perkovich or Jackson was made to look like an idiot. In a declaration submitted in support of Tracy’s October 7, 2014, motion to disqualify Perkovich, Jackson described the remark as directed at Perkovich—“[Tracy] commented that Perkovich’s one-sided approach ‘made [her] look like an idiot,’ ” and stated that the comment “immediately set Perkovich off.” Blevans’s declaration also stated that this comment was directed at Perkovich. This interpretation appears to be most consistent with the strength of Perkovich’s response.

support arrearages and property restraints be set for evidentiary hearing. The August 12 ruling modified the earlier decision primarily by increasing the amount of attorney fees Tracy was required to advance to Jose from \$100,000 to \$150,000, apparently to cover the costs of the newly ordered evidentiary hearing.¹¹

Tracy Tries but Fails to Remove the Temporary Judge and Jose Seeks to Wrest Control of PPNV from Tracy

Perceiving Blevans had an “inside track” to Perkovich’s thinking and decisionmaking,¹² Jackson filed a motion in the superior court on September 5, 2013, to withdraw the stipulation and order, remove Perkovich as temporary judge, and reopen discovery. Unaware of Perkovich’s failure to disclose in writing or on the record her mutual judging relationship with Blevans as required by canon 6D(5)(a), Jackson based the motion instead on the inconvenience and expense of having a temporary judge based in Sacramento in a case in which Jose was “avidly pursuing litigation and discovery instead of settlement,” and the fees of the temporary judge were certain to “skyrocket.” The motion was denied on October 20, 2013.

Meanwhile, the evidentiary hearing was held on October 9, 2013. Much of the hearing focused on distributions Tracy took from PPNV. At the end of the hearing, Jackson expressed his exasperation about the irrelevant “minutiae” into which Blevans was delving, his manipulation of the facts, and the unreasonableness of the restraints he sought to impose on Tracy and the company. Insisting Tracy received no personal benefit from PPNV’s tax payments and other distributions, Jackson argued that setting aside a large amount of corporate assets for Jose would not only cripple the company but be unfair. If Jose was to benefit from PPNV’s profits, Jackson argued, “then he should be liable for any taxes the company may have to incur,” but “he’s getting all the gain and Tracy is getting zero.” Furthermore, Jackson complained, “we have been the ones that have been providing all the documents . . . and the depositions,” and Jose was unjustifiably being held harmless without any inquiry into his independent assets.

¹¹ Tracy appealed the increased fee to this court on October 7, 2013, but later moved to dismiss the appeal, which was dismissed on February 18, 2014.

¹² In a declaration filed in support of Tracy’s writ petition, Jackson provided written correspondence to him from Blevans assertedly supporting Jackson’s view that Blevans expressed “great confidence that the paid private judge Nancy Perkovich would find in [Jose’s] favor on most all issues or, alternatively . . . how Perkovich was feeling or thinking about various issues.” For example, in a letter dated August 9, 2013, Blevans told Jackson he was “confident Judge Perkovich would find Jose’s spousal support demand to be due and of course it would be ordered paid immediately and bear continued interest at 10%.” In a letter to Jackson dated September 23, 2013, Blevans declared, “it is necessary that discovery be unambiguously ‘open’ for all purposes. This sentiment is shared by Judge Perkovich.”

Perkovich's October 28 ruling states that Jackson reported on the morning of the October 9 hearing that Tracy could not appear because she was ill, "there were potential tax issues which may implicate her rights against self-incrimination [that] may give rise to the assertion of her 5th Amendment privilege" and her named expert, Kevin Ziegler, would not attend "due to 5th Amendment issues." Perkovich denied Jackson's request to continue the hearing to permit an arrangement in which Tracy and Ziegler would be able to testify, but received the testimony of Jose's expert Darlene Elmore and also considered the deposition testimony of Tracy and Ziegler, as well as documentary evidence presented by the parties.

Perkovich found that Tracy authorized payment from PPNV of \$273,004.15 for legal fees she paid four attorneys, that under a prior court order Jose was entitled to 40 percent of this amount, \$109,201.66, in order to pay his own attorneys, and ordered that amount paid to Jose in the form of spousal support, together with simple interest of 10 percent commencing on the date each distribution was made. The October 28 ruling also directed that, with respect to the arrearages in spousal support, "[a] writ of execution shall issue forthwith." The ruling stated that there was evidence Tracy had improperly taken other corporate distributions for her personal benefit, and Perkovich reserved jurisdiction to make further orders about them and any other challenged distributions until the necessary business records were made available to Jose.

On November 7, 2013, Jose filed a request in the superior court "For Control and Management of [PPNV] or in the Alternative for Appointment of a Receiver." Jose claimed Tracy failed to pay him monthly spousal support in violation of the June 2011 support order, "directed [PPNV] to withhold her salary and is refraining from taking a paycheck so that her pay will not be subject to a Wage Garnishment Order reactivated by Jose on June 18, 2013," and authorized PPNV to pay various personal expenses on her behalf, thereby reducing the company's net income and profitability to Jose's detriment. He also claimed she was not involved in the daily operations of the company and was engaging in "erratic conduct demonstrat[ing] a renewed instability and inability to manage the community business." According to Jose, "Tracy's continued control of the company's operations virtually assures she will be able to thwart the court's rulings and deprive Jose of funds for support and fees." Jose asked the court to (1) award him "exclusive management" of PPNV and order him to (2) remove Tracy from her position as CEO of PPNV, (3) "immediately suspend" her annual salary of \$350,000, (4) direct PPNV to pay him an annual salary not to exceed \$350,000, and authorize him to make distributions from PPNV "to pay spousal support arrearages, attorney's fees, expert costs, and any outstanding Judge *Pro Tem* fees." In the alternative, Jose asked the court to appoint a named receiver to run the company.

Settlement Efforts and Tracy's Claim of Duress

According to Blevan's declaration, the parties had begun settlement negotiations at conferences in October 2012, and June 2013, the latter a few months after Jackson substituted into the case. Tracy extended two proposals in July 2013, and in August 2013, Jose proposed a "complete and global resolution" that Blevans later described as having become the "foundation" for the memorandum of agreement (MOA) the parties eventually signed. In November, after Jose filed his request to gain control of PPNV, Tracy offered another settlement proposal. According to Blevans, Tracy, Jackson, and Tracy's attorneys, Ian Carter and Eric Jeppson, all attended an all-day settlement conference on December 4, 2013, though Tracy "was asked to leave . . . due to her disruptive behavior" and discussions continued at a December 23 meeting attended by Jackson, Carter, and Jeppson. Blevans then met with Jeppson and Carter on January 10, 2014, to discuss how Tracy would structure payments Jose had agreed to accept at the December 23 meeting. At this point, the hearing on Jose's motion for control of the company or appointment of a receiver was set for January 14, 2014.

The agreement Tracy signed on January 13, 2014, required her to pay Jose \$300,000 for the parties' residence, \$2.4 million to equalize the division of property other than the residence, and spousal support of \$25,000 per month, nonmodifiable until the equalizing payment was made in full. Tracy's spousal support obligation was to "survive" Jose's remarriage and continue until his death.

According to Tracy and Jackson, the MOA was negotiated without their participation at the January 10, 2014, meeting between Blevans, Jeppson and Carter. Jeppson and Carter worked for Tracy on corporate and tax matters involving PPNV; she stated in a declaration that they "negotiated without my authorization." Jackson stated that upon his arrival at Blevans's office on January 10, he was met by Jeppson and Carter, who informed him that Blevans "was unavailable because he was attending to another matter," and that an agreement had been reached "resolving all material issues before the court."

As described in her brief and declaration in support of the present writ petition, Tracy considered the MOA "disastrous." Tracy stated in her declaration that she only received the document late on the afternoon of the day before the hearing on Jose's motion to take control of PPNV or put the company in the hands of a receiver, and she "did not understand the terms of the Agreement." Tracy claims she was "emotional, confused, and afraid" at being forced to decide either to sign the MOA or submit to a hearing before a judge she considered biased against her on a motion seeking to transfer

control of PPNV to Jose. Tracy would not have executed the MOA, she said, “except for the threats against my company”; she “feared for her company’s existence, her employees’ futures, and her own livelihood [and] was also concerned about possible tax and criminal ramifications due to Jose’s refusal to share information about off-shore bank and brokerage accounts he had established with company money, leaving Tracy to face the consequences here, while he stayed in Argentina.” Assertedly on the basis of Jackson’s prediction that Perkovich would likely grant Jose’s motion to grant him control of PPNV or appoint a receiver, Tracy signed the MOA, but noted on the document that she did so “under protest.” On January 14, 2014, after Jackson told her the MOA would not be accepted with that notation, Tracy signed a fresh copy without expressing protest. Jackson confirmed that, based on his assessment of the situation, he advised Tracy the document would not be accepted if she wrote on it that she signed “under protest,” and her only options were: “(a) execute an identical copy of the Agreement without the words ‘under protest’ on the document (thereby avoiding the receivership hearing), or (b) proceed with the receivership hearing on the following day.”¹³

Tracy Obtains Disqualification of Perkovich

On March 26, 2014, Jackson was substituted out of the case and Tracy’s present lawyers, Keith E. Dolnick and David B. Ezra, entered the fray. Two months later, on May 20, 2014, Jose filed a motion to enforce the MOA pursuant to section 664.6. Tracy’s new lawyers, who had not yet learned of the mutual private judging relationship between Blevans and Perkovich, opposed the motion on the grounds that (1) the parties had not, prior to signing the MOA, served on one another or mutually waived the final declarations of economic interests and income and expense as required by Family Code section 2105, and (2) Tracy signed the MOA under economic duress.

On May 30, 2014, Tracy filed a second motion to withdraw the stipulation and order appointing Perkovich temporary judge, this time on the ground

¹³ At his deposition in March 2015, Jeppson stated that he was retained by PPNV and HEI, not Tracy individually, and was focused on “trying to make sure the company had the wherewithal to meet different proposed schedules of payments [to Jose].” When asked whether Tracy’s statement that the MOA “was negotiated without my authorization by my two corporate attorneys Eric Jeppson and Ian Carter” was true, Jeppson replied, “I don’t know, I can’t tell you what was in her mind about what she said about what she believed . . . but I can tell you I would not have negotiated without the authorization of the entities.” During the January 10 meeting, Jeppson periodically kept Jackson “posted” on developments, and Jeppson believed Jackson understood himself to be on “standby” in case he was needed. Jeppson concluded that PPNV could “cash flow the payments” to Jose. After the meeting, in a conference call, Jackson explained to her the terms of the “final version” of the agreement counsel came up with.

that, due to Perkovich's failure to certify that she was "aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and the California Rules of Court," as required by rule 2.831(b), she lacked the power to rule on the pending motion to enforce the MOA pursuant to section 664.6, and lacked judicial authority "to make any of the determinations she has made in this matter to date." The motion maintained that Perkovich's failure to provide the certification required by the Rules of Court provided "good cause" permitting Tracy to withdraw the stipulation (rule 2.831(f)). Tracy also contended that the stipulation and order did not grant Perkovich authority to decide a motion under section 664.6, which was outside the scope of the cause she was hired to judge. The motion was denied on July 11, 2014. Tracy filed a writ petition in this court challenging the ruling, which we denied on September 10.

On September 22, 2014, Tracy's present counsel requested from Perkovich a copy of the "engagement letter and any disclosures signed by [Tracy] that were made by Perkovich," as well as copies of billing statements in the case and a list of "any articles co-authored by Perkovich and Blevans over the past four years and any seminars they had spoken at together." Perkovich responded by e-mail as follows: "I gave a verbal disclosure of the personal and professional contacts I have had with Mr. Munsill and Mr. Blevans at our first meeting on October 29, 2012.^[14] All parties, their attorneys, and their forensic CPAs were present. I disclosed the professional committees I was on with Mr. Munsill and the professional organizations I had in common with both attorneys and the limited social contact I had with each attorney. I disclosed that I had hired both Mr. Munsill and Mr. Blevans to act as judge pro tems or settlement judges on cases I had and that I had also been hired by each of them previously in the capacity of settlement judge or judge pro tem."

On October 7, 2014, Tracy asked the Presiding Judge of the Napa County Superior Court to disqualify Perkovich.^[15] Tracy's "statement of disqualification" was based on two separate grounds. The first was that "Perkovich

¹⁴ The pleadings of the parties state that the first meeting was on October 30, 2012, not on October 29, as Perkovich states. The discrepancy is inconsequential.

¹⁵ The request was filed on a Judicial Council form "Request for Order" and characterized as a "Motion to Disqualify Nancy Perkovich." As noted in *Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415 [285 Cal.Rptr. 659] (*Urias*), technically, disqualification is sought in the form of a "statement of disqualification," which is not a motion. (*Id.* at p. 422.) As *Urias* explains, section 170.3, subdivision (c)(1), provides that if a judge who should disqualify himself or herself fails to do so, "any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge." As far as we are aware, neither Perkovich nor Jose objected to the form in which Tracy sought disqualification, and Judge Stone treated the motion as a statement of disqualification. While the statement of disqualification was not verified as required by section 170.3, subdivision (c)(1), it was in the form of a declaration

violated the Canons of Judicial Ethics by disclosing her mutual judging relationship, if at all, only verbally and off the record,” and “there is no written waiver.” Tracy’s motion asserted that “[i]t was not until September of 2014 that I first learned that Perkovich uses Blevans as a private judge in cases where she acts as an attorney representing a client in a divorce case (and he returns the favor by using Perkovich as a private judge in cases where Blevans is representing a client in divorce proceedings).” According to Tracy, “Perkovich first disclosed that information in an informal e-mail dated September 22, 2014.”

The second ground for disqualification alleged in Tracy’s motion was that any person aware of her conduct “would have substantial doubt that Perkovich was or could be impartial,” and Perkovich should therefore be disqualified under section 170.1, subdivision (a)(6)(A)(iii). In support of her bias claim, Tracy declared that Perkovich “seemed to visibly favor” Jose and Blevans and “took steps to block” Tracy’s attorney from introducing evidence supporting her contentions. Perkovich allegedly refused to order Jose to produce bank statements that Tracy claimed would show he was improperly withholding community property for himself; unfairly imposed a levy on the bank account from which Tracy directed payment of spousal support despite knowing the account “had been swept to pay Mr. Blevans \$185,000 in attorney fees” and Tracy had no other personal funds; and conducted hearings unfairly, for example by giving no notice she would refuse to receive oral testimony at the July 30, 2013, hearing where she knew Tracy planned to present witnesses. Tracy declared that Perkovich conveyed bias by her “body language and her tone toward me and Mr. Jackson,” which “was very different than it was toward Mr. Blevans and [Jose]. She was very standoffish, and regularly appeared to be visibly and noticeably annoyed with me” and “often would stand over me with her arms crossed. She would never make eye contact with me. When [Jose] or Blevans spoke, Perkovich was relaxed and thoughtful, often making helpful comments or asking insightful questions that would help them fully develop the point they were trying to make.” Perkovich also allegedly engaged in “highly inappropriate” interactions with Blevans. “For example,” Tracy stated, “during the July 30, 2013, hearing, I personally saw Perkovich flirt with Blevans, proclaiming, ‘Oh Bob, that’s so funny of you,’ while she batted her eyelashes at him,” and Perkovich and Blevans “inappropriately spoke to each other about the case when my attorney was not present,” which Tracy assertedly learned from an invoice billing her for the time Perkovich spent on the phone, without Tracy’s lawyer, in preparation for a hearing.

under penalty of perjury, which is sufficient. (*Urias*, at p. 421, fn. 4, citing *Hollingsworth v. Superior Court* (1987) 191 Cal.App.3d 22, 25–26 [236 Cal.Rptr. 193].)

Jackson's declaration in support of Tracy's motion to disqualify corroborated Tracy's description of Perkovich's different demeanor with Tracy and Jackson than with Jose and Blevans. Jackson noted that Perkovich and Blevans "were on a first name basis" and "knew things about each other that were not generally known to the public," such as when Blevans congratulated Perkovich on the birth of her grandchild. Blevans had Perkovich's "after hours number," which Jackson never had, and appeared to have discussed the case with her outside Jackson's presence. During the proceedings, Perkovich "demonstrated a strong affinity toward Blevans" through "tone of voice, body language, eye contact and other physical means," such as rolling her eyes at Jackson and then "making knowing eye contact with Blevans" and "shaking her head from side to side." Perkovich's "body language and voicetone toward [Tracy] was almost always very negative, indicating dismissiveness, condescension, and superiority," while she "always appeared understanding and accommodating toward Jose and Blevans." Her "tone, body language, and actions led everyone involved to believe that [Tracy] was not going to prevail on any significant issue that might be decided by Perkovich." Jackson believed Perkovich was aware that her actions were presenting the appearance that she was favoring Blevans and Jose, as indicated by her comment at a hearing that she could see from Tracy's pleadings and demeanor that Tracy did not trust Perkovich to judge the case fairly.

Additionally, the declaration of Tracy's current counsel, Keith Dolnick, related an incident in which he believed Perkovich acted in a manner that appeared to favor Jose. After Tracy filed her motion to withdraw the stipulation appointing the temporary judge based on Perkovich's failure to provide the certification required by rule 2.831(b), Jose's attorneys sent Perkovich two certifications to sign, one stating that she was aware of and would comply with the applicable provisions and the other adding that the certification was "further evidenced by" Perkovich's "Consent and Oath of Office" in another case, which was attached as an exhibit. Dolnick declared that he objected to this "improper ex parte communication without prior notice" and asked Perkovich to take no action and remain neutral, to which Blevans responded by telling Perkovich that signing the certification was appropriate "and if it moots the issue raised by Mr. Dolnick, so be it." Perkovich signed the second certification. Dolnick further described Blevans communicating ex parte with Perkovich after Tracy filed a motion to quash, e-mailing her to ask "how she would like to handle this issue."

On October 16, 2014, before any hearing or ruling on the request to disqualify, Perkovich delivered to the Presiding Judge of the Napa County Superior Court a letter expressing a desire to recuse herself from the case. Noting that Tracy had filed a motion to disqualify her "on the grounds of bias," the letter asserts that Tracy "claims a bias in favor of Blevans because Blevans has acted as a private settlement judge on one case where I was

associated as counsel and because I have been hired on two cases where he was an attorney.” Pointing out that she also “had the same mutual judging relationship with two of [Tracy’s] previous attorneys, Roger Lewis and John Munsill,” Perkovich disagreed that her prior professional relationship with Blevans constituted bias and stated that Tracy consented to her retention as temporary judge “after disclosure from me at our first case management meeting about the details of my professional relationship with both Munsill and Blevans.” Perkovich’s letter to Presiding Judge Stone then ended with the following paragraph: “I have, however, become concerned about my personal safety in this case due to [Tracy’s] conduct. Her behavior has become increasingly hostile with angry outbursts to the point that I am fearful of her. It is also evident from [Tracy’s] ongoing violations of the existing court orders that she will never accept anything I decide. I therefore feel that I am an impediment to resolution of the parties’ case, which is not desirable. It is for these reasons that I request recusal.”

In an order filed on November 7, 2014, Presiding Judge Stone granted Tracy’s request to disqualify Perkovich. The order found that Perkovich’s letter requesting recusal “does not satisfy the requirement of the filing of consent to the disqualification” imposed by section 170.3, subdivision (c)(3),¹⁶ and that “as a result of her failure to file a consent or a verified answer within the time allowed, Nancy Perkovich is deemed to have consented to her disqualification pursuant to Code of Civil Procedure section 170.3[, subdivision] (c)(4).”¹⁷ The order declared, “Nancy Perkovich is hereby disqualified as Judge Pro Tempore in this action and shall not participate in the proceedings in this action after October 7, 2014,” the date Tracy filed her request for disqualification. The order reassigned the case to Superior Court Judge Diane M. Price.

The Case Proceeds Before Judge Price

On December 10, 2014, Judge Price conducted a hearing on Jose’s motions to reopen discovery and compel the production of documents and Tracy’s

¹⁶ Section 170.3, subdivision (c)(3), provides: “Within 10 days after the filing or service, whichever is later, the judge may file a consent to disqualification in which case the judge shall notify the presiding judge or the person authorized to appoint a replacement of his or her recusal as provided in subdivision (a), or the judge may file a written verified answer admitting or denying any or all of the allegations contained in the party’s statement and setting forth any additional facts material or relevant to the question of disqualification. The clerk shall forthwith transmit a copy of the judge’s answer to each party or his or her attorney who has appeared in the action.”

¹⁷ As will be discussed *post*, the order as prepared by Blevans also stated, “Petitioner Tracy Hayward’s Request for Order re Motion for Disqualification, filed October 7, 2014, is rendered moot.” The court amended this language by interlineation to read, “The court is making no finding as to whether the allegations set forth in Petitioner Tracy Hayward’s Request for Order re Motion for Disqualification, filed October 7, 2014, is true.”

motions to quash subpoenas compelling her and Jackson to submit to deposition, all of which related to Jose's earlier motion to enforce the MOA, which had been submitted to Perkovich but not decided before she was found disqualified. At the hearing before Judge Price, Tracy objected to reopening discovery on matters related to whether she signed the MOA under duress primarily because much of the evidence Jose sought to discover regarding that matter was protected by the attorney-client and/or work product privilege. Rejecting this objection on the ground Tracy's and Jackson's declarations constituted a waiver of privilege as to certain communications between her and her attorney, Judge Price reopened discovery related to Jose's pending motion to enforce the MOA and requests pertaining to attorney fees and spousal support. Judge Price felt it would be "fundamentally unfair" to allow Tracy to file declarations discussing her communications with Jackson without allowing discovery by Jose limited to those communications between Tracy and Jackson she relied upon in the declaration she filed in opposition to Jose's motion to enforce the MOA. Tracy withdrew her objections to the production of documents pertinent to a range of issues that did not implicate the attorney-client and/or work product privileges. Judge Price continued for further hearing Tracy's motion to quash a subpoena to Jackson and ordered him to submit all responsive documents for the court's in camera review to determine which were to be produced and whether redaction was required for any attorney-client privilege and/or work product information that had not been waived. Tracy's motion to quash a subpoena to her was denied.

On January 28, 2015,¹⁸ Tracy asked Judge Price to declare void and vacate all orders issued by Perkovich, arguing that the orders of a disqualified judge are void and the disqualification occurs when the facts creating disqualification arise, not when the disqualification is established.¹⁹ Judge Price subsequently filed an order granting Jose's motion to continue the hearing on Tracy's motion, because Tracy had not filed a declaration supporting the relief sought, and the scheduled depositions of Tracy and Jackson might "cover the issues raised" in the motion. Judge Price's March 2 order also denied Jose's motion to consolidate the hearings on Tracy's motion to set aside Perkovich's orders and Jose's motion to enforce the MOA because the motions "involve discrete issues."

Meanwhile, at a hearing on February 3, Judge Price granted Jose's request for appointment of a discovery referee (§ 639, subd. (a)(5)) to attend the

¹⁸ All further dates will refer to 2015 unless otherwise specified.

¹⁹ Petitioner cited, inter alia, *Christie v. City of El Centro* (2006) 135 Cal.App.4th 767 [37 Cal.Rptr.3d 718] (*Christie*) and *Rosco Holdings, Inc. v. Bank of America* (2007) 149 Cal.App.4th 1353, 1363 [58 Cal.Rptr.3d 141] (*Rosco Holdings*), which we later discuss in detail.

depositions of Tracy and Jackson.²⁰ Accepting Jose’s arguments, Judge Price granted the request on the basis of three “exceptional circumstances”: (1) Tracy’s behavior at the previous deposition was “extraordinarily rude, nonresponsive, [and] argumentative,” (2) the attorney-client privilege would probably be raised by Tracy and Jackson and it would be “expeditious” to have rulings on those objections during the deposition, and (3) Tracy was “reluctant” to turn over financial information legally required to be disclosed, and it would be helpful to have a referee present to “monitor.”

Also at the February 3 hearing, Judge Price addressed Jose’s earlier motion to award him the reasonable expenses, including reasonable attorney fees, he incurred in prevailing on his motions to reopen discovery, produce documents, and subpoena Tracy and Jackson for appearances at depositions. Finding that Tracy’s opposition to all of Jose’s discovery requests was without “substantial justification” (§§ 2024.050, subd. (c), 1987.2, subd. (a))—because it was unreasonable to think she could maintain she did not understand the MOA she signed and was relying on the statements or failures to act of her attorney “and not think that opens the door to discovery”—Judge Price awarded Jose the total amount of \$36,091.

On March 10, Tracy filed a five-page declaration in support of her motion to vacate Perkovich’s orders. Tracy explained that if Perkovich verbally disclosed her professional relationship with Blevans at the settlement conference on October 30, 2012—which was almost seven months after Perkovich was appointed temporary judge—Tracy was unaware of it because “I was either not involved in those discussions or did not believe they were directed at me. Nor did I understand an informal discussion or exchange of pleasantries could later be used to argue that it had forced me to waive valuable rights, including the right to a neutral, unconflicted judge.” Tracy’s declaration reiterated that she did not learn of Perkovich’s mutual judging arrangement with Blevans until the September 2014 e-mail. She also reiterated the concerns stated in her declaration in support of her motion to disqualify Perkovich about the manner in which Perkovich conducted hearings and, in Tracy’s view, her demonstrated bias in favor of Jose and Blevans. Tracy further stated that she had not had any contact with Perkovich since the December 2013 settlement conference, and that she did not recall having any “meaningful interaction” or exchanging any words with Perkovich at the conference, during which Tracy “spent the large majority of time . . . sitting in my car or in the lobby of Blevans office.”

²⁰ The court’s order was filed on February 20.

Perkovich Resists Tracy's Demand for Refund of Fees

On March 27, after Tracy demanded repayment of all fees paid Perkovich pursuant to the terms of the 2012 stipulation and order (Stipulation and Order), Perkovich filed a request for declaratory relief. Asking for “direction . . . as to how she should respond to the demand that she refund all fees and costs paid by [Tracy] pursuant to the Stipulation and Order,” Perkovich stated that she had performed all of the services she was called upon to perform and was entitled to be compensated for that work in accordance with the terms of the Stipulation and Order.²¹ She also pointed out that the superior court had twice (Oct. 10, 2013, and July 11, 2014) denied Tracy’s requests to withdraw the Stipulation and Order appointing her temporary judge; the second of these rulings found the Stipulation and Order was “valid and enforceable” and, by voluntarily participating in proceedings before Perkovich, Tracy waived “any objection to the Stipulation and Order.”

Perkovich represented that she told the six persons present at the October 2012 settlement conference—Tracy and Jose and their counsel, as well as David Schultze and Darlene Elmore, forensic accountants for the parties—“about my professional contacts with each attorney including the fact that (1) I had been hired once before as a judge pro tem in a case where Blevans was an attorney, (2) Blevans was hired as a judge pro tem once in a case where I was an attorney, (3) Munsill was hired as a judge pro tem once in a case where I was an attorney, (4) I was hired as a settlement judge once in a case where Munsill was an attorney, (5) Munsill and I had been previously associated as counsel on a case, (6) I served on the Sacramento Family Law Bar Association Committee with John Munsill and socialized once with he and his wife and children related to that professional organization, and (7) I am a member of the American Academy of Matrimonial Lawyers and was acquainted with Blevans from that organization. I also disclosed that I had hired David Schultze, CPA many times on cases throughout my career and had also had him as an opposing expert on many cases. I had not previously met Darlene Elmore, CPA. I asked all parties and attorneys if they were comfortable with my acting as judge pro tem. All parties indicated that they wished me to proceed in that capacity.”

Blevans, Elmore, and Schultze all stated in declarations or deposition testimony given in late 2014 or early 2015 that Perkovich verbally disclosed her prior contacts with Blevans and with Munsill at the October 2012

²¹ As material, the Stipulation and Order stated that Tracy “shall advance all fees of Perkovich, who bills at the hourly rate of \$450.00, subject to later allocation by the court.” Perkovich stated in her request for declaratory relief that “her total fees and costs charged from October 30, 2012, to November 19, 2014, are \$42,064.09, Tracy has paid \$37,625.09 and \$4,439.00 remains outstanding.”

meeting, including that she and each of the attorneys had acted as temporary judge in each other's cases, and that the parties agreed to proceed with Perkovich as temporary judge.

Munsill testified at a deposition in February 2015 that he recalled Perkovich discussing at the settlement conference "her various prior connections with both [Blevans] and me," but did not recall "the details" of that discussion. He did not recall Tracy expressing concerns about Perkovich's disclosures. Munsill acknowledged that he had a "mutual judging relationship with Perkovich," each having served as judge in a case where the other represented a party. Munsill stated that he had no reason to believe inaccurate the statement in Blevan's declaration that after Perkovich's disclosures at the settlement conference, "both counsel and the parties acknowledged their understanding and agreement to move forward with Judge Pro Tem Perkovich presiding." He did not recall presenting Tracy with a written waiver of any potential conflict after Perkovich disclosed her professional relationships with the two attorneys and stated, "I don't recall there being a need for that."

Judge Price Expands Discovery

On April 13, over Tracy's objections, Judge Price granted Jose's motion to clarify her earlier ruling that Tracy waived her attorney-client privilege regarding matters Jose sought to discover. Judge Price clarified that Tracy's waiver of the attorney-client privilege included "any communications with or between attorneys Trevor Jackson, Ian Carter, and or Eric Jeppson made from the time period beginning August 9, 2013 (when the parties began active settlement negotiations that lead to the Memorandum of Agreement) to [the] present," regarding the claims that (1) Tracy "was not part of the negotiations that took place regarding the Memorandum of Agreement" and "had no input whatsoever"; (2) Eric Jeppson and Ian Carter were not authorized to negotiate the MOA on Tracy's behalf; (3) Tracy was unclear how the terms of the MOA were reached; (4) Tracy did not understand the terms of the MOA; and (5) Tracy was "forced" to execute the MOA due to a threat that her company would be taken away from her.

Also over Tracy's objections, Judge Price expanded the time period of the documents relating to negotiation of the MOA that Jackson was required to provide for in camera review in response to Jose's subpoena duces tecum. In addition to the documents he prepared and gave Tracy between January 10 and January 13, 2014, Jackson was also required to produce those he prepared and provided Tracy during the period from August 9, 2013, to the present. Finally, the April 13 order found that Tracy's opposition to the foregoing discovery was "not reasonable" in light of the court's prior ruling

that Tracy waived the attorney-client privilege, and granted Jose's request for attorney fees and costs under section 1987.2, subdivision (a), in the amount of \$6,000.

We Issue an Order Staying All Trial Court Proceedings

On April 16, 2015, we issued an order temporarily staying "all discovery proceedings," including the pending depositions of Tracy and Jackson.

A little more than three weeks later, on May 21, 2015, Jose submitted to the trial court (which stamped the document "Received") a memorandum of points and authorities and declaration of Blevans in support of Perkovich's right to refuse to refund the fees paid her by Tracy. Blevans stated in his declaration that the Stipulation and Order appointing Perkovich a temporary judge was drafted by Munsill, who did not "include any provision authorizing any judge of the Superior Court to make any determination concerning the reasonableness of her fees or to order any refund of fees and costs that were advanced." Jose argued that Tracy's demand for a refund of fees she paid could not be granted because such relief was not authorized by the Stipulation and Order under which the fees were paid and because Perkovich was protected by a common law quasi-judicial immunity. The latter contention was based upon *Howard v. Drapkin* (1990) 222 Cal.App.3d 843 [271 Cal.Rptr. 893], which was a civil action seeking damages for professional negligence against a psychologist evaluating a child custody dispute.

Tracy had responded to Perkovich's request for declaratory relief in a brief dated May 18 that, at least in the record before us, does not bear any stamp from the trial court. Relying on cases, such as *A.I. Credit Corp., Inc. v. Aguilar & Sebastianelli* (2003) 113 Cal.App.4th 1072 [6 Cal.Rptr.3d 813] (*Aguilar*), holding as a matter of law that "an attorney disqualified for violating an ethical obligation is not entitled to fees" (*id.* at p. 1079), Tracy argued a private judge disqualified for violation of an ethical obligation should not be treated differently.²² Tracy emphasized that Perkovich's request ignored the crucial fact that all of the orders she was paid by the parties to make were void and had to be vacated, and that the Stipulation and Order had no bearing on Perkovich's rights after she was disqualified for violating ethical obligations.

²² Tracy also maintained that one who, like Perkovich, is "not a party to [the] proceeding may not make a motion" (*Chase v. Superior Court* (1962) 210 Cal.App.2d 872, 876 [27 Cal.Rptr. 383]), and her request for declaratory relief could therefore be made only through a separate lawsuit, citing section 1060, "Any person interested . . . may . . . bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties . . ." Tracy's writ petition does not include this claim.

At the time we issued our stay, Judge Price had issued no ruling on Perkovich's request for declaratory fees regarding her entitlement to the fees Tracy had advanced.

On June 2, a week after Jose filed his support for Perkovich's request for declaratory relief, Tracy asked this court to expand the scope of the temporary stay of discovery we issued on April 16 because, since issuance of that stay, Perkovich had been aggressively pursuing her motion for declaratory relief, Jose had asked Judge Price to direct Tracy to advance him \$250,000 for attorney fees he might incur in this and related efforts, and a hearing on many of Jose's requests had been set for June 1, 2015. Tracy represented that her attorneys "have been required to prepare multiple opposition/responses and participate in multiple hearings in response to the flurry of paperwork initiated by [Jose] and Perkovich" and that counsel for Jose refused to stipulate to a stay of litigation in the trial court pending action on this writ petition. Tracy maintained that the discovery issues Jose and the trial court were preoccupied with should have been put on hold pending a determination whether the rulings of a disqualified judge are void and must be vacated, because that determination would facilitate a resolution of most other issues presented, including Perkovich's right to receive fees for services rendered in violation of her ethical obligations.

On June 3, we expanded the earlier stay by additionally staying "all trial court proceedings" pending determination of this writ petition or further order of the court.

DISCUSSION

The fundamental question presented is whether the rulings of disqualified Temporary Judge Perkovich are void and must be set aside. If so, additional questions are whether Perkovich must refund fees she received for her services and whether the disqualifying acts of the temporary judge so tainted the MOA that it must be deemed unenforceable, and so tainted the proceedings before Judge Price that her rulings must also be vacated.

I.

Disqualified Temporary Judge Perkovich's Orders Are All Void and Must Be Vacated

Under section 170.1, "(a) A judge shall be disqualified if any one or more of the following are true: [¶] . . . [¶] (6)(A) For any reason: [¶] . . . [¶] (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." (§ 170.1, subd. (a)(6)(A)(iii).)

As we have said, Tracy’s motion to disqualify was based on Perkovich’s alleged violation of canon 6D by failing to disclose her personal or professional relationships with Blevans “in writing or on the record” and failure to obtain the parties’ written waiver to disqualification on that ground and file it with the record as required by section 170.3, subdivision (b)(1). The motion to disqualify was also based upon the claim that Perkovich’s conduct during the proceedings over which she presided demonstrated that she was actually biased and prejudiced against Tracy. Tracy maintains that a person aware of the facts Perkovich declined to disclose in writing or on the record, and/or her biased conduct during the proceedings, “might reasonably entertain a doubt that [Perkovich] would be able to be impartial.” (Canon 6D(3)(a)(vii)(C); § 170.1, subd. (a)(6)(A)(iii).)

■ The statutory scheme governing the disqualification process presents three options to a judge whose impartiality has been challenged by the filing of a statement of disqualification. First, the judge may, “[w]ithout conceding his or her disqualification, . . . request any other judge agreed upon by the parties to sit and act in his or her place.”²³ (§ 170.3, subd. (c)(2).) The second option is to timely “file a consent to disqualification in which case the judge shall notify the presiding judge . . . of his or her recusal” and the presiding judge appoints a replacement. (§ 170.3, subd. (c)(3).) The third option is to “file a written verified answer admitting or denying any or all of the allegations contained in the party’s statement and setting forth any additional facts material or relevant to the question of disqualification.” (*Ibid.*) Presiding Judge Stone held that Perkovich’s October 16, 2014, letter requesting recusal (for reasons independent of Tracy’s allegations in her statement of disqualification) did not constitute a consent to disqualification within the meaning of section 170.3, subdivision (c)(3).²⁴ ■ Judge Stone therefore applied section 170.3, subdivision (c)(4), which provides that where a challenged judge fails to timely file either a consent or an answer to the statement of disqualification, he or she “shall be deemed to have consented to his or her disqualification.” (§ 170.3, subd. (c)(4).)

■ The meaning of this determination is disputed by the parties: In Tracy’s view, “consent” and “deemed consent” to disqualification are equivalent to admitting the facts alleged in the statement of disqualification. Jose

²³ If the parties cannot agree on a replacement judge, such a judge is selected by the Chairperson of the Judicial Council. (§ 170.3, subd. (c)(5).)

²⁴ Aside from the fact that Perkovich’s letter was not “filed” with the court as required for a consent under section 170.3, subdivision (c)(3), it could not be viewed as a “consent to disqualification” because it disavowed the allegations of the statement of disqualification. Nor could it be viewed as an “answer” within the meaning of the statute because it was not verified and filed. Instead of following the statutory procedure, Perkovich attempted to circumvent the disqualification motion by seeking recusal based on her professed fear of Tracy, a basis wholly independent of the motion for disqualification.

sees it differently, viewing “consent to disqualification” as consent to being removed from the case *without* admission of the truth of the alleged basis for disqualification. Jose’s view misinterprets the statutory scheme. As indicated, the option section 170.3 provides for a challenged judge who wishes to consent to disqualification “[w]ithout conceding” there is a factual basis for disqualification is to “request any other judge agreed upon by the parties to sit and act in his or her place.” (§ 170.3, subd. (c)(2).) Perkovich elected not to pursue that course. Nor did she file a response to the motion to disqualify her. Instead, informally, by letter to Judge Stone, she denied Tracy’s allegations and sought recusal on different grounds. Because she elected not to either seek replacement or file a consent or an answer contesting Tracy’s allegations as provided in section 170.3, Perkovich was properly “deemed to have consented” to her disqualification. That determination treats the judge’s failure to file a response to the statement of disqualification as an admission of the truth of its allegations, and authorizes the presiding judge to appoint a replacement.

It is settled that, as stated in *Urias, supra*, 234 Cal.App.3d 415, “[w]hen no answer is filed in response to a statement of disqualification, *the facts set out in the statement are taken as true.*” (*Id.* at p. 424, italics added.) In support of that proposition, the *Urias* court cited the statement in *Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678 [32 Cal.Rptr. 288] (*Oak Grove*) that where the “statement of disqualification” of the party seeking disqualification “is legally sufficient and the judge fails to file an answer thereto within five days,^[25] the facts alleged in the statement must be taken as true and the judge becomes disqualified automatically.” (*Oak Grove*, at p. 702.) The California Supreme Court was equally clear in *Calhoun v. Superior Court* (1958) 51 Cal.2d 257, 262 [331 P.2d 648]: After identifying the two factual issues raised by the statement of disqualification, the court concluded, “since the judge has failed to file a written answer to the statement of bias and prejudice, verified as required by section 170 of the Code of Civil Procedure, the facts alleged in the statement must be taken as true.”

■ The opinion in *Oak Grove* stated that that the failure of a challenged judge to file a verified answer within the specified period “has the same effect as if the judge admits his disqualification or is found disqualified.” (*Oak Grove, supra*, 217 Cal.App.2d at p. 702.) As *Urias, supra*, 234 Cal.App.3d 415 explained, a challenged judge “cannot simply ignore [a statement of disqualification]. If the judge does not strike the statement [as untimely or legally insufficient on its face] and wants to contest his disqualification, he must file an answer within section 170.3, subdivision (c)(3)’s 10-day period admitting or denying the allegations in the statement. If he fails to do so, he is deemed

²⁵ The time period within which the judge was required to answer at the time *Oak Grove* was decided, five days, has been extended to 10 days. (§ 170.3, subd. (c)(3).)

to have consented to the disqualification and he is disqualified.” (*Urias*, at p. 421.) In short, *Urias*, *Oak Grove*, and the cases they rely upon stand for the proposition that the facts alleged in a statement of disqualification must be considered true where, as here, the judge whose impartiality was challenged fails to consent to or challenge the allegations of the statement of disqualification.

Repeatedly dismissing *Urias* and *Oak Grove* as “lacking substantive analysis” and “without analytical support” Jose claims they are also distinguishable, because “the facts establishing disqualification in [those cases] were undisputed, making the only relevant issue the legal sufficiency of the statement of disqualification.” According to Jose, unlike the situations in *Urias* and *Oak Grove*, the facts alleged in Tracy’s statement of disqualification are disputed. Moreover, Jose argues, because Perkovich declined to answer the statement of disqualification, he was left “with no alternative but to stipulate to her disqualification with the caveat that he did not agree that Perkovich is subject to disqualification for the reasons stated in Tracy’s motion.” In other words, Jose asserts that Perkovich’s failure to dispute the allegations of Tracy’s statement of disqualification cannot deprive him of the right to contest the truth of those allegations. He states, “[b]efore any fact is determined to be true and used to adversely affect a party, that party must be given the opportunity to be heard concerning whether or not those facts are true.”

■ The dispute Jose perceives and desires to engage in is whether the unanswered allegations of Tracy’s statement of disqualification are factually true. But he offers no authority for the proposition that a party has a right to dispute grounds for disqualification alleged by another party which the challenged judge does not contest. The only instance in which the statutory scheme appears to allow a party to participate in a disqualification dispute is when the challenged judge files an answer denying any or all of the allegations contained in a statement of disqualification, and the judge deciding the question of disqualification sets the matter for hearing or receives evidence in some other fashion. (§ 170.3, subd. (c)(6).)

If, as Jose maintains, a judge who files neither a consent nor an answer to the statement of disqualification filed by a party does not dispositively concede the truth of the facts alleged in the statement, a challenged judge’s failure to respond to a motion to disqualify would be relatively inconsequential and render purposeless section 170.3, subdivision (c)(2), which expressly permits a challenged judge to secure a replacement without conceding disqualification. The statutory scheme places the decision whether to contest the factual basis of a statement of disqualification solely in the hands of the challenged judge. Jose fails to appreciate that, as *Urias* explained and we

previously noted (see *ante*, at p. 26, fn. 15), a request for disqualification is not genuinely a “motion” but in the nature of a charging document: a “written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge.” (§ 170.3, subd. (c)(1).) “[T]he determination of a judge’s disqualification is outside the usual law and motion procedural rules.” (*Urias, supra*, 234 Cal.App.3d at p. 422.) “While the challenged judge and all parties must be served with the statement of disqualification, the matter need not be set for hearing. Moreover, while the judge determining the issue may request argument or evidence from the other parties, he is not obligated to do so. Accordingly, [a party] cannot complain that it was not given an opportunity to be heard before the judge was disqualified.” (*Ibid.*) Permitting a party to defend the propriety of allegedly unethical conduct and bias where the challenged judge refuses to respond at all to the charges, and is therefore deemed to have consented to the allegations in the statement of disqualification, would wreak havoc with the disqualification process prescribed by the Legislature in section 170.3.

Because she pursued neither of the options provided by subdivision (c)(2) and (3) of section 170.3, Perkovich left Presiding Judge Stone with no alternative but to deem her to have conceded disqualification on the factual bases alleged in Tracy’s motion. Perkovich could have avoided this result by consulting section 170.3 and following one of the options it sets forth for responding to a statement of disqualification. Blevans’s office specifically called her attention to the statute in a letter sent to Perkovich the day after Tracy filed the statement of disqualification. While this letter omitted reference to the option that would have permitted Perkovich to do what Jose now maintains she should be seen as having done—remove herself from the case without conceding the disqualification—this option would have been apparent if Perkovich had referred to the statute.²⁶ (§ 170.3, subd. (c)(2).) As authorized by section 170.3, provided Judge Stone decided the disqualification issue solely on the basis of the statement of disqualification (§ 170.3, subd. (c)(6)); he did not conduct an evidentiary hearing (*ibid.*) because Perkovich did not seek or provide any need for a hearing. And while we recognize that Judge Stone made “no finding” as to the truth of the allegations of Tracy’s statement of disqualification, the legal effect of Perkovich’s failure to file a response was that she effectively conceded disqualification was warranted on the grounds alleged and no factual determination by the court was required.

²⁶ The letter stated that within 10 days after service of a motion to disqualify, a challenged judge may (1) consent to disqualification (§ 170.3, subd. (c)(3)), (2) file a verified answer admitting or denying the allegations and setting forth any additional facts (§ 170.3, subd. (c)(3)), or (3) do nothing, in which case the judge will be deemed to have consented to disqualification (§ 170.3, subd. (c)(4)). It did not mention section 170.3, subdivision (c)(2).

The dissent objects to our application of these principles on the theory that Perkovich's letter, although neither verified nor stated under penalty of perjury, was a "response" to the statement of disqualification. In the sense that it was written in reaction to the statement of disqualification, yes. But rather than admitting or denying Tracy's allegations, the letter was dismissive of the claimed inadequate disclosure, made no mention of the detailed examples of conduct Tracy claimed reflected actual bias, and requested recusal for a reason independent of the alleged basis for disqualification—Perkovich's professed fear of Tracy. Perkovich was not attempting to "answer" the statement of disqualification within the meaning of section 170.3; she was attempting to circumvent the procedures required by the statute.²⁷

We also take issue with the insistence of the dissent that Tracy's motion to disqualify was untimely. To be sure, the motion was filed long after the conference at which Perkovich assertedly made her verbal disclosures. But the dissent utterly disregards Tracy's claim that she did not hear or understand the significance of any such disclosures. Tracy claimed that she learned Perkovich had not disclosed her mutual judging relationship with Blevans in writing or on the record only after her current counsel sought documentation of Perkovich's disclosures and Perkovich responded that they had been made verbally at the October 2012 conference. Tracy filed her motion to disqualify two weeks later. It is only by assuming Tracy's claim to be untrue that the dissent can view her to have violated the requirement of moving for disqualification "at the earliest practicable opportunity." (§ 170.3, subd. (c)(1).) The record provides no basis for this assumption; on the contrary, under the principles just discussed, Tracy's allegations must be taken as true. Perkovich could have challenged the timeliness of the disqualification motion, but she chose not to do so.

Jose claims it would raise "fundamental due process concerns" if Tracy's allegations were accepted as true for any purpose that would "adversely affect Jose." The authority he cites is *In re Marriage of Kelso* (1998) 67 Cal.App.4th 374 [79 Cal.Rptr.2d 39] (*Kelso*), a marital dissolution proceeding in which the wife's former attorney sought attorney fees and costs. The commissioner presiding over the case recused himself from determining that issue, stating he was biased against the former attorney, but then, at a hearing with no

²⁷ The dissent suggests that by refusing to view Perkovich's letter as an answer we are unfairly holding Perkovich to the letter of the law while excusing Tracy's failure to file the correct document as her statement of disqualification. Tracy's motion to disqualify Perkovich was sufficient because it met the requirements of the statute: It objected to the temporary judge's participation and stated the basis for the claimed disqualification, and its execution under penalty of perjury served the purpose of verification. (*Urias, supra*, 232 Cal.App.4th 415; *Hollingsworth v. Superior Court, supra*, 191 Cal.App.3d at pp. 25–26.) The same cannot be said of Perkovich's letter, which was neither verified nor executed under penalty of perjury and sought recusal for a reason independent of the alleged bases for disqualification.

notice to the former attorney or opportunity for her to be heard, addressed “‘the whole issue of attorney fees’” and ordered the wife to pay \$5,000 as a sanction for making the litigation unduly acrimonious. (*Id.* at pp. 379–380.) The new judge to whom the issue of the former attorney fees had been assigned then refused to conduct a hearing, finding it would be futile in light of the commissioner’s findings that the wife was not entitled to any award of attorney fees and costs. Reversing, the Court of Appeal explained that the judge should not have relied upon findings made by the commissioner after he had recused himself and without providing the former attorney an opportunity to be heard. Because the right to the award is the party’s, not the attorney’s, “a judicial officer who is disqualified from ruling on the motion because of bias against the attorney cannot rule on the motion indirectly by ruling against the party. The issues are too intertwined to permit such a splitting of the disqualification.” (*Id.* at p. 383.)

Jose describes *Kelso* in a parenthetical as holding that “it is error to give conclusive effect to the findings of a Commissioner that were made after he recused himself and without affording one party the opportunity to be heard,” and does not otherwise explain its applicability to the case at hand. But the situations have nothing in common. In *Kelso*, the commissioner tried to justify adjudicating matters he was disqualified from hearing by artificially separating the interests of the attorney he was biased against from those of the wife, resulting in the former attorney being denied her right to a hearing on the previously reserved issue of her right to a fee. The case says nothing about a party’s right to be heard when a challenged judge declines to contest the allegations of a statement of disqualification under section 170.3.²⁸

Jose does not explain how he is “adversely affect[ed]” by the factual allegations of the disqualification statement being taken as true. Presumably, his concern is with having lost his chosen decision maker and her rulings, as well as the time and money spent on all the proceedings. As we have no occasion to review the merits of the rulings involved here, neither Jose nor this court can anticipate whether the ultimate outcome of the dissolution proceedings will be more or less favorable to him. While we recognize that a party may be adversely affected by the disqualification of a judge who has participated in a complex proceeding, that price may have to be paid. It is justified by the need for enforcement of the disqualification statutes, which are designed “‘to ensure public confidence in the judiciary and to protect the

²⁸ The only other authority Jose cites on this point—also without explanation of its relevance to the present situation—is section 2033.410. This provision of the Civil Discovery Act provides that “[a]ny matter admitted in response to a request for admission” is “binding only on that party” and only “for the purpose of the pending action.” (§ 2033.410.) This discovery rule does not dictate the effect of the procedures specified in the statutes governing judicial disqualification.

right of the litigants to a fair and impartial adjudicator . . . ?” (*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1251 [135 Cal.Rptr.2d 639, 70 P.3d 1054].)

■ Under section 170.3 and the case law we have discussed, we conclude that Perkovich was disqualified for the reasons stated in the statement of disqualification—that is, because a person aware of her failure to disclose her mutual judging relationship with Blevans in writing or on the record, and her conduct indicative of bias and prejudice, might reasonably entertain a doubt about her impartiality. The cases Tracy relies upon, culminating most recently in *Christie, supra*, 135 Cal.App.4th 767, and *Roscco Holdings, supra*, 149 Cal.App.4th 1353, compel us to also agree with her contention that all the orders issued by Perkovich were void.

In *Christie* the trial court set aside a nonsuit and dismissal in favor of the city, its police department, and police officers in an arrestee’s action for false arrest and wrongful imprisonment. The trial court granted a new trial after finding that the judge who granted the nonsuit was disqualified to act in the matter as of the time at which he had had a conversation with a previously disqualified judge. Having found the judge who granted nonsuit disqualified to rule on the matter, the trial court set aside the resulting dismissal as void.

■ In affirming this determination, the Court of Appeal explained that “[e]xcept in very limited circumstances not applicable here, a disqualified judge has no power to act in any proceedings after his or her disqualification.” (*Christie, supra*, 135 Cal.App.4th at p. 776.) Significantly, the appellate court emphasized that “disqualification occurs when the facts creating disqualification arise, not when disqualification is established. [Citations.] The acts of a judge subject to disqualification are void or, according to some authorities, voidable.^[29] [Citations.]” (*Christie*, at p. 776.)

Roscco Holdings, supra, 149 Cal.App.4th 1353, which relied on *Christie*, was an action by a trust against a bank alleging numerous causes of action in

²⁹ In *Urias, supra*, 234 Cal.App.3d at page 424, the court held acts of a disqualified judge voidable, not void, based in part on the reasoning of Witkin: “Witkin notes little is accomplished by calling the judgment of a disqualified judge ‘void’; the problem is one of jurisdiction. While the disqualified judge totally lacks power to hear and determine the cause, the court itself is not without jurisdiction. [Citation.] But the court, with subject matter jurisdiction, may properly be held to lack jurisdiction to act while the judge is disqualified. The problem is more accurately one of excess of jurisdiction. [Citation.] ‘Consequently, the actions of a disqualified judge are not void in any fundamental sense but at most voidable if properly raised by an interested party.’ (*In re Christian J.* (1984) 155 Cal.App.3d 276, 280 [202 Cal.Rptr. 54] . . .).” The *Christie* court, after discussing the view of *Urias* and some other courts, held the acts of a disqualified judge “void” because the Supreme Court had said so in *Giometti v. Etienne* (1934) 219 Cal. 687, 689 [28 P.2d 913], and had never reconsidered the proposition. (*Christie, supra*, 135 Cal.App.4th at pp. 779–780.)

tort and contract arising from financial transactions. The bank sought and obtained arbitration and an arbitration award was entered in favor of the bank. The parties filed cross-petitions to vacate and confirm the award. The trial judge who had issued the order compelling arbitration, the Honorable Alexander Williams III, disqualified himself under section 170.1, subdivision (a)(8), because he had engaged in conversations with private dispute resolution providers regarding possible employment prior to issuing his order compelling arbitration. After the matter was transferred to a new judge, the trial court granted the trust's motion to vacate the order compelling arbitration due to disqualification Judge Williams's lack of authority to issue that order.

The Court of Appeal held that Judge Williams was properly disqualified under section 170.1 and the order compelling arbitration was void. Quoting *Christie, supra*, 135 Cal.App.4th 767, the court explained: “ ‘[D]isqualification occurs when the facts creating disqualification arise, not when the disqualification is established’ [Citation.] ‘[I]t is the fact of disqualification that controls, not subsequent judicial action on that disqualification.’ [Citation.] On February 25, 2004, Judge Williams had before him a motion to compel arbitration in this case. At that point in time he had, within the past two years, participated in discussions regarding prospective employment as a dispute resolution neutral. He was therefore disqualified from the case, regardless of his lack of knowledge of the law providing for his disqualification. His order compelling arbitration was therefore void.” (*Rosco Holdings, supra*, 149 Cal.App.4th at p. 1363, italics omitted; see § 170.1, subd. (a)(8)(A).)

Tracy also relies on *Urias, supra*, 234 Cal.App.3d 415, in which, after summary judgment was granted for the defendant, the plaintiff's attorney learned that the judge's former law firm had represented the defendant for the past 10 years. The court held that, “[b]ecause the summary judgment [had been] rendered by a disqualified judge, the judgment was voidable upon [the] plaintiff's objection.” (*Id.* at p. 426.)

In short, Tracy contends the case law establishes that Perkovich's orders were all void and must be set aside because all issued after Perkovich's failure to comply with the Code of Judicial Ethics, which constituted one of the grounds for disqualification.

Jose disagrees, arguing that the cases Tracy relies on are all inapplicable because the facts establishing disqualification in those cases were undisputed, whereas those in the present case are disputed. As we have explained, Perkovich's failure to file a consent or answer to the statement of disqualification established the truth of the facts it alleged. There is no basis for Jose's apparent assumption that the rulings of a judge who neither consents to

disqualification nor answers a motion to disqualify cannot be declared void and vacated without an independent judicial hearing as to whether the unanswered allegations of the statement of disqualification are true and constitute grounds for disqualification.

■ It is important to clarify that we are not holding that the facts alleged in the statement of disqualification have been determined to be true for any purpose other than establishing the basis of disqualification and consequences thereof. Nor are we making an independent factual finding that Perkovich failed to verbally disclose the mutual judging relationship or that she was in fact biased and prejudiced against Tracy, matters upon which we express no opinion. What we *are* saying is that by operation of the disqualification statute, the facts alleged in the statement of disqualification and not disputed by the challenged judge must be taken as true for purposes of determining the basis and effect of a disqualification order.

■ None of the alternative arguments Jose advances in order to sustain Perkovich's rulings stands up to scrutiny. The first is that, even if Perkovich did violate canon 6D(5)(a), her orders should not be deemed void and set aside because section 170.3, subdivision (b)(4), provides that if a judge is disqualified before he or she has completed judicial action in a proceeding, "in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge." As earlier explained, "disqualification occurs when the facts creating disqualification arise, not when the disqualification is established." (*Christie, supra*, 135 Cal.App.4th at p. 776; see *Roscco Holdings, supra*, 149 Cal.App.4th at p. 1363.) The facts creating disqualification in this case first occurred in October 2012, when Perkovich was required, but failed, to make her on the record disclosures. This preceded all of her rulings.³⁰ In these circumstances, preserving the orders she made prior to the disqualification order would undermine the purpose of the ethical rules she violated and the disqualification procedure.

While the text of section 170.3, subdivision (b)(4)—"[i]f grounds for disqualification are first learned of or arise after the judge has made one or more rulings . . . in the absence of good cause the rulings he or she has made up to that time shall not be set aside"—read literally and in isolation, might support Jose's reading, the context in which this text appears demonstrates it does not apply to the situation presented in this case. Subdivision (b) of

³⁰ Jose appears to believe Perkovich's first and only disqualifying act was her October 16, 2014, letter to the presiding judge requesting recusal due to Tracy's hostility, which led Perkovich to fear for her personal safety. But Perkovich's letter, which she delivered to the presiding judge *after* Tracy filed her statement of disqualification, was not a ground upon which Perkovich was sought to be or was ordered disqualified.

section 170.3 addresses only the situation of “[a] judge who determines himself or herself to be disqualified.” Subdivision (b)(4), therefore, necessarily applies when the grounds for disqualification “arise after” or “are first learned of” *by the judge*. This makes sense, because the rulings made prior to the existence or knowledge of the disqualifying facts likely were not affected by them. Outside the context of a judge recognizing his or her own disqualification, subdivision (b)(4) does not apply. Aside from the fact that this conclusion is required by the structure of the statute, to conclude otherwise would be to validate rulings made by a judge who was disqualified at the time the rulings were made simply because the parties had not yet learned of the grounds for disqualification.

Jose’s argument is also unavailing because consideration of the circumstances he relies upon to show the absence of good cause to vacate Perkovich’s rulings would effectively vitiate the ethical obligation she failed to discharge. The mitigating circumstance Jose relies on most heavily is that Perkovich “fully and completely disclosed her prior professional relationships with counsel for the parties’ and the parties’ forensic CPAs” at the first settlement conference on October 30, 2012, and Tracy was not prejudiced by the fact that the disclosures were not made on the record within five days of her designation as a temporary judge. But the fact and effect of a verbal disclosure is disputed: Tracy insists she did not hear Perkovich describe her professional relationship with counsel. Moreover, Jose ignores the fact that Munsill, the only one of Tracy’s attorneys with whom Perkovich had a professional relationship and knew of the relationship with Blevans, quickly substituted out as Tracy’s attorney and Perkovich never disclosed her professional relationship with Blevans to the attorneys who represented Tracy during almost all of the proceedings, until one of them finally sought the disclosures that were never made in writing or placed on the record.

■ Munsill’s departure from the case also defeats Jose’s suggestion that because Perkovich’s mutual judging relationships were with counsel for “both parties,” she lacked any incentive to favor one over the other. Even if Munsill had remained, the argument misses the point. There is no telling how a temptation to stray from impartiality in one direction may balance out against a temptation pulling in another direction. If there is conflict of interest adverse to a party, that party is entitled to know and to make a decision whether to proceed regardless of whether there is a second conflict that may work in her favor. It would distort the purpose of ethical rules to say that a failure to disclose a relationship with one party is excused because the judge *also* failed to disclose a relationship with the opposing party.

In any case, the reason both disclosure and any waiver are required to be in writing and/or on the record is to eliminate the use of other, much less certain,

factors of the sort Jose relies upon to create doubt whether disclosure has been made or disqualification waived. The wisdom of requiring both disclosure and waiver to be in writing or on the record is dramatically demonstrated by this case, as is the need to enforce the requirement rigorously. The parties dispute whether Tracy was aware, or can be charged with knowledge, of the verbal disclosures Perkovich represents she made, as well as the scope of the disclosure. In the absence of documented disclosures and a documented waiver, we are presented with a sideshow of competing declarations and deposition transcripts describing what the participants in the October 2012 settlement conference—the parties, the lawyers, two expert witnesses and the temporary judge herself—remembered two years later about what Perkovich said and how Tracy responded. There have been discovery disputes, motions, and writ proceedings—all relating to issues completely extraneous to the primary dispute between the parties. The dispute over whether there was a disclosure and whether there was a waiver, and if not, the effect of the disqualification, has consumed an inordinate amount of the trial court's and this court's time, not to mention the parties' and their counsel's, and significantly delayed the ultimate resolution of the case.

Lauding the many virtues of private judges in matrimonial cases, which we do not dispute, our dissenting colleague takes us to task, first, for “show[ing] no appreciation for the realities of the situation, no consideration for what I understand, anecdotally at least, to be the real life facts facing trial judges,” and, secondly, for our indifference to the fact that Perkovich lacked the resources available to sitting judges sought to be disqualified and had to act “on her own.” (Dis. opn., *post*, at p. 72.) With all due respect, we think it is the dissent that ignores the pertinent realities, and also Perkovich’s deliberate disregard of the statutory disqualification scheme.

The reality that seems to us most pertinent to this case is that, unlike permanent judges, temporary judges operate in a context that greatly increases the likelihood of potential conflicts. Temporary judges have broad powers substantially comparable to those of a sitting judges (*In re Estate of Kent* (1936) 6 Cal.2d 154, 163 [57 P.2d 901]), but most who serve as temporary judges simultaneously maintain private law practices, as in this case. Consequently, these lawyer/judges commonly engage in continuing business relationships with lawyers likely to come before the court to which they are appointed—unlike public judges, who are precluded from doing so by the provision of canon 4D(1)(b) that “[a] judge shall not engage in financial or business dealings that . . . involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to appear before the court on which the judge serves.” This is particularly true within a specialized field like matrimonial law, the legal area most private judges engage in. (Comment, *The Marriage of Family Law and Private Judging in California* (2007) 116 Yale L.J. 1615, 1617 [more than

half of private judges' cases in California are family law disputes].) The private practice of most temporary judges therefore presents a greater likelihood reasonable doubt can be cast on their impartiality than on that of permanent judges. Moreover, because temporary judges are appointed and supervised by the presiding judges of the superior courts, doubts about the impartiality of private judges may also reflect adversely on the integrity of the California judicial system.

The gravity of this danger, and the likelihood lawyers who serve as temporary judges may not be as acculturated as full time judges to the demands of the Code of Judicial Ethics, are undoubtedly reasons the Rules of Court require such lawyers to certify to their awareness of and compliance with "applicable provisions of canon 6 of the Code of Judicial Ethics and the California Rules of Court." (Rule 2.831(b).)

Although disclosure may be onerous, matrimonial practitioners (and others who frequently participate in the private judging process) have a greater interest in assiduous disclosure than they may realize. As one such practitioner has pointed out, the use by the "small" and "collegial" family law bar "of our friends, colleagues, and prior opposing counsel as private judges unwittingly exposes all of us, as a community and as individuals, to potential liability for violations of the various ethical canons, claims of cronyism, allegations of bias, complaints of self-dealing, and malpractice law suits. I believe that we are well intentioned, but I also believe the problems related to the inter-relationships of our bar in this way have been 'under-discussed' and 'under-examined.'" (Hersh, *Ethical Considerations in Appointing our Colleagues as Private Judge* (2009) 31 No. 4 Family L. News 31.)³¹ The requirement that disclosure be "in writing or on the record," as well as that any waiver of disqualification be in writing and recite the basis of disqualification (see § 170.3, subd. (b)(1)), cannot be treated casually by a temporary judge except at his or her peril—and also that of the system of private judging in California.

The dissent's lament that Perkovich lacked the resources available to permanent judges sought to be disqualified, and was obliged to act on her own, is unconvincing. First of all, Blevans informed Perkovich of the requirements of the disqualification scheme spelled out in section 170.3 and advised her to either consent to disqualification or answer the motion (see, *ante*, at p. 40, fn. 27), which advice she ignored. Secondly, the alternatives available to Perkovich set forth in section 170.3 are not complicated. Finally,

³¹ The practice of the author of this article, which she recommends to her colleagues, is to send a letter to the individual under consideration for appointment as a temporary judge or referee requesting detailed written disclosures of specified matters prior to the signing of the stipulation and order.

as we have said, the dissent's acceptance of Perkovich's hand-delivered letter to Judge Stone—which was highly unprofessional in several ways—as the functional equivalent of a “written verified answer” to the motion to disqualify (see dis. opn., *post*, at pp. 73–74) that satisfies the requirements of section 170.3, subdivision (c)(3), seems to us extraordinarily unjustified.

Jose and the dissent suggest that the stipulation and order designating Perkovich temporary judge, which was signed by the parties and their attorneys, should be considered a timely waiver of the “on the record” disclosure requirement. They rely on paragraph 4 of the stipulation, which simply states: “Both parties waive the clerk’s minutes.” The obvious meaning of this brief sentence is simply that the parties intended to forgo formal clerk’s minutes for the proceedings to be held before the temporary judge. It is a waiver of formal clerk’s minutes in general, making no reference to disclosures or otherwise suggesting it was designed to eliminate the need for the written or on the record disclosure mandated by the Code of Judicial Ethics. The fact that memorialization in the clerk’s minutes is among several ways a disclosure can be placed on the record³² does not provide a sufficient basis upon which to infer that the parties’ choice to forgo formal clerk’s minutes in general constitutes a waiver of the specific requirement for on-the-record disclosure. And in any event, paragraph 4 certainly did not waive the alternative means by which the statute allows a disclosure to be documented—“in writing.” If the parties’ choice to forgo a formal record meant disclosures were not required to be, or could not be, made “on the record,” it was incumbent upon Perkovich to make them “in writing” as required by canon 6D(5)(a).

■ As for Jose’s argument that Tracy waived disqualification after Perkovich verbally disclosed her professional relationships with counsel, as we have said, section 170.3, subdivision (b)(1), requires a waiver of disqualification to “recite the basis for the disqualification” and to be “signed by all parties and their attorneys and filed in the record.” (§ 170.3, subd. (b)(1).) No such waiver exists in the present case. Jose maintains section 170.3, subdivision (b)(1), is inapplicable because it relates to the situation in which a judge “determines himself or herself to be disqualified after disclosing the

³² The Committee on Judicial Ethics Opinions, which operates under the aegis of the California Supreme Court, has pointed out that one of the ways in which a disqualifying disclosure can be placed “on the record” pursuant to canon 3E(2)(a) when there is no court reporter or electronic recording of the proceedings is to “[e]nter the disclosure document in the case file as a minute order, official court minutes, or a formal order.” (Cal. Supreme Court, Com. on Judicial Ethics, *Disclosure on the Record When There Is No Court Reporter or Electronic Recording of the Proceedings*, formal opinion No. 2013-002 (Dec. 11, 2013) p. 9.)

basis for his or her disqualification on the record,”³³ and Perkovich did not find herself disqualified. But neither Jose nor the dissent, which adopts Jose’s argument, explains how Perkovich’s failure to disclose the basis for her disqualification can excuse the requirement of a written waiver that would apply if she had properly determined herself disqualified after disclosing the basis of that determination. The information Perkovich was obliged to disclose was clearly disqualifying—a professional relationship between the temporary judge and counsel for one of the parties in which each had the power to determine the outcome of the other’s cases, thereby affecting each other’s financial and professional interests.³⁴ Neither her failure to disclose those disqualifying facts as required, nor any failure on her part to recognize that they were disqualifying, can relieve Perkovich of the additional obligation to obtain a written waiver that describes the disqualifying conduct to which it refers. Accepting the dissent’s view that the requirement of a written waiver applies only where the judge actually finds himself or herself disqualified would permit a disqualified judge to avoid the consequences of disqualification, even in the absence of a waiver, by simply failing to acknowledge his or her own disqualifying conduct. Such a result cannot be countenanced.

Finally, the implied waiver cases Jose relies upon are inapposite. To be sure, parties can waive disqualification by their conduct where they are aware of grounds for disqualification but continue to participate in the proceedings without raising the objection. (*People v. Johnson* (2015) 60 Cal.4th 966, 978–979 [184 Cal.Rptr.3d 612, 343 P.3d 808] (*Johnson*) [judge disclosed close personal and professional relationship with prosecutor; defense counsel stated readiness to proceed and defendant personally agreed]; *Las Canoas Co., Inc. v. Kramer* (2013) 216 Cal.App.4th 96, 101 [156 Cal.Rptr.3d 561] [trial judge in civil suit against court reporter disclosed having used reporter’s services in private practice; disqualification claim forfeited by counsel declining when court asked for any comment on disclosure]; *In re Steven O.* (1991) 229 Cal.App.3d 46, 55 [279 Cal.Rptr. 868] (*Steven O.*) [referee who presided over hearings on two juvenile supplemental petitions alleging probation violations had been prosecutor on original petition; failure to object in juvenile court forfeited issue where minor was present at hearings where referee appeared as prosecutor and defense counsel

³³ Section 170.3, subdivision (b)(1), provides in full: “A judge who determines himself or herself to be disqualified after disclosing the basis for his or her disqualification on the record may ask the parties and their attorneys whether they wish to waive the disqualification, except where the basis for disqualification is as provided in paragraph (2). A waiver of disqualification shall recite the basis for the disqualification, and is effective only when signed by all parties and their attorneys and filed in the record.”

³⁴ That Perkovich initially had mutual judging relationships with the attorneys for both parties is of no consequence. As we have said, the failure to disclose a relationship with one party cannot be excused by the judge’s failure to disclose a relationship with the opposing party.

had access to records that would reveal referee's earlier involvement]; *Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1336–1338 [84 Cal.Rptr.3d 835] [motion to disqualify judge for improperly undertaking independent investigation of facts untimely where facts known but not raised until after adverse ruling on issue in case and unsuccessful writ petition].) But here, Tracy stated that she was not aware of Perkovich's mutual judging relationship with Blevans until shortly before she filed her statement of disqualification. By failing to answer the statement of disqualification, Perkovich conceded these facts. Perkovich was disqualified as of the time she should have disclosed her professional relationship with respondent's attorney in writing or on the record.

None of the implied waiver cases upon which Jose and the dissent rely purport to establish a rule applicable in all circumstances, and none involve the circumstances presented here. These cases address waiver of known bases for disclosure; none address waiver of the disclosure itself, and none involved a clearly disqualifying direct conflict of interest like the one presented here or an unwaivable claim of personal bias and prejudice. In *Johnson, supra*, 60 Cal.4th at pages 977–978, the judge disclosed a close personal and professional relationship with the prosecutor, stating that “‘there was never anything inappropriate,’” they did not discuss business, and “‘there’s always a separation and a distance from what I do as a judge.’” Defense counsel represented that he had explained to the defendant that in his experience, judges with whom he had personal relationships nevertheless ruled impartially, and both counsel and the defendant agreed to proceed. The potential conflict in *Johnson* was thus the amorphous possibility of the judge favoring one attorney, perhaps unconsciously, due to familiarity and personal fondness. (See also *Las Canoas Co., Inc. v. Kramer, supra*, 216 Cal.App.4th at p. 101 [judge in civil suit against court reporter disclosed having used the reporter's services in private practice].) The risk of divided loyalty, conscious or unconscious, is considerably stronger where, as here, the temporary judge has a direct professional incentive to favor an attorney who has been and likely again will be in a position to determine the outcome of cases in which the present temporary judge acts as an attorney.

In *Steven O., supra*, 229 Cal.App.3d at page 55, the issue was that the referee who presided over hearings on two juvenile supplemental petitions alleging probation violations had been the prosecutor on the original petition. The prior representation may have given the now-judge background information about the minor, but to the extent any such information went beyond what was presented at the hearings on the probation violations, judges often are called upon to put aside inadmissible evidence of which they are aware. That the judge has heard these things “‘does not mean that [s]he cannot divorce them from [her] mind.’” (*People v. Scott* (1997) 15 Cal.4th 1188, 1206 [65 Cal.Rptr.2d 240, 939 P.2d 354] (*Scott*), quoting *People v. Beaumaster*

(1971) 17 Cal.App.3d 996, 1009 [95 Cal.Rptr. 360].) In *Scott*, at page 1207, the defendant argued on appeal that the judge who presided over his court trial should have disqualified herself because, at pretrial hearings at which he was not present, the judge received information that made it impossible for her to remain impartial. The court noted (in the context of a different issue) that the information the judge had received was not of a type that would undermine the judge's impartiality, as the pretrial hearings were solely concerned with ensuring a defense witness would appear for trial and not with the witness's credibility. The same reasoning—that a judge is presumed able to put aside inadmissible information—applies to *Tri Counties Bank v. Superior Court, supra*, 167 Cal.App.4th at pages 1336–1338, in which the judge allegedly undertook an improper independent investigation of facts.

■ In our view, none of the foregoing cases supports excusing the statutory requirement of a written waiver where a judge who has business and professional relationships with counsel in the proceeding that constitute an actual direct conflict of interest, and are required to be disclosed on the record in writing, fails to make the disclosures as required and then fails to contest a statement of disqualification based on the insufficient disclosure. A fortiori they do not excuse the requirement when the alleged basis of disqualification is conduct indicating actual bias.

Drawing on the evidence discussed above that Perkovich verbally disclosed her mutual judging relationships with both Blevans and Munsill at the October 2012 settlement conference, and Tracy's claim that she did not hear such disclosures, Jose and the dissent emphasize that a client's personal waiver is not necessary where counsel chooses not to challenge a judge. (*Johnson, supra*, 60 Cal.4th at p. 980; *Scott, supra*, 15 Cal.4th at p. 1207.) Aside from our view, just discussed, that implied waiver does not apply in the particular circumstances of this case, it is worth observing that *Johnson*, while stating that “deciding whether to challenge a judge” is one of the tactical decisions surrendered by a defendant represented by professional counsel, in fact involved a defendant who, after the judge disclosed his relationship with the prosecutor, personally stated his agreement with his attorney's belief the judge would be fair. (*Johnson*, at p. 979.) We question whether the same rule should control in a case where the client and his or her current counsel are unaware of a disqualifying conflict of the sort presented here. *Scott*, the case *Johnson* relied upon in holding a personal waiver was not required, involved facts suggesting the defendant may not have been aware of the alleged basis for disqualification, which was based on the judge's receipt of information at pretrial hearings at which the defendant was not present. (*Scott*, at p. 1207.) As indicated above, however, the information was not of a type that threatened to undermine the judge's impartiality. (*Ibid.*) *Scott*, in turn, relied upon *In re Horton* (1991) 54 Cal.3d 82, 95 [284 Cal.Rptr. 305, 813 P.2d 1335], a case which did not involve disqualification but rather

held that defense counsel could impliedly stipulate to trial before a court commissioner without the defendant having personally waived his right to a regularly elected or appointed superior court judge.

■ Of most fundamental significance, none of the implied waiver cases upon which Jose and the dissent rely involved a private judge. As we have explained, and as this case illustrates, private judges are not insulated in the way public judges are: Unlike public judges, they often have continuing and reciprocal business relationships with the lawyers who appear before them. Because private judges operate within a system in which potential conflicts are likely, adherence to requirements for written or on the record disclosure and waiver is imperative. Viewing the decision whether to waive a judge's conflict as a tactical one to be exercised by the attorney, even if the client is unaware of the facts, takes on a different light in the context of private judging, where it is possible for three attorneys—opposing counsel and the temporary judge—to mutually agree to work on each other's cases to serve their own professional interests, which may or may not align with those of their clients.

Finally, Jose argues that, waiver aside, the failure of a temporary judge to disclose potential conflicts in the manner prescribed by the Code of Judicial Ethics “does not, without more, result in disqualification.” The dissent agrees. The argument that a violation of the disclosure requirement of canon 6D(5)(a), standing alone, cannot support disqualification—a proposition not supported by the cases Jose relies upon³⁵—presents an interesting question. But this is not Tracy’s claim. Tracy’s argument is that a person aware that Perkovich had a mutual judging relationship with Jose’s lawyer and failed to disclose it in the manner required by the Code of Judicial Ethics “might reasonably entertain a doubt that [she] would be able to be impartial.” (§ 170.1, subd. (a)(6)(A)(iii).) In other words, Tracy’s nondisclosure claim is not that Perkovich’s failure to properly disclose is disqualifying in and of itself; the claim rests as well on the nature of the information she failed to

³⁵ In *Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384 [168 Cal.Rptr.3d 605], the first case he relies on, upon learning that the commissioner presiding over a dissolution action had agreed to officiate at the wife’s counsel’s wedding, the husband filed a statement of disqualification; the commissioner filed an answer denying any disqualifying conduct, the disqualification motion was denied and the appellate court affirmed the finding that, because the commissioner was not a personal friend but solely the officiant, the objective standard for disqualification was not met. (*Id.* at pp. 387, 395.) The court emphasized, however, that disclosure was required. (*Id.* at pp. 395–396.) *People v. Martinez* (1978) 82 Cal.App.3d 1 [147 Cal.Rptr. 208], the other authority Jose offers, held that a criminal defendant was not prejudiced by the judge, in chambers, telling students observing the trial that he believed the defendant was guilty, because the jury did not hear the remarks and the judge’s rulings did not reflect prejudice. (*Martinez*, at pp. 16–17.) Neither of these cases has any bearing on the consequence of a private judge ordered disqualified after failing to answer a statement of disqualification alleging violation of a disclosure requirement.

reveal in writing and on the record, which itself may reasonably be seen as an indication of partiality. The claim of nondisclosure therefore does not “stand alone.”

■ The nondisclosure claim also cannot be said to stand alone because it is accompanied by the independent claim that Perkovich was actually biased against Tracy. Not only did Perkovich decline to formally contest the allegation of actual bias, her letter to Judge Stone—complaining for the first time about hostile conduct some 10 months earlier—provides reason to believe the allegation.³⁶ Furthermore, unlike the failure to disclose, which can be waived, a claim that the judge “has a personal bias or prejudice concerning a party” cannot be waived. (§ 170.3, subd. (b)(2)(A).) In short, entirely apart from the alleged failure to properly disclose, Tracy’s motion to disqualify alleges a sufficient basis upon which to disqualify Perkovich.

Finally, it deserves to be emphasized that all of the arguments advanced by Jose and the dissent as to why Tracy should be seen as having waived disqualification, or the claims upon which she sought and obtained disqualification were untimely or otherwise untenable, *could have been raised by Perkovich herself, and a hearing on those claims could have been conducted by the trial court*. The most legally significant factor in this case, it seems to us, is not Perkovich’s asserted failure to disclose in writing or on the record as required, nor even her alleged bias and prejudice. As indicated, like the trial judge, we make no independent findings on those matters. The regnant factor is instead Perkovich’s complete indifference to the legal rules regarding the disqualification process specified in section 170.3. As provided in subdivision (c)(2) of section 170.3, Perkovich, without conceding her disqualification, could have simply requested any other judge agreed upon by the parties to sit and act in her place; but she did not. Alternatively, as provided in subdivision (c)(3), she could have filed a written verified answer denying any or all of the allegations of Tracy’s statement of disqualification and set forth “any additional facts material or relevant to the question of disqualification,” but she did not do that either. The result of those failures, and also her failure to consent to disqualification (§ 170.3, subd. (c)(3)), is that, as Judge Stone found, she must be “deemed to have consented to her disqualification.” The statement of the Supreme Court, echoed by the Courts of Appeal, that where a judge “has failed to file a written answer to the statement of bias and prejudice . . . [citation], the facts alleged in the

³⁶ Perkovich’s last direct contact with Tracy was at the settlement conference in December 2013. The record certainly reflects Tracy’s uncooperative, agitated, and disruptive conduct and verbal expressions of anger, including loud and “aggressive” demands to see Jose at the December 2013 conference described by Blevans, Elmore, and another of Jose’s attorneys, the heated exchange at the July 30, 2013, hearing, and “strange” e-mails from Tracy to Jose. We are not aware of any suggestion of threat of physical harm, nor of any contact between Tracy and Perkovich for approximately 10 months preceding Perkovich’s letter.

statement must be taken as true" (*Calhoun v. Superior Court, supra*, 51 Cal.2d at p. 262) declares a rule of law. Unlike Jose, and also our dissenting colleague, we are unwilling to treat that rule of law as if it were an equitable doctrine, whose application is not universal but depends upon circumstances that will vary from case to case. Doing so would undermine the uniformity, certainty, and predictability essential to effective enforcement the disqualification process, which strengthens the integrity of the judicial process.³⁷

For the foregoing reasons, we conclude that Perkovich's orders were all void at the time they issued and must be vacated, regardless whether they were legally correct.³⁸ (*Cadenasso v. Bank of Italy* (1932) 214 Cal. 562, 568–569 [6 P.2d 944]; *Roscco Holdings, supra*, 149 Cal.App.4th at p. 1367.)

***Perkovich Cannot in This Proceeding Be Required to
Refund Fees She Received for Her Services***

Tracy claims that due to Perkovich's failure to comply with her ethical obligations, Tracy is entitled to a refund of the fees she paid Perkovich. The claim is based on *Aguilar, supra*, 113 Cal.App.4th 1072, which confirmed that “[i]t is settled in California that an attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility.” (*Id.* at p. 1076, quoting *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 618 [120 Cal.Rptr. 253]; accord, *Jeffry v. Pounds* (1977)

³⁷ The dissent's suggestion that our decision will wreak havoc by invalidating orders in any case where a private judge did not strictly comply with the requirement of canon 6D that disclosure be made in writing or on the record is, we believe, greatly exaggerated. Several unusual circumstances combined to present the problem we have addressed in this case: An experienced private judge failed to place her disclosures in writing or on the record, a party sought to disqualify the temporary judge for this reason and for alleged actual bias, and the challenged temporary judge failed to seek replacement without conceding disqualification or to file a consent or an answer contesting the allegations. We will not presume that temporary judges commonly disregard the requirements of the Code of Judicial Ethics. And it cannot be common for a temporary judge who is challenged to fail to respond to a statement of disqualification in any of the ways prescribed by section 170.3. The result we have reached in this case would not obtain absent these unusual circumstances. Moreover, if the dissent is correct that temporary judges routinely ignore the requirement of canon 6D(5)(a) that disclosures be made in writing or on the record, there is all the more reason to insist upon adherence to it.

³⁸ Until further action is taken by the parties or the trial court on remand, the effect of vacating Perkovich's orders will be to return the parties to the positions they were in before the temporary judge entered the case, governed by the superior court's 2012 spousal support order. We recognize, however, that the orders we are vacating required the payment of substantial sums for attorney and expert witness fees and additional amounts of spousal support. We express no opinion on the correctness of any of these orders. On remand, the parties and the trial court will have to devise a practical means of determining the parties' respective rights and obligations with regard to payments or other accommodations that have been made in compliance with Perkovich's void orders.

67 Cal.App.3d 6, 10–12 [136 Cal.Rptr. 373] [attorney entitled to fees for services rendered *before* breach of professional conduct]; *Clark v. Millsap* (1926) 197 Cal. 765, 785 [242 P. 918] [“‘acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties’” prevent an attorney from receiving fees for his or her services].) Acknowledging that no case addresses the question whether a temporary judge who violates the Code of Judicial Ethics is also barred from receiving fees for his or her services, Tracy maintains that no rationale supports the use of a lesser standard for lawyers serving as temporary judges.³⁹

Jose has not responded to this argument,⁴⁰ and we will not resolve it. The dispute is between Tracy and Perkovich, and because Perkovich is not a party to these proceedings, we cannot adjudicate her rights to the fees in question.

II.

The MOA Was Tainted by Perkovich’s Void Rulings and Is Therefore Unenforceable Under Section 664.6

Tracy emphasizes that the MOA was proposed in the wake of a series of adverse rulings issued by Perkovich after Munsill was replaced as her counsel by Jackson, who was unaware of the mutual judging relationships between Perkovich and Blevans. According to Tracy, Blevans was aware of the hostility between Perkovich and Tracy and her counsel and, in that context, the MOA presented Jackson and Tracy a Hobson’s choice: Considering that Perkovich had repeatedly ruled in Jose’s favor, had threatened Tracy with contempt and appeared hostile, Tracy feared her refusal to sign the MOA (which according to Tracy required her to pay “approximately \$800,000 per year over a five-year period, and then \$300,000 per year for the rest of Jose’s life”) would likely result in loss of control of the business she founded and had run for two decades.

³⁹ Since a temporary judge is constitutionally required to be a member of the California State Bar, such a judge who violates canon 6D of the Code of Judicial Ethics also necessarily violates rule 1-710 of the Rules of Professional Conduct of the California State Bar, which requires a temporary judge to comply with canon 6D, and therefore violates his or her ethical obligation both as a temporary judge *and as an attorney*.

⁴⁰ In his trial court pleadings in support of Perkovich’s request for declaratory relief, Jose raised the different arguments that Tracy’s demand for a refund could not be granted because (1) the fees paid were authorized by and consistent with the terms of the Stipulation and Order, which did not authorize the court to order any refund of fees, and (2) the refund request amounted to “an assertion of liability” for improper performance of duties as a pro tempore judge and, under *Howard v. Drapkin, supra*, 222 Cal.App.3d 843, Perkovich enjoyed quasi-judicial immunity against a suit for “monetary compensation” on this basis.

Tracy now argues that the MOA was tainted by the void rulings that induced it and, therefore, enforcing it under section 664.6 would thwart the policy informing the disclosure requirements. As she says in her briefs, “[i]f there is *any possibility* that the hostile interactions at hearings or the void orders Perkovich issued impacted the circumstances leading to its execution, the MOA should be declared unenforceable,” because “the legitimacy of the judicial system” is at stake.

Preliminarily, we disagree with the dissent’s view that this claim is a “180-degree change of position” from the position Tracy took in an earlier writ petition challenging the trial court’s denial of the second motion to withdraw the stipulation appointing Perkovich, which had been filed *before Tracy’s attorneys learned of the undisclosed mutual judging relationship.* (Dis. opn., *post*, at p. 69, fn. 2.) The trial court rejected Tracy’s arguments that Perkovich lacked power to rule in the case because of her failure to sign the certification required by rule 2.831(b) and that the terms of the stipulation did not permit her to hear a motion to enforce the MOA.

With regard to the second point, Tracy argued in her writ petition that the stipulation did not allow Perkovich to hear a motion to enforce “an agreement in which she had no role.” Urging that the jurisdiction of a temporary judge, circumscribed by the stipulation, is limited to matters that are “a continuation of the stipulated cause or question its finality, such as motions to vacate or reconsider” and not to “ancillary” matters “heard on a separate record” and seeking “an independent judgment or reviewable order” (*Orange County Dept. of Child Support Services v. Superior Court* (2005) 129 Cal.App.4th 798, 807 [28 Cal.Rptr.3d 877]), Tracy maintained that Jose’s motion to enforce the MOA was ancillary because Perkovich had no role in negotiating, drafting, or approving it.⁴¹

The dissent views Tracy’s assertions in the prior writ petition that Perkovich had “no nexus” to the MOA as incompatible with Tracy’s present claim that she entered the MOA due to duress caused by Perkovich’s rulings. (Dis. opn., *post*, at p. 69, fn. 2.) But saying Perkovich played no part in the negotiations, drafting, or approval of the MOA is a far cry from saying that Tracy’s evaluation of and reasons for signing the MOA were not influenced by rulings Perkovich had previously issued. Tracy’s argument in the prior writ petition—that Perkovich did not participate in the development or

⁴¹ The dissent quotes Tracy’s statement that the MOA “is not the result of a ruling or order of attorney Perkovich, and she did not sign it. She had no role in its preparation or execution. The MOA was negotiated by lawyers working in the office of Jose’s counsel. It was signed initially by Tracy at her private residence and later by her at her family law attorney’s office. [¶] . . . [¶] [Perkovich’s] role as a judicial officer was *not in play* in the MOA. Her imprimatur was not necessary for it to have effect. [¶] . . . [¶] [Perkovich] has no nexus with the MOA Tracy and Jose executed.” (Dis. opn., *post*, at p. 69, fn. 2.)

execution of the MOA, and enforcement of the MOA exceeded the scope of her stipulated appointment—addresses a completely different point from, and is not inconsistent with, Tracy’s present argument that Perkovich’s rulings had a psychological effect on Tracy and influenced her evaluation of and decision to enter the MOA.

Jose’s view is that the enforceability of the MOA has nothing to do with Perkovich’s “technical noncompliance” with the disclosure requirements, her disqualification, or the voidness of her orders, but rather presents “a question of fact for the trial court to determine” as part of its determination of Jose’s motion to enforce the MOA under section 664.6. The “question of fact” Jose posits is whether Tracy can establish her claim that she signed the document under economic duress; he emphasizes that this claim is now “only a yet-to-be-proven allegation in a declaration that has yet to be subjected to discovery or cross-examination.”

Jose’s argument is based on the status of his motion to enforce the MOA *at the time it was presented to Perkovich*. As we have explained, at that time Tracy and her counsel were unaware of Perkovich’s noncompliance with canon 6D(5)(a), and Tracy’s opposition to enforcement of the MOA was based solely on her claims that she signed the document under economic duress and that the parties had not served on one another or mutually waived the final financial declarations required by Family Code section 2105 prior to signing the MOA. By the time the issue of enforcing the MOA was presented to Judge Price, Tracy and her counsel had learned of Perkovich’s failure to disclose “in writing or on the record” and successfully obtained her disqualification. The disqualification of Perkovich dramatically changed the focus of the motion to enforce the MOA: The question was no longer whether Tracy signed the MOA under duress but whether Perkovich’s void orders so influenced the MOA that it is tainted and unenforceable.

Roscco Holdings, supra, 149 Cal.App.4th 1353, is instructive on the manner in which the acts of a disqualified judge may taint subsequent proceedings. As earlier described, the trial judge in the case disqualified himself after issuing an order compelling arbitration. The newly assigned judge vacated not only the order compelling arbitration, but also the subsequent arbitration award. While affirming that the disqualified judge’s order compelling arbitration was void, the reviewing court reversed the order vacating the arbitration award as premature because the award was not necessarily improper: Since the basis for the order compelling arbitration was a contractual arbitration clause, if the clause governed the parties’ dispute, they would be required to arbitrate independently of the judge’s void order. (*Id.* at p. 1365.) In that case, the arbitration award should be vacated only if the trial court determined that the arbitration was tainted by

the disqualified judge, or should be vacated on other grounds. (*Id.* at p. 1367.) *Rosco Holdings* described the appropriate standard for determining whether the arbitration was tainted as “whether ‘[a] person aware of the facts might reasonably entertain a doubt that the [arbitrators] would be able to be impartial.’” (*Ibid.*)

While *Rosco Holdings* was concerned with the effect of a void order compelling arbitration on the arbitrators deciding the merits of the case, and the question here is the effect of void court orders on the parties’ own decisions whether to accept the terms of a settlement, the policy considerations are the same. In explaining why the disqualification of the judge who issued the order compelling arbitration did not require invalidation of the arbitration award absent a determination that the arbitration proceedings were tainted, the *Rosco Holdings* court pointed out that “the policy behind judicial disqualification is not thwarted by allowing an untainted arbitration to stand. ‘Statutes governing disqualification for cause are intended to ensure public confidence in the judiciary and to protect the right of the litigants to a fair and impartial adjudicator.’ [Citation.] Public confidence in the judiciary is not undermined by allowing an untainted arbitration to stand. To the contrary, public confidence . . . would be undermined if the court threw out an arbitration award issued by fair and impartial arbitrators, thereby requiring a second arbitration, simply because the judge who initially granted the motion to compel arbitration should not have ruled on the motion.” (*Rosco Holdings, supra*, 149 Cal.App.4th at p. 1365.)

■ Similarly, here, enforcement of a marital settlement agreement that was *not* influenced by void orders of a disqualified judge would not undermine the policy behind judicial disqualification, and public confidence in the judiciary would be undermined if such an independent agreement was not enforced. But the contrary is also clearly true: Enforcement of an agreement that *was* influenced by the void rulings of a disqualified judge would both undermine the policy of judicial disqualification and cast doubt on the impartiality of, and therefore public confidence in, the courts.

It warrants reiteration that the legal correctness of the void rulings is irrelevant, as is the question whether Tracy signed the MOA under economic distress as she originally claimed. The relevant inquiry is whether Perkovich’s void rulings influenced the parties’ assessment of the strengths of their respective cases and therefore their willingness to accept terms of the settlement. Adapting the standard described in *Rosco Holdings* to the present question, the appropriate standard is whether a person aware of the facts might reasonably entertain a doubt that, in the absence of the void rulings, the parties would have agreed to the terms of the MOA.

It is virtually a truism that parties considering settlement after a lengthy period of litigation take into consideration the court's rulings to that point; those rulings tell the parties where they stand on whatever issues have been determined, providing some basis for assessing the strengths and weaknesses of their respective cases and anticipating the outcome of further rulings. While there may well be cases litigated as long as this one was in which the rulings of the judge or temporary judge did not affect the parties' settlement, this case is not one of them. As *Roscco* indicates, if there is doubt about the effect of a disqualified judge's conduct, the issue of taint presents a factual, not a legal, issue. There can be no such doubt in this case.

After initially pursuing dissolution proceedings in superior court in April 2012, the parties submitted their dispute to a private judge who presided over multiple settlement conferences and hearings. Perkovich's rulings were almost all in Jose's favor. That Tracy and her counsel perceived Perkovich as favoring Jose and Blevans is evident from Tracy's two attempts to withdraw from the stipulation appointing Perkovich before finally seeking disqualification. Tracy signed the MOA the day before the hearing at which Perkovich was to rule on Jose's motion to transfer control of Tracy's company to Jose or a receiver, threatening Tracy with the potential loss of any say in the running of the company she had founded.

■ Might a person aware of these facts reasonably entertain a doubt whether Tracy would have signed the MOA in the absence of Perkovich's rulings? To ask the question is to answer it: Even if she did not sign the MOA under economic duress, how could she *not* have taken into consideration the orders that had been issued in the case and what they led her to expect from the highly consequential hearing the next day? It would be a waste of judicial resources to remand this case to inquire whether this was in fact the case. As *Roscco Holdings* points out, judicial economy is a factor properly considered in cases of judicial disqualification. (*Roscco Holdings, supra*, 149 Cal.App.4th at p. 1365, fn. 20.) We conclude as a matter of law that the MOA cannot be enforced under section 664.6, because the effectuation of a settlement tainted by the void rulings of a disqualified temporary judge would undermine public confidence in the judiciary and the right of litigants to fair and impartial adjudication.

III.

Judge Price's Rulings

■ Tracy urges that Judge Price should also be disqualified, and her orders vacated, because she was familiar with Perkovich's "anti-Tracy" arguments before she began to rule in the case and because she analyzed

privileged communications between Tracy and her attorneys in camera. Tracy emphasizes Perkovich's letter expressing fear of Tracy and her participation in this case after being disqualified, in violation of Judge Stone's order; she characterizes Perkovich's motion for declaratory relief concerning fees as "portray[ing] Tracy and her attorneys in a bad light, while advocating for Blevans and his client." Tracy views Perkovich as having violated canon 3(B)(7)(a), which prohibits a judge who knows she is disqualified from hearing a case and from discussing the matter with the judge assigned to the case.

Even accepting the inappropriateness of Perkovich's conduct, we have no basis for concluding it tainted the proceedings to the extent of interfering with Judge Price's ability to maintain impartiality. Perkovich's motion for declaratory relief portrayed the facts in a self-serving light, but it did not expressly cast aspersions on Tracy or her attorneys. The motion and supporting declaration stated that Perkovich had acted in accordance with the stipulation and order appointing her and was entitled to be paid for the services she rendered, pointing out that Tracy's first two attempts to disqualify her had been denied and characterizing her eventual disqualification as having resulted from her "request for recusal" in response to Tracy's claim of bias. She stated that Judge Stone's order denied Tracy's "request for a finding that I acted beyond the authority granted by the Stipulation and Order to Appoint Judge Pro Tem." Perkovich's letter to Judge Stone was considerably more inflammatory, referring to concern for her "personal safety" due to Tracy's "increasingly hostile" behavior and "angry outbursts." But this does not mean Judge Price was influenced by Perkovich's injudicious comments.

■ “A trial judge hears many items during the course of a trial which are inadmissible, and [s]he is called upon to rule on the admissibility of numerous evidentiary matters. The fact that [s]he has heard these things does not mean that [s]he cannot divorce them from [her] mind.’ (*People v. Beaumaster*[, *supra*.] 17 Cal.App.3d [at p. 1009], quoted in *In re Richard W.* [(1979)] 91 Cal.App.3d [960,] 968 [155 Cal.Rptr. 11] [both cases involving a court trial].)’ (*Scott, supra*, 15 Cal.4th at p. 1206.) “As an aspect of the presumption that judicial duty is properly performed [(Evid. Code, § 664)], we presume . . . that the court knows and applies the correct statutory and case law [citation] and is able to distinguish admissible from inadmissible evidence, relevant from irrelevant facts, and to recognize those facts which properly may be considered in the judicial decisionmaking process.’ (*People v. Coddington* (2000) 23 Cal.4th 529, 644 [97 Cal.Rptr.2d 528, 2 P.3d 1081].) Stated another way, a trial court is presumed to ignore material it knows is incompetent, irrelevant, or inadmissible.” (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1526 [125 Cal.Rptr.3d 292].) “Only proof that the

evidence actually figured in the court’s decision will overcome these presumptions. [Citations.] Clearly, the mere fact that the court heard or read the evidence is not sufficient to overcome the presumptions.” (*Ibid.*)

When Judge Price entered the case, it was clear that relations between Perkovich and Tracy had soured irredeemably; Perkovich’s letter was obviously not written from an impartial perspective. This had to have been clear to Judge Price. We presume Judge Price viewed the letter in proper context and did not allow it to influence her view of the parties’ positions and legal arguments.

Judge Price stated at a hearing regarding reopening discovery, “I read Perkovich’s [letter]. And it generally said that anything she decided would never be satisfactory to petitioner and so she was asking to be relieved.” Pointing to this statement and noting that Judge Price did not mention Perkovich’s “numerous ethical violations, the disqualifying conflicts that led to the motion to disqualify, the favor Perkovich had done to help Blevans defeat a motion that was pending before Judge Stone, or even Perkovich’s highly inappropriate (and probably false) suggestion that she suddenly perceived Tracy as a physical threat,” Tracy states that Perkovich “successfully poisoned the new judge against the party who had called for disqualification” in violation of the canons of Judicial Ethics.

We will not assume, as Tracy seems to, that Judge Price’s comment at the hearing reflects her acceptance of Perkovich’s view of Tracy or of the disqualification. In an aside not directly relevant to the issue actually being discussed, Blevans asked the court to “[r]emember” that Tracy had had “a desperate desire” to no longer have Perkovich on the case and “ultimately succeeded in having [Perkovich] say, ‘I don’t want this case either.’ ” When Tracy’s attorney interjected that this was a misstatement of facts and evidence, Judge Price made the statement quoted above. Her description of the “gist” of Perkovich’s letter was correct, and the circumstances did not call for any further comment on Tracy’s allegations or the import of the disqualification.

Furthermore, Perkovich’s letter to Judge Stone, as well as her motion for declaratory relief, is a part of the record in this case, available to any judge who presides over it in the future. Any future judge will be placed in the same position as Judge Price, having to ignore Perkovich’s negative comments about Tracy. We presume their ability to do so.

Aside from seeking to have Judge Price’s orders vacated as a consequence of her asserted disqualification, Tracy asks us to reverse Judge Price’s sanctions orders on the merits. All the sanctions orders related to discovery

relevant to the question of enforceability of the MOA. In ordering the \$36,000 in sanctions, Judge Price found that it was unreasonable for Tracy to think the door to discovery was not opened by her claim that she signed the MOA without understanding what she was signing and in reliance upon her attorney's statements or failures to act, and Tracy therefore had no substantial justification for opposing Jose's motions to reopen discovery related to enforcement of the MOA and to compel documents (aside from certain attorney billing records), or for moving to quash the subpoenas issued to Tracy and to Jackson (with the same exception). The final sanctions order was imposed because Judge Price found Tracy had no substantial justification for opposing Jose's motion to clarify, which sought to broaden the scope of discovery related to enforcement of the MOA to include all settlement negotiations and not just those the few days surrounding the date the MOA was signed. Judge Price noted that when the motion to reopen discovery was first heard, no one argued the time frame of the discovery request or argued negotiations had extended over months before the date of execution; the judge knew only that the MOA was executed in January 2014 and "had no idea what the background was."

In light of our decisions that Perkovich's orders were void and that the MOA is unenforceable, Judge Price's decision to postpone resolution of Tracy's motion to set aside Perkovich's orders and proceed with discovery related to enforcement of the MOA was misguided; the discovery that Judge Price ordered to proceed, and sanctioned Tracy for opposing, was unnecessary and is now moot. But the question is whether the sanctions orders were within Judge Price's discretion at the time she made them. Tracy's arguments in this regard are not convincing. She maintains that the \$36,000 sanctions order resulted from motions pertaining to "remnants of Perkovich's actions that never should have occurred in the first place." Perkovich did not issue any orders relevant to the motion to enforce the MOA. The discovery motions Tracy opposed pertained to "remnants of Perkovich's actions" in the sense that those actions were the basis of Tracy's successful argument in this court that her decision to sign the MOA was influenced by Perkovich's orders and conduct. But this was not the posture of the case before Judge Price. Tracy was opposing Jose's motion to enforce the MOA by arguing that she signed it under duress caused by Perkovich's rulings and conduct, and Jackson's advice, and we can find no fault in Judge Price's determination that Tracy's argument opened the door to discovery related to the parties' negotiation of the MOA. Tracy argues that the additional order for \$6,000 in sanctions imposed on April 13, 2015, was unreasonably based on the fact that in opposing Jose's motion to clarify Judge Price's prior discovery order, Tracy argued that the order was correct and clear. The point of Jose's motion, however, was that the entire history of negotiations was relevant, not just the few days in January when the final version of the MOA was negotiated and

executed. Judge Price viewed Tracy as having no substantial justification for insisting that discovery should be limited to those few days. We see no abuse of discretion.

Further, even if Judge Price had properly considered Tracy's motion to vacate Perkovich's orders before considering the discovery issues, the discovery issues would have remained when the judge turned to Jose's motion to enforce the MOA. Our conclusion that we can, and should, decide the enforceability issue as a matter of law in the interest of judicial economy does not mean Judge Price necessarily should have done so. No party had asked her to do so; indeed, even in her initial brief in support of her petition to this court, Tracy asked us to order the trial court to address the "invalidity" of the MOA.

DISPOSITION

The petition is granted.

The orders entered by Perkovich are void and must be vacated.

The matter is remanded to the Napa County Superior Court for proceedings consistent with the views expressed herein, including resolving the parties' respective rights and obligations created by vacation of the orders, most of which pertained to matters bearing upon spousal support and attorney and expert witness fees.

Stewart, J., concurred.

RICHMAN, J., Dissenting.—In February 2011, Tracy Hayward filed a petition to dissolve her marriage; in April, Jose Osuch filed his response. In early 2012, the parties and their attorneys signed a stipulation that Sacramento Attorney Nancy Perkovich be appointed a private judge to handle the matter, an appointment approved by the Napa Superior Court in April 2012. Perkovich presided over hearings and issued orders, including orders that transferred monies between the parties. Perkovich's last involvement was in 2013, probably October. Meanwhile, without any involvement by Perkovich, the parties engaged in five months of settlement negotiations, culminating in a January 2014 "Memorandum of Understanding" (MOA) signed by the parties and their attorneys. On May 20, 2014, Jose filed a motion to enforce the MOA. Ten days later a new attorney entered the picture.

On May 30, 2014, Tracy's current attorney—her fourth—substituted in, and began what can only be described as a vituperative attack on Perkovich, on Jose's attorney—indeed, on the very concept of private judging. It began

with a motion to withdraw the stipulation and remove Perkovich, based on her claimed failure to make a certification. The trial court denied the motion. Tracy sought a writ. We denied it. The Supreme Court denied review.

On October 7, 2014, Tracy filed the petition before us here, asserting for the first time two new grounds for removing Perkovich, two grounds of claimed disqualification never before urged, and based on claimed facts that had been known for over a year, some for almost two. Despite that history, despite that timing, the majority wholeheartedly agrees with Tracy, in an opinion that for some reason views every fact and interprets every circumstance in favor of Tracy—an approach that, as a close reading of the majority opinion will reveal, sometimes results in the majority engaging in a lengthy explanation or justification, and other times in simply dismissing any contrary reading.

Based on that approach, the majority holds that disqualification occurred when Perkovich did not comply with canon 6D(5) of the Code of Judicial Ethics requiring disclosures either “in writing or on the record” when she presided over her first session with the parties, on October 30, 2012. The majority also holds that Perkovich’s response to Tracy’s petition was not a “written, verified answer,” and Perkovich was thus “deemed to have consented to the disqualification,” which in turn resulted in “an admission of the truth of its allegations.”

The majority also holds that all of Perkovich’s orders are void, a holding that necessarily requires disgorgement of all the monies that Perkovich caused to be transferred, doing so without any guidance or direction to the trial court as to how to accomplish that disgorgement.

Finally, the majority goes so far as to hold that as a matter of law the MOA “was tainted” by Perkovich’s orders and is “therefore unenforceable.” (Maj. opn., *ante*, at p. 55, capitalization & italics omitted.) This holding is notwithstanding that the MOA followed five months of negotiations in which Perkovich had no involvement—and notwithstanding that taint is a question of fact.

I cannot agree with any of that, and I dissent.

As will be discussed, I have a much different view of the salient facts here, facts not mentioned by the majority, that lead me to disagree with the majority’s conclusions as to the law of disqualification. Moreover, the majority disregards that the petition before us here, filed on October 7, 2014—24 months after the first claimed disqualifying circumstance and 12 months after the second—is in abject violation of Code of Civil Procedure, section 170.3, subdivision (c)(1), which requires that Tracy must move “at the

earliest practicable opportunity” after the facts of disqualification become known. Put otherwise, even if there were a proper basis for disqualification—which there was not—it was waived. Not to mention time-barred.

The Pertinent Facts as I See Them

Presiding Justice Kline’s majority opinion contains a 23-page statement of “Facts and Proceedings Below,” an extensive recitation to be sure. (Maj. opn., *ante*, at p. 17.) But there are other facts pertinent to all that transpired here, and I begin with those background facts.

On February 16, 2011, Tracy filed in Napa County a petition to dissolve marriage. She was represented by Napa Attorney Roger Lewis.

On April 1, 2011, Jose filed his response, represented by Napa Attorney Robert Blevans.

Various proceedings were held before Napa County Superior Court judges, in at least one of which Tracy was sanctioned. And at a case management conference on January 9, 2012, the case was set for trial on May 21, 2012. Eleven days later, on January 20, Attorney Lewis substituted out. Tracy was now in *propria persona*.

Sometime later, apparently in late March, Blevans received a communication from Attorney John Munsill, of Gold River, Sacramento County. Munsill advised that he had been asked to substitute in as attorney for Tracy, and was considering it, but would only do so if Blevans would agree to have the matter dropped from the calendar and presided over by a private judge, Nancy Perkovich, a Sacramento attorney who specialized in family law. Blevans, who knew Perkovich from previous relationships, on behalf of Jose, agreed.

In late March 2012 a comprehensive five-page “Stipulation and Order” (Stipulation) was prepared, drafted by Munsill. The Stipulation was signed on March 28 by Tracy, Jose, Munsill, and Blevans. On March 29, Perkovich signed the oath at the end of the Stipulation. On April 3, Presiding Judge Stone of the Napa County Superior Court signed this order: “Pursuant to Rule 2.830 et seq. of the California Rules of Court, the foregoing selection of Nancy Perkovich, Esq. as Temporary (‘Private’) Judge in the above-titled cause is hereby approved, and said attorney is so designated and assigned. In addition, all other terms set forth in the above Stipulation and Order are hereby so ordered.” On April 5, the Stipulation was filed with the court.

The Stipulation began with a 10-line recital of the broad powers given to Perkovich. Paragraph 4 of the Stipulation recited that “Both parties waive the

clerk's minutes." The Stipulation went on to include orders vacating the trial date and deferring discovery, apparently done with an eye toward possible resolution.

The first session before Perkovich was not until October 30, 2012, held in her office in Sacramento, a settlement conference. Those in attendance included Tracy and her attorney, Munsill; Jose and his attorney, Blevans; and two accountants, David Schultze on behalf of Tracy, and Darlene Elmore on behalf of Jose. There is no dispute that at the session Perkovich made oral disclosures about her prior relationships with Munsill and Blevans. As the majority describes it, Perkovich has represented that she told all present "'about my professional contacts with each attorney including the fact that (1) I had been hired once before as a judge pro tem in a case where Blevans was an attorney, (2) Blevans was hired as a judge pro tem once in a case where I was an attorney, (3) Munsill was hired as a judge pro tem once in a case where I was an attorney, (4) I was hired as a settlement judge once in a case where Munsill was an attorney, (5) Munsill and I had been previously associated as counsel on a case, (6) I served on the Sacramento Family Law Bar Association Committee with John Munsill and socialized once with he and his wife and children related to that professional organization, and (7) I am a member of the American Academy of Matrimonial Lawyers and was acquainted with Blevans from that organization. I also disclosed that I had hired David Schultze, CPA many times on cases throughout my career and had also had him as an opposing expert on many cases. I had not previously met Darlene Elmore, CPA. I asked all parties and attorneys if they were comfortable with my acting as judge pro tem. All parties indicated that they wished me to proceed in that capacity.'" (Maj. opn., *ante*, at p. 32.) Indeed they did.

As the majority also acknowledges, "Blevans, Elmore, and Schultze all stated in declarations or deposition testimony . . . that Perkovich . . . disclosed her prior contacts with Blevans and with Munsill at the October 2012 meeting, including that she and each of the attorneys had acted as temporary judge in each other's cases, and that the parties agreed to proceed with Perkovich as temporary judge. . . . [¶] Munsill testified at a deposition in February 2015 that he recalled Perkovich discussing at the settlement conference 'her various prior connections with both [Blevans] and me,' but did not recall 'the details' of that discussion. He did not recall Tracy expressing concerns about Perkovich's disclosures. Munsill acknowledged that he had a 'mutual judging relationship with Perkovich, each having served as judge in a case where the other represented a party. Munsill stated that he had no reason to believe inaccurate the statement in Blevan's declaration that after Perkovich's disclosures at the settlement conference, 'both counsel and the parties acknowledged their understanding and agreement to move forward with Judge Pro Tem Perkovich presiding.' He did not recall presenting Tracy with a

written waiver of any potential conflict after Perkovich disclosed her professional relationships with the two attorneys and stated, ‘I don’t recall there being a need for that.’” (Maj. opn., *ante*, at pp. 32–33.)

The register of actions reflects one uneventful entry after October 30, 2012, on December 12. The next two entries, on March 26 and April 19, 2013, are substitutions of attorneys. Under the first, Munsill was out, and Tracy was again in *propria persona*. Under the second, Trevor Jackson, an attorney in Napa, substituted in.

Over the ensuing months various hearings were held before Perkovich. A “Summary of Hearings, Conferences and Orders” prepared by Perkovich—which is not disputed by either Tracy or Jose—shows that there were seven telephonic case management conferences (on Nov. 2 and 20, 2012, Feb. 11, Mar. 4, Apr. 26, June 3 and 13, 2013) before a case management order was filed on September 10, 2013, and another telephonic conference on November 18, 2013, before a second case management order was filed on December 16, 2013. There were two actual hearings (on July 30, 2013, and a “long cause hearing” on Oct. 9, 2013) and a telephonic hearing “re Claim of Exemption” on October 24, 2013. And, of course, Perkovich made the various orders Tracy seeks to void here.

Meanwhile, settlement negotiations resumed, without any Perkovich involvement, which negotiations continued over many months. They began with a conference in June 2013, a few months after Jackson substituted into the case. In July Tracy extended two proposals, and Jose responded in an August 9 letter, where he proposed a “complete and global resolution,” the terms of which included that Tracy pay Jose \$300,000 to equalize the award to Tracy of the parties’ residence; \$2.5 million to equalize the community interest in the companies; and spousal support of \$25,000 per month until Jose’s death, remarriage or further court order. As the majority puts it, “Blevans . . . described [this proposal] as having become the ‘foundation’ for the memorandum of agreement (MOA) the parties eventually signed.” (Maj. opn., *ante*, at p. 24.)

While those settlement negotiations continued, on November 7, 2013 Jose filed a “Request for Control and Management of PPNV or in the Alternative for Appointment of A Receiver,” set for hearing on January 14, 2014. The basis of Jose’s motion was that Tracy had engaged in various shenanigans vis-à-vis the business, to Jose’s detriment. As Jose’s counsel represented to the court below, the complained-of conduct includes Tracy’s “actions in terminating her salary so that [Jose] would not be paid. It includes the court’s finding that she took \$600,000 in excess distribution from the company at a time when she was saying the company was in precarious financial condition,

paid out \$270,000 for her own personal litigation expenses, shipped off \$30,000 to Grand Cayman, turned over control of the company to Howell Bennett and Stan Blyth who then attempted a corporate takeover.”

Meanwhile, settlement negotiations continued. On November 25, Tracy proposed a settlement providing for payments of \$300,000 for the residence, \$2 million for the companies, and \$10,000 monthly spousal support for Jose’s life, regardless of remarriage. On December 4, Blevans, Tracy, Jackson, and Tracy’s business attorneys, Ian Carter and Eric Jeppson, attended an all-day settlement conference, which was adjourned in order to provide Jose time to prepare a disclosure statement regarding foreign bank accounts. After the disclosure was made, discussions resumed at a December 23 meeting attended by Blevans, Jackson, Carter and Jeppson. Through these three attorneys, Blevans says, Tracy proposed a \$2.5 million equalizing payment and spousal support of \$18,000 per month, to be reduced to \$16,500 per month after six years and terminated after 11 years. Jose’s counterproposal specified payment of \$300,000 for the residence, \$2.5 million for the companies, and spousal support of \$25,000 per month, nonmodifiable until Tracy paid the \$2.5 million in full.

On January 10, 2014, Blevans met with Jeppson and Carter to discuss how Tracy would structure the payments Jose had agreed to accept at the December 23 meeting, and Blevans agreed to the equalizing payment being reduced to \$2.4 million. And on that day the MOA was signed.

On May 20, 2014, Jose filed a motion to enforce the MOA. Ten days later, another substitution of attorneys was filed. Jackson was out, and Tracy was now represented by her fourth attorney, Keith Dolnick of Irvine (apparently later to be associated with David Ezra, also of Irvine).

With that, the litigation took off, the upshot of which is the last 25 pages in the register of actions. But the litigation did not just increase in quantity, but in intensity, with Tracy’s papers reflecting a tone that can only be called intemperate. Below, and here, Tracy filed papers riddled with vituperation, filled with attacks on the very system of private judging, not to mention ad hominem attacks on Perkovich and Blevans, attorneys I understand to be reputable members of the American Academy of Matrimonial Lawyers. Jose’s briefs implore us to disregard what he claims are the unsupported attacks manifest in Tracy’s briefs. For sure.¹

¹ Here are a few quotations from the briefs:

“No California litigant should ever have to wonder whether the paid private judge they entrusted with their case is corrupt and aligned with the other side’s attorney.”

“The relationship between Mr. Blevans and Ms. Perkovich has cast a pall over this case. The thought that a system could be manipulated to the point that a ‘settlement’ could be

Regardless, with briefs riddled with such invective, Tracy's lawyers set out to undo all that had transpired: to have Perkovich disqualified, to have her orders declared void—indeed, to have the MOA held invalid because it was signed against the background of Perkovich's rulings, which, in the words of Tracy's attorneys, "created the ultimate duress."²

The majority agrees on all counts. I agree on none. The law does not support disqualification. But even if it did, Tracy's motion was untimely. And I do not understand how the majority can decide duress, ultimate or otherwise, as a matter of law. Duress is an issue of fact. (*Kravitz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 176 [107 Cal.Rptr.2d 209].)

obtained by threatening to have a private judge who was subject to disqualification take away a litigant's company and her livelihood unless millions of dollars were forfeited via 'settlement' is stomach turning."

"Instead, these attorneys and experts had worked together and side-stepped ethical requirements so often, that they never even considered complying with the Canons of Judicial Ethics by making on the record disclosures. Nor did they ever consider requesting a proper signed, written waiver they could file with the court. [¶] If a litigant caught on and protested, these family law attorneys planned to circle the wagons and try to blame the litigant."

"Apparently, attorneys and experts who all know each other and work together on case after case, get in a room or call each other's cell phones, and they collectively decide what is going to happen and how the litigants' money will be doled out to the involved professionals. [¶] Attorneys who are socially and professionally connected to the experts and other attorneys in the case, acting as paid judges for their friends, is bad enough. But where the 'judging' relationship is *mutual*, there is a strong temptation for attorneys who act as 'paid private judges' to engage in unethical and inappropriate 'you scratch my back; I'll scratch yours' behavior."

"However, by systematically 'relaxing' these ethical rules, small groups of family law attorneys can dominate their local markets, knowing reciprocity will ensure ample attorney's fee awards and outcomes that financially benefit the attorneys who hire their friends as judges. [¶] This routinized departure from the ethical rules helps ensure that money will be free-flowing for the attorneys and experts—handed out by a 'judge' who, in reality, is a friend they can count on."

² Hyperbole by attorneys is one thing. Disingenuousness is another. And I am particularly concerned by the 180-degree change of position manifest by the belated claim of duress here, in light of the express concession of Tracy and her attorneys in their writ petition to this court. There, in arguing that Perkovich should not be the one to enforce the MOA, they made these representations: "The MOA is not the result of a ruling or order of attorney Perkovich, and she did not sign it. She had no role in its preparation or execution. The MOA was negotiated by lawyers working in the office of Jose's counsel. It was signed initially by Tracy at her private residence and later by her at her family law attorney's office. [¶] . . . [¶] [Perkovich's] role as a judicial officer was *not in play* in the MOA. Her imprimatur was not necessary for it to have effect. [¶] . . . [¶] Nancy Perkovich has no nexus with the MOA Tracy and Jose executed."

I do not understand such a blatant change of position to be ethical advocacy. And the majority's labored effort to explain this away in a two-page discussion of "ancillary" matters does not convince me otherwise.

DISCUSSION

Private Judges

Article VI, section 21 of the California Constitution provides that “On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.” As described in *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 907–908 [30 Cal.Rptr.2d 265, 872 P.2d 1190]: “‘California has created a full-fledged system of private judges, colloquially “rent-a-judge,” which permits the parties to agree to a temporary judge Such an agreement allows the parties to bypass urban courts’ crowded calendars, obtain a trial on a certain, prearranged date convenient to parties and witnesses, and avoid the cost of trailing on a master calendar while waiting for a courtroom.’”

Recognizing the propriety of private judging, the majority, however obliquely, casts a skeptical eye on it, especially in the family law setting, suggesting it needs some special oversight there, apparently because the participants are familiar with one another.

I see it differently, and perhaps especially in the family law area, for reasons described, for example, by retired Los Angeles Superior Court Family Law Commissioner Jill S. Robbins: “Unlike public judges, private judges are selected by the parties. One tremendous advantage of private judging is that it allows counsel to ensure that the judicial officer has experience in the relevant substantive area of law involved. Family law, for example, has become so sophisticated that the attorney must have a working knowledge of juvenile dependency, bankruptcy, general corporate formation, business transactions and valuation techniques, cash flow analysis, security and enforcement methodology for future payments, and behavioral sciences, to name a few. This knowledge, of course, is in addition to the substantive area of family law and all its intricacies. Some family law judges never practiced family law before their appointment. Accordingly, the selection of a private judge with expertise in the applicable area or areas provides a significant advantage, not only in reducing ‘education time’ but in providing the attorney and client with the certainty that the private judge will understand the evidence presented.” (Robbins, *The Private Judge: California Anomaly or Wave of the Future* (2000) 3 IAFL L.J. at p. 3.)

As the law review article cited by the majority sums up: “private judges will likely have had years of experience . . . adjudicating family disputes. Parties can select a mutually agreeable private judge who has specialized knowledge of the relevant area of family law, such as . . . property division,

or alimony. . . . [¶] . . . Given that divorce . . . battles can drag on . . . to the detriment of all . . . involved, speed and efficiency are invaluable.” (Comment, *The Marriage of Family Law and Private Judging in California* (2007) 116 Yale L.J. 1615, 1618–1619, fns. omitted; see Judicial Council of Cal., *Report and Recommendations of the Judicial Council Advisory Committee on Private Judges* (1990) pp. 14–15.) In sum, not only do private judges provide expediency, but perhaps most important of all they provide the parties and their counsel an expert to preside over the dispute, someone counsel knows, and for whom he or she has respect. And trusts.

Whether these reputed virtues of a private judge are real is not at issue. What is relevant is that Tracy and Jose elected the procedure.

There Is No Basis for Disqualification

Introduction to the Issue

The majority begins its substantive discussion as follows: “Tracy’s motion to disqualify was based on Perkovich’s alleged violation of Canon 6D by failing to disclose her personal or professional relationships with Blevans ‘in writing or on the record’ and failure to obtain the parties’ written waiver to disqualification on that ground and file it with the record as required by section 170.3, subdivision (b)(1). The motion to disqualify was also based upon the claim that Perkovich’s conduct during the proceedings over which she presided demonstrated that she was actually biased and prejudiced against Tracy. Tracy maintains that a person aware of the facts Perkovich declined to disclose in writing or on the record, and/or her biased conduct during the proceedings, ‘might reasonably entertain a doubt that [Perkovich] would be able to be impartial.’ (Canon 6D(3)(a)(vii)(C); § 170.1, subd. (a)(6)(A)(iii).)” (Maj. opn., *ante*, at p. 36.)

Tracy’s petition in support of disqualification devoted the bulk of its argument, more than two-thirds, to the first claim of disqualification, the claimed noncompliance with canon 6D of the California Code of Judicial Ethics. Similarly, the oral arguments here focused almost exclusively on the canon. Despite that, the majority essentially disregards that claim, to the point that it is virtually ignored.

So despite Tracy’s focus and emphasis, and despite her argument, I will address the issues in the same order as the majority.

Code of Civil Procedure Section 170.3 Does Not Support Disqualification.

The majority focuses on Tracy’s second basis for disqualification and holds that because Perkovich did not “file a written verified answer admitting or

denying’’ the allegations in Tracy’s statement, she was “‘deemed to have consented to . . . her disqualification.’” (Maj. opn., *ante*, at p. 36.) And, the majority concludes, “That determination treats the judge’s failure to file a response to the statement of disqualification as an admission of the truth of its allegations” (*Id.* at p. 37.)

This holding, I submit, is not supported here. Worse, it is flatly contrary to Presiding Judge Stone’s order below.

Before turning to a demonstration of why, I begin with the observation that the majority’s conclusion shows no appreciation of the realities of the situation, no consideration for what I understand, anecdotally at least, to be the real-life facts facing trial judges. Specifically: I understand that the standing order in many superior courts is that a judge who receives a challenge is to immediately advise his or her presiding judge. And I understand that the challenged judge is put in contact with the Judicial Council, which provides assistance, usually in the form of a lawyer to advise and assist the judge in how to respond. Put simply, a challenge to a judge is a most significant, yet infrequent, occurrence, one requiring expert help and guidance, help the court system provides. Thus, for example, there are at least two publications by the Judicial Council addressing the subject: (1) California Judges Bench Guide: Disqualification of Judge; and (2) Disqualification and Disclosure.³ There is also a video to assist judges in dealing with judicial challenges: <<http://www2.courtinfo.ca.gov/cjer/judicial/1715.htm>> (as of Aug. 3, 2016). And a Serranus Web site.

Perkovich, of course, had access to none of that assistance. So, acting on her own, in response to Tracy’s request for disqualification Perkovich prepared a letter to Presiding Judge Stone that was hand delivered to the court and filed on November 7, 2014. That letter provided in its entirety as follows:

³ The introduction to Disqualification and Disclosure, described as a “Compilation of Advice From the Ethics Committee of the California Judges Association and Discipline by the Commission on Judicial Performance,” nicely synthesizes the situation:

“INTRODUCTION ”This paper addresses the problems facing judges in recognizing situations and cases in their court assignments that mandate disclosure and potential disqualification. Judges are required by statute (CCP § 170) and the canons (Code of Judicial Ethics Canon 3B(1)) to hear and decide all matters in which they are not disqualified, and they may be disciplined for improper recusal [citation]. At the same time, they are required to adhere diligently to the statutes governing disqualification (CCP §§ 170.1 et seq.) However, in determining the propriety of presiding in matters which contain factors that overlap on the remainder of their personal and professional lives, judges are frequently confronted with questions that cannot be resolved by simple reference to the codes and the canons.

“The California Judges Association provides a hot line service with immediate member access to a judge serving on the Committee on Judicial Ethics. The presented problem is analyzed, and informal advice is rendered

“This paper focuses on disqualification and disclosure problems”

“Dear Judge Stone,

“I would like to recuse myself from the case of Marriage of Hayward & Osuch. The Petitioner, Tracy Hayward, filed a motion for disqualification on the grounds of bias on October 7, 2014. She alleges that I have a financial interest in the proceedings because I am paid for my work pursuant to the stipulation of the parties appointing me as the Judge Pro Tempore. She further claims a bias in favor of Blevans because Blevans has acted as a private settlement judge on one case where I was associated as counsel and because I have been hired on two cases where he was an attorney. I also had the same mutual judging relationship with two of Ms. Hayward’s previous attorneys, Roger Lewis and John Munsill. I disagree that these professional relationships constitute bias. The California Rules of Court, Rule 2.830, et seq. specifically allows for retention of private judges. The Petitioner consented to my retention. She did so after disclosure from me at our first case management meeting about the details of my professional relationship with both Munsill and Blevans.

“I have, however, become concerned about my personal safety in this case due to Ms. Hayward’s conduct. Her behavior has become increasingly hostile with angry outbursts to the point that I am fearful of her. It is also evident from Ms. Hayward’s ongoing violations of the existing court orders that she will never accept anything I decide. I therefore feel that I am an impediment to resolution of the parties’ case, which is not desirable. It is for these reasons that I request a recusal.”

The effect of this, the majority concludes, is the “admission of the truth of its allegations.” (Maj. opn., *ante*, at p. 37.)

The Supreme Court has held that although the disqualification statute refers to a written, verified answer, a written declaration under penalty of perjury will satisfy the “statutory requirement.” (*People v. Mayfield* (1997) 14 Cal.4th 668, 811 [60 Cal.Rptr.2d 1, 928 P.2d 485].) While admittedly not a verified answer or a declaration, Perkovich filed a response. In the cases the majority cites, the challenged judge filed nothing. (*Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 419 [285 Cal.Rptr. 659] [judge “did not respond”]; *Calhoun v. Superior Court* (1958) 51 Cal.2d 257, 260 [331 P.2d 648] [“no denial of the allegations thereof by Judge Hewlicker”].)⁴

⁴ As shown below (see fn. 5), the majority notes, but excuses, that Tracy’s attempt to remove Perkovich was not the correct document, not the required “statement of disqualification.” No matter, the majority says, we’ll consider it as proper. But not as to Perkovich’s letter denying the charges and asking to be released. No, that was not the required “answer,” and so the majority concludes Perkovich admitted all charges of bias. In other words, no need to hold Tracy to the letter of the law. Just Perkovich.

But most troubling of all is the majority's conclusion as to the claimed effect of this—that it “admi[ts] the truth of [the] allegations” (maj. opn., *ante*, at p. 37.)—is that it disregards Presiding Judge Stone’s order of November 7, 2014. There, he disqualified Perkovich, finding that her letter requesting recusal “does not satisfy the requirement of the filing of consent to the disqualification,” and that “as a result of her failure to file a consent or a verified answer within the time allowed, Nancy Perkovich is deemed to have consented to her disqualification pursuant to Code of Civil Procedure section 170.3(c)(4).” But most significantly, Judge Stone’s order held that “The court is making no finding as to whether the allegations set forth in Petitioner Tracy Hayward’s Request for Order re Motion for Disqualification, filed October 7, 2014, is true.”

Canon 6(D) Does Not Support Disqualification

As noted, the claimed noncompliance with canon 6D of the California Code of Judicial Ethics was the focus of most of Tracy’s position here. That position is treated by the majority almost as an afterthought, relegated to a brief discussion. Whatever the significance to the majority, the claim does not support disqualification.

I do not understand that a failure to comply with a canon results in per se disqualification. The majority cites no law that it does. The law relied on by Jose holds it does not. (See, e.g., *Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 387 [168 Cal.Rptr.3d 605] [judge not disqualified for failing to disclose potentially disqualifying information absent additional facts, even though disclosure required under Cal. Code Jud. Ethics, canon 3E(2)(a)]; *People v. Martinez* (1978) 82 Cal.App.3d 1, 16 [147 Cal.Rptr. 208] [judge not disqualified even though his “intemperate and inflammatory remarks were totally improper; his conduct clearly violated canon 2A”].) So, the fact that Perkovich failed to make disclosures as required does not, without more, result in disqualification.

But beyond that, the majority assumes that there was noncompliance with the canon, without any meaningful discussion of paragraph 4 in the Stipulation, that “Both parties waive the clerk’s minutes.” That provision, I submit, could—and should—be read to say the parties expressly waived the canon’s requirement.

Under the canon, the disclosure must be “in writing *or* on the record.” (Cal. Code Jud. Ethics, canon 6D(5), *italics added*.) No question there was no “writing.” But there is a real question whether “on the record” alternative was waived. As the majority recognizes, “The Committee on Judicial Ethics Opinions, which operates under the aegis of the California Supreme Court,

has pointed out that one of the ways in which a disqualifying disclosure can be placed ‘on the record’ pursuant to canon 3E(2)(a) when there is no court reporter or electronic recording of the proceedings is to ‘[e]nter the disclosure document in the case file as a minute order, official court minutes, or a formal order.’ (Cal. Supreme Court, Com. on Judicial Ethics, *Disclosure on the Record When There Is No Court Reporter or Electronic Recording of the Proceedings*, formal opinion No. 2013-002 (Dec. 11, 2013) p. 9.)” (Maj. opn., *ante*, at p. 48, fn. 32.)

As I understand it, Perkovich conducted the settlement conference in her office, with no court reporter, and no clerk, no one in the usual position who would create a “minute order, official court minutes, or a formal order.” Perhaps Munsill and Blevans, both experienced and involved with private judging, provided for that in the Stipulation, agreeing that “Both parties waive the clerk’s minutes.” What this means is nowhere discussed in the record, there being no testimony about it. The majority says, however unsupportedly, “[t]he obvious meaning of this brief sentence is simply that the parties intended to forgo formal clerk’s minutes for the proceedings to be held before the temporary judge.” (Maj. opn., *ante*, at p. 48.) That may be the “obvious meaning” to the majority. The “obvious meaning” to me is that this is an agreement, by knowledgeable counsel, using words of art, to effect an express waiver.

The majority notes that Jose argues that “Tracy waived [the on the record requirement].” (Maj. opn., *ante*, at p. 48.) The majority rejects the argument based on Code of Civil Procedure section 170.3, subdivision (b)(1), which the majority says “requires a waiver of disqualification to ‘recite the basis for the disqualification’ and to be ‘signed by all parties and their attorneys and filed in the record.’ (§ 170.3, subd. (b)(1).) No such waiver exists in the present case.” (Maj. opn., *ante*, at p. 48.) This, I submit, is simply wrong, as section 170.3, subdivision (b)(1) applies only “when the judge determines himself or herself to be disqualified.” Perkovich did not do that here.

But even if the record does not support an express waiver, it certainly supports an implied one.

Any Claimed Disqualification Was Waived

There is no doubt that parties can waive disqualification by their conduct. (*People v. Johnson* (2015) 60 Cal.4th 966, 979–980 [184 Cal.Rptr.3d 612, 343 P.3d 808] (*Johnson*); *Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1337–1338 [84 Cal.Rptr.3d 835] (*Tri Counties*); *In re Steven O.* (1991) 229 Cal.App.3d 46, 53–54 [279 Cal.Rptr. 868].) Thus in *Johnson*, a capital murder case, the Supreme Court held that the defendant

waived his right to disqualify the judge based on the judge's close professional and personal relationship with the prosecutor when, at the outset of the proceeding, and after full disclosure of the relationship, counsel agreed to proceed. (*Johnson, supra*, 60 Cal.4th at pp. 978–980.)

The majority observes that Tracy claims she did not hear Perkovich's disclosure. But even if she did not, it would not matter. Again *Johnson* is apt, where a unanimous Supreme Court noted that even if the defendant was not properly told by his counsel about the judge's relationship, the right to challenge the judge is within “‘‘counsel’s complete control of . . . strategies and tactics.’’” (*Johnson, supra*, 60 Cal.4th at p. 979, italics omitted.)

People v. Scott (1997) 15 Cal.4th 1188 [65 Cal.Rptr.2d 240, 939 P.2d 354] is similar. There, the defendant argued he was not personally present when the circumstances giving rise to the waiver occurred. The Supreme Court held that the defendant's “absence makes no difference. He was represented by counsel, who *was* present at the hearing. ‘‘When the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of ‘fundamental’ personal rights to *counsel’s* complete control of defense strategies and tactics.’’ (*In re Horton* (1991) 54 Cal.3d 82, 95 [284 Cal.Rptr. 305, 813 P.2d 1335], original italics [holding that counsel may impliedly stipulate to trial before a court commissioner].) ‘‘An attorney may not sit back, fully participate in a trial and then claim that the court was without jurisdiction on receiving a result unfavorable to him.’’ (*Id.* at p. 91.)” (*People v. Scott, supra*, 15 Cal.4th at p. 1207.)

Here, Tracy did not promptly seek Perkovich's disqualification even though she and her attorney, Munsill, knew on October 30, 2012, that the disclosures were not made on the record. They decided not to challenge Perkovich at the time, and in fact consented to her continuing as the private judge. This decision “came within the range of tactical decisions competent counsel may make”; it is not to be second guessed. (*Johnson, supra*, 60 Cal.4th at p. 980.)

That waiver is present here is also demonstrated by Tracy's earlier attempts to have Perkovich removed.

As indicated in the majority, Tracy first attempted to have Perkovich removed on September 3, 2013, via a motion filed by Attorney Jackson. Nothing was said about noncompliance with canon 6(D) of the California Code of Judicial Ethics, nothing about any claimed biased conduct or rulings. The motion was denied three weeks later.

Then, on May 30, 2014, represented by Attorney Dolnick, Tracy filed what the majority calls a “second motion to withdraw the stipulation,” in the words of the majority, “this time on the ground that, due to Ms. Perkovich’s failure to certify that she was ‘aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and the Rules of Court,’ as required by rule 2.831(b), she lacked the power to rule on the pending motion to enforce the MOA pursuant to section 664.6, and lacked judicial authority ‘to make any of the determinations she has made in this matter to date.’ The motion maintained that Ms. Perkovich’s failure to provide the certification required by the Rules of Court provided ‘good cause’ permitting Tracy to withdraw the stipulation (Rule 2.831(f)).” (Maj. opn., *ante*, at pp. 25–26.) Again, nothing was said about claimed noncompliance with the canon. And nothing about any claimed biased conduct or rulings by Perkovich, all of which had happened many months before.

Tracy’s second motion to remove Perkovich was denied on July 11, 2014. She took a writ. We denied it. The Supreme Court denied review.

Only in Tracy’s third attempt to remove Perkovich, filed on October 7, 2014, did Tracy make the claims as to noncompliance with the canon and the claimed biased conduct the majority relies on here. This time, as the majority states, “Tracy’s ‘statement of disqualification’^[5] was based on two separate grounds” (maj. opn., *ante*, at p. 26), those quoted above. And as to the second ground, the majority describes it this way: “The second . . . was that any person aware of her conduct ‘would have substantial doubt that Perkovich was or could be impartial,’ and Perkovich should therefore be disqualified under section 170.1, subdivision (a)(6)(A)(iii). In support of her bias claim, Tracy declared that Ms. Perkovich ‘seemed to visibly favor’ Jose and Blevans and ‘took steps to block’ Tracy’s attorney from introducing evidence supporting her contentions. . . . Tracy declared that Perkovich conveyed bias by her ‘body language and her tone toward me and Mr. Jackson,’ which ‘was very different than it was toward Mr. Blevans and [Jose]. She was very standoffish, and regularly appeared to be visibly and noticeably annoyed with me’ and ‘often would stand over me with her arms crossed. She would never make eye contact with me. When [Jose] or Blevans spoke, Perkovich was relaxed and thoughtful, often making helpful comments or asking insightful questions that would help them fully develop the point they were trying to make.’ Perkovich also allegedly engaged in ‘highly inappropriate’ interactions with Blevans. ‘For example,’ Tracy stated, ‘during the July 30, 2013, hearing, I personally saw Perkovich flirt with Blevans, proclaiming, “Oh Bob, that’s so

⁵ Actually, Tracy’s request was not a “statement of disqualification,” and thus not the proper pleading. It was filed on a Judicial Council form “Request for Order,” and characterized as a “Motion to Disqualify Nancy Perkovich.” The proper form is a “Statement of Disqualification.” (See *Urias v. Harris Farms, Inc.*, *supra*, 234 Cal.App.3d at p. 421.)

funny of you,” while she batted her eyelashes at him,’ and Perkovich and Blevans ‘inappropriately spoke to each other about the case when my attorney was not present,’ which Tracy assertedly learned from an invoice billing her for the time Perkovich spent on the phone, without Tracy’s lawyer, in preparation for a hearing.” (Maj. opn., *ante*, at p. 27.)

As seen, to the extent Tracy identified any date when any allegedly biased activity occurred, the latest date mentioned is “July 30, 2013,” the day Tracy claims she saw Perkovich “flirt” with Blevans. Her attempt at disqualification filed 14 months later was untimely.

Any Claim for Disqualification Was Untimely

In the express language of the disqualification statute, a party seeking disqualification must move “at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification.” (§ 170.3, subd. (c); see *People v. Guerra* (2006) 37 Cal.4th 1067, 1111 [40 Cal.Rptr.3d 118, 129 P.3d 321]; *People v. Scott, supra*, 15 Cal.4th at p. 1206.) Failure to comply with the promptness requirement constitutes forfeiture or an implied waiver of the disqualification. (*Tri-Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1337 [84 Cal.Rptr.3d 835]; *In re Steven O., supra*, 229 Cal.App.3d at pp. 54–55.) The Supreme Court has many times set out the reason for the promptness rule: ““[I]t would seem . . . intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.”” (*People v. Scott, supra*, 15 Cal.4th at p. 1207, quoting *In re Steven O., supra*, 229 Cal.App.3d at pp. 53–55.) Those principles govern here.

Perkovich’s claimed noncompliance with canon 6D of the California Code of Judicial Ethics was in late October 2012. It was necessarily known at that time. The claimed biased rulings and biased conduct were all known by mid-2013, October at the latest. Tracy’s request to disqualify was untimely.

The MOA Cannot Be Set Aside as a Matter of Law

The majority’s penultimate holding is that “the MOA was tainted by Perkovich’s void rulings and is therefore unenforceable” (maj. opn., *ante*, at p. 55, capitalization & italics omitted.), a holding apparently made in response to Tracy’s assertion that the MOA was the result of the “ultimate duress.” As the majority describes it, “Tracy emphasizes that the MOA was proposed in the wake of a series of adverse rulings issued by Perkovich after Munsill was replaced as her counsel by Jackson, who was unaware of the mutual judging

relationships between Perkovich and Blevans. According to Tracy, Blevans was aware of the hostility between Perkovich and Tracy and her counsel and, in that context, the MOA presented Jackson and Tracy a Hobson's choice" (*Ibid.*) And so the majority finds such "taint," expressly doing so "as a matter of law."

I disagree, for reasons both legal and factual.

As to the legal, as noted, duress is a question of fact. (*Kravitz v. BT Visual Images, supra*, 89 Cal.App.4th 164, 176.) The majority cites nothing to the contrary.

As to the factual, the circumstances leading to the MOA are described in detail above. To briefly recap, the MOA was signed in January 2014, following months of settlement discussions that resumed in August 2013. The terms of the MOA were very much along the lines of a proposal Tracy had made, though one of the monetary terms was increased. And the MOA followed an all day settlement conference on December 14 attended by Tracy and three attorneys on her side: Jackson, representing her, and Ian Carter and Eric Jeppson, representing her company. I do not understand how that can be duress as a matter of law.

That it is not is made clear by *Rosscos Holdings, Inc. v. Bank of America* (2007) 149 Cal.App.4th 1353 [58 Cal.Rptr.3d 141], the one case cited by the majority, a case the majority describes as follows: "As earlier described, the trial judge [Judge Williams] in the case disqualified himself after issuing an order compelling arbitration. The newly assigned judge vacated not only the order compelling arbitration, but also the subsequent arbitration award. While affirming that the disqualified judge's order compelling arbitration was void, the reviewing court reversed the order vacating the arbitration award as premature because the award was not necessarily improper: . . . [T]he arbitration award should be vacated only if the trial court determined that the arbitration was tainted by the disqualified judge, or should be vacated on other grounds. [Citation.]" (Maj. opn., *ante*, at pp. 57–58.)

In other words, the Court of Appeal remanded for further proceedings, with the trial court to vacate the arbitration award "[o]nly if the trial court concludes that the arbitration was tainted by Judge Williams." (*Rosscos Holdings, Inc. v. Bank of America, supra*, 149 Cal.App.4th at p. 1367.) Or, to put it bluntly, "taint" is a question of fact.

Some Closing Observations

I conclude with the observation that I have no dispute with the majority's laudatory characterizations of the goals of canon 6D of the California Code of

Judicial Ethics and the importance of having judicial decision makers free from the suspicion of possible bias. And certainly I do not disagree with the majority that disclosure requirements must be taken seriously.

That said, I do disagree that a private judge's failure to make such a disclosure irretrievably taints everything done by him or her. No case I am aware of so holds, and I am not prepared to sign on to the first case that does, especially not in light of the facts here.

Moreover, I would not be surprised to learn that there may be cases where parties through their attorneys have chosen to proceed with a private judge—the respected person they want, and trust, to decide their case—in which the private judge may not have strictly complied with canon 6D of the California Code of Judicial Ethics, not making the required disclosure “in writing or on the record.” If that is true, parties up and down California will wake up to a majority opinion that tells them that the orders under which they are proceeding with their financial affairs—not to mention, the custody of their children—are void. If, heaven forbid, that is the case, I can only imagine the havoc that will follow.

The majority goes where no court has gone before. I refuse to join them. And I dissent.

The petition of real party in interest for review by the Supreme Court was granted November 9, 2016, S237174. On March 1, 2017, review dismissed and cause transferred to Court of Appeal, First Appellate District, Division Two.

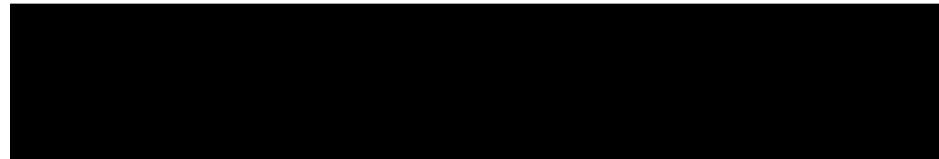
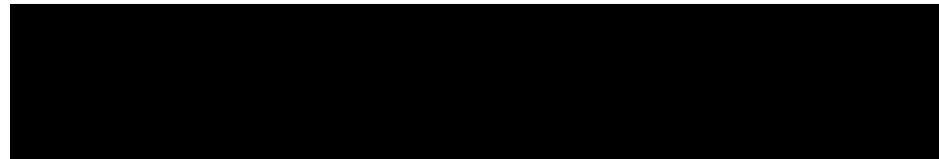
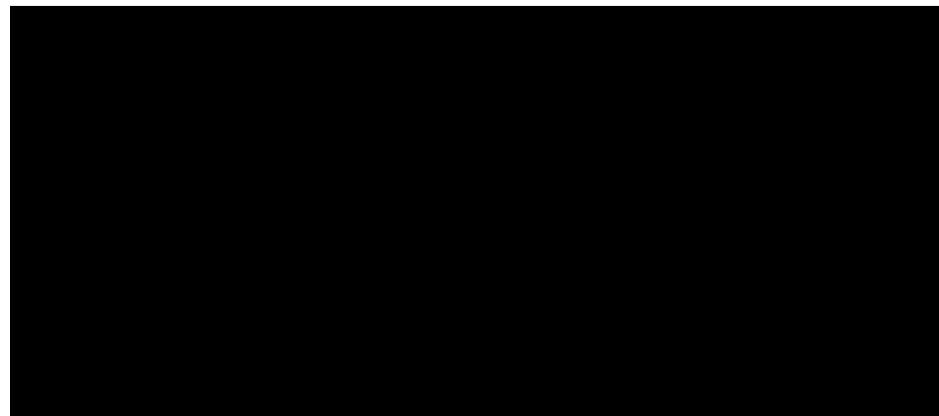
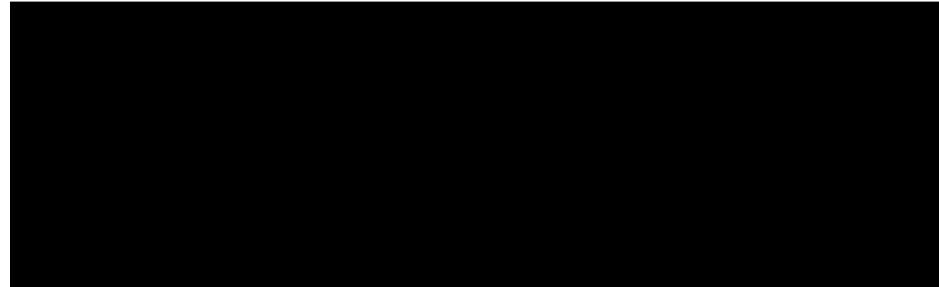
[No. B266930. Second Dist., Div. Eight. Aug. 3, 2016.]

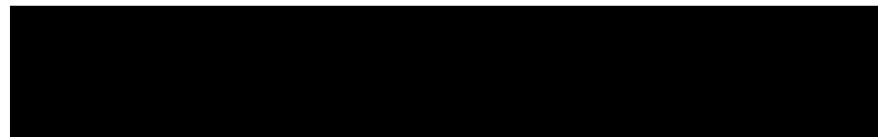
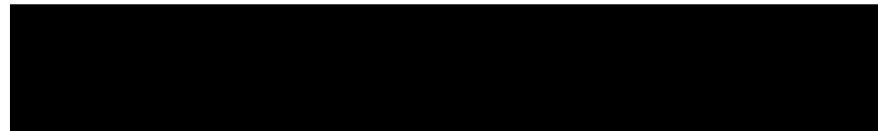
YOLANDA LACHI IGNACIO, Plaintiff and Respondent, v.
MARILYNNE CARACCIOLLO, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Mark R. Weiner & Associates and Kathryn Albarian for Defendant and Appellant.

Layfield & Barrett, Philip J. Layfield and Christopher M. Blanchard for Plaintiff and Respondent.

OPINION

RUBIN, J.—Yolanda Lachi Ignacio, the plaintiff in a personal injury action, was offered \$75,000 by defendant Marilynne Caracciolo to settle the action under certain terms, including that plaintiff execute a release. Plaintiff rejected the offer, and subsequently obtained a judgment against defendant for \$70,000. Defendant sought to tax plaintiff's costs, and obtains her own costs, pursuant to Code of Civil Procedure section 998.¹ The trial court concluded defendant's settlement offer was invalid under section 998, and denied her the cost-shifting benefits of that statute. Defendant appeals. Because the release defendant submitted to plaintiff as part of her settlement offer sought to release defendant and others from claims outside the scope of the current personal injury action, it rendered the offer invalid under section 998. We therefore affirm.

¹ All undesignated statutory references are to the Code of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

On April 10, 2013, plaintiff was injured in an “auto versus pedestrian” accident; she was struck by defendant’s vehicle. On June 11, 2013, plaintiff filed suit against defendant, alleging causes of action for motor vehicle and general negligence.²

On March 20, 2015, counsel for defendant conveyed to counsel for plaintiff a settlement offer under section 998. Defendant offered to settle for \$75,000 plus costs incurred as of the date the offer was served, “in exchange for a release (exemplar attached for purposes of identifying material terms of the release) and dismissal without prejudice of the complaint filed by . . . [plaintiff].”

Attached to the offer was a document entitled “RELEASE OF ALL CLAIMS,” which was two pages long, single spaced. The first paragraph provides as follows: “For and in consideration of the sum of \$75,000.00, paid by draft issued by State Farm . . . [1] to [plaintiff], [plaintiff], on behalf of herself and her dependents, heirs, executors, administrators, and assigns (hereinafter collectively referred to as ‘Releasors’), [2] hereby fully and forever release and discharge [defendant], each of her partners, employees, agents, personal representatives, insurers, attorneys, successors or predecessors in interest, assigns, subsidiaries, past and present, any other person while using [defendant]’s vehicle within the scope of consent of [defendant] on or about April 10, 2013, and any other person or organization who is or might be liable for [defendant]’s alleged negligent use of a vehicle on or about April 10, 2013 (hereinafter collectively referred to as ‘Releasees’), [3] from any and all claims, demands, liens, agreements, contracts, covenants, actions, suits, causes of action, obligations, controversies, debts, costs, expenses, damages, judgments, orders, and liabilities *of whatever kind and nature in law, equity, or otherwise, whether now known or unknown, suspected or unsuspected, that have existed or may have existed or which do exist, or which hereinafter can, shall or may exist,* [4] including but without, in any respect, limiting the generality of the foregoing, any and all claims that were, or might, or could have been alleged in connection with an accident that occurred on or about April 10, 2013, and are the subject of the lawsuit entitled *Ignacio v. Caracciolo*, filed in the Los Angeles Superior Court, bearing case number BC511878 (‘Lawsuit’).”³ (Italics added.)

² Robert Nicolas Caracciolo was also named as a defendant. The record on appeal does not indicate the disposition of plaintiff’s action against him, but he appears to have been out of the case by the time of the settlement offer.

³ We have identified, in brackets, four parts of the release to facilitate our discussion of its essential terms.

Another provision of the release waived the protections of Civil Code section 1542, which provides that a general release does not extend to claims not known or suspected at the time of execution of the release. That provision also provided, “Releasors agree the Release of All Claims shall constitute a full release in accordance with its terms and acknowledge and agree that this waiver [of Civil Code section 1542] is an essential and material term of this Release of All Claims and the settlement that led to it, and that without such waiver, the settlement would not have been entered into.”

Plaintiff did not accept the offer, and the case proceeded to trial. At trial, the jury concluded plaintiff’s damages were \$100,000, but that she was 30 percent comparatively negligent, while defendant was 70 percent responsible. This resulted in a judgment in plaintiff’s favor for \$70,000.

Because the \$70,000 judgment was less than the \$75,000 offered, defendant believed the section 998 cost-shifting procedures applied. In contrast, plaintiff believed defendant’s settlement offer was invalid under section 998, and that plaintiff was entitled to her costs as the prevailing party. Competing cost memoranda and motions to tax costs were filed.⁴

Plaintiff challenged the validity of defendant’s settlement offer on three bases: (1) as it offered a dismissal without prejudice, it did not offer a final resolution equivalent to a judgment; (2) it attached only an “exemplar” release, leaving plaintiff to guess at the actual release terms sought by defendant; and (3) it sought a general release of claims beyond the scope of the current litigation.

At the hearing on the first motion addressing the issue of the validity of defendant’s offer, defendant’s counsel argued that the offer was limited only to the claims that arose out of plaintiff’s complaint. Plaintiff’s counsel responded that the release would have encompassed other potential claims, suggesting as an example a claim for invasion of privacy against defendant, her investigator, and her attorney, on the basis that they had “potentially invaded [plaintiff’s] privacy and had potentially violated certain eavesdropping statutes.” Plaintiff’s counsel argued that plaintiff was not prepared to release that claim as part of the proffered settlement, but the exemplar release would have required her to release it. Defendant’s counsel was unable to clearly state whether the release would have encompassed the identified

⁴ Plaintiff also filed a motion to sanction defendant and her counsel for filing a frivolous memorandum of costs, on the basis that no reasonable person could believe the offer to have been a valid section 998 offer. Sanctions were ultimately denied, and the disposition of the sanctions motion is not at issue on appeal. It is relevant only because it was the third motion raising the issue of the validity of defendant’s section 998 offer, and, as it happens, it was argued first.

privacy claim, leading the court to question whether the scope of the release was ambiguous. The following day, on the hearing on the next motion, defendant's counsel stated that the release absolutely would not reach the invasion of privacy claim, because "our general release . . . absolutely tailors it to anything arising out of the accident. [¶] The investigation, the sub rosa investigation is an entirely different matter."

The trial court took the matters under submission, and ultimately ruled in favor of plaintiff, concluding that defendant's settlement offer was invalid under section 998. The court struck defendant's cost memorandum, and denied her motion to tax plaintiff's costs in all relevant respects.⁵

Defendant filed a timely notice of appeal from this postjudgment order.

DISCUSSION

1. Standard of Review

We independently review whether a section 998 settlement offer was valid. In our review, we interpret any ambiguity in the offer against its proponent. (*Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117, 122 [78 Cal.Rptr.3d 755] (*Chen*).) The burden is on the offering party to demonstrate that the offer is valid under section 998. (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 799 [101 Cal.Rptr.2d 167] (*Barella*).) The offer must be strictly construed in favor of the party sought to be bound by it. (*Ibid.*)

2. Section 998

■ "As a general rule, the prevailing party in a civil lawsuit is entitled to recover its costs. (Code Civ. Proc., § 1032.) However, section 998 establishes a procedure for shifting the costs upon a party's refusal to settle. If the party who prevailed at trial obtained a judgment less favorable than a pretrial settlement offer submitted by the other party, then the prevailing party may not recover its own postoffer costs and, moreover, must pay its opponent's postoffer costs, including, potentially, expert witness costs. (§ 998, subd. (c)(1).)" (*Barella, supra*, 84 Cal.App.4th at p. 798.)

3. A Release Going Beyond the Scope of the Current Litigation Renders the Settlement Offer Invalid Under Section 998

■ It is well established that a purported section 998 offer "requiring the release of claims and parties not involved in the litigation is invalid."

⁵ The motion to tax costs was granted with respect to a few line items not at issue on appeal.

(*McKenzie v. Ford Motor Co.* (2015) 238 Cal.App.4th 695, 706 [189 Cal.Rptr.3d 560].) “That limitation exists because of the difficulty in calculating whether a jury award is more or less favorable than a settlement offer when the jury’s award encompasses claims that are not one and the same with those the offer covers. [Citations.]” (*Chen, supra*, 164 Cal.App.4th at pp. 121–122.) If the settlement offer includes “terms or conditions, apart from the termination of the pending action in exchange for monetary consideration, that make it exceedingly difficult or impossible to determine the value of the offer to the plaintiff,” the offer is invalid under section 998. (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 766 [60 Cal.Rptr.3d 375] (*Fassberg*).) Requiring resolution of potential unfiled claims not encompassed by the pending action renders the offer incapable of valuation. (*Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 699–700 [247 Cal.Rptr. 483] (*Valentino*)).

In *Valentino*, the plaintiff slipped and fell at the defendant’s gas station and sued for her physical injuries. The defendant made a section 998 offer for \$15,000 in settlement of not only the plaintiff’s personal injury action, but other potential claims she might possess against its attorneys and insurer, including bad faith. (*Valentino, supra*, 201 Cal.App.3d at pp. 694–695.) When the jury awarded the plaintiff less than \$10,000, the defendant successfully moved to shift costs under section 998. The Court of Appeal reversed, on the basis that the section 998 offer was invalid, in that it could not be determined how to value the other claims the plaintiff would have given up if she had accepted the offer. “To pinpoint the value of the various potential unfiled claims Ms. Valentino might have had at the time of the statutory offer or in the future against three different parties, only one of whom was even a party to the instant action, would require the court to engage in wild speculation bordering on psychic prediction. Merely identifying all the potential claims would take some clairvoyance as well as the collection of a host of facts unrelated to the merits of the instant case—details about the pre- and postfiling behavior of [the defendant], its insurance company, and the lawyer, any investigators it might have employed, the insurance company’s practices in like cases, etc., etc., etc. After all the potential causes of action had been identified, the court would then have to gather further facts about the apparent probabilities of success and possible recoveries for each as they would have appeared at the time of the statutory offer. Then it would have had to arrive at estimates as to all these variables and calculate an estimated value for each individual potential claim, cumulate those estimated values, and determine whether the total exceeded [the] \$5,250 [difference between the amount offered and the plaintiff’s recovery at trial]. By this time, the court would be engaged in pure guesswork.” (*Id.* at pp. 699–700.)

■ Indeed, because the proponent of the offer has the burden of establishing its validity, *ambiguity* as to whether the offer encompasses claims

beyond the current litigation is sufficient to render the offer invalid under section 998. (*Chen, supra*, 164 Cal.App.4th at p. 122, fn. 5.)

4. *Defendant's Release Was Overbroad, Invalidating the Offer Under Section 998*

We turn to the language of the exemplar release attached to the defendant's offer, which we have quoted extensively on pages 2 and 3. Part [1] states: “*For and in consideration of the sum of \$75,000.00, paid by draft issued by State Farm . . . to [plaintiff], [plaintiff], on behalf of herself and her dependents, heirs, executors, administrators, and assigns (hereinafter collectively referred to as ‘Releasors’) . . .*” (Italics added.) This language simply identifies the releasors and, in and of itself, does not invalidate the offer under section 998.

■ Part [2] continues: “[*The releasors*] hereby fully and forever release and discharge [defendant], each of her partners, employees, agents, personal representatives, insurers, attorneys, successors or predecessors in interest, assigns, subsidiaries, past and present, any other person while using [defendant]’s vehicle within the scope of consent of [defendant] on or about April 10, 2013, and any other person or organization who is or might be liable for [defendant]’s alleged negligent use of a vehicle on or about April 10, 2013 (hereinafter collectively referred to as ‘Releasees’)” (Italics added.) This language identifies the releasees. Boilerplate language identifying individuals and entities beyond the named parties in the case as releasors and releasees does not invalidate the offer, if the claims released relate only to the subject matter of the current litigation. (*Fassberg, supra*, 152 Cal.App.4th at p. 767.) Standing alone, part [2] does not invalidate the release, as long as the release is limited to claims arising from the accident at issue in the lawsuit.

Pursuant to part [3], the releasors release the releasees “*from any and all claims, demands, liens, agreements, contracts, covenants, actions, suits, causes of action, obligations, controversies, debts, costs, expenses, damages, judgments, orders, and liabilities of whatever kind and nature in law, equity, or otherwise, whether now known or unknown, suspected or unsuspected, that have existed or may have existed or which do exist, or which hereinafter can, shall or may exist*” (Italics added.) Similarly, the Civil Code section 1542 waiver refers to the release as a “*full release*;” and implies that the release is a “*general release*.⁶” (Italics added.) The language is incredibly broad, and encompasses numerous claims the releasors may have against the releasees beyond those at issue in the lawsuit.

⁶ The implication arises because of the reference to Civil Code section 1542. Civil Code section 1542 applies only to “*general release[s]*.” If defendant’s release were not a general release, there would be no need for it to include an express waiver of the protections of Civil Code section 1542.

■ Defendant relies on *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, 907–908 [32 Cal.Rptr.2d 740] (*Goodstein*) for the proposition that a general release does not necessarily invalidate a section 998 offer. While the statement on its face may often be correct, a lack of precision in terminology may have given rise to some confusion. Historically, a “general release” was a release “which was phrased broadly enough to include unknown claims,” while a specific release did “not extend to unknown claims.” (*Casey v. Proctor* (1963) 59 Cal.2d 97, 109 [28 Cal.Rptr. 307, 378 P.2d 579].) In *Goodstein*, the defendant’s section 998 offer had sought a “general release.” In concluding the offer was nonetheless valid, the court interpreted the offer’s reference to a “general release” to refer only to the litigation in which it was offered. (*Goodstein*, at pp. 907–908.) The Court of Appeal affirmed over a dissent, which argued that a general release has no place in a section 998 offer. (*Id.* at p. 911 (dis. opn. of Johnson, J.).) Justice Johnson’s dissent noted, “The majority seeks to characterize the ‘general release’ in this case as somehow confined to the precise causes of action that were being litigated in this case. Thus, according to that opinion, the offer does not suffer from any of the vices which bother me.” (*Id.* at p. 916.) He disagreed, however, with that interpretation of the release, because “[a]s commonly used among lawyers, in judicial decisions and in statutes, [a general release] would bar actual or potential causes of action beyond those embodied in the specific litigation that would go to trial if he rejected the offer.” (*Ibid.*) In other words, the *Goodstein* majority upheld the validity of the section 998 offer by construing the term “general release” more narrowly than its then-established common meaning. The rule to be taken from *Goodstein* is not that a “general release” does not invalidate a section 998 offer; the rule is that a release of unknown claims arising only from the claim underlying the litigation itself does not invalidate the offer. (See *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 272 [95 Cal.Rptr.3d 538].)

■ But, the release here is not so limited. It applies not just to all claims arising out of the April 10, 2013 accident, but to “any and all claims” the releasees may have against the releasors “whether now known or unknown, suspected or unsuspected, that have existed or may have existed or which do exist, or which hereinafter can, shall or may exist” Such an unlimited release goes well beyond the scope of the litigation, and renders the offer invalid under section 998.

Defendant relies on part [4] of the release, which states, “*including but without, in any respect, limiting the generality of the foregoing, any and all claims that were, or might, or could have been alleged in connection with an accident that occurred on or about April 10, 2013, and are the subject of the lawsuit entitled Ignacio v. Caracciolo, filed in the Los Angeles Superior Court, bearing case number BC511878 ('Lawsuit').*” (Italics added). Noting that the latter part of this language refers to claims which were or could have

been alleged in connection with the accident giving rise to this lawsuit, defendant takes the position that the release was limited to those accident-related claims. But this argument takes the language out of the context of the release, utterly ignoring the part of the release we have italicized above. The release does not say it is “limited to” such accident-related claims; it says the opposite. The general release includes, but is not in any way limited to, accident-related claims.⁷

Moreover, plaintiff identified before the trial court a claim that would be encompassed by the release that was not accident related and could not have been brought in the pending lawsuit—her claim against defendant, her attorney, and her investigator for violation of plaintiff’s privacy rights during the carrier’s investigation of her claim. The release specifically identifies defendant and her attorney as released parties; whether it also encompasses her investigator would depend on whether the investigator was defendant’s agent or employee. More importantly, however, the release encompasses “all claims” plaintiff may have against the released parties, without any limitation to claims arising from the accident. The release’s plain language necessarily encompasses, at the very least, plaintiff’s privacy violation claim against defendant and defendant’s attorney. Thus, the release encompassed more than section 998 permits, and the trial court did not err in concluding defendant’s offer was invalid under section 998.

DISPOSITION

The postjudgment order is affirmed. Plaintiff is to recover her costs on appeal.

Bigelow, P. J., and Grimes, J., concurred.

⁷ Defendant argued no less than five times before the trial court, and three times on appeal, that the release was narrowly limited to the language in section [4], in complete derogation of the broad language of section [3]. In *Chen*, this court cautioned against “selectively quoting” the terms of a settlement offer. (*Chen, supra*, 164 Cal.App.4th at p. 123.) Such a strategy is as unsuccessful today as it was in *Chen*.

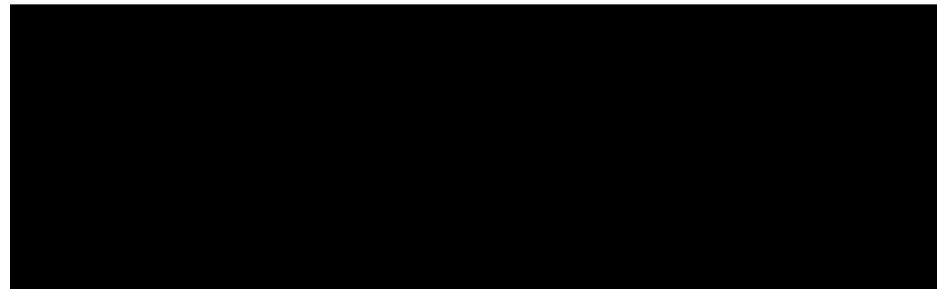
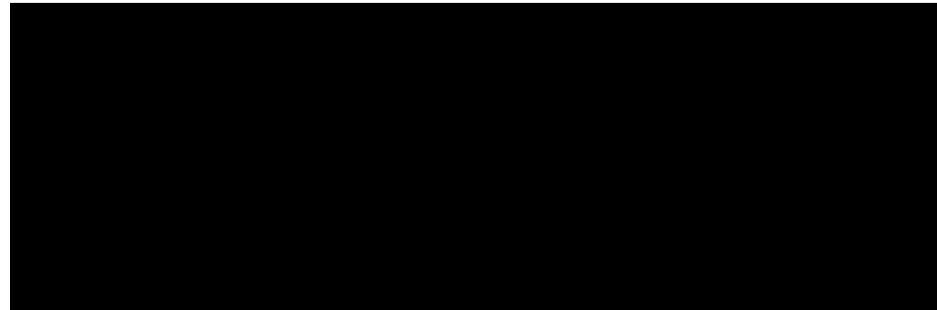
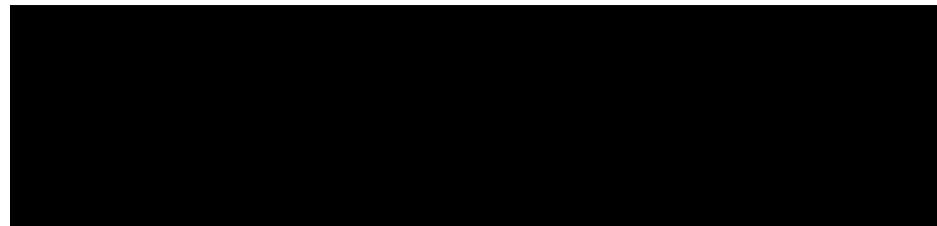
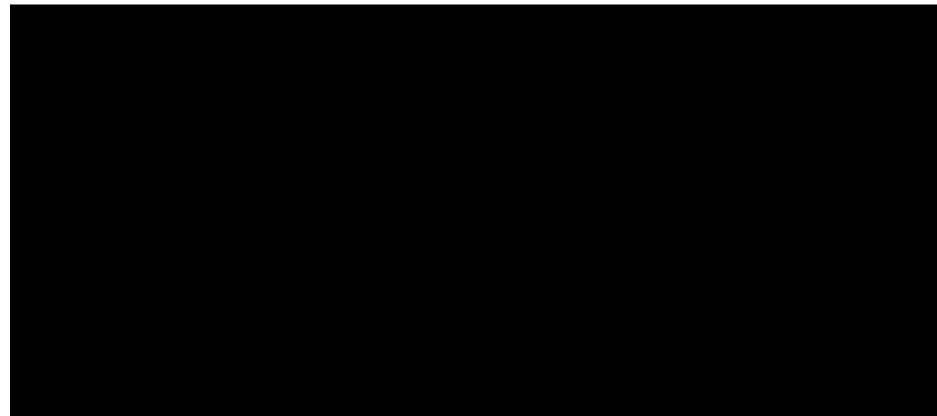
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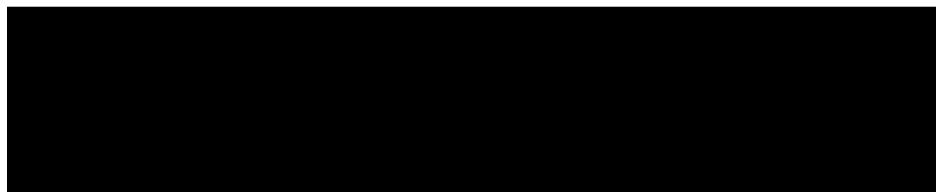
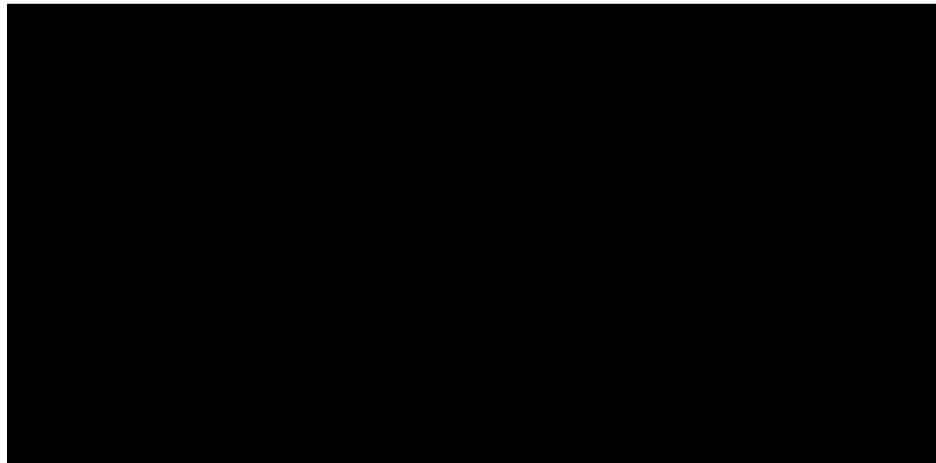
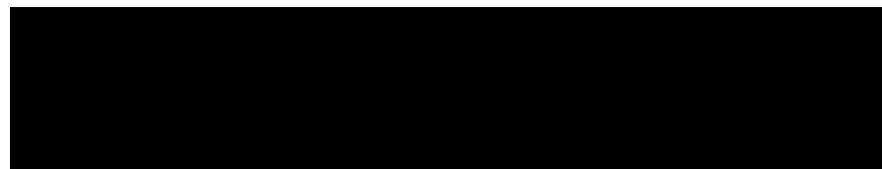
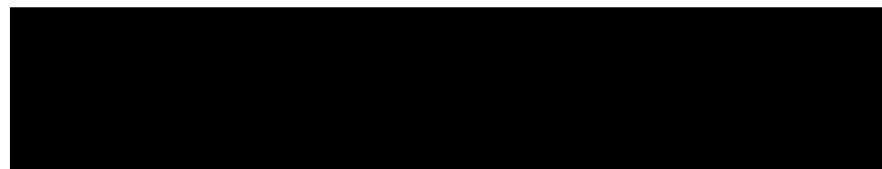
THE PEOPLE, Plaintiff and Respondent, v.
RYAN JHONG FROMUTH, Defendant and Appellant.

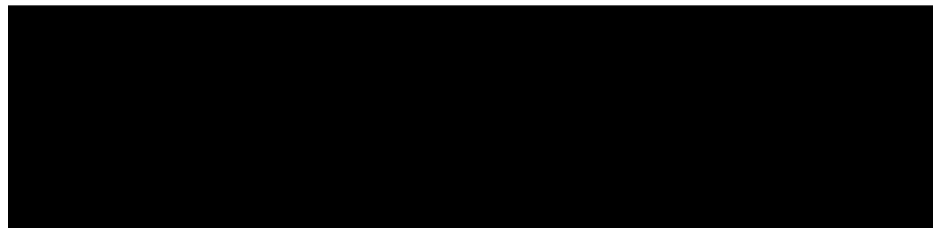
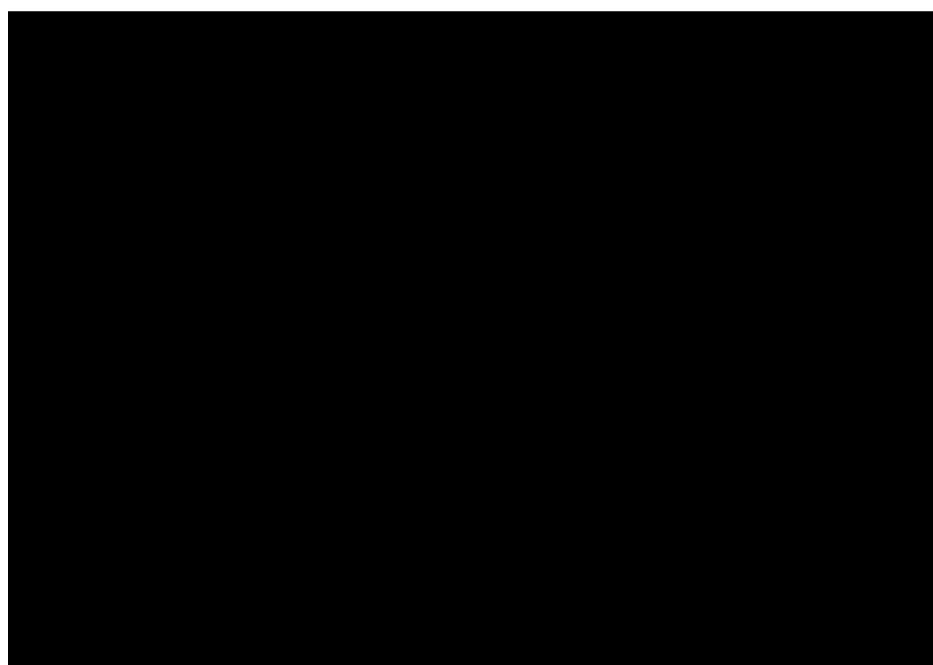
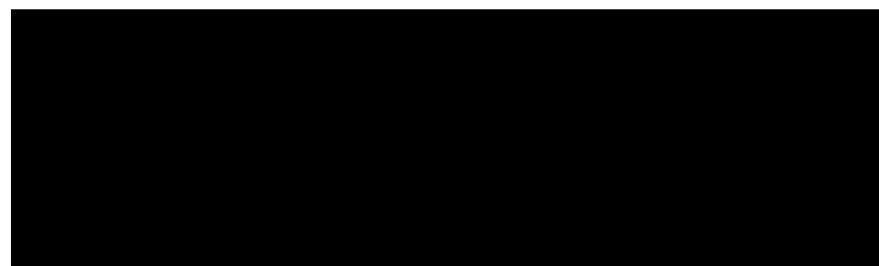
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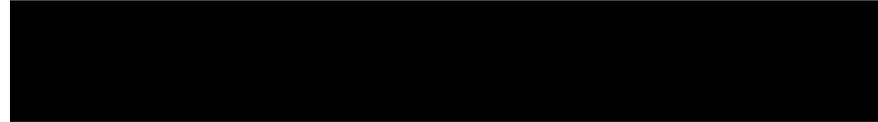
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COUNSEL

Alexis Ivar Haller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Acting Assistant Attorney General, Catherine A. Rivlin and David H. Rose, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

MIHARA, J.—Defendant Ryan Jhong Fromuth was convicted by jury trial of violating Penal Code section 288.4, subdivision (b).¹ Section 288.4 provides: “Every person who, motivated by an unnatural or abnormal sexual interest in children, arranges a meeting with a minor or a person he or she believes to be a minor for the purpose of . . . engaging in lewd or lascivious behavior” and “who goes to the arranged meeting place at or about the arranged time” commits a felony. Defendant was granted probation.

On appeal, he makes two related contentions premised on his assertion that the “motivated by” element of the offense requires that the motivation be a “substantial factor” in the commission of the proscribed conduct. He asserts that the jury’s verdict is not supported by substantial evidence that the required motivation was a substantial factor and that the trial court prejudicially erred in failing to give a substantial factor instruction. Defendant also

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

contends that the trial court prejudicially erred in refusing to instruct on entrapment, that his trial counsel was prejudicially deficient in failing to object to the court's imposition of probation services fees in the absence of evidence of his ability to pay those fees, and that the court imposed a section 290.3 fine in a statutorily unauthorized amount.

While we agree with defendant that the motivated by element requires proof that the motivation was a substantial factor in the commission of the prohibited conduct, we find substantial evidence to support the jury's verdict and conclude that the trial court did not have a *sua sponte* duty to give a substantial factor instruction. We also conclude that the court was not obligated to instruct on entrapment and that defendant's trial counsel was not deficient in failing to object to the imposition of probation supervision fees. However, we find that the trial court failed to comply with its duty to specify the statutory bases for its imposition of a \$1,610 section 290.3 fine, and we remand for the court to fulfill its duty.

I. Factual Background

In October 2013, Sergeant Brian Hoskins of the Monterey County Sheriff's Department began an investigation into predators on craigslist. As one part of his investigation, he posted an advertisement on craigslist. He posted the advertisement in the "casual hookup/NSA" part of the "personal/romance" portion of the "casual encounters" section of craigslist. "NSA" stands for "No strings attached." This section is "known to be the section for people looking for . . . casual sex." Craigslist permits a person posting an advertisement in this section to specify gender and "what you're looking for," and "[t]here's a box for your age" Craigslist prominently states that "'by posting here you confirm you're 18 or older.' "

Hoskins's advertisement, which was posted at 2:19 p.m. on October 26, 2013, was headed: "Young cutie looking for a hookup today!!!—w4m (Salinas)." The "w4m" signified a woman seeking a man. The text read: "Hi, I am young and cute looking to hookup with someone today. This is for today only and probably will be a onetime thing. Yes I do have a bf, so this has to be on the way DL. I am drama free and clean and you need to be to. I promise you wont be disappointed with my looks. I am latina 5'6, 115 pound with brown hair past my shoulders and brown eyes. I am looking to do this today, so only send me a message if you can meet today. I am very real. Put 'today' in the subject line and send me a pic. If I like what I see I will respond." Hoskins left the age box blank. He did this because he knew that an advertisement stating an age under 18 would be removed from craigslist. Hoskins left his advertisement up for an hour to an hour and a half, and he received over 300 responses.

[REDACTED]

At 2:56 p.m., defendant, who was 30 years old, responded to the advertisement. He provided a photo (showing him fully clothed) and said: "Hi there. There's my picture. I'm 6'0, 160lbs, half asian. Anyway, good luck with your hook up. Oh and I'm in Salinas and available!" Hoskins, who was pretending to be "Maria Garcia," responded at 3:05 p.m. "Hey, you are cute. Where are you from? I am 15 and dont drive so you would have to come pick me up let me know if that is going to be a problem. How old are you?" Defendant responded five minutes later: "Thanks. I'm from Salinas, and I'm much older than 15. My advice for you hooking up on craigslist is to stop telling people you're 15 because that makes people worry about if you're actually 15 trying to hook up, or police." Hoskins responded three minutes later: "I just want to be honest so that no dudes go all crzay on me. That's all, but ok thank you. What if someone asks for my id?" Defendant responded six minutes later: "People ask for id if you look too young and they check if you're over 18. There's no reason to ask for ID if you are telling people you're 15. Maybe there's something else you can do today besides hook up with someone? You're unhappy with your boyfriend? Do you have skype or AIM or something?"²

Hoskins ceased communicating with defendant after defendant gave this response because his protocol was to terminate contact if the responder suggested something other than sex. At 3:15 p.m., Hoskins took down the advertisement. Almost an hour later, defendant wrote to "Maria" again: "You deleted your ad so I hope you found your hookup?" Hoskins responded one minute later: "I think I did. But if I didnt, ill message you." Defendant responded six minutes later: "When you delete your ad, pretty soon I don't think it lets us talk anymore. We'll have to share email directly . . . mine it ryan909@gmail.com [REDACTED] Good luck I hope everything goes okay~."

Several hours later, just before 8:00 p.m., Hoskins sent an e-mail to defendant: "So it looks like I got ditched on. Are you still interested?" Defendant responded seven minutes later: "Hi. Did it go badly too? What part of Salinas are you?" Hoskins responded 49 minutes later: "Im in creekbridge. Yes he ditched me. never showed up. Where are you at?" Defendant replied three minutes later: "south salinas. You think you want to see me?" Hoskins responded one minute later: "If you are down and not into games. We both know what this is about." Defendant responded seven minutes later: "So, where are we going? Am I picking you up or am i just visiting you?" Hoskins responded two minutes later: "Well are you down or do you just want to talk?" Defendant responded two minutes later: "I'm down. What's the plan?"

Over the next hour, Hoskins and defendant exchanged a flurry of e-mails. Hoskins told defendant "I don't want to do this in a car in case we get

² "AIM" is AOL instant messaging.

caught." Defendant offered to "get us a room." Hoskins informed defendant: "I am not on bc [birth control] so you would have to bring something to handle that too. I have to know before we meet you are not into weird stuff?" Defendant responded: "I consider this weird actually, because I wouldn't tell people I know that I consider doing this." Hoskins told defendant: "Well I am not very expereinced, so I want to know what you want me to do. But I am good with all the normal stuff. I guess I am trying to say I am scared of anal. You aren't going to try that with me or make me do that right." Defendant asked where he would pick her up, and he reassured her that "[i]f you were uncomfortable with something it would bother me." He also reassured her that he would be "using protection" and was "not here to trick or bother you, but it's good to be cautious!" Hoskins told defendant "I have only been with two guys" and was therefore "nervous." When Hoskins asked "wat motel," defendant replied: "You seem pretty bright, so I hope you appreciate that both of us are facing a risky situation. I can't just be reckless now either. That means I don't want to type any direct answer for that in a message." Hoskins told defendant: "Other than regular and oral you arent expecting anything else right. No crazy stuff. Just fun for us both. There are a lot of creepers out there. But you dont seem like."

Just after 10:00 p.m., as they were making final arrangements to meet, defendant asked: "It's not too late for you to go out?" Hoskins responded: "No my mom works nights." Hoskins asked defendant: "I want to know how much you are cuz I am very tight down there and if you are to big it is guna hurt and will you lick me first cuz I have never had a guy do that to me. Or is that something you dont do?" Defendant responded: "Sounds fun. 6" is the average size I am. I can't believe nobody has ever ever licked you." Hoskins responded: "Ok, sounds good Make sure you have protection I am not on BC." Hoskins expressed concern that defendant's roommates might hear them. Defendant asked "Are you loud?" Hoskins responded: "I am loud if it feels good." Hoskins asked if defendant's "bed make lots of noise when you do it." Defendant assured Hoskins that it was "not too noisy." Hoskins reminded defendant "Dont forget protection." As Hoskins was providing directions to defendant to the location where "Maria" would meet defendant, defendant e-mailed: "This is the riskiest part you know It's very scary."

When defendant arrived at the designated meeting location, he was arrested. A single condom was found in the center console of his vehicle. Defendant told Hoskins that he was there to meet a girl he had met on craigslist. Hoskins asked defendant "why he thought it was a good idea to meet with a 15-year-old girl." Defendant responded "that it wasn't a good idea, that it was a horrible idea. That he had wrecked his life and his family was going to be disappointed in him." Defendant explained to Hoskins that he was "both horny and stressed," "had broken up with his ex-girlfriend several months earlier," and "had issues with impulse control." He also

[REDACTED]

admitted to Hoskins that, “if there would have actually been a 15 year old,” he would have had sex with her. Defendant told Hoskins that he “felt this may have been a police sting operation” and “didn’t know why he still came.” He admitted that he knew that what he had done was wrong. Defendant said that he had brought the condom at the girl’s request. He also told Hoskins that he “didn’t even actually think that it was possible for a 15 year old to be on Craigslist looking for a hookup.”

II. Procedural Background

Defendant was charged by information with three counts: a violation of section 288.4, subdivision (b); a violation of section 288.3, subdivision (a) (contacting or communicating with a person he believed to be a minor for the purpose of committing a sexual offense); and attempted oral copulation of a person under 16 (§§ 288a, subd. (b)(2), 664). It was further alleged that he had previously suffered a felony conviction for which he had served a prison term (§ 667.5, subd. (b)).³

Hoskins was the only prosecution witness at trial. Defendant was the only defense witness. He testified that he did not intend to have sex or engage in any other lewd conduct with a 15 year old when he arrived at the arranged meeting with “Maria.”⁴ His trial counsel argued that “the issue in this case is whether or not Mr. Fromuth thought he was meeting a 15 year old for sex. The other elements, quite frankly, aren’t really in dispute.” “We posit that he never believed this person to be a minor, that he wasn’t intending to go and have sex with a 15-year-old girl.”

Defendant was acquitted of the attempted oral copulation count and convicted of the section 288.4 count. The jury was unable to reach a unanimous verdict on the section 288.3 count.⁵ The court suspended imposition of sentence and placed defendant on probation for three years conditioned on him serving a year in jail. He was ordered to register as a sex offender for the rest of his life. The court also ordered defendant to pay a probation services fee of \$864 plus \$81 per month and a section 290.3 fine of \$1,610. Defendant timely filed a notice of appeal.

³ The prison prior was bifurcated at defendant’s request, and he subsequently waived his right to a jury trial on it and admitted it.

⁴ He admitted that he had suffered a felony conviction for sale of marijuana eight years earlier.

⁵ The prosecution thereafter dismissed the section 288.3 count.

III. Discussion

A. Section 288.4's "Motivated By" Element

The premise for defendant's challenges to the sufficiency of the evidence to support his conviction and to the validity of the court's instructions on the section 288.4 offense is that the "motivated by an unnatural or abnormal sexual interest in children" element of the section 288.4 offense requires that this motivation be a "substantial factor" in the commission of the proscribed conduct.

Section 288.4 provides: "(a) (1) Every person who, motivated by an unnatural or abnormal sexual interest in children, arranges a meeting with a minor or a person he or she believes to be a minor for the purpose of . . . engaging in lewd or lascivious behavior, shall be punished by a fine not exceeding five thousand dollars (\$5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment. [¶] . . . [¶] (b) Every person described in paragraph (1) of subdivision (a) who goes to the arranged meeting place at or about the arranged time, shall be punished by imprisonment in the state prison for two, three, or four years."

Defendant relies on *In re M.S.* (1995) 10 Cal.4th 698 [42 Cal.Rptr.2d 355, 896 P.2d 1365] (*M.S.*) to support his claim that the "motivated by" element requires that the specified motivation be a "substantial factor." The two minors involved in *M.S.* had participated in a physical assault on a group of gay men, which had been preceded by the minors shouting "antigay epithets" and making threats of harm to the victims. (*Id.* at pp. 707–708.) A petition was filed alleging that the minors had violated section 422.6, which makes it a misdemeanor to engage in certain conduct, including criminal threats, "because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55." (§ 422.6, subds. (a), (b), italics added.) The petition also alleged assault and battery counts that were accompanied by enhancement allegations under section 422.7, which applies where "the crime is committed against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to him or her" by law. (§ 422.7, italics added.) The juvenile court found the allegations true. (*M.S.*, at p. 709.)

The minors in *M.S.* claimed that the "'because of'" language was unconstitutionally vague and that this language required proof of "'but-for' causation." (*M.S.*, *supra*, 10 Cal.4th at pp. 716, 718.) The California Supreme Court concluded that the "'because of'" language, which it referred to as the "discriminatory motivation," was not vague because this language was "commonly and properly used to indicate that an event, in this case the crime, was

caused in fact by something, in this case the accused's prohibited bias.”⁶ (*M.S.*, at pp. 716–718, italics added.) The court noted that this same language appeared in a variety of other civil rights and antidiscrimination statutes, and it cited *People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381 [250 Cal.Rptr. 515, 758 P.2d 1046] (*Caswell*) as an example of a criminal case in which it had upheld an analogous statute against a vagueness challenge. (*M.S.*, at pp. 717–718.) *Caswell* involved section 647, subdivision (d), which prohibited “‘loiter[ing] in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act.’” (*Caswell*, at p. 390.)

After resolving the vagueness issue, the court considered the meaning of the “‘because of’” language. The minors claimed that the “‘because of’” language required “‘but-for’ causation,” while the Attorney General contended that all that was required was that the “bias motivation” “‘contributed to’ or was ‘a factor in’ the offense.” (*M.S., supra*, 10 Cal.4th at pp. 718–719.) The California Supreme Court considered “the legislative purpose” in enacting these statutes and concluded that the “bias motivation” was not required to be the sole cause but only “a substantial factor” in the offense. “By employing the phrase ‘because of’ in sections 422.6 and 422.7, the Legislature has simply dictated the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. [Citation.] When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the crime.” (*M.S.*, at p. 719.)

Defendant contends that the “motivated by” language in section 288.4 is analogous to the “because of” language construed by the California Supreme Court in *M.S.* and therefore should be accorded the same construction. While the two phrases are not identical, we agree with defendant that both phrases are “commonly . . . used” to refer to “a cause in fact . . .” (*M.S., supra*, 10 Cal.4th at pp. 716, 719).⁷

Like the California Supreme Court did in *M.S.*, we examine the Legislature’s purpose in enacting section 288.4 to determine whether the common meaning of “motivated by” is consistent with the Legislature’s intent. The section 288.4 offense was created by the Legislature in 2006.⁸ (Stats. 2006, ch. 337, p. 2583, eff. Sept. 20, 2006.) The Legislature explicitly acknowledged

⁶ The court also rejected the minors’ claim that the statutes were unconstitutionally overbroad.

⁷ The word “motive,” the root of motivated, means “something (as a need or desire) that causes a person to act.” (Merriam-Webster’s Collegiate Dict. (10th ed. 1993) p. 759.) The word “because” means “for the reason that.” (*Id.*, p. 101.)

⁸ The offense was originally added as section 288.3 by an urgency measure in September 2006. In November 2006, Proposition 83 enacted a new section 288.3 creating a different crime. (Voter Information Guide, Gen. Elec. (Nov. 7, 2006) text of proposed law, p. 128.) In

that the language describing this offense had been “drawn from a long-standing statute (Pen. Code 647.6) that prohibits a person who has an abnormal sexual interest in children from annoying or bothering children.”⁹ (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1128 (2005–2006 Reg. Sess.) as amended Mar. 7, 2006, p. D; see *People v. Yuksel* (2012) 207 Cal.App.4th 850, 855 [143 Cal.Rptr.3d 823].) “This crime uses settled and court-tested language from Penal Code Section 647.6—annoying or molesting (without physical contact) a child—about persons with an abnormal sexual interest in children. The crime defined is committed where the defendant, with the noted abnormal interest, contacts a child or a person they think is a child with the intent to engage in sexual activity.” (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1128 (2005–2006 Reg. Sess.) as amended Mar. 7, 2006, p. I.)

■ Since the Legislature intended for the motive element in section 288.4 to be the same as the one in section 647.6, we must examine that section. Section 647.6, subdivision (a)(1) makes it a crime for a person to “annoy[] or molest[] a child under 18 years of age . . .”¹⁰ This offense was originally proscribed by former section 647a. Neither section 647.6, subdivision (a)(1) nor its precursor contained an express motive element, but courts long ago held that the offense has a motive element. “Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole in the light of the evident purpose of this and similar legislation enacted in this state indicates that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to children.”¹¹ (*People v. Pallares* (1952) 112 Cal.App.2d Supp. 895, 901 [246 P.2d 173]; accord, *In re Gladys R.* (1970) 1 Cal.3d 855, 867 [83 Cal.Rptr. 671, 464 P.2d 127] [approving of *Pallares* and holding that the statute “applies only to offenders who are motivated by an unnatural or abnormal sexual interest or intent.”].)

2007, the original section 288.3 created by the Legislature was renumbered as section 288.4 without any substantive changes. (Stats. 2007, ch. 579, p. 4759 [only change was to the cross-reference to § 290].)

⁹ The Legislature referred to the proposed offense as “child luring.” (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1128 (2005–2006 Reg. Sess.) as amended Mar. 7, 2006, p. J.)

¹⁰ Section 647.6, subdivision (a)(2), which was added to section 647.6 by the same legislation that created the section 288.4 offense, contains the same motive element as section 288.4. However, unlike section 288.4, section 647.6, subdivision (a)(2) does not contain a separate specific intent element.

¹¹ After the Legislature enacted section 288.4, a Court of Appeal held that the motive element of section 647.6, subdivision (a)(1) “does not merely protect children as a class” but is satisfied if the perpetrator has an unnatural or abnormal sexual interest in the individual child victim. (*People v. Shaw* (2009) 177 Cal.App.4th 92, 102–104 [99 Cal.Rptr.3d 112] (*Shaw*).) Since the Legislature could not have been relying in 2006 on *Shaw*’s 2009 holding, the holding in *Shaw* is not relevant to our construction of section 288.4. Section 288.4 explicitly uses the word “children” in defining the motive element.

The Attorney General asserts that there is a “lack of authority” to support defendant’s claim that the prohibited motivation in section 288.4 must be a “substantial factor” in the commission of the crime. However, she concedes that the California Supreme Court’s opinion in *M.S.* “repeatedly equated an element requiring [that] an act be ‘motivated by’ a factor with an element requiring [that] an act be ‘because of’ a factor.” By equating “because of” and “motivated by” elements in *M.S.*, the California Supreme Court provided considerable “authority” supporting defendant’s position. Our examination of the legislative history of section 288.4 reveals that it is consistent with an intent to target only those whose abnormal sexual interest in children was a substantial factor in causing their conduct. Indeed, it is not possible to conceive of a rational purpose for requiring proof of a prohibited motivation where that motivation was not required to be a substantial factor in the commission of the proscribed conduct.

■ “The Legislature, of course, is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof. [Citation.] Where a statute is framed in language of an earlier enactment on the same or an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction.” (*People v. Harrison* (1989) 48 Cal.3d 321, 329 [256 Cal.Rptr. 401, 768 P.2d 1078].) Here, the Legislature must be deemed to have been aware of the California Supreme Court’s 1995 *M.S.* decision requiring proof that a motivation element was a substantial factor in the commission of the proscribed conduct when it enacted section 288.4’s analogous motivation element in 2006. We conclude that section 288.4 requires that the prohibited motivation be a substantial factor in the commission of the prohibited act. With this construction of the statute in mind, we proceed to defendant’s claims that the evidence does not support his conviction and that the trial court prejudicially erred in failing to give a *sua sponte* substantial factor instruction.

1. Substantial Evidence

Defendant claims that the record lacks substantial evidence supporting the “motivated by” element. He contends that there was no evidence that he had “an ‘unnatural or abnormal’ sexual interest in ‘children’ ” or that he was “motivated by” such an interest.

Our standard of review is well established. “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 576 [162 Cal.Rptr. 431, 606 P.2d 738], quoting *Jackson v. Virginia*

(1979) 443 U.S. 307, 318–319 [61 L.Ed.2d 560, 99 S.Ct. 2781].) “[The] appellate court must view the evidence in the light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Reilly* (1970) 3 Cal.3d 421, 425 [90 Cal.Rptr. 417, 475 P.2d 649]; accord, *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237 [278 Cal.Rptr. 640, 805 P.2d 899].) “Evidence is sufficient to support a conviction only if it is substantial, that is, if it ‘‘reasonably inspires confidence’’ [citation], and is ‘credible and of solid value.’” (*People v. Raley* (1992) 2 Cal.4th 870, 891 [8 Cal.Rptr.2d 678, 830 P.2d 712].)

This standard of review requires us to presume that the jury drew all reasonable inferences that could support its finding that defendant had an unnatural or abnormal sexual interest in children. Defendant points out that there was no evidence that he had ever previously exhibited a sexual interest in children. This is true. However, defendant’s conduct in this case was sufficient to support a reasonable inference that his sexual interest in “Maria” was demonstrative of his general sexual interest in children. Defendant did not merely have a brief interaction with “Maria” nor did he spend a significant period of time believing she was an adult. Her first e-mail to defendant, just *nine minutes* after he responded to the advertisement, plainly told him that she was 15 years old. Yet upon learning that “Maria” was 15 years old, he did not terminate his communications with her. Instead, he continued to communicate with her until she cut him off. After that, he continued for an extended period of time to monitor her advertisement for a sex partner, reinitiated contact, and invited her to keep e-mailing him. There was no reason to do so other than a sexual interest. They had not engaged in and did not engage in any significant communication that was unrelated to their arrangement of a sexual rendezvous. “Maria” was a stranger to him so defendant’s interest in her could not have been specific to her; all he knew about “Maria” was the generic physical description in the advertisement, her age, and her sexual availability. Based solely on that limited information, defendant devoted hours of his time to arranging to meet 15-year-old “Maria.” Even after learning that “Maria” did not exist, defendant told Hoskins that, “if there would have actually been a 15 year old,” he would have had sex with her despite the fact that he knew that would be wrong. We find this evidence sufficient to support a reasonable inference that defendant had an unnatural or abnormal sexual interest in children.

Defendant claims that Hoskins’s depiction of “Maria” as “physically mature and sexually active” rebutted the inference that his interest in her was “unnatural or abnormal” He focuses on the fact that the original advertisement did not say that “Maria” was a child and reasons from this premise that his response to the advertisement did not reflect that he had a sexual interest in *children*. We agree that defendant’s *initial* response to the

advertisement did not reflect that defendant had a sexual interest in children. It was his subsequent actions in continuing to pursue “Maria” after he learned that she was 15 years old that reflected his sexual interest in children. We cannot credit defendant’s claim that it is not “unnatural” or “abnormal” for a “lonely” 30-year-old man who initially responds to an advertisement seeking a sexual rendezvous with a female he believes to be an adult and immediately learns that the female is *a 15-year-old child* to proceed to arrange a sexual rendezvous with that child. The jury could have reasonably concluded that the fact that a 30-year-old man makes arrangements for a sexual rendezvous with a stranger he believes to be 15 years old demonstrates that he has an unnatural and abnormal sexual interest in children.

■ Defendant also contends that the prosecution failed to present substantial evidence that his sexual interest in children “motivated” his commission of the proscribed conduct. As we have already discussed, the motivated by element requires that the motivation be a substantial factor in the commission of the offense. “‘The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.’ [Citation.] Thus, ‘a force which plays only an “infinitesimal” or “theoretical” part in bringing about injury, damage, or loss is not a substantial factor’ [citation], but a very minor force that does cause harm is a substantial factor [citation].” (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398]; accord, *M.S., supra*, 10 Cal.4th at p. 719.)

■ As noted above, defendant reinitiated contact with “Maria” after he learned that she was 15 years old and continued to pursue a sexual rendezvous with a 15-year-old girl for hours despite knowing nothing more about “Maria” other than her age, a generic physical description, and her sexual availability. The jury could have drawn a reasonable inference that his belief that “Maria” was a *child* played a significant role and thus was a “substantial factor” in motivating defendant to engage in his lengthy pursuit of a sexual rendezvous with “Maria.” We find the evidence sufficient to support a finding that defendant’s unnatural or abnormal sexual interest in children was a substantial factor in motivating him to arrange a meeting with “Maria.”

■ Defendant contends that “[b]y effectively arguing that the motivation element is met whenever the intent element is satisfied, [the Attorney General] disregards the rule that ‘a statute should not be construed to make portions of it meaningless.’” We do not understand the Attorney General to be arguing that the “motivated by” element is satisfied *whenever* the specific intent element of section 288.4 is established. Section 288.4’s specific intent element requires proof that, when he or she arranged the meeting, the defendant intended to engage in sexual conduct with a person he or she

believed to be a child. The motivation element requires proof that, when he or she arranged the meeting, the defendant was motivated by an unnatural or abnormal sexual interest in children. The primary difference between the two elements is the “unnatural or abnormal” nature of the interest. Where a person arranges a meeting with a child of a similar age (such as two 16 year olds arranging a tryst or even an 18 year old arranging a meeting with his 17-year-old girlfriend), the sexual interest motivating the arrangement of the meeting will not usually be found to be “unnatural or abnormal” and therefore will not violate section 288.4 even though the person arranging the meeting intends to engage in sexual conduct with a child. The other difference between the two elements is that the specific intent element may be satisfied by proof of a sexual interest in a particular individual, while the “motivated by” element requires a sexual interest in “children.” Thus, proof of the specific intent element does not necessarily satisfy the “motivated by” element. In this case, however, the same evidence established both elements. When a 30-year-old male doggedly pursues sex with a stranger he believes to be a 15-year-old girl as defendant did in this case, it may demonstrate both that he is “motivated by an unnatural and abnormal sexual interest in children” and that he intends to engage in sexual conduct with a person he believes to be a 15-year-old girl. Substantial evidence supports the jury’s verdict.

2. Instructions

Defendant asserts that the trial court prejudicially erred in failing to sua sponte instruct the jury that the “motivated by” element was required to be a “substantial factor” in his commission of the offense. He claims that such an instruction would have required the jury to find that the “motivated by” element was “more than a trivial or remote factor” in the commission of the proscribed conduct. (See CALCRIM No. 1350 (hate crimes) [“If you find that the defendant had more than one reason to commit the alleged acts, the bias described here must have been a substantial motivating factor. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that motivated the conduct.”].)

a. Background

Both the defense and the prosecutor requested CALCRIM No. 1126 on the section 288.4 count, and the court agreed to give that instruction. Defendant did not request a substantial factor instruction. The version of CALCRIM No. 1126 given to the jury provided, in relevant part: “The defendant is charged in Count 2 with going to a meeting with a minor for a lewd purpose, in violation of Penal Code Section 288.4(b). To prove that the defendant is guilty of this crime, the People must prove that: [¶] One, the defendant

arranged a meeting with a person he believed to be a minor; [¶] Two, when the defendant did so, he was motivated by an unnatural or abnormal sexual interest in children; [¶] Three, at that meeting, the defendant intended to expose his genitals or pubic or rectal area or have the minor expose her genitals or pubic or rectal area or engage in lewd or lascivious behavior; [¶] And four, the defendant went to the arranged meeting place at or about the arranged time.”¹²

The prosecutor argued to the jury: “What do we mean by ‘abnormal’ or ‘unnatural’ sexual interest in children? Well, we’re not necessarily meaning that this has to be someone who is only sexually interested in children because then what would happen if he actually had shown up and there was a 15 year old girl? We’re not talking about someone who only seeks out children for sexual purposes, someone who focuses solely on children. That certainly falls under this category, but it’s really only one type of predator that we’re talking about. There’s also the people who are predators via access, and that’s what we’re got here. [¶] What we’ve got here is a man 30 years old who, according to what he tells Sergeant Hoskins, he’s lonely, he’s horny, he broke up with his girlfriend a few months ago, and he’s strolling the Internet on Craigslist for casual encounters. [¶] What we know is that he doesn’t care that Maria is supposed to be 15. He gets the information that Maria is 15 and he ignores it. He continues to correspond with her. And when she stops talking to him, he’s the one that actually makes that extra step and reinitiates contact. [¶] We know that she [*sic*], in fact, asked him [*sic*] to contact him if the hookup doesn’t work out and admits that it is something that someone should be sent to prison for a long time for. He knows it’s wrong. And that’s the unnatural or abnormal interest we’re talking about. [¶] We’re talking about someone who when provided access to a 15-year-old child doesn’t do what we would expect from a normal person. He doesn’t say no. He doesn’t stop communicating. He doesn’t decide to cease contact that point. He does the opposite. He disregards that. He doesn’t care. And that is abnormal and that is unnatural. [¶] A normal person when faced with the prospect of potentially having sexual contact with a 15-year-old girl is going to say no. Is going to say you’re too young for this, we can’t do this, no way. He never does that.”

b. Analysis

Defendant claims that there “are three reasons why the trial court had a sua sponte duty to instruct the jury regarding the substantial factor requirement

¹² The jury was also instructed: “The specific intent required for the crime of meeting a minor for a lewd purpose, as charged in Count 2, is the specific intent to expose genitals or pubic or rectal areas or to have the minor expose her genitals or pubic or rectal areas or to engage in lewd and lascivious conduct.”

here.” (Italics omitted.) First, he asserts that “a lay jury can hardly be expected to discover the ‘substantial factor’ requirement on its own.” Second, he argues that it is difficult to discern a person’s motive. Third, he claims that a *sua sponte* duty existed in this case because there was, in his view, little evidence of his motivation.

■ We can find no authority for the proposition that a trial court has a *sua sponte* duty to give a substantial factor instruction. Defendant cites *People v. Sweeney* (2009) 175 Cal.App.4th 210 [95 Cal.Rptr.3d 557], but *Sweeney* actually held that the trial court erred because it failed to instruct on the *causation element* in a sexually violent predator proceeding. (*Id.* at pp. 222–223.) Here, the trial court did not fail to instruct the jury on any of the elements of the offense. It expressly instructed the jury that it could not convict defendant of the offense unless it found that defendant “was motivated by an unnatural or abnormal sexual interest in children.” There is no merit to defendant’s suggestion that *M.S.* provides the necessary authority. *M.S.* was a juvenile case where there was a court trial, and the California Supreme Court said nothing about a trial court’s instructional obligations. The mere fact that the standard CALCRIM instruction for hate crimes now includes a substantial factor instruction does not itself provide authority for the proposition that a *sua sponte* instruction is required. ■ “[J]ury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent.” (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7 [104 Cal.Rptr.2d 582, 18 P.3d 11].)

■ The trial court instructed the jury on the motivated by element of the offense. Defendant’s claim of error is solely that the court did not explain to the jury that “motivated by” meant that “an unnatural or abnormal sexual interest in children” was a substantial factor, that is a *more than trivial or remote factor*, in the commission of the proscribed conduct. The trial court did not provide a definition of “motivated by” but simply instructed the jury on the “motivated by” element using the language of the statute. Statutory language “is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language.’” (*People v. Estrada* (1995) 11 Cal.4th 568, 574 [46 Cal.Rptr.2d 586, 904 P.2d 1197].) A trial court is obligated to define a term only if the “‘statutory term “does not have a plain, unambiguous meaning,” has a “particular and restricted meaning” [citation], or has a technical meaning peculiar to the law or an area of law [citation].’ [Citation.] ‘A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning.’” (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012 [44 Cal.Rptr.3d 632, 136 P.3d 168].) “The law is settled that when terms have no technical meaning peculiar to the law, but are commonly

understood by those familiar with the English language, instructions as to their meaning are not required.” (*People v. Anderson* (1966) 64 Cal.2d 633, 639–640 [51 Cal.Rptr. 238, 414 P.2d 366] (*Anderson*).)

The phrase “motivated by” as used in section 288.4 has a “commonly understood” “nonlegal” meaning. The common meaning of the word “motive,” the root of motivated, is “something (as a need or desire) *that causes a person to act.*” (Merriam-Webster’s Collegiate Dict., *supra*, p. 759, italics added.) Given this common understanding of the phrase “motivated by,” the trial court’s instruction that the jury was required to find that, at the time of the conduct, defendant was “motivated by an unnatural or abnormal sexual interest in children” fully informed the jury of the need for proof that the motivation “cause[d]” the conduct. “Defendant’s contention essentially is that the instructions given needed amplification or explanation; but since he did not request such amplification or explanation, error cannot now be predicated upon the trial court’s failure to give them on its own motion.” (*Anderson*, *supra*, 64 Cal.2d at p. 639.)

Because “motivated by” is a commonly understood phrase that is naturally understood to require causation, a lay jury would readily understand that the motivated by element required that the motivation be *a cause* of defendant’s conduct. The fact that it may be difficult to determine a person’s motive does not support a claim that a substantial factor instruction was required. The jury was instructed on the need for proof beyond a reasonable doubt that defendant harbored the requisite motive. A substantial factor instruction would have made no difference in discerning whether defendant harbored such a motive because the instructions already informed the jury of the need for a causation finding. Finally, as we have already determined, the jury was presented with substantial evidence supporting the motivated by element of the offense. Since defendant did not request a substantial factor instruction and the court had no *sua sponte* duty to give such an instruction, the trial court did not err in failing to so instruct the jury.¹³

B. Entrapment

Defendant claims that the trial court prejudicially erred in refusing to instruct on entrapment.

¹³ We note that a substantial factor instruction appears to offer no potential benefit to a defendant. The plain meaning of the motivated by instruction given by the court required the jury to find that the conduct was *caused by* the motivation. A substantial factor instruction would have told the jury that the motivation needed to be only *a more than trivial factor* in causing the conduct. Such an instruction would appear to benefit the prosecution rather than the defense.

The prosecution made an in limine motion seeking a pretrial Evidence Code section 402 hearing on the sufficiency of defendant's entrapment defense to merit instructions. The court deferred this motion until after it had heard the evidence. After Hoskins testified, defendant's trial counsel told the court that she wished to present an entrapment defense. The prosecutor asserted that there was not substantial evidence to support an entrapment defense. The court found that entrapment was not "supported by any level of substantial evidence" and denied the defense request.

■ Entrapment instructions were required "if, but only if, substantial evidence supported the defense." (*People v. Watson* (2000) 22 Cal.4th 220, 222 [91 Cal.Rptr.2d 822, 990 P.2d 1031] (*Watson*).) The inquiry "focuses on the police conduct and is objective." (*Id.* at p. 223.) "Entrapment is established if the law enforcement conduct is likely to induce a *normally law-abiding person* to commit the offense. [Citation.] '[S]uch a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect—for example, a decoy program—is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.' " (*Ibid.*) Thus, there are "two guiding principles." (*Ibid.*) "First, if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent, entrapment will be established.' " (*Ibid.*) "Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person will likewise constitute entrapment. Such conduct would include, for example, a guarantee that the act is not illegal or the offense will go undetected, an offer of exorbitant consideration, or any similar enticement.' " (*Ibid.*)

We examine Hoskins's conduct to determine whether he merely offered defendant an "'opportunity to act unlawfully,' " which a normally law-abiding person would resist, or instead used "'overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts'" to apply "'pressure'" that would be "'likely to induce a normally law-abiding person to commit the crime.' " (*Watson, supra*, 22 Cal.4th at p. 223.)

Hoskins initially posted an advertisement that purported to be from an attractive female seeking a one-time sexual partner for that day. When defendant responded to the advertisement, Hoskins immediately identified the

female as a 15-year-old girl.¹⁴ Defendant responded with an e-mail that suggested “Maria” do something else besides “hookup,” so Hoskins immediately terminated the communications. It was defendant who continued to monitor the advertisement, reinitiated contact, and provided his e-mail address to “Maria” so that they could maintain contact. Hours later, Hoskins sent defendant an e-mail asking if he was “still interested.” In response to defendant’s immediate e-mail seeking the location of “Maria,” Hoskins sought to clarify the nature of defendant’s interest in “Maria.” He did not use any enticing or overbearing language. He first asked: “If you are down and not into games. We both know what this is about.” When defendant immediately responded by seeking to schedule a meeting but without specifying its purpose, Hoskins asked: “Well are you down or do you just want to talk?” Defendant immediately responded: “I’m down. What’s the plan?” The remainder of their lengthy interchange primarily concerned the specifics of what “Maria” would be willing to do. The only possible “enticements” were a request by “Maria” that defendant perform oral sex on her and a statement by “Maria” that she was “loud if it feels good.”

Hoskins’s conduct would not have induced a *normally law-abiding man* to arrange to have sex with a 15-year-old girl. His conduct did nothing more than present defendant with the opportunity to commit the offense. “[A] person who steals when given the opportunity is an opportunistic thief, not a normally law-abiding person.” (*Watson, supra*, 22 Cal.4th at p. 224.) Similarly, a person who arranges to have sex with a child when given the opportunity is an opportunistic sexual predator, not a normally law-abiding person. A normally law-abiding person would not have continued to arrange a “hookup” after Hoskins revealed that “Maria” was a 15-year-old girl. Nothing Hoskins did thereafter would have “‘pressure[d]’ a normally law-abiding man to pursue sex with a 15-year-old girl. An objective examination of Hoskins’s conduct reveals no basis for an entrapment defense.

Defendant contends that when the police conduct is viewed “[i]n the context of a lonely male seeking sexual activity with an adult woman on a Saturday night in Salinas” it was the type of conduct that would induce a normally law-abiding person to commit the offense. He claims that Hoskins’s use of “enticing facts, flattery, a ‘bait and switch’ and sexual language” would have induced a normally law-abiding person to commit the offense. The “enticing facts” that defendant identifies are: (1) the advertisement’s failure to identify “Maria” as a child and implicit representation that she was an adult; (2) the advertisement’s description of “Maria” as attractive and sexually available; (3) the response from Maria calling defendant “cute” and at the same time identifying herself as a 15-year-old girl; and (4) the subsequent

¹⁴ We do not view as an “overbearing” enticement Hoskins’s statement that defendant was “cute.”

communications about what sex acts would be involved. First, a normally law-abiding man would not have been induced to commit the offense simply because he did not learn that the female was a 15-year-old girl until after he sent a single short e-mail responding to a craigslist advertisement no matter how attractive the advertisement made the girl sound. Nor would he have been enticed to commit a crime as a result of the 15-year-old girl calling him “cute.” Second, a normally law-abiding man would not have initiated further communications with “Maria” about a prospective sexual “hookup” after learning that she was 15 years old. Thus, he would not have engaged in any of the communications regarding sex acts that he claims were so enticing.

Defendant also claims that Hoskins applied “pressure” to persuade him to engage in sexual activity after he suggested that “Maria” do something else. We disagree. After defendant suggested that “Maria” do something other than have a “hookup,” Hoskins terminated the communications. It was defendant who reinitiated the conversation and asked about her “hookup.” When Hoskins later told defendant that the “hookup” had not happened, defendant immediately asked if “Maria” wanted to “see me” and asked about her location. At this point, Hoskins sought to clarify what the nature of their contact would be. He asked if defendant was “down and not into games” and when defendant did not give a straight answer he asked “are you down or do you just want to talk?” A normally law-abiding man would not be pressured into a sexual rendezvous with a 15-year-old girl by her asking him if he wanted to have sex or “just want[ed] to talk.”¹⁵

Finally, defendant suggests that Hoskins enticed him by suggesting that they would not be “caught” and that defendant could protect “Maria” from other more dangerous men. While Hoskins did make comments about “Maria” not wanting to be seen rendezvousing with defendant, such comments would not have led a normally law-abiding man to agree to have sex with a 15-year-old girl. Nor would the comments by Hoskins that there were dangerous people out there. Such comments would have caused a normally law-abiding man to consider contacting the police to alert them to the danger that “Maria” was facing.

There was no evidence that Hoskins engaged in any conduct that could have persuaded a normally law-abiding man to agree to a sexual rendezvous with a 15-year-old girl. Therefore, the trial court did not err in declining to instruct on entrapment.

¹⁵ Defendant claims that Hoskins “made it clear that there would be no further communications if Appellant ‘just want[ed] to talk.’” An objective reading of the emails does not support this interpretation. In any case, a normally law-abiding 30-year-old man would not be enticed to arrange a sexual rendezvous with a 15-year-old stranger simply because it was the only option for continuing to communicate with her.

C. Fines and Fees

Defendant challenges the court's imposition of probation services fees on the grounds that he was not apprised of his right to a hearing on his ability to pay probation fees and that there was not sufficient evidence that he had the ability to pay the probation fees. Defendant did not object to the court's imposition of probation services fees. A defendant who fails to object to the imposition of probation supervision fees forfeits his challenge. (*People v. Aguilar* (2015) 60 Cal.4th 862, 866–869 [182 Cal.Rptr.3d 137, 340 P.3d 366].) Defendant concedes that he forfeited his challenge, but he claims that his trial counsel was prejudicially deficient in failing to object to the imposition of these fees.

To succeed on an appellate claim of ineffective assistance, a defendant must establish that his trial counsel's performance was deficient and that his defense was prejudiced by the deficiency. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218 [233 Cal.Rptr. 404, 729 P.2d 839]; *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 104 S.Ct. 2052].) “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Strickland*, at p. 694.) Whenever counsel’s conduct can be reasonably attributed to sound strategy, a reviewing court will presume that the conduct was the result of a competent tactical decision, and the defendant must overcome that presumption to establish ineffective assistance. (*Id.* at p. 689.)

When the court imposed the probation services fees at the sentencing hearing, it expressly informed defendant that these fees were “subject to a hearing if necessary.” The trial court’s written probation order provided: “PROBATION SERVICE FEES: The defendant is ordered to pay \$864.00 for the cost of preparation of the probation report plus \$81.00 per month as the cost of supervised probation *in accordance with his/her ability to pay*. The defendant is ordered to provide the probation officer with financial information *for evaluation of his/her ability to pay and is ordered to pay the amount probation determines he/she can afford.*” (Underscoring omitted & italics added.) Defendant had testified at trial that he was currently unemployed but had previously been a student in a registered nursing program. One of the conditions of his probation was that he “maintain gainful employment or become enrolled as a full-time student.”

First of all, the court did inform defendant of his right to a hearing on the probation services fees when it told him at the sentencing hearing that these fees were “subject to a hearing” Second, defendant’s trial counsel was not deficient in failing to object on the ground that defendant lacked the

ability to pay the fees. Since the probation order limited defendant's obligation to pay the probation services fees to the amount that he could afford, his trial counsel could have reasonably concluded that there was nothing to be gained by objecting. After all, defendant's probation required him to "maintain gainful employment or become enrolled as a full-time student." If defendant obtained gainful employment, he would be able to pay the fees. If not, his obligation to pay the fees would be limited to the amount he could afford. Under these circumstances, defendant's trial counsel could have reasonably decided that highlighting defendant's current lack of gainful employment might sway the court against granting probation while affording defendant no benefit. Defendant has failed to establish that his trial counsel was deficient in failing to object to the court's imposition of probation services fees.

Defendant also challenges the court's imposition of a \$1,610 section 290.3 fine. Defendant did not object to the court's imposition of this fine, and the Attorney General contends that he forfeited this challenge. However, as defendant's appellate challenge is to the court's *statutory authority* to impose *this amount*, he has not forfeited this challenge. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 823 [76 Cal.Rptr.2d 732].)

■ At the sentencing hearing, the court ordered defendant to "[play a \$1,610 fine pursuant to 290.3. That includes the \$300 restitution fine." The court's written order of probation imposed a \$1,610 section 290.3 fine, which it stated "includes \$300.00 SRF." Neither at the sentencing hearing nor in the written order did the court identify the specific statutory bases for the \$1,610 amount of the fine. Section 290.3 authorizes the court to impose a \$300 fine. (§ 290.3, subd. (a).)

■ The Attorney General concedes that the trial court failed to identify any statutory authority for the imposition of a \$1,610 fine, and she also concedes that even her search for statutory authority for increasing the amount of a \$300 section 290.3 fine leaves \$50 of that amount "unexplained." "'Although we recognize that a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts.'" (*People v. Eddards* (2008) 162 Cal.App.4th 712, 717 [75 Cal.Rptr.3d 924].) Trial courts are required to "specify[] the statutory bases of all fees, fines, and penalties" imposed on a defendant. (*Id.* at p. 718.) Since the record lacks any indication of the statutory authority for the court's imposition of a section 290.3 fine in the amount of \$1,610, we will remand the matter to the trial court for it to detail the statutory bases for the amount of the section 290.3 fine and to correct the amount if necessary.

IV. Disposition

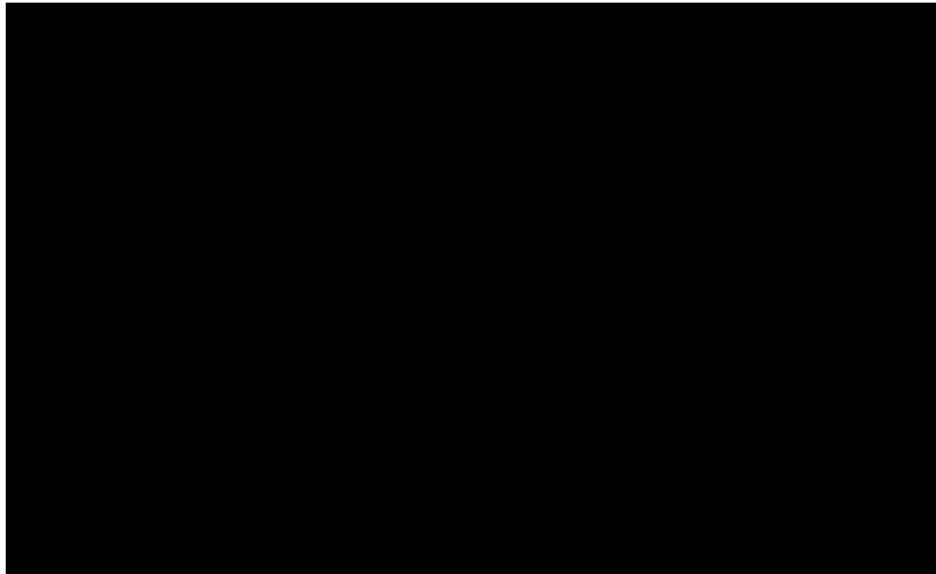
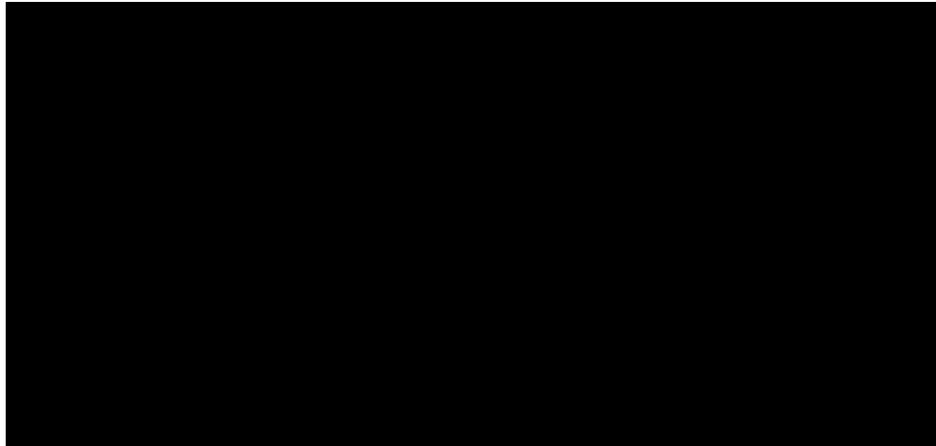
The probation order is reversed and remanded to the trial court with directions to prepare an amended probation order identifying the statutory bases for the court's calculation of the amount of the section 290.3 fine and correcting the amount of that fine if the \$1,610 amount is not statutorily authorized.

Bamattre-Manoukian, Acting P. J., and Grover, J., concurred.

Appellant's petition for review by the Supreme Court was denied November 9, 2016, S237184.

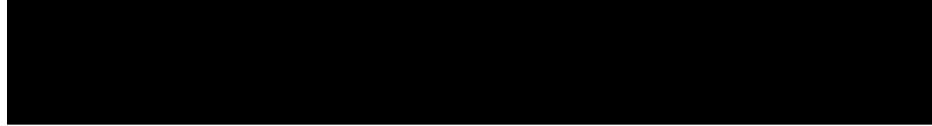
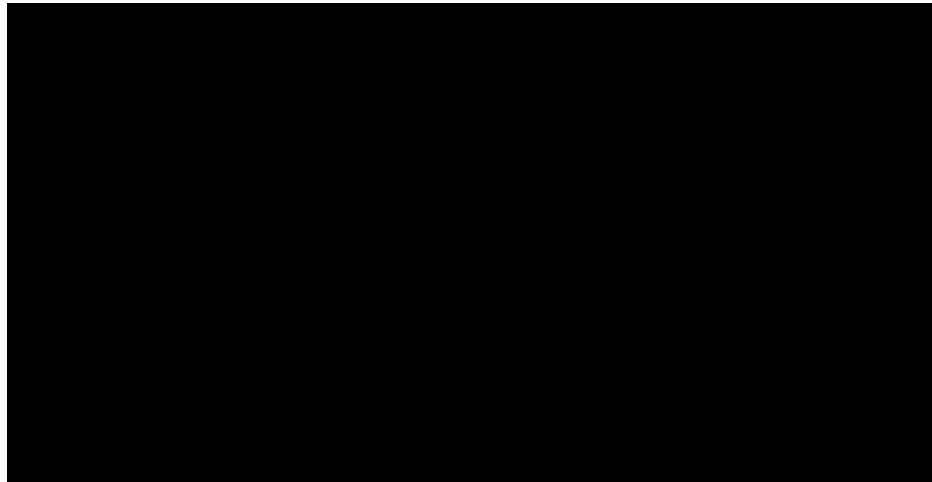
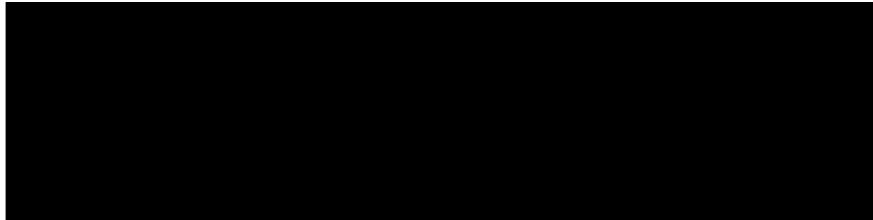
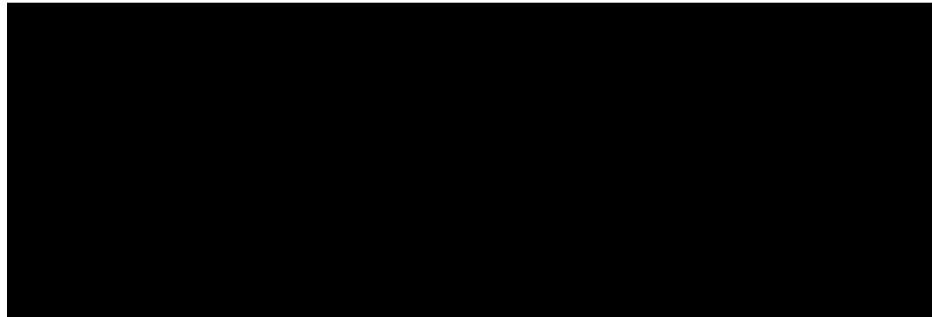
[No. B258806. Second Dist., Div. Eight. July 12, 2016.]

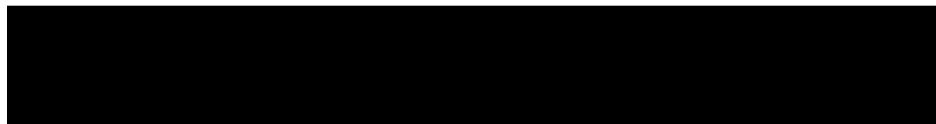
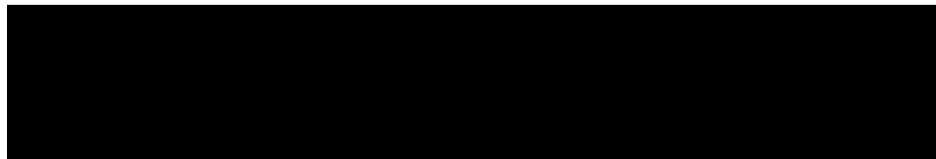
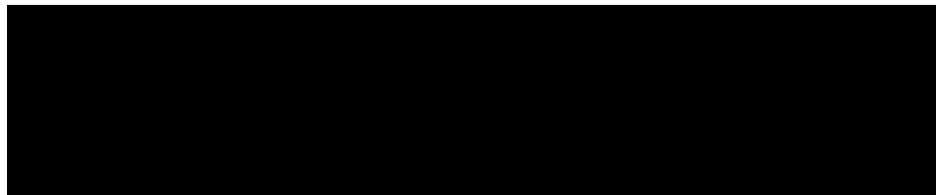
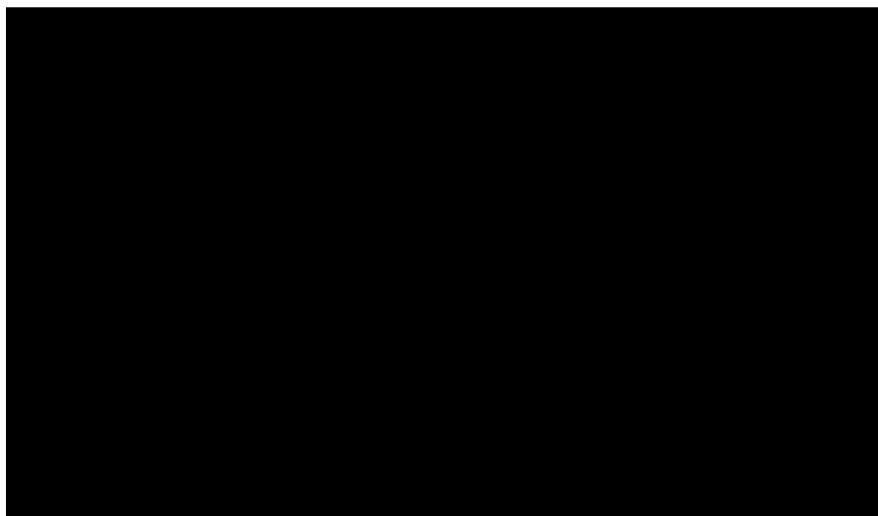
THE KIND AND COMPASSIONATE et al., Plaintiffs and Appellants, v.
CITY OF LONG BEACH et al., Defendants and Respondents.

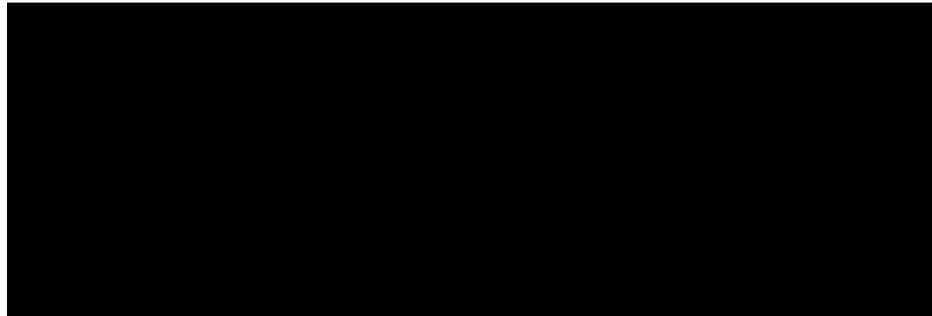












COUNSEL

Matthew Pappas; Rallo Law Firm, Arthur J. Travieso and Amy L. Bingham for Plaintiffs and Appellants.

Charles Parkin, City Attorney, and Theodore B. Zinger, Deputy City Attorney, for Defendants and Respondents.

OPINION**GRIMES, J.—****SUMMARY**

This is an appeal from a judgment dismissing a complaint after the trial court sustained a demurrer. The court granted leave to amend, but plaintiffs never did.

Plaintiffs are two medical cannabis “collectives/dispensaries” (The Kind and Compassionate, and Final Cut) and three medical cannabis patients, who are members of The Kind and Compassionate collective. Plaintiffs alleged 11 causes of action against the City of Long Beach (city) and/or three of its

employees or officers (Eric Sund, Robert Shannon and Robert Foster), all arising from the city's enforcement of municipal ordinances that first regulated and then entirely prohibited the operation of medical marijuana dispensaries within the city's borders. The principal claim in the complaint is that defendants have discriminated against plaintiffs by enacting and enforcing these ordinances, which plaintiffs assert are facially discriminatory and have a disparate and adverse impact on persons with disabilities. Plaintiffs also assert various constitutional violations and tort claims.

We affirm the trial court's judgment dismissing the complaint.

FACTS AND LEGAL BACKGROUND

Before we turn to the facts alleged in the complaint, we briefly note several established principles applicable to medical marijuana dispensaries or collectives.

First, federal law prohibits the possession, distribution and manufacture of marijuana, finding it to be "a drug with 'no currently accepted medical use in treatment in the United States' [citation], and there is no medical necessity exception to prosecution and conviction under the federal act [citation].'" (*City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 738–739 [156 Cal.Rptr.3d 409, 300 P.3d 494] (*Riverside*).)

Second, California law also imposes sanctions on marijuana possession, cultivation, and related activities. In California, however, voters and the Legislature have adopted limited exceptions to those sanctions where marijuana is possessed, cultivated, distributed and transported for medical purposes. (*Riverside*, *supra*, 56 Cal.4th at p. 739.) These statutes are the Compassionate Use Act (CUA; Health & Saf. Code, § 11362.5), adopted by the voters in 1996, and the Medical Marijuana Program (MMP; § 11362.7 et seq.), enacted in 2004. "Among other things, these statutes exempt the 'collective[] or cooperative[] . . . cultiva[tion]' of medical marijuana by qualified patients and their designated caregivers from prosecution or abatement under specified state criminal and nuisance laws that would otherwise prohibit those activities." (*Riverside*, at p. 737.)

Third, the CUA and the MMP "have no effect on the federal enforceability of the [Controlled Substances Act (21 U.S.C. § 801 et seq.)] in California." (*Riverside*, *supra*, 56 Cal.4th at p. 740.) The CUA and the MMP have a "narrow reach" (*Riverside*, at p. 745), providing only "a limited immunity from specified state marijuana laws" (*id.* at p. 748).

Fourth, "the CUA and the MMP do not expressly or impliedly preempt [a city's] zoning provisions declaring a medical marijuana dispensary . . . to be

a prohibited use, and a public nuisance, anywhere within the city limits.” (*Riverside, supra*, 56 Cal.4th at p. 752; *id.* at p. 754, fn. 8 [“the CUA and the MMP, by their substantive terms, grant limited exemptions from certain *state* criminal and nuisance laws, but they do not expressly or impliedly *restrict* the authority of local jurisdictions to decide whether local land may be used to operate medical marijuana facilities”].)

Fifth, the Ninth Circuit has held that “medical marijuana use is not protected by the ADA [(Americans with Disabilities Act (42 U.S.C. § 12101 et seq.))],” because the ADA “defines ‘illegal drug use’ by reference to federal, rather than state, law, and federal law does not authorize the plaintiffs’ medical marijuana use.” (*James v. City of Costa Mesa* (9th Cir. 2012) 700 F.3d 394, 397.)

With this background in mind, we turn to the complaint.

1. *The Complaint*

The complaint stated the intention to seek class certification of a class of patients and a class of collectives. The patient class members suffer from physical or mental disabilities, serious illnesses or permanent injury that limits a major life activity; are, or were, members of medical marijuana patient collectives; and qualify for protection under federal and state laws applicable to persons with disabilities. Each member of the collective class is a nonprofit group consisting of member patients, or authorized caregivers of patients, who associate together to form the members of the collective class “for the purpose of mitigating their respective disabilities/conditions.”

The 43-page complaint includes numerous conclusions of fact and law that we do not, under principles of appellate review, assume to be true. The following summary includes the pertinent factual allegations.

The complaint recited facts concerning voter approval of the CUA in 1996 and the MMP in 2003; the city’s passage on March 17, 2010, of an ordinance regulating medical marijuana patient collectives (Long Beach Mun. Code, former ch. 5.87; hereafter chapter 5.87 or the March 2010 ordinance); comments by city officials stating their views on the ordinance and medical marijuana collectives; and the city’s implementation, “between March 17, 2010 and June 1, 2010,” of a permit lottery and permit fee schedule requiring large application and annual permit fees.

Plaintiffs alleged that pharmacies, medical clinics, medical treatment programs, methadone clinics and organic nutritional providers are “comparable

uses” to medical marijuana collectives. The complaint alleges these comparable uses are not subject to various restrictions (such as location or spacing requirements); that various fees charged to the collectives were substantially higher than fees paid by comparable uses; and that additional taxes imposed on collectives in December 2010 were not charged to comparable uses.

The complaint described litigation initiated on August 30, 2010, that challenged the enforcement of chapter 5.87 on constitutional grounds. (This litigation culminated in an appellate decision, issued on Oct. 4, 2011, holding that the permit provisions of ch. 5.87, including the fees and lottery system, were preempted by federal law, because those provisions authorized conduct that federal law forbids. The Supreme Court granted a petition for review, but later dismissed review as moot after the city repealed ch. 5.87 and replaced it with an ordinance imposing a complete ban on medical marijuana collectives within the city (chapter 5.89 or the February 2012 ban). (See *Pack v. Superior Court** (Cal. App.).)

Between August 2010 and October 5, 2011, defendants and other city and police officers issued “multiple administrative citations” to plaintiff class members, charging violations of chapter 5.87 and ordering them to pay fines. During the same period, city employees “contacted and threatened the landlords” of properties leased by class members and issued multiple administrative citations to the landlords; threatened class members “with citations, fines, arrest, and harassment” based on “discriminatory animus” toward medical marijuana patients or based on alleged violations of chapter 5.87; and “issued at least 150 criminal citations and charged patients with violation” of chapter 5.87.

The city has continued to enforce chapter 5.89 through “warrantless and/or improper raids” of the collective class members, “arrest, booking, and charging of patients,” “multiple citations,” “harassment” of patient class members based on chapter 5.89, and “seizure of property and medication.”

The complaint alleged that the enactment and enforcement of both chapter 5.87 and the February 2012 ban violated six statutes: Civil Code section 54 (the Disabled Persons Act or DPA); Civil Code section 51 (the Unruh Civil Rights Act); the ADA; section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794); Civil Code section 52.1 (the Bane Act); and the Federal Civil Rights Act of 1871 (42 U.S.C. § 1983) (section 1983). As to those claims, the complaint further alleged as follows.

*Reporter’s Note: Review granted on January 18, 2012. On August 22, 2012, review was dismissed.

Before May 2, 2010, medical marijuana collectives opened in the city and operated “with a business license under various categories.” The city enacted chapter 5.87, requiring any existing collective to immediately cease operation, in violation of provisions protecting their “vested rights.” Chapter 5.87 made lawful businesses illegal without a hearing in violation of various enumerated federal and state constitutional rights.

Each of the members of the collective class applied for permits and complied with all requirements in chapter 5.87, but the city failed to notify any of them whether their applications had been approved or denied. Between May 2010 and October 2010, each of the collective class members established or reestablished leases, and expended money, executed contracts, and paid for improvements based on the express provisions of the ordinance.

The complaint alleged that in or after September 2010, the city conducted the permit lottery, and on October 12, 2010, “each of the . . . collective class members were notified they had prevailed in [the city’s] marijuana permit lottery.” Between October 12, 2010 and January 11, 2012, each of the class members “expended money, executed contracts, and paid for improvements based on their selection in the marijuana permit lottery.”

The collective class members “were legally established” before enactment of chapter 5.89 banning the operation of medical marijuana dispensaries on February 24, 2012, and they relied on provisions of the city’s municipal code protecting their vested rights. The city failed to comply with state and city charter public notice and hearing requirements before enactment of chapter 5.89. The collective class members “had real property rights and interests, including but not limited to leaseholds, that were effectively taken away” by chapter 5.89, in violation of their constitutional rights.

Based on the allegations summarized above, plaintiffs alleged causes of action for violation of the DPA, the Unruh Civil Rights Act, the ADA, and the Rehabilitation Act (first through fourth causes of action). Plaintiffs further alleged constitutional violations remediable under the Bane Act and section 1983 (fifth and sixth causes of action); tortious interference with business relations (against defendants Sund and Shannon, eighth cause of action); intentional infliction of emotional distress and civil conspiracy (against the individual defendants, ninth and tenth causes of action). (There was no seventh cause of action.)

Finally, plaintiffs sought declaratory and injunctive relief (11th and 12th causes of action), declaring that chapter 5.89 banning medical marijuana dispensaries as a public nuisance is illegal, void and unenforceable, and prohibiting enforcement of chapter 5.89.

2. *The Trial Court's Rulings*

On January 14, 2014, the court sustained the city's demurrer, with leave to amend and gave plaintiffs 30 days to file a second amended complaint. Plaintiffs did not file an amended complaint, and the city filed a motion to dismiss for failure to amend. The motion was not heard until July 21, 2014. Counsel for plaintiffs did not appear, and the court dismissed the case. On October 22, 2014, the court entered a judgment of dismissal.

Plaintiffs filed a notice of appeal on September 8, 2014. We deem the appeal to have been taken from the judgment of dismissal.

DISCUSSION

1. *Standard of Review*

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].)

2. *Plaintiffs' Causes of Action*

In their opening brief, plaintiffs contend there was no basis in law for the trial court's ruling sustaining defendants' demurrer. In their reply brief, with new attorneys, plaintiffs tell us the previous attorney "most egregiously failed to file the Second Amended Complaint," and that plaintiffs are "able and willing to amend the complaint to cure the defects." But their briefs are entirely silent on how the complaint could be amended to state a legally sufficient claim as to any of their causes of action.

At oral argument, counsel stated that plaintiffs did not wish to relitigate the issues on demurrer, effectively conceding that the trial court correctly sustained the city's demurrer to the first amended complaint. Instead, counsel asserted this court should provide a remedy for previous counsel's negligent failure to file a second amended complaint. That, of course, is not within the scope of appellate review of the trial court's dismissal order. Where there is no error by the trial court, there is no basis for reversal of the judgment of dismissal.

To avoid any ambiguity in the appellate record, we explain *post*, despite counsel's concession, why the trial court's rulings were correct. Because the

trial court properly granted the demurrer to each cause of action in the operative first amended complaint, and plaintiffs have not demonstrated any reasonable possibility that the defects can be cured by amendment, the judgment dismissing the complaint must be affirmed.

We note one preliminary point. The city contends that plaintiffs' state law claims are barred by failure to comply with the presuit filing requirements of the Government Claims Act (Gov. Code, § 810 et seq.). (Compliance is not required for federal civil rights claims.) The city is correct, but only to the extent the complaint alleges state law claims for damages based on the alleged invalidity of chapter 5.89 (the February 2012 ban). As to those claims—which are not viable in any event, as will be seen from the discussion *post*—plaintiffs did not comply with the presuit claims presentation requirement of the Government Claims Act. Counsel for plaintiffs filed a claim with the city dated October 15, 2011 (and the city attorney rejected the claim on Nov. 8, 2011). The claim letter predated the enactment of chapter 5.89, and plaintiffs do not identify any other presuit claim. However, the city's other contentions based on Government Claims Act requirements must be rejected, as explained in the margin.¹

¹ The Government Claims Act requires a plaintiff to file a timely claim for money or damages with the public entity as a condition precedent to the filing of a lawsuit. Failure to do so bars the lawsuit, “‘even in face of the public entity’s actual knowledge of the circumstances surrounding the claim.’” (*California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1591 [126 Cal.Rptr.3d 160] (*California Restaurant Management*).) “Claims for personal injury must be presented not later than six months after the accrual of the cause of action, and claims relating to any other cause of action must be filed within one year of the accrual of the cause of action.” (*Ibid.*, citing Gov. Code, § 911.2, subd. (a).) The date of accrual is the date “that would pertain under the statute of limitations applicable to a dispute between private litigants.” (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208–209 [64 Cal.Rptr.3d 210, 164 P.3d 630].)

The city contends that the October 15, 2011 claim letter filed by counsel for plaintiffs was untimely, apparently on the ground that their causes of action accrued when chapter 5.87 became effective in 2010, and because plaintiffs alleged in their complaint that the city began enforcing chapter 5.87 on August 30, 2010. However, tort claims for intentional infliction of emotional distress, or interference with contract, or Bane Act violations, would accrue on the date on which a specific incident occurred—not “when Chapter 5.87 became effective in 2010.” While some of the incidents—none of which, as we discuss *post*, are sufficiently alleged—may have occurred more than six months before the claim was filed, others would have been timely. Thus the state causes of action cannot be dismissed on this basis.

The city also observes that the three plaintiffs named in the initial complaint—The Kind and Compassionate, Final Cut, and Lawrence King—were not among the claimants named in the October 15, 2011 claim letter. However, the claim letter specified the intention to sue as a class, and included among those who would be suing “all patient members of any and all patient collectives that were subjected to closure, raid, citation, harassment and/or other action . . . between August 30, 2010 and October 15, 2011.” While ordinarily a claimant must file his or her own claim, that is not so in the case of a putative class action lawsuit, “provided the filed claim is sufficient to satisfy the statutory purposes.” (*California Restaurant*

a. *The discrimination claims*

■ The bulk of plaintiffs' 43-page opening brief is devoted to its assertions that the city ordinances regulating, and then banning medical marijuana dispensaries discriminate against persons with disabilities. This claim has no merit, and the trial court properly sustained the city's demurrer to plaintiffs' causes of action for violations of the DPA, the Unruh Civil Rights Act, the ADA, and the Rehabilitation Act.

■ Our conclusion is controlled by now well-established principles: “[The CUA and the MMP] remove state-level criminal and civil sanctions from specified medical marijuana activities, but they do not establish a comprehensive state system of legalized medical marijuana; or grant a ‘right’ of convenient access to marijuana for medicinal use; or override the zoning, licensing, and police powers of local jurisdictions; or mandate local accommodation of medical marijuana cooperatives, collectives, or dispensaries.” (*Riverside, supra*, 56 Cal.4th at pp. 762–763; see also *Safe Life Caregivers v. City of Los Angeles* (2016) 243 Cal.App.4th 1029, 1048 [197 Cal.Rptr.3d 524] [“[i]t is too late in the day . . . to argue that the CUA and MMP[] grant a statutory right to use and/or collectively cultivate medical marijuana”]; *Conejo Wellness Center, Inc. v. City of Agoura Hills* (2013) 214 Cal.App.4th 1534, 1553 [154 Cal.Rptr.3d 850] (*Conejo Wellness Center*) [neither the CUA nor the MMP creates “a state right to cultivate, distribute, or otherwise obtain marijuana collectively, and thereafter to possess and use it, for medical purposes”].)

Plaintiffs argue at great length that *Riverside* did not involve discrimination claims, and they “disagree” with the principle that the CUA and the MMP do not confer a right to use and distribute marijuana. Our Supreme Court in *Riverside* definitively held that neither the CUA nor the MMP grant a “‘right’ of convenient access to marijuana for medicinal use.” (*Riverside, supra*, 56 Cal.4th at p. 762.) That being so, municipal regulation of, and bans on, medical marijuana dispensaries cannot operate to discriminate against persons with disabilities, because those persons have no right of convenient access to medicinal marijuana in the first place.

Management, supra, 195 Cal.App.4th at p. 1592.) The city does not mention this principle, or explain why it does not apply here.

Finally, the city contends that even if the claim was presented timely, the causes of action for intentional infliction of emotional distress and conspiracy were not reflected in the claim. But the cases the city cites to support this contention stand for the principle that a complaint “is vulnerable to a demurrer if it alleges a factual basis for recovery which is not fairly reflected in the written claim.” (*Donohue v. State of California* (1986) 178 Cal.App.3d 795, 802 [224 Cal.Rptr. 57].) While we conclude *post* that plaintiffs do not sufficiently allege causes of action for intentional infliction of emotional distress and conspiracy, the claim letter alleges the same facts plaintiffs allege in their complaint (e.g., “incidents of harassment, arrest, citation, attack,” and so on).

■ In addition to that fundamental point, neither the DPA nor the Unruh Civil Rights Act has any application to plaintiffs' desire to use, sell, or have convenient access to medicinal marijuana. The DPA gives individuals with disabilities "the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places." (Civ. Code, § 54, subd. (a).) The DPA does not give them the right to convenient access to marijuana. The Unruh Civil Rights Act entitles all persons, including those with disabilities, to "full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).) It does not entitle anyone to convenient access to medicinal marijuana.

The cited sections of the DPA and the Unruh Civil Rights Act both contain subdivisions stating in substance that "[a] violation of the right of an individual under the [ADA] also constitutes a violation of this section." (Civ. Code, § 54, subd. (c); see § 51, subd. (f).) This does not assist plaintiffs either, because medical marijuana use is not protected by the ADA. Even as to plaintiffs "who face debilitating pain," Congress "has made clear . . . that the ADA defines 'illegal drug use' by reference to federal, rather than state, law, and federal law does not authorize the plaintiffs' medical marijuana use." (*James v. City of Costa Mesa, supra*, 700 F.3d at p. 397.)

■ This disposes of plaintiffs' discrimination claims under the DPA, the Unruh Civil Rights Act and the ADA. That leaves their claim under the Rehabilitation Act of 1973, which protects qualified individuals with disabilities from discrimination under, or the denial of the benefits of, "any program or activity receiving Federal financial assistance." (29 U.S.C. § 794(a).) Except for an allegation that the city "receives federal funding," the complaint fails to state any facts supporting the claim. The claim fails on the same basis as plaintiffs' other disability discrimination claims: there is no right to convenient access to marijuana. (See also *Assenberg v. Anacortes Housing Authority* (9th Cir. 2008) 268 Fed. Appx. 643, 644 [affirming eviction based on illegal drug use and rejecting medical necessity defense by medical marijuana user; "[t]he Fair Housing Act, [ADA], and Rehabilitation Act all expressly exclude illegal drug use"].)

b. *Claims of constitutional violations and state tort claims*

i. *The Bane Act*

■ The Bane Act permits a civil action for damages "for 'certain misconduct that interferes with' federal or state laws, if accompanied by

threats, intimidation, or coercion, and whether or not state action is involved.” (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 843 [11 Cal.Rptr.3d 692, 87 P.3d 1].)

The complaint alleges that, between August 2010 and October 5, 2011, city employees “contacted and threatened the landlords” of property plaintiffs leased and issued administrative citations to the landlords; “threatened each of the [patient class member] plaintiffs with administrative action and criminal arrest” under chapter 5.87; and “threatened the [patient class] members . . . with citations, fines, arrest, and harassment.” Plaintiffs allege that the “threatening, intimidating, and/or coercive enforcement actions complained of herein” have interfered with their rights under the California Constitution (art. 1, §§ 3, 7, 13, 17, and 19) and the Fourth, Fifth, Sixth, Eighth, and 14th Amendments to the federal Constitution. (The California provisions involve open meetings, due process and equal protection, search and seizure, excessive fines, and eminent domain.)

We see no error in sustaining the city’s demurrer to this cause of action. Simply put, there is no federal or state law granting plaintiffs the right to lease property to operate a marijuana collective, so defendants could not have interfered with any such right.

Plaintiffs’ briefs on appeal shed no light on their Bane Act claim. Indeed, the only reference in their opening brief to claims other than discrimination claims is contained in a single paragraph. Plaintiffs refer to their causes of action for “inverse condemnation as well as various other claims,” arguing that “[t]he constitutional violations based on [the Bane Act] as well as 42 U.S.C. § 1983 are pled with factual sufficiency showing improper taking.” They are not and they do not.

ii. *Section 1983*

■ Section 1983 provides redress for the deprivation, under color of law, of any rights, privileges or immunities secured by the Constitution and laws. The complaint alleges the enforcement of the city’s marijuana ordinances deprived class members of federal constitutional rights (Fourth, Fifth and 14th Amendments) and “rights . . . secured by the California constitution under color of an invalid law.”

■ Plaintiffs never had a vested property right to operate a medical marijuana dispensary in the city. The city asserted in the trial court and on appeal that the city’s zoning code is drafted in a permissive fashion, so that any use not enumerated in the municipal code is presumptively prohibited. (Cf. *Conejo Wellness Center, supra*, 214 Cal.App.4th at p. 1562 [the plaintiff’s operation of a collective medical marijuana dispensary “was always

unlawful: first, as a use not expressly permitted by the [municipal code], and later, as a use expressly banned by the [municipal code]”; the plaintiff was “therefore not entitled to the constitutional protections afforded property owners or lessees engaged in lawful existing nonconforming uses”]; *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418, 433 [83 Cal.Rptr.3d 1] [“where a particular use of land is not expressly enumerated in a city’s municipal code as constituting a *permissible* use, it follows that such use is *impermissible*”].)

Plaintiffs made no effort in the trial court or on appeal to explain why this principle does not or should not apply in this case. Nor do they dispute the city’s assertion that it never issued a permit to plaintiffs to operate a medical marijuana dispensary in the city. (Cf. *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791 [132 Cal.Rptr. 386, 553 P.2d 546] [“It has long been the rule in this state . . . that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit.” (italics added)].)

In the absence of factual allegations that would establish a vested right, at any time, to operate a marijuana dispensary, plaintiffs cannot state a claim under section 1983 for deprivation of vested property rights.

iii. Other state law tort claims

The complaint alleged three state law causes of action against the individual defendants: tortious interference with business relations (against defendants Sund and Shannon); intentional infliction of emotional distress; and civil conspiracy. The complaint does not state facts sufficient to support any of these claims.

■ To state a claim for intentional interference with contractual relations, a plaintiff must plead “ ‘(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.’ ” (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55 [77 Cal.Rptr.2d 709, 960 P.2d 513].)

The complaint alleges that collective class members had “lease and/or rental agreements for real property” and “had developed business relationships with property owners and/or managers related to their leases.” Between August 2010 and February 14, 2012, defendants Sund and Shannon “contacted and threatened the landlords and/or property managers . . . to harm

and/or terminate the existing business relationships.” During the same period, defendant Sund “made private statements that were false to people who had established business relationships with” the collective class members “to harm and/or terminate the business relationships.”

The complaint fails to identify any lease agreement, fails to identify the date of any “contact[] and threat[],” fails to describe the nature of the contact or threat, fails to allege any actual breach or disruption of a lease agreement, and fails to describe how or what damage ensued. Accordingly, the trial court’s ruling sustaining defendants’ demurrer was proper.

■ Plaintiffs’ cause of action for intentional infliction of emotional distress is equally deficient. That cause of action requires, among other things, extreme and outrageous conduct causing the plaintiff to suffer severe or extreme emotional distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050 [95 Cal.Rptr.3d 636, 209 P.3d 963].) “A defendant’s conduct is ‘outrageous’ when it is so ‘‘extreme as to exceed all bounds of that usually tolerated in a civilized community.’” (Id. at pp. 1050–1051.) Liability “‘does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’ [Citation.]” (Id. at p. 1051.) “Severe emotional distress means ‘‘emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.’” (Ibid.)

Here, the complaint alleges the individual defendants participated in “warrantless police raids of patient collectives” and seized property pursuant to “invalid [provisions of chapter 5.87]” to the detriment of patients and caregivers in the city.

Once again, the bare allegations of “police raids” are entirely conclusory, with no facts to show who did what to whom and when; that is, no facts showing conduct exceeding the bounds tolerated in a civilized community. (*Hughes v. Pair, supra*, 46 Cal.4th at p. 1051.) The city’s enforcement of its marijuana ordinances does not constitute extreme and outrageous behavior. The trial court properly sustained the demurrer to this claim.

■ Plaintiffs’ claim for civil conspiracy likewise fails. “[T]here is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results from that act” (5 Witkin, Summary of Cal. Law (10th ed. 2010) Torts, § 45, p. 111.) Because, as we have seen, the complaint does not sufficiently allege any tort claims, the cause of action for civil conspiracy cannot stand. And finally, because plaintiffs have stated no viable claims for discrimination, constitutional violations or other tort claims, the trial court properly sustained the city’s demurrer to their causes of action for declaratory and injunctive relief.

In sum, the trial court did not err in sustaining the city's demurrer to the first amended complaint. Nor did it err when it dismissed the action after plaintiffs failed to file a second amended complaint (and failed to appear at the hearing on defendants' motion to dismiss the complaint, which took place some five months after the deadline for amending the complaint).

DISPOSITION

The judgment is affirmed. The city shall recover its costs on appeal.

Rubin, Acting P. J., and Flier, J., concurred.

[No. B266393. Second Dist., Div. Two. Aug. 4, 2016.]

EDWARD J. ROBERTS, Plaintiff and Appellant, v.
UNITED HEALTHCARE SERVICES, INC., Defendant and Respondent.

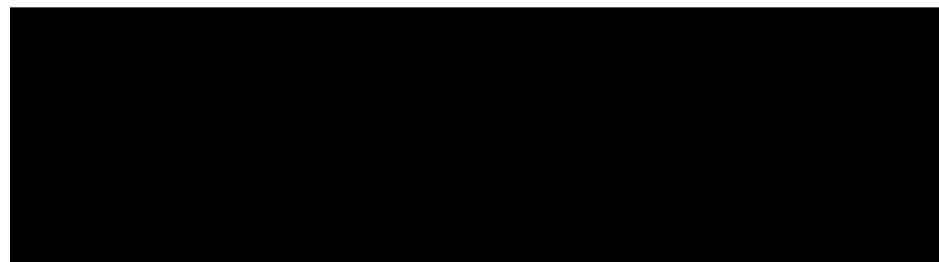
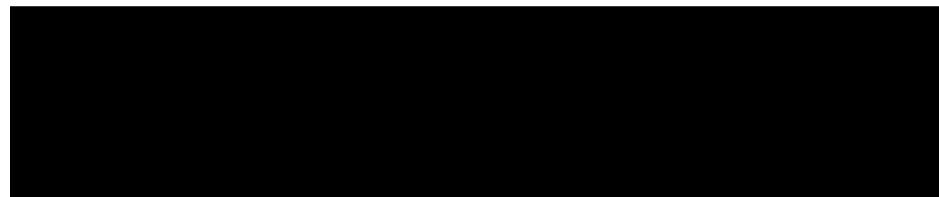
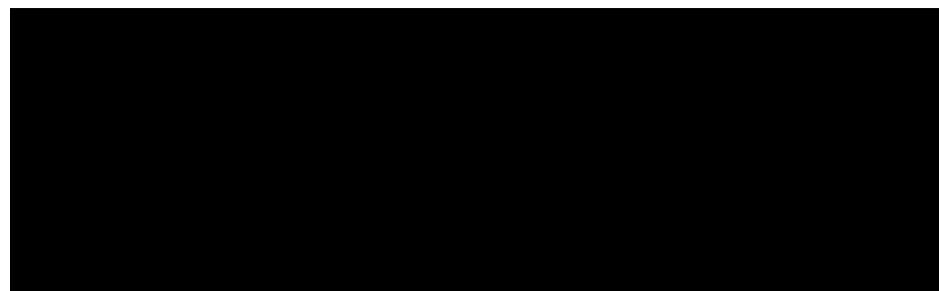
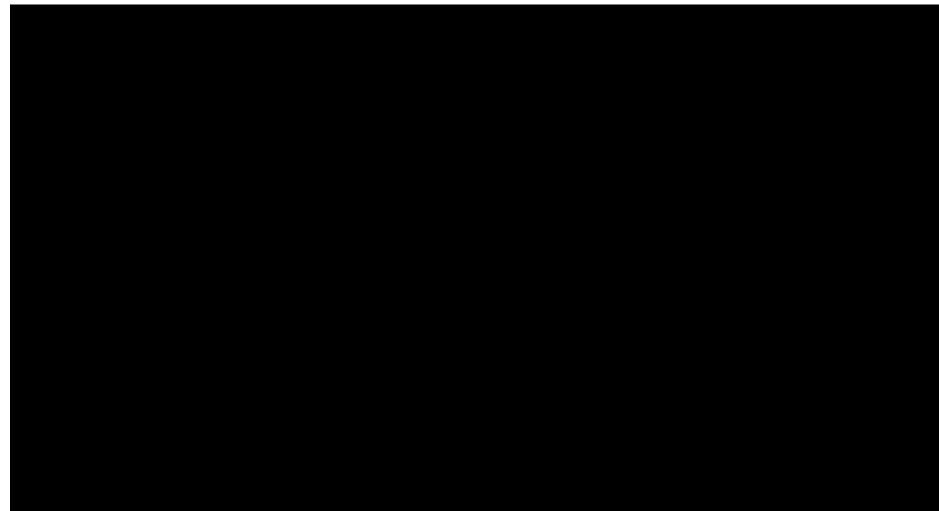
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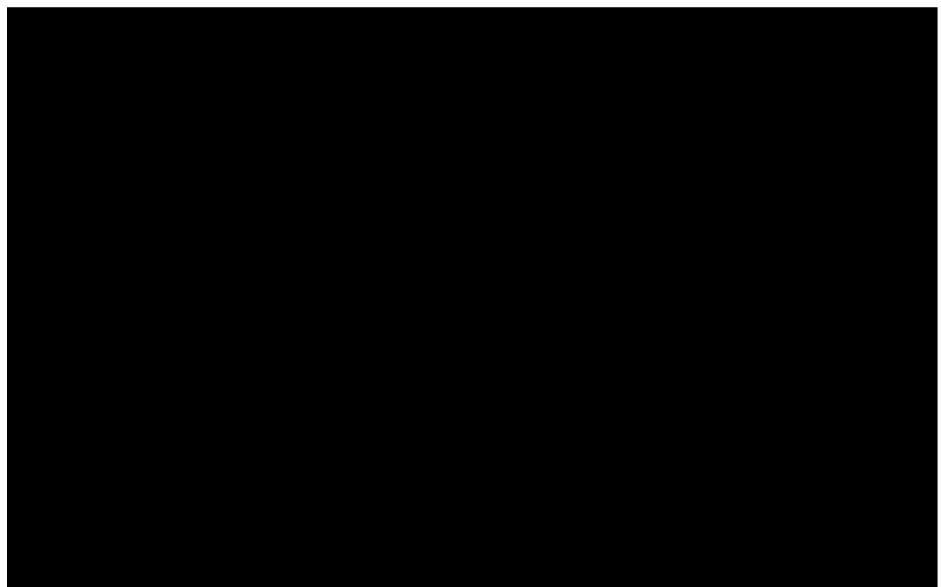
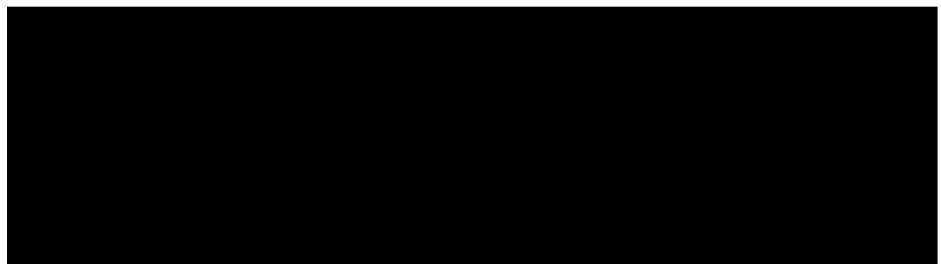
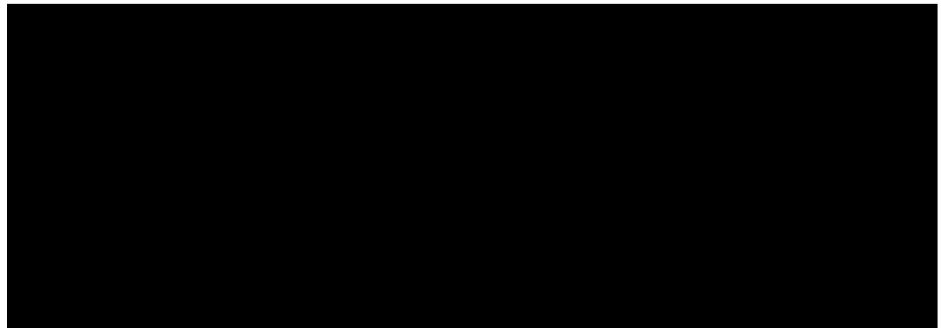
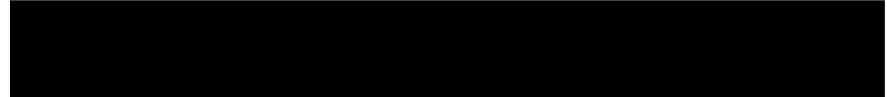
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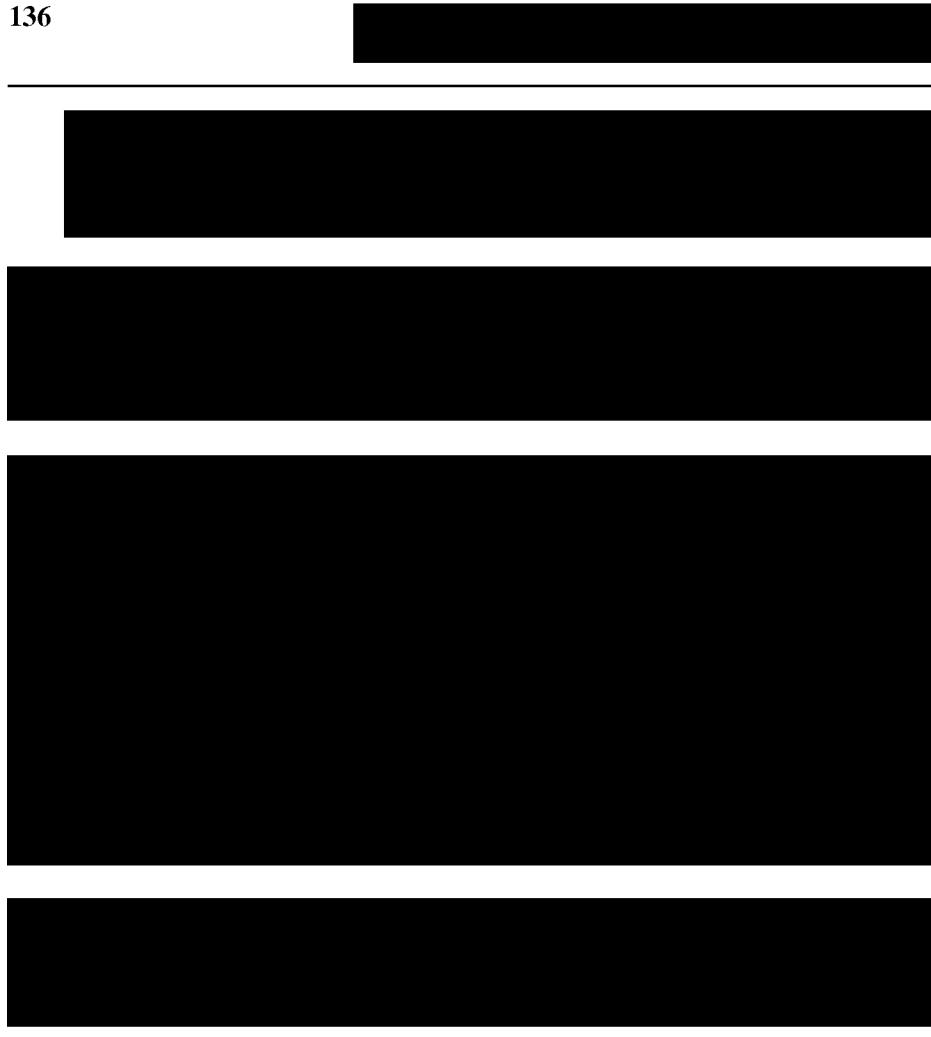
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COUNSEL

Kabateck Brown Kellner, Brian S. Kabateck, Joshua H. Haffner, Kevin S. Conlogue, Justin F. Spearman and Drew R. Ferrandini for Plaintiff and Appellant.

Hogan Lovells US, Michael M. Maddigan, Poopak Nourafchan and Vassiliki Iliadis for Defendant and Respondent.

OPINION

HOFFSTADT, J.—Plaintiff Edward J. Roberts (plaintiff) enrolled in a private health plan offering benefits to persons 65 and over as well as

disabled persons under the federally funded Medicare Advantage program (42 U.S.C. § 1395w-21 et seq.), and went to an urgent care center outside of the plan’s network for medical services; as a result, he was forced to pay a \$50 copayment instead of the \$30 copayment for in-network centers. Alleging that the plan’s marketing materials misled him (and other enrollees) as to the availability of in-network urgent care centers (and their smaller copayments) and that the absence of any in-network urgent care centers in California rendered the plan’s network inadequate, plaintiff filed this class action for unfair competition, unjust enrichment and financial elder abuse.

This appeal presents two questions: (1) Are plaintiff’s misrepresentation and adequacy of network based claims expressly preempted by the preemption clause applicable to Medicare Advantage plans (42 U.S.C. § 1395w-26(b)(3)), or implicitly preempted by the requirement that the plan’s marketing materials and adequacy of plan coverage be preapproved by the Center for Medicare and Medicare Services (Center); and (2) are plaintiff’s claims, to the extent they challenge a denial of benefits, subject to dismissal because plaintiff did not first exhaust his administrative remedies under the Medicare Act (42 U.S.C. §§ 405(g), (h), 1395ii)? We conclude that the answer to the first question is yes. In ruling that plaintiff’s claims are *expressly* preempted, we part company with *Cotton v. StarCare Medical Group, Inc.* (2010) 183 Cal.App.4th 437, 447–454 [107 Cal.Rptr.3d 767] (*Cotton*) and *Yarick v. PacifiCare of California* (2009) 179 Cal.App.4th 1158, 1165–1167 [102 Cal.Rptr.3d 379] (*Yarick*), and join with the later-decided *Do Sung Uhm v. Humana, Inc.* (9th Cir. 2010) 620 F.3d 1134, 1148–1157 (*Uhm*). We further conclude that the answer to the second question is yes. We accordingly affirm the trial court’s dismissal of plaintiff’s complaint.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

We draw these facts from the allegations in plaintiff’s complaint as well as from documents subject to judicial notice (*Kyanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 [199 Cal.Rptr.3d 66, 365 P.3d 845]), resolving any conflicts in favor of the judicially noticed documents (*Sciaratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 561 [201 Cal.Rptr.3d 218]).

Defendant United Healthcare Services, Inc. (United Healthcare), offers to persons eligible for Medicare benefits—chiefly, persons 65 and over or who are disabled (42 U.S.C. § 1395c)—several different health care plans under the Medicare Advantage program. As described more fully below, the Medicare Advantage program allows eligible Medicare beneficiaries the right to

obtain the statutorily mandated benefits, as well as a variety of additional benefits, through privately run health plans. (See generally *In re Avandia Marketing* (3d Cir. 2012) 685 F.3d 353, 357–358 (*Avandia*).)

United Healthcare advertised its various Medicare Advantage plans with written materials; it submitted those materials, as well as materials regarding the plan’s benefits coverage, to the Center for preapproval and the Center had no objection to those materials. In the marketing materials for its AARP Medicare Complete Secure Horizons Plan 1 (Secure Horizons Plan 1), United Healthcare represented that the plan “offer[ed] one of the nation’s largest networks, made up of local doctors, clinics and hospitals who know your community.” In light of this representation, plaintiff “reasonably believed that there would be an in-network, urgent care healthcare provider within a reasonable distance of his home.”

Plaintiff enrolled in the Secure Horizons Plan 1 in April 2013. United Healthcare sent him a “Welcome Book” listing all providers within the plan’s network and specifying that the patient copayment for in-network visits was \$30 and for out-of-network visits was \$50. The closest urgent care center to plaintiff’s residence was outside of the plan’s network; in fact, the plan had no in-network urgent care centers anywhere in California.

In July 2013, plaintiff needed urgent care and drove to the nearby out-of-network urgent care center and made a \$50 copayment (rather than the \$30 copayment).

II. *Procedural History*

Plaintiff sued United Healthcare on behalf of the class of “all individuals residing in California who, during the four years preceding the filing of this action, enrolled in the [Secure Horizons Plan 1] through [United Healthcare] and paid a co-pay[ment] in excess of \$30 for urgent care.” Specifically, plaintiff alleged that United Healthcare’s marketing materials were misleading and accordingly constituted (1) “unlawful, unfair or fraudulent” business practices in violation of the unfair competition law (Bus. & Prof. Code, §§ 17200, 17500), Insurance Code section 790.03, subdivision (b) regarding misleading advertising, and Civil Code sections 1571 and 1573 regarding constructive fraud, (2) unjust enrichment, and (3) financial elder abuse (Welf. & Inst. Code, § 15610.30). Plaintiff sought “full disgorgement and restitution,” “treble damages” under Civil Code section 3345, punitive damages, injunctive relief, and attorney’s fees.

United Healthcare removed the case to federal court. Three months later, the federal court remanded it back to state court.

Following remand, United Healthcare demurred to plaintiff's complaint. In a seven-page written ruling, the trial court determined that plaintiff's lawsuit was "federally preempted by the Medicare Act (and alternatively, that [plaintiff's] administrative remed[ies] ha[d] not been exhausted)" and sustained the demurrer without leave to amend.

The trial court found that plaintiff's lawsuit rested primarily on his claims that United Healthcare's marketing materials misrepresented the scope of in-network services and thus the likely copayments due. Because the Center was required to (and did) preapprove all marketing materials used by the Medicare Advantage plans (42 U.S.C. § 1395w-21(h); 42 C.F.R. §§ 422.2260–422.2276 (2015)) as well as the adequacy of each plan's network (42 C.F.R. § 422.112 (2015)), and because the Medicare Act provides that the "standards [applied by the Center] shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to [Medicare Advantage] plans which are offered by [Medicare Advantage] organizations under this part" (42 U.S.C. § 1395w-26(b)(3)), the court concluded that plaintiff's allegations "stand directly in contrast to the exclusive power Congress bestowed on the [Center] to regulate" marketing materials and the adequacy of coverage, and thus fell within the terms of the express preemption clause. The court noted that its decision was in accord with the Ninth Circuit's decision in *Uhm, supra*, 620 F.3d 1134. In the court's view, plaintiff's claims were also "arguably" implicitly preempted because his "marketing claims . . . would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

"To the extent plaintiff's claims . . . can be characterized as being based on [United Healthcare's] failure to provide any in-network urgent care centers in California . . . as opposed to . . . misrepresentation of its benefits and services," the court determined that such claims were "inextricably intertwined" with a claim for benefits, and thus had to be administratively exhausted.

The court subsequently entered a judgment of dismissal, which plaintiff has timely appealed.

DISCUSSION

I. *Background Law*

A. *Medicare Act*

The Medicare Act (Act) is "part of the Social Security Act" and "established a federally subsidized health insurance program . . . administered by

the Secretary of Health and Human Services” (Secretary). (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 416 [106 Cal.Rptr.2d 271, 21 P.3d 1189] (*McCall*); see 42 U.S.C. § 1395 et seq.) The chief beneficiaries of Medicare insurance are eligible individuals “who are age 65 or over” and individuals suffering from a “disability.” (42 U.S.C. § 1395c.) The Act provides benefits in four parts. (*Dial v. Healthspring of Alabama, Inc.* (11th Cir. 2008) 541 F.3d 1044, 1046 (*Dial*).)

Under Parts A and B of the Act, Medicare beneficiaries requiring medical services obtain those services directly from providers participating in the Medicare program, and the Secretary directly reimburses those providers on a “fee-for-service” basis. (42 U.S.C. §§ 1395c through 1395i-5 (Part A), 1395j through 1395w-6 (Part B); *Avandia, supra*, 685 F.3d at p. 357.) Part A covers “hospital, skilled nursing, home health, and hospice care benefits,” while Part B covers “physician and other outpatient services.” (*Dial, supra*, 541 F.3d at p. 1046.)

In 1997, Congress added part C to the Act (Part C). (42 U.S.C. §§ 1395w-21 through 1395w-28; see generally Balanced Budget Act of 1997, Pub.L. No. 105-33 (Aug. 5, 1997) 111 Stat. 251, 276.) Under Part C, Medicare beneficiaries can sign up for a privately administered health care plan—originally called a “Medicare+Choice” plan, but later renamed a “Medicare Advantage” plan—that provides all of the Part A and B benefits as well as additional benefits. (42 U.S.C. §§ 1395w-21(a)(1), (d)(4)(A)(i), 1395w-22(a)(1)–(3), (c)(1)(F); see also *Dial, supra*, 541 F.3d at p. 1046; 70 Fed.Reg. 4588 (Jan. 28, 2005) [renaming plan].) If a beneficiary elects to participate in such a plan, the government pays the plan’s administrator a flat, monthly fee to provide all Medicare benefits for that beneficiary. Because Part C limits the government’s responsibility to just the monthly fee, the private health plan—rather than the government—ends up “assum[ing] the risk associated with insuring” the beneficiary. (*Avandia, supra*, 685 F.3d at pp. 357–358; see *Yarick, supra*, 179 Cal.App.4th at pp. 1163–1164.)

The Secretary closely regulates Medicare Advantage health plans. Although the plan administrator may choose which physicians and facilities to include in the plan’s network (42 U.S.C. § 1395w-22(d)(1)), the Secretary—through the Center—reviews each plan to ensure that it has a “sufficient number and range of health care professionals and providers willing to provide services under the terms of the plan.” (42 U.S.C. § 1395w-22 (d)(4); 42 C.F.R. §§ 422.100, 422.112 (2015).) Among other things, each plan must “[p]rovide coverage for . . . emergency and urgently needed services.” (42 C.F.R. § 422.112(a)(9) (2015); see 42 C.F.R. § 422.100(b)(1)(ii) (2015).) To ensure that Medicare beneficiaries can make an informed choice about whether to elect into a Medicare Advantage plan, the Secretary—again,

through the Center—reviews all “marketing material” used by Medicare Advantage plans prior to their use; if the Center does not disapprove the materials within 45 days (or fewer days, if the plan uses “model marketing language”), they are deemed approved. (42 U.S.C. § 1395w-21(h)(1) through (h)(5); 42 C.F.R. § 422.2262 (2015).) The Secretary is authorized to promulgate regulations setting forth the “standards” for its review of marketing materials, as well as the adequacy of a plan’s coverage (42 U.S.C. §§ 1395w-21(h)(2), 1395w-26(b)(1).) The standards for marketing materials mirror the statutory mandate and require the Center to ensure that the “materials are not materially inaccurate or misleading or otherwise make material misrepresentations.” (42 C.F.R. § 422.2264(d) (2015); see 42 U.S.C. § 1395w-21(h)(2) [same].)

As enacted in 1997, Part C included a two-part express preemption clause. The first part provided that “[t]he standards established” by regulation “shall supersede any State law or regulation . . . with respect to [Medicare Advantage] plans which are offered by [Medicare Advantage] organizations under this part *to the extent such law or regulation is inconsistent with such standards.*” (42 U.S.C. § 1395w-26(b)(3)(A) (2000), italics added.) The second part provided that four categories of “[s]tate standards . . . are superseded” irrespective of inconsistency, including “[r]equirements relating to inclusion or treatment of providers” and “[r]equirements relating to marketing materials and summaries and schedules of benefits regarding a [Medicare Advantage] plan.” (42 U.S.C. § 1395w-26(b)(3)(B)(ii), (iv) (2000).)

In 2003, Congress enacted the Medicare Prescription Drug, Improvement and Modernization Act of 2003. (Pub.L. No. 108-173 (Dec. 8, 2003) 117 Stat. 2066.) In addition to adding part D (Part D) to grant Medicare beneficiaries prescription drug coverage, the 2003 Act also replaced Part C’s two-part express preemption clause with the more simplified current language: “The standards established” by regulation “shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to [Medicare Advantage] plans which are offered by [Medicare Advantage] organizations under [Part C].” (42 U.S.C. § 1395w-26(b)(3).)

B. *Demurrers*

In reviewing a complaint dismissed on demurrer due to federal preemption, our review is de novo. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10 [72 Cal.Rptr.3d 112, 175 P.3d 1170] (*Salmon Cases*); *McCall, supra*, 25 Cal.4th at p. 415.)

II. *Preemption*

■ The supremacy clause of the United States Constitution provides that federal law “shall be the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (U.S. Const., art. VI, cl. 2.) The clause “vests Congress with the power to preempt state law.” (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777 [174 Cal.Rptr.3d 626, 329 P.3d 180] (*Harris*).) This authority may be exercised through federal statutes or federal regulations. (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 950 [28 Cal.Rptr.3d 685, 111 P.3d 954] [“‘federal regulations have no less pre-emptive effect than federal statutes.’” quoting *Fidelity Federal Sav. & Loan Assn. v. de la Cuesta* (1982) 458 U.S. 141, 153 [73 L.Ed.2d 664, 102 S.Ct. 3014]].).

Preemption of state law can be express or implied. It is express when Congress positively enacts a preemption clause displacing state law; it is implied when courts infer a congressional intent to displace state law under one of three doctrines of “implied preemption”—namely, “field, conflict, or obstacle preemption.” (*Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, 308 [195 Cal.Rptr.3d 505, 361 P.3d 868] (*Quesada*).) “Field preemption applies when federal regulation is comprehensive and leaves no room for state regulation”; “[c]onflict preemption is found when it is impossible to comply with both state and federal law simultaneously”; and “[o]bstacle preemption occurs when state law stands as an obstacle to the full accomplishment and execution of congressional objectives.” (*Harris, supra*, 59 Cal.4th at p. 778.) For all types of preemption, the “foremost” consideration is “congressional intent.” (*Jankey v. Lee* (2012) 55 Cal.4th 1038, 1048 [150 Cal.Rptr.3d 191, 290 P.3d 187] (*Jankey*)).

■ Recognizing that Congress generally treads lightly when displacing state law, we employ a “presumption against preemption” when assessing Congress’s intent. (*Quesada, supra*, 62 Cal.4th at p. 312; *Jankey, supra*, 55 Cal.4th at p. 1048.) Although the “continuing vitality” of this presumption has recently been called into question (*Quesada*, at p. 314), it is still the law and requires us to find a “‘clear and manifest’” congressional intent to displace state law before we may declare that law preempted. (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 [135 L.Ed.2d 700, 116 S.Ct. 2240]; see *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230 [91 L.Ed. 1447, 67 S.Ct. 1146].) Where, as here, preemption turns on questions of law such as the meaning of a preemption clause or the ascertainment of congressional intent, our review is *de novo*. (*John v. Superior Court* (2016) 63 Cal.4th 91, 95–96 [201 Cal.Rptr.3d 459, 369 P.3d 238] [statutory construction, including determining legislative intent, reviewed *de novo*]; *Salmon Cases, supra*, 42 Cal.4th at p. 1089, fn. 10 [“federal preemption presents a pure question of law”].)

A. Express preemption

The express preemption provision at issue here provides: “The standards established under [Part C] shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to [Medicare Advantage] plans which are offered by [Medicare Advantage] organizations under [Part C].” (42 U.S.C. § 1395w-26(b)(3).)

With express preemption clauses, Congress’s intent to preempt is clear; our job is reduced to “‘identify[ing] the domain expressly pre-empted.’” (*Quesada, supra*, 62 Cal.4th at p. 308, quoting *Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1062 [126 Cal.Rptr.3d 428, 253 P.3d 522].) The “best evidence concerning th[at] breadth” is “the statutory text” itself. (*Quesada*, at p. 308.) Here, the plain language of section 1395w-26(b)(3) plainly spells out Congress’s intent that the standards governing Medicare Advantage plans will displace “any State law or regulation” except for State laws regarding licensing or plan solvency. (Italics added.) Because the Secretary has promulgated standards governing the content of a Medicare Advantage plan’s marketing materials (42 C.F.R. §§ 422.2260–422.2276 (2015)) as well as the adequacy of its network (42 C.F.R. §§ 422.100, 422.112 (2015)), those standards fall within the ambit of the preemption clause. Because plaintiff’s claims for violation of the unfair competition law, for unjust enrichment and for financial elder abuse do not deal with either of the preemption clause’s exceptions for licensing or plan solvency, they are preempted “with respect to [United Healthcare’s] plan.”

The legislative history of the preemption clause, the construction given to it by the Secretary, and the weight of authority interpreting it all confirm this reading.

When Congress amended the preemption clause in 2003, inserting the current clause in lieu of the prior clause superseding “state standards” in four discrete areas and any other “State laws or regulations” “inconsistent” with Part C’s standards, the conference report on that amendment explained: “The conference agreement clarifies that the [Medicare Advantage] program is a federal program operated under Federal rules. State laws, do not, and should not apply, with the exception of state licensing laws or state laws related to plan solvency.” (H.R.Rep. No. 108-391, 1st Sess., p. 557 (2003).) This explanation leaves little room for doubt: The clause means what it says, and the Medicare Advantage standards supersede “any State law or regulation” “with respect to” the plans governed by those standards, except in the two carve-outs for licensing and plan solvency.

Although the Secretary (through the Center) initially indicated in her 2003 proposed rulemaking comments that she “continue[d] to believe that generally applicable State tort, contract, or consumer protection law” as well as standards “based on case law precedents” would not be preempted under the 2003 preemption clause (69 Fed.Reg. 46866, 46913–46914 (Aug. 3, 2004)), the Secretary altered that view in the final rulemaking, declaring instead that “all State standards, including those established through case law, are preempted to the extent that they specifically would regulate [Medicare Advantage] plans, with exceptions of State licensing and solvency laws” (70 Fed.Reg. 4588, 4665 (Jan. 28, 2005)).

■ The majority of courts to have considered the current preemption clause have interpreted it to displace state laws to the extent they touch upon areas regulated by the Medicare Advantage standards. In *Uhm*, the Ninth Circuit held that the preemption clause preempted state fraud and consumer protection claims based on misleading marketing materials because those materials were subject to preapproval by the Center. (*Uhm, supra*, 620 F.3d at pp. 1148–1157.) Although *Uhm* addressed the prescription drug benefits under Part D, Part D expressly incorporates Part C’s preemption clause. (42 U.S.C. § 1395w-112(g); *Uhm*, at p. 1148.) *Phillips v. Kaiser Foundation Health Plan, Inc.* (N.D.Cal. 2011) 953 F.Supp.2d 1078, 1087–1090, applied *Uhm* to Part C’s express preemption clause and concluded that the plaintiff’s misleading marketing claims under our state’s Unfair Competition Law and Consumer Legal Remedies Act (Civ. Code, § 1770 et seq.) were expressly preempted. (Accord, *Meek-Horton v. Trover Solutions, Inc.* (S.D.N.Y. 2012) 910 F.Supp.2d 690, 696 [following *Uhm*]; *PacifiCare of Nevada, Inc. v. Rogers* (Nev. 2011) 127 Nev. 799 [266 P.3d 596, 600–601] [following *Uhm*]; *Rudek v. Presence Our Lady of the Resurrection Med. Ctr.* (E.D.Ill., Oct. 27, 2014, No. 13 C 06022) 2014 U.S. Dist. Lexis 152025 [following *Uhm*].)

Two California Court of Appeal decisions have construed Part C’s express preemption clause more narrowly. In *Yarick, supra*, 179 Cal.App.4th at pp. 1165–1167, the Fifth District held that the phrase “any State law or regulation” in Part C’s express preemption clause only reached (1) “‘positive state enactments’” such as “laws and administrative regulations, but not the common law,” and (2) common law rights grounded solely in duties created by positive state law. In reaching this conclusion, the court cited *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51 [154 L.Ed.2d 466, 123 S.Ct. 518] (*Sprietsma*), which had given the same construction to similar language in the preemption clause in the Federal Boat Safety Act of 1971 (46 U.S.C. § 4306). (*Yarick*, at pp. 1165–1166.) In *Cotton, supra*, 183 Cal.App.4th at pages 449–451, the Fourth District followed *Yarick*’s holding that Part C’s preemption clause was limited to positive state enactments and went one step further: It read the clause’s mandate that Part C standards “shall supersede any State law or regulation . . . with respect to [Medicare Advantage] plans” to mean

that the “State law or regulation” had to be “with respect to” the plans, and could not be general in application. Thus, under *Cotton*, Part C’s preemption clause reaches only state statutes or regulations that are targeted at Medicare Advantage plans; common law rights and all generally applicable statutes and regulations are *not* preempted.

We disagree with both of these limitations and decline to follow *Yarick* and *Cotton*.

We reject *Yarick*’s holding that Part C’s preemption clause reaches only positively enacted state laws and regulations for two reasons.

■ First, it is inconsistent with *Riegel v. Medtronic, Inc.* (2008) 552 U.S. 312 [169 L.Ed.2d 892, 128 S.Ct. 999] (*Riegel*). There, the United States Supreme Court held that the preemption clause in the Medical Device Amendments of 1976 (21 U.S.C. § 360k), which preempted state “requirements,” reached “common-law duties” as well as duties created by positive law. (*Riegel*, at p. 324 [“Absent other indication, reference to a State’s ‘requirements’ includes its common-law duties”].) Although the preemption clause here refers to “State law or regulation” rather than state law “requirements,” *Riegel*’s rationale applies with full force here: “[E]xcluding common-law duties from the scope of pre-emption would make little sense” because common law duties prescribing different standards than those imposed by federal law “disrupt[] the federal scheme no less than state regulatory law to the same effect.” (*Riegel*, at pp. 324–325; accord, *Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 772 [88 Cal.Rptr.3d 673] [“Federal laws may preempt state common law as well as state legislation”].)

■ Second, we are not persuaded that *Sprietsma*—the *Yarick* court’s chief justification for its limitation—is relevant. In *Sprietsma*, the Supreme Court construed the preemption clause in the Federal Boat Safety Act of 1971. (*Sprietsma, supra*, 537 U.S. at p. 54.) The clause provided that “a State . . . may not establish, continue in effect, or enforce *a* law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment” (46 U.S.C. § 4306, italics added), but that federal law elsewhere had a savings clause providing that “[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law” (46 U.S.C. § 4311(g)). *Sprietsma* held that the clause reached only positive state enactments and grounded its holding on three points: (1) “[T]he article ‘*a*’ before ‘law or regulation’ implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law” (*Sprietsma*, at p. 63); (2) the word “law” in “law or regulation” “might . . . be interpreted to include

regulations, which would render the express reference to ‘regulation’ . . . superfluous” (*ibid.*); and (3) the existence of the savings clause, which exists to “‘save’ ” “‘some significant number of common-law liability cases’ ” (*ibid.*, quoting *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 868 [146 L.Ed.2d 914, 120 S.Ct. 1913]). The first and third rationales are wholly inapplicable to Part C. Part C’s preemption clause refers to “any State law or regulation”—not “*a* State law or regulation”; because “‘the word “any” has an expansive meaning, that is, “one or some indiscriminately of whatever kind”’” (*Ali v. Federal Bureau of Prisons* (2008) 552 U.S. 214, 218–219 [169 L.Ed.2d 680, 128 S.Ct. 831]; see *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 714 [168 Cal.Rptr.3d 440, 319 P.3d 201]), “[t]he use of ‘any’ negates the ‘discreteness’ that the Court identified in *Sprietsma*” (*Uhm, supra*, 620 F.3d at p. 1153). Part C also has no clause saving common law actions. The closest the Act comes is section 1395, which reserves to state law only the “supervision or control” (1) “over the practice of medicine or the manner in which medical services are provided,” (2) “over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services,” or (3) “over the administration or operation of any such institution.” (42 U.S.C. § 1395.) ■ Even if we assume that Part C’s later-enacted express preemption clause did not supersede this reservation clause (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960 [184 Cal.Rptr.3d 60, 342 P.3d 1217] [“‘[i]f conflicting statutes cannot be reconciled, later enactments supersede earlier ones’”]), the reservation clause does not purport to preserve common law actions dealing with the same subjects otherwise covered by Part C’s standards—and hence does not override Part C’s preemption clause.

■ *Sprietsma*’s second rationale—the concern that the word “regulation” “might” be superfluous if the word “law” were read broadly to reach *all* positive and common law enactments—applies to Part C’s preemption clause, but is in our view too thin a reed upon which to leave all common law actions intact when doing so, as noted above, would disrupt the efficacy of the Center’s preapproval of marketing materials and plan coverage. The canon of statutory construction that counsels against construing words as surplusage is just a guide for ascertaining legislative intent, it is not a command. (*United States v. Atlantic Research Corp.* (2007) 551 U.S. 128, 137 [168 L.Ed.2d 28, 127 S.Ct. 2331]; *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1017–1018 [22 Cal.Rptr.3d 876, 103 P.3d 276].) Where, as here, that canon leads to a result at odds with the otherwise clearly expressed legislative intent, the canon necessarily yields to that intent.

■ We also reject *Cotton*’s holding that Part C’s preemption clause only reaches laws specifically targeting Medicare Advantage plans. *Riegel* rejected that very same argument when it held that the Medical Device Amendments of 1976’s preemption clause, which reaches “requirements . . . with respect

to” medical devices, did not mean that the state laws preempted by that clause “must apply *only* to the relevant device, or only to medical devices and not to all products and all actions in general.” (*Riegel, supra*, 552 U.S. at pp. 327–328.) In other words, the phrase “with respect to” does not refer to the specificity or breadth of the “State law or regulation” to be preempted; instead, it refers to the extent of preemption—those laws or regulations are superseded to the extent Part C’s standards supersede them, but no further.

Plaintiff offers four further reasons why, in his view, Part C’s express preemption clause should not bar his lawsuit. First, he argues that our Supreme Court came to a contrary conclusion in *McCall, supra*, 25 Cal.4th 412. *McCall* held that Medicare beneficiaries suing a health maintenance organization (HMO) under state law for negligence, fraud and other torts in refusing to provide medical services were not required to exhaust their claims administratively. (*Id.* at pp. 414–415.) In the course of reaching this holding, *McCall* also noted that the plaintiff’s claims were not preempted by the Medicare Act because “[n]o intent to displace state tort law remedies was expressed in the Medicare Act *as it read at the time relevant to this case*.” (*McCall*, at p. 422, italics added.) But *McCall* was interpreting Parts A and B of the Act (*McCall*, at p. 416), which do not have an express preemption clause—not Part C, which does. Indeed, the *McCall* court commented how Congress later enacted Part C’s preemption clause, and contrasted it with the “then applicable law” at issue in *McCall*. (*McCall*, at pp. 423–424.)

Second, plaintiff argues that *Uhm* is distinguishable because it dealt with Medicare’s prescription drug benefits defined in Part D, rather than the Medicare Advantage program defined in Part C. As noted above, however, Part D expressly incorporates Part C’s preemption clause; the analysis is identical, so is the result.

Third, plaintiff asserts that the preemption clause by its own terms does not apply to his challenge to the representations in United Healthcare’s marketing materials regarding the adequacy of its network because the Center’s review of those materials is inadequate (and, under plaintiff’s view, ostensibly not subject to preemption) unless the Center could compare those marketing materials against the adequacy of United Healthcare’s network. This assertion lacks merit both factually and legally. Factually, plaintiff’s assertion ignores that the Center did review—and did approve—the adequacy of United Healthcare’s network. Legally, plaintiff’s assertion seems to rest on the premise that preemption only applies if a state court satisfies itself that the federal standards to be preempted were properly applied, with the propriety of review ostensibly being judged with standards set forth by state law; but this premise is antithetical to the very concept of preemption, which is to insulate the areas Congress designates as preempted from review under state law. (*Harris, supra*, 59 Cal.4th at p. 778.)

■ Lastly, plaintiff contends that the federal court's remand to state court rests on a finding that there was no "complete preemption," and that this finding means that United Healthcare's preemption defense lacks merit. The premise of plaintiff's argument is that "complete preemption" and the preemption question we decide here are one and the same; they are not. "Complete preemption" is a "doctrine of jurisdiction" that applies when a federal statute has such "'extraordinary' preemptive force" that a federal court is "obligated to construe [a] complaint [pleading state-law causes of action] as raising a federal claim," thereby overcoming the general rule that a defense based on federal law cannot support federal jurisdiction when the plaintiff's "well-pleaded complaint" is based on state law. (*Sullivan v. American Airlines, Inc.* (2d Cir. 2005) 424 F.3d 267, 271–272; *Marin General Hospital v. Modesto & Empire Traction Co.* (9th Cir. 2009) 581 F.3d 941, 945; *Retail Property Trust v. United Brotherhood of Carpenters* (9th Cir. 2014) 768 F.3d 938, 948–949.) So far, the United States Supreme Court has identified only three federal statutes with "complete preemptive" force—the Labor-Management Relations Act, 1947 (29 U.S.C. § 185), the Employee Retirement Income Security Act (ERISA) (29 U.S.C. § 1132(a)), and the National Bank Act (12 U.S.C. §§ 85–86). (See *Sullivan*, at p. 272.) The doctrine of federal preemption we outline and apply above is called "defensive preemption"; it is a substantive defense to a claim based on state law. (*Retail Property Trust*, at pp. 948–949; *Hall v. North American Van Lines, Inc.* (9th Cir. 2007) 476 F.3d 683, 689, fn. 8.) The doctrine of complete preemption does not apply to Part C (*Parra v. PacifiCare of Arizona, Inc.* (9th Cir. 2013) 715 F.3d 1146, 1155), but this does not mean that preemption cannot be raised as a substantive defense (*id.* at pp. 1155–1156, fn. 3). Indeed, the federal court's remand order that rejected complete preemption as a jurisdictional doctrine explicitly left open the substantive question of defensive preemption for resolution on remand.

B. *Implied preemption*

Under the doctrine of "obstacle preemption," federal law can impliedly preempt state law where "state law stands as an obstacle to the full accomplishment and execution of congressional objectives." (*Harris, supra*, 59 Cal.4th at p. 778.) Congress requires the Secretary to evaluate the marketing materials and the adequacy of Medicare Advantage health plans, and the Secretary promulgates regulations and entrusts the Center with reviewing and approving marketing materials and the plans themselves. "Were a state court to determine that [a plan's] marketing materials constituted misrepresentations resulting in fraud or fraud in the inducement, it would directly undermine [the Center's] prior determination that those materials were not misleading and in turn undermine [the Center's] ability to create its own standards for what constitutes 'misleading' information about Medicare Part D." (*Uhm, supra*, 620 F.3d at p. 1157.) Indeed, the courts in

Cotton and *Yarick* came to the same conclusion with respect to the portions of the plans preapproved by the Center. (*Cotton, supra*, 183 Cal.App.4th at p. 455; *Yarick, supra*, 179 Cal.App.4th at pp. 1165–1167.) *Yarick* itself noted, “[i]f state common law judgments were permitted to impose damages on the basis of these federally approved [actions], the federal authorities would lose control of the regulatory authority that is at the very core of Medicare generally and the [Medicare Advantage] program specifically.” (*Yarick*, at pp. 1167–1168.) Accordingly, we further conclude that plaintiff’s claims based on misrepresentations in United Healthcare’s marketing materials and based on the adequacy of its plan are impliedly preempted by the Act as well.

III. *Exhaustion*

■ “When remedies before an administrative forum are available, a party must in general exhaust them before seeking judicial relief.” (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609 [110 Cal.Rptr.3d 718, 232 P.3d 701], citing *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080 [29 Cal.Rptr.3d 234, 112 P.3d 623].) “Exhaustion requires ‘a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings.’” (*City of San Jose*, at p. 609, quoting *Bleek v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 432 [95 Cal.Rptr. 860].) “Exhaustion of administrative remedies is ‘a jurisdictional prerequisite to resort to the courts.’” (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70 [99 Cal.Rptr.2d 316, 5 P.3d 874], quoting *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293 [109 P.2d 942].)

When a defendant claims that the courts lack jurisdiction over a plaintiff’s lawsuit because that plaintiff has not exhausted his administrative remedies, we must decide: (1) was the plaintiff required to exhaust the claims he now presses in court?; and (2) if so, did he fully exhaust them? The first question is a question of law we review de novo. (*Defend Our Waterfront v. State Lands Com.* (2015) 240 Cal.App.4th 570, 580 [192 Cal.Rptr.3d 790].) So is the second question, at least where, as here, we are evaluating only the allegations of a complaint and judicially noticed documents. (E.g., *Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1384 [191 Cal.Rptr.3d 551, 354 P.3d 346] [where “appeal involves the application of a statute to undisputed facts, our review is de novo”].)

■ When a Medicare beneficiary participating in a Part C-authorized private health care plan challenges his “entitle[ment] to receive a health service” or “the amount (if any) that [he] is required to pay with respect to such service,” Congress has erected a four-tier administrative review scheme.

First, the beneficiary must raise his challenge with the Medicare Advantage plan itself, and Congress requires every such plan to “have a procedure for making [those] determinations” and requires the plan’s administrator to issue a written statement “of the reasons for the denial.” (42 U.S.C. § 1395w-22(g)(1).) Second, the beneficiary must seek reconsideration of an adverse determination with the Medicare Advantage plan, which Congress also specifies that each plan must offer. (*Id.*, § 1395w-22(g)(2).) Third, the beneficiary must appeal the denial of reconsideration to the “independent, outside entity” designated by the Secretary “to review and resolve . . . reconsiderations that affirm denial of coverage, in whole or in part.” (*Id.*, § 1395w-22(g)(4); see generally *Willy v. Administrative Review Bd.* (5th Cir. 2005) 423 F.3d 483, 491–492 [agency head may delegate its authority to issue final decisions]; *Impact Energy Resources, LLC v. Salazar* (10th Cir. 2012) 693 F.3d 1239, 1252, fn. 1 [same].) Fourth, if the independent outside entity denies relief and “the amount in controversy is \$100 or more,” the beneficiary must seek a hearing before the Secretary. (42 U.S.C. § 1395w-22(g)(5); accord, 42 U.S.C. § 1395mm(c)(5)(B) [same, for benefits claims under Parts A and B].) If the Secretary denies relief and “the amount in controversy is \$1,000 or more,” then and only then may the beneficiary obtain judicial review of that decision. (42 U.S.C. §§ 1395w-22(g)(5), 1395ii [incorporating general administrative exhaustion provision for title 42 into Medicare Act]; see also 42 U.S.C. § 405(g), (h) [general administrative exhaustion and judicial review provisions for title 42].)

■ In assessing whether a plaintiff’s claim is subject to exhaustion, courts look not only to how the plaintiff has styled his claim, but also to its substance. ■ Consistent with the more specific multi-tiered administrative review scheme under Part C set forth above, a plaintiff’s claim that he “is entitled to benefits . . . and the amount of [those] benefits” is, as a general matter, a claim that “arises under” the Medicare Act and one that must therefore be administratively exhausted. (*McCall, supra*, 25 Cal.4th at pp. 416–417; see 42 U.S.C. § 405(h).) Even if a plaintiff’s claim is not expressly styled as seeking benefits, courts will treat it as such (and hence as a claim “arising under” the Medicare Act) if either (1) “‘the standing and the substantive basis for the presentation’ of the claim is the Medicare Act,” or (2) “the claim is ‘inextricably intertwined’ with a claim for Medicare benefits” (*McCall*, at p. 417, quoting *Heckler v. Ringer* (1984) 466 U.S. 602, 614–615 [80 L.Ed.2d 622, 104 S.Ct. 2013]) because the plaintiff is “at bottom . . . seeking to recover benefits.” (*Ardary v. Aetna Health Plans of California, Inc.* (9th Cir. 1996) 98 F.3d 496, 499–500; see also *Heckler*, at p. 614; *McCall*, at pp. 424–425; accord, *Uhm, supra*, 620 F.3d at p. 1143 [exhaustion requirement applies to “creatively disguised claims for benefits”].)

In this case, plaintiff's complaint expressly asserts that United Healthcare (1) used misleading marketing materials and (2) provided inadequate coverage. These assertions are not claims for benefits or inextricably intertwined with claims for benefits, and thus fall outside of the exhaustion requirement. (See *Uhm, supra*, 620 F.3d at p. 1145 [so holding].) That is why we have addressed whether those claims are, on their merits, preempted by the Act. However, the trial court also liberally construed plaintiff's complaint as implicitly raising a third claim—namely, a challenge to “the amount (if any) that [plaintiff] is required to pay with respect to” the urgent care service he received. (42 U.S.C. § 1395w-22(g)(1).) This third, implicit claim is, by definition, a claim for benefits, and therefore subject to the four-tier exhaustion scheme outlined above.

It is undisputed that plaintiff did not exhaust *any* of his administrative remedies. In his complaint, he did not allege compliance with any of the four tiers of review. On appeal, he asserts that United Healthcare lacked “proper procedures to resolve grievances.” This is factually incorrect because United Healthcare’s plan specifically empowers enrollees to challenge a benefit determination and, if dissatisfied with that challenge, to seek reconsideration through an appeal. Indeed, plaintiff’s lack of awareness of United Healthcare’s internal procedures for challenging benefits determinations confirms that he did not satisfy the first two steps of administrative exhaustion and thus could not have satisfied the third.

Plaintiff raises two arguments in response. First, he asserts that his claim for benefits was a claim for only \$20, that this amount falls below the \$100 threshold for obtaining a hearing before the Secretary, and that he accordingly had no administrative remedies to exhaust. This argument ignores that the hearing before the Secretary was the *fourth* tier of administrative review. Because plaintiff did not pursue any of the preceding three tiers—including the tier before the “outside, independent agency” that, in the absence of a hearing, issued the Secretary’s final decision—he did not exhaust his administrative remedies.

Second, plaintiff contends that United Healthcare should not be permitted to raise plaintiff’s failure to exhaust administrative remedies because it did not provide the required internal procedures for challenging benefit determinations, and thus has “unclean hands.” Not only is this factually incorrect for the reasons stated above, it is also legally incorrect. Although unclean hands may be asserted as a defense to legal and equitable causes of action (e.g., *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 432 [173 Cal.Rptr.3d 689, 327 P.3d 797]), the doctrine may not be asserted to avoid “do[ing] what the law requires and exhaust[ing] [his] administrative remedies” (*Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 111 [26 Cal.Rptr.3d 744]).

DISPOSITION

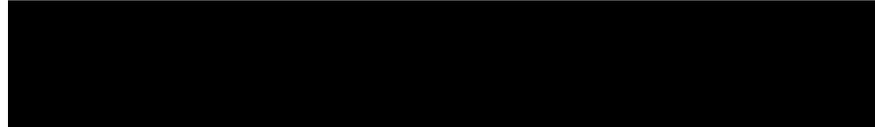
The judgment of dismissal is affirmed. United Healthcare is entitled to its costs on appeal.

Boren, P. J., and Chavez, J., concurred.

[No. B266482. Second Dist., Div. Six. Aug. 4, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
SEAN F. DUNN, Defendant and Appellant.

[REDACTED]



COUNSEL

Stephen P. Lipson, Public Defender, Michael C. McMahon, Chief Deputy Public Defender, and William Quest, Deputy Public Defender, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

TANGEMAN, J.—Sean F. Dunn appeals an order denying a petition to recall his sentence for felony petty theft with a prior and for resentencing to a misdemeanor pursuant to Proposition 47, the Safe Neighborhoods and School Act (the Act). (Pen. Code, §§ 1170.18, 666.)¹

Here we hold that a person is not eligible for resentencing pursuant to section 666 if the person is required to register as a sex offender as a result of a prior juvenile adjudication. (§§ 666, 290.008, formerly § 290, subd. (d)(1).) This treatment of registered juvenile sex offenders does not deny Dunn equal protection of the laws. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).)

BACKGROUND

In 1990, when Dunn was 14 years old, he committed two acts of forcible rape in concert with another and three acts of forcible sexual penetration. A juvenile court sustained allegations that he committed two counts of section 264.1 and three counts of section 289, subdivision (a). It committed him to the California Youth Authority for a 54-year term. Following Dunn's discharge, he was required to register as a sex offender. (§ 290.008, formerly § 290, subd. (d)(1).)²

¹ All statutory references are to the Penal Code.

² Former section 290, subdivision (d)(1), in effect when Dunn was discharged, is substantially similar to current section 290.008 and provided: "Any person who, on or after January 1,

In 1997, Dunn was sentenced to prison for assault with force likely to produce great bodily injury. (§ 245, former subd. (a)(1).) In 2011, he returned to prison for robbery. (§ 211.) While on parole for the robbery in 2012, he stole items from a department store. He pled guilty to felony petty theft with a prior. (§ 666, former subd. (b).) He admitted the prior strike conviction for robbery and the court sentenced him to 32 months in prison. (§ 667, subds. (b)–(i).)

Dunn was released on parole in 2014, with electronic monitoring. (§§ 3000.08, subd. (a), 3010.10, subd. (b).) Two months later, he violated parole by removing his electronic tracking device. The court revoked and reinstated his parole. In 2015, Dunn petitioned for resentencing to misdemeanor petty theft under the Act.

DISCUSSION

Dunn contends only adult sex offenders should be ineligible for relief under section 666. The plain language of the statute provides otherwise.

■ A person who is serving a felony sentence may be resentenced under any of the Proposition 47 statutes if (1) they “would have been guilty of a misdemeanor under [the Act had it] been in effect at the time of the offense”; (2) they have no prior “conviction[]” for a super strike³ offense or for an offense requiring registration under section 290, subdivision (c); and (3) resentencing would not pose an unreasonable risk of danger to the public. (§ 1170.18, subds. (a), (b), (i).)

■ Dunn’s petition fails at the first prong because he would not have been guilty of a misdemeanor under the Act. Petty theft with a prior is not a misdemeanor under the Act for those who are “required to register pursuant to the Sex Offender Registration Act [§§ 290–290.024].” (§ 666, subd. (b).) Juvenile sex offender registry is a part of the Sex Offender Registration Act. (§ 290.008.)

If the electorate intended to make only adult offenders ineligible for relief under section 666, it knew how to do so. (Health & Saf. Code, §§ 11350, 11357, 11377; Pen. Code, §§ 459.5, 473, 476a, 490.2, 496, 1170.18, subd. (i).)

1986, is discharged or paroled from the Department of the Youth Authority to the custody of which he or she was committed after having been adjudicated a ward of the juvenile court pursuant to [s]ection 602 of the Welfare and Institutions Code because of the commission or attempted commission of [an enumerated sex offense] shall be subject to registration under the procedures of this section.”

³ Dunn’s juvenile adjudications are not super strikes because he was under 16 in 1990. (§ 667, subd. (d)(3).)

A person is ineligible for relief under the other Proposition 47 statutes only if they are a person with one or more convictions “for an offense requiring registration pursuant to subdivision (c) of [s]ection 290 [adult sex offender registration].” (Health & Saf. Code, §§ 11357, 11377; Pen. Code, § 1170.18, subd. (i); see Health & Saf. Code, § 11350; Pen. Code, §§ 459.5, 473, 476a, 490.2, 496; *In re Derrick B.* (2006) 39 Cal.4th 535, 540 [47 Cal.Rptr.3d 13, 139 P.3d 485].)

Dunn asks us to construe section 666 to make only adult sex offenders ineligible. He contends this would best effectuate the electorate’s intent; it is required by the rule of lenity; the disparity between section 666 and other Proposition 47 statutes reflects a drafting error; and the disparity violates state and federal equal protection principles. We disagree with each of these contentions.

■ The electorate’s intent to withhold relief from juvenile sex offenders who commit serial thefts is unambiguously expressed in section 666. (*People v. Canty* (2004) 32 Cal.4th 1266, 1276 [14 Cal.Rptr.3d 1, 90 P.3d 1168] [“If the language is clear and unambiguous, we follow the plain meaning of the measure”].) The rule of lenity does not apply because section 666 is not reasonably susceptible to two constructions. (*People v. Avery* (2002) 27 Cal.4th 49, 58 [115 Cal.Rptr.2d 403, 38 P.3d 1].) A person is disqualified if they are “required to register under the Sex Offender Registration Act [§§ 290–290.024].” (§ 666, subd. (b).) Section 666 does not reflect a drafting error; there is no compelling evidence the electorate intended a different result. (*People v. Garcia* (1999) 21 Cal.4th 1, 6 [87 Cal.Rptr.2d 114, 980 P.2d 829] [we may reform a statute only “when compelled by necessity and supported by firm evidence of the drafters’ true intent”].) The electorate advanced its goal of “[r]equir[ing] misdemeanors . . . for nonserious, nonviolent crimes like petty theft and drug possession,” while withholding relief from all sex offenders who commit serial theft. (Prop. 47, § 3, subd. (3); see Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 70.)

■ Section 666 does not violate equal protection guarantees because juvenile sex offenders who commit recidivist theft crimes and juvenile sex offenders who commit other Proposition 47 crimes are not similarly situated. (*People v. Morales* (2016) 63 Cal.4th 399, 408 [203 Cal.Rptr.3d 130, 371 P.3d 592] [claimant must show the state adopted a classification that affects two or more groups similarly situated for purposes of the challenged law]; *People v. Shaw* (2009) 177 Cal.App.4th 92, 101 [99 Cal.Rptr.3d 112] [a recidivist is more blameworthy than a first offender].) Harsher consequences for recidivists is not irrational. (*People v. McCain* (1995) 36 Cal.App.4th 817, 820 [42 Cal.Rptr.2d 779].) Even if the crimes were comparable, distinctive treatment

is rational because the two groups' rehabilitative prospects vary. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 827, 837–838 [16 Cal.Rptr.3d 420, 94 P.3d 551] [rational basis review].)

DISPOSITION

The order is affirmed.

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

[No. B264861. Second Dist., Div. Four. Aug. 5, 2016.]

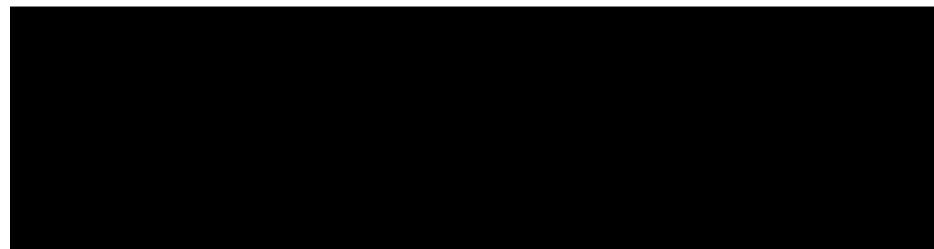
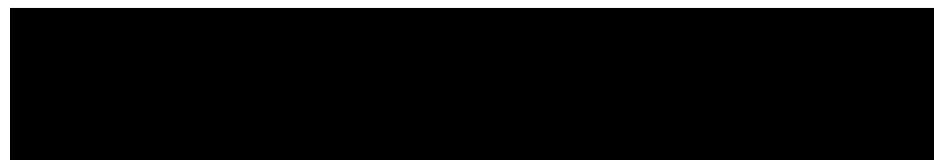
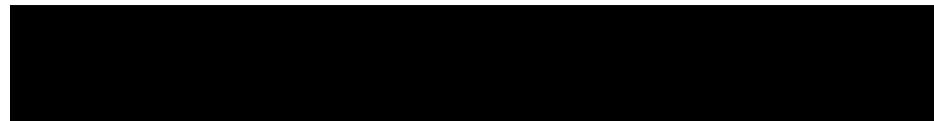
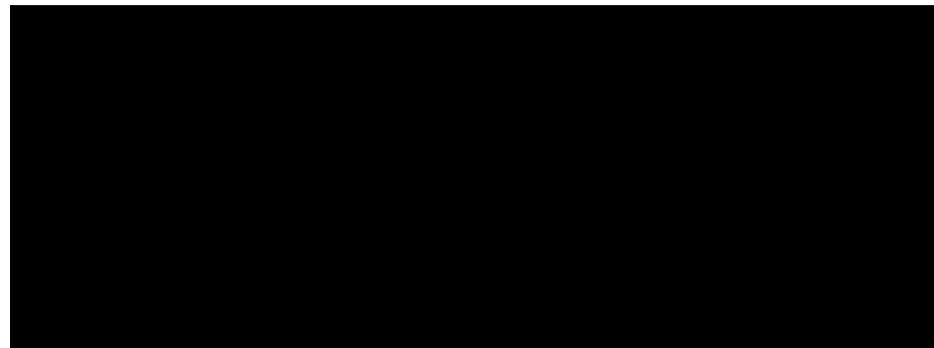
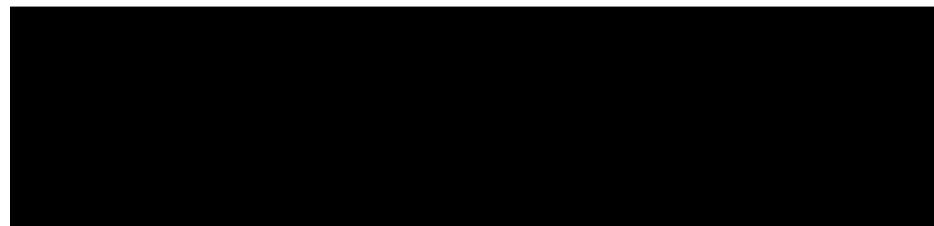
ACE AMERICAN INSURANCE COMPANY, Plaintiff and Appellant, v.
FIREMAN'S FUND INSURANCE COMPANY, Defendant and Respondent.

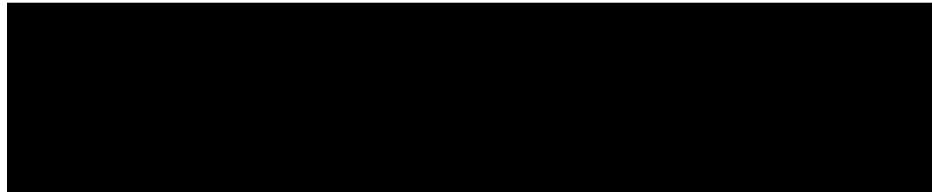
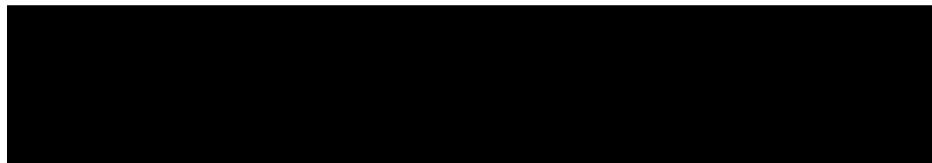
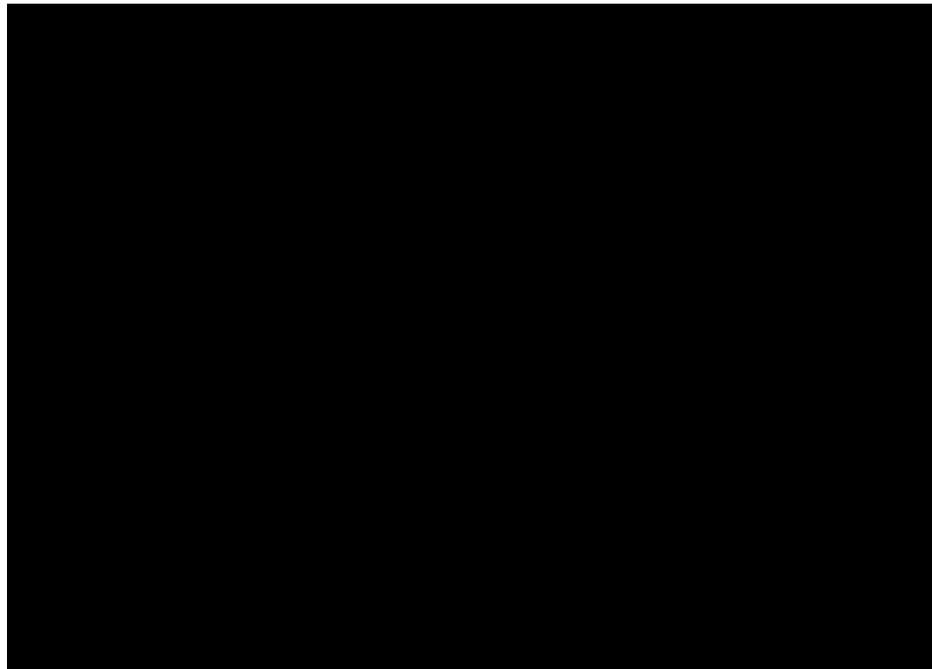
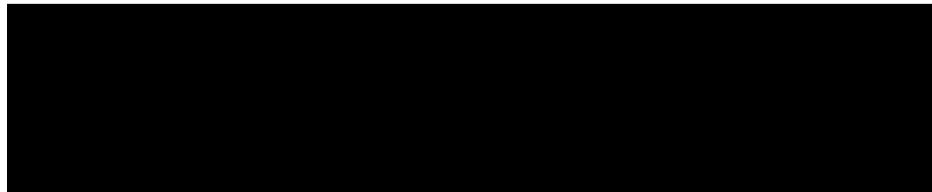
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) November 9, 2016, S237175.

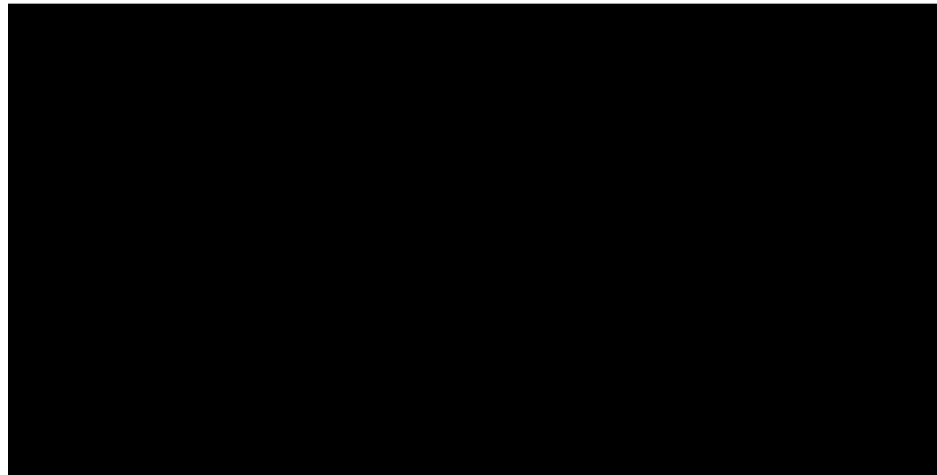
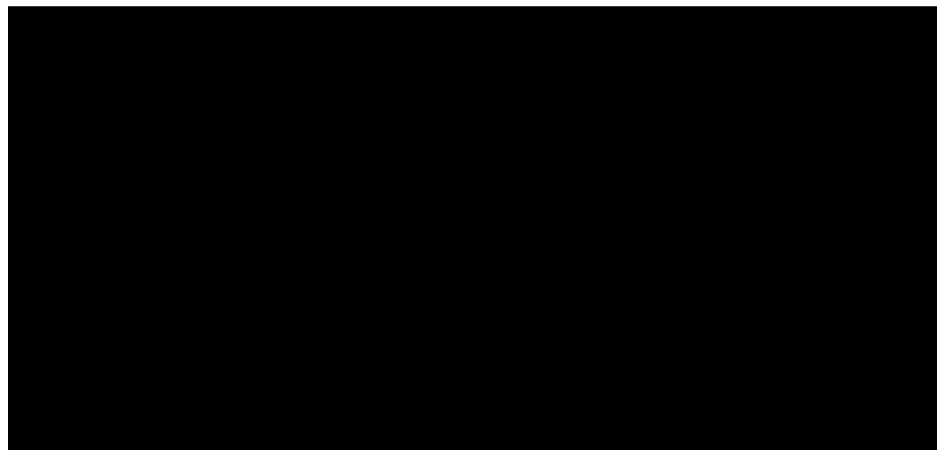
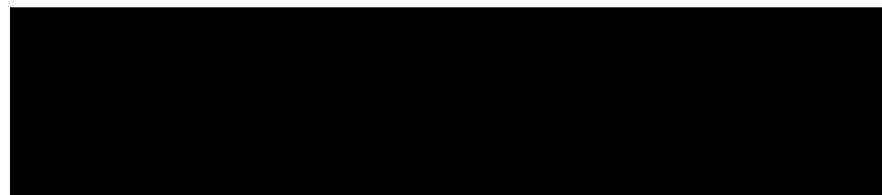
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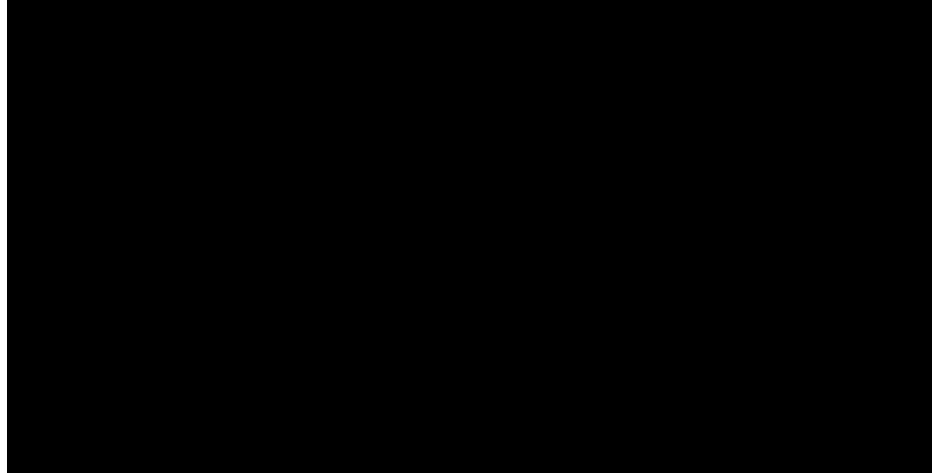
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COUNSEL

Clyde & Co., David Anthony Gabianelli and Marianne G. May for Plaintiff and Appellant.

Sheppard Mullin Richter & Hampton, Marc Jeremy Feldman and Peter H. Klee for Defendant and Respondent.

OPINION**COLLINS, J.—****INTRODUCTION**

A film industry worker was seriously injured on a film set. His employer had two primary insurance policies with Fireman's Fund Insurance Company, and an excess insurance policy with Ace American Insurance Company. The injured worker sued, Fireman's Fund defended the case, and the case eventually settled with the participation of and contributions from both insurers.

Ace American then sued Fireman's Fund for equitable subrogation, alleging that the injured worker initially offered to settle his case within the limits of the Fireman's Fund policies, and that Fireman's Fund unreasonably rejected those settlement offers. Ace American alleged that as a result, it was

required to contribute to the eventual settlement, which exceeded the limits of the Fireman's Fund policies.

The question before us is whether Ace American has stated viable causes of action for equitable subrogation and breach of the duty of good faith and fair dealing, or whether the lack of a judgment in the employment injury case bars Ace American's claims. We find that because Ace American, the excess insurer, alleged it was required to contribute to the settlement of the underlying case due to the primary insurer's failure to reasonably settle the case within policy limits, the lack of an excess judgment against the insured in the underlying case does not bar an action for equitable subrogation and breach of the duty of good faith and fair dealing.

FACTUAL AND PROCEDURAL BACKGROUND

The facts below are taken from Ace American's complaint and first amended complaint. Because the case is on appeal following a demurrer, we accept the alleged facts as true for the limited purpose of determining whether Ace American has stated a viable cause of action. (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885 [66 Cal.Rptr.2d 888, 941 P.2d 1157].)

A. The underlying action

In July 2010, John Franco was working on a film set when a special effects accident caused him to suffer serious injuries. Franco's injuries included pelvic crush injuries, a broken hip, fractures to both femurs, crush injuries to both knees, broken tibias and fibulas, broken ribs, a punctured lung, and soft tissue injuries to his face. Franco alleged that the incident left him with permanent nerve pain, an eye injury, urinary and sexual dysfunction, and fear and depression.

In April 2011, Franco and his wife sued Warner Brothers Entertainment, Inc., and related entities for damages and loss of consortium. Fireman's Fund provided the Warner Brothers entities a primary insurance policy with a \$2 million limit, and an umbrella insurance policy with a \$3 million limit. Ace American provided the Warner Brothers entities an excess insurance policy with a \$50 million limit.

Fireman's Fund defended the Warner Brothers entities in the Francos' lawsuit. In April and May 2012, the Francos made settlement demands within the limits of the Fireman's Fund policies. According to Ace American's complaints, the demands were reasonable and supported by substantial evidence, but Fireman's Fund "failed and/or refused to pay those demands within [the insurance policies'] limits." In October 2012, the Francos settled

their lawsuit “for an amount substantially in excess” of the limits of the Fireman’s Fund policies. According to Ace American, Fireman’s Fund “consented to the settlement and contributed to it,” and Ace American contributed the amounts in excess of the Fireman’s Fund policies’ limits. Following the settlement, the case was dismissed with prejudice.

B. *This action*

Ace American filed an action against Fireman’s Fund for equitable subrogation and breach of the covenant of good faith and fair dealing. In the first amended complaint, which is relevant here, Ace American alleged the facts of the Franco lawsuit, as stated above. It alleged that the Francos’ settlement demands within the limits of the Fireman’s Fund policy were reasonable, and there was a substantial likelihood that a jury verdict would exceed the limits of the Fireman’s Fund policies. It alleged that “Ace American sustained a loss for which [Fireman’s Fund] is liable because of [Fireman’s Fund’s] wrongful conduct in failing to settle the Underlying Action within its policy limits, despite repeat[ed] opportunities to settle within its limits.” Ace American also alleged that its policy provided that if the insured had a right to recover all or part of any payment Ace American made under the policy, those rights were transferred to Ace American.

Fireman’s Fund demurred, arguing that the rights of an excess insurer such as Ace American derive from the rights of the insured, Warner Brothers. As such, an excess insurer may only sue for equitable subrogation if there has been a judgment against the insured that exceeds the limits of the primary policy. Because the Franco lawsuit settled and there was no judgment against Warner Brothers, Fireman’s Fund argued, Ace American could not sue for equitable subrogation. Fireman’s Fund relied on *RLI Ins. Co. v. CNA Casualty of California* (2006) 141 Cal.App.4th 75 [45 Cal.Rptr.3d 667] (*RLI*), which stated that an “insured’s right to recover from the primary insurer hinges upon ‘a judgment in excess of policy limits.’” (*RLI, supra*, 141 Cal.App.4th at p. 82, italics omitted, quoting *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 725 [117 Cal.Rptr.2d 318, 41 P.3d 128] (*Hamilton*).) *RLI* also stated, “Without an excess judgment, the primary insurer’s refusal to settle is not actionable” (*RLI, supra*, 141 Cal.App.4th at p. 82.)

Ace American opposed the demurrer, arguing that a judgment is not required for an equitable subrogation action by an excess insurer. Ace American argued that it was irrelevant whether the underlying action was resolved by a settlement or a judgment, as long as the insured—and by extension, the excess insurer—was liable for any amount beyond the limits of the primary policy as a result of the primary insurer’s bad faith refusal to settle within policy limits. Ace American relied in part on *Fortman v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1394 [271 Cal.Rptr. 117] (*Fortman*), which

held that an excess judgment was not a prerequisite to an equitable subrogation claim, as long as the excess insurer demonstrated that it actually paid an amount in excess of the primary insurer's policy limits.

The trial court sustained Fireman Fund's demurrer without leave to amend. The court held, "*RLI* is directly on point. *RLI* was clear: Until the judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable. Here, there is no dispute a judgment was not entered. The demurrer is sustained."

The trial court entered judgment, and Ace American timely appealed.

STANDARD OF REVIEW

"We review de novo the trial court's order sustaining a demurrer." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1468 [169 Cal.Rptr.3d 619].) We accept as true all well-pleaded allegations in the complaint, and treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6 [40 Cal.Rptr.3d 205, 129 P.3d 394]; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241].)

DISCUSSION

A. *Equitable subrogation and breach of the covenant of good faith and fair dealing*

■ "Primary coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability. . . . [¶] 'Excess' or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted.' [Citation.]" (*Transcontinental Ins. Co. v. Insurance Co. of the State of Pennsylvania* (2007) 148 Cal.App.4th 1296, 1304 [56 Cal.Rptr.3d 491].)¹ Here, Fireman's Fund is the primary insurer, and Ace American is the excess insurer.

■ California recognizes "an implied duty on the part of the insurer to accept reasonable settlement demands on [covered] claims within the policy

¹ In its opposition to Fireman's Fund's demurrer, Ace American encouraged the court to overrule the demurrer because New York law may apply and "there has been no choice of law determination in this case." Toward the end of its opening brief on appeal, Ace American again mentions that "there has been no choice of law determination," and argues it was "premature" for the trial court to sustain the demurrer. Ace American has provided no argument or analysis on the choice-of-law issue, and both parties' analyses focus almost exclusively on California law. We therefore apply California law.

limits.” (*Hamilton, supra*, 27 Cal.4th at p. 724.) “An insurer’s liability for failing to accept a reasonable settlement offer ‘is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing.’” (*Archdale v. American Internat. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 465–466 [64 Cal.Rptr.3d 632] (*Archdale*), quoting *Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173] (*Crisci*) (italics in *Archdale*).) “An insurer that breaches its duty of reasonable settlement is liable for all the insured’s damages proximately caused by the breach, regardless of policy limits.” (*Hamilton, supra*, 27 Cal.4th at p. 725.)

■ “Subrogation is defined as the substitution of another person in place of the creditor or claimant to whose rights he or she succeeds in relation to the debt or claim.” (*Fireman’s Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1291 [77 Cal.Rptr.2d 296] (*Fireman’s Fund v. Maryland*)).

■ “Equitable subrogation allows an insurer that paid coverage or defense costs to be placed in the insured’s position to pursue a full recovery from another insurer who was primarily responsible for the loss.” (*Maryland Casualty Co. v. Nationwide Mutual Ins. Co.* (2000) 81 Cal.App.4th 1082, 1088 [97 Cal.Rptr.2d 374].) ■ “Since the insured would have been able to recover from the primary carrier for a judgment in excess of policy limits caused by the carrier’s wrongful refusal to settle, the excess carrier, who discharged the insured’s liability as a result of this tort, stands in the shoes of the insured and should be permitted to assert all claims against the primary carrier which the insured himself could have asserted.” (*Commercial Union Assurance Companies v. Safeway Stores, Inc.* (1980) 26 Cal.3d 912, 917–918 [164 Cal.Rptr. 709, 610 P.2d 1038].) ■ “The subrogated insurer is said to ‘stand in the shoes’ of its insured, because it has no greater rights than the insured and is subject to the same defenses assertable against the insured.” (*Fireman’s Fund v. Maryland, supra*, 65 Cal.App.4th at p. 1292.)

■ The elements of an insurer’s cause of action for equitable subrogation include: Ace American has paid the claim of its insured, Warner Brothers, to protect its own interest and not as a volunteer; Ace American has suffered damages caused by Fireman’s Fund’s act or omission; and Ace American’s damages are in a liquidated sum.² (*Fireman’s Fund v. Maryland, supra*, 65 Cal.App.4th at p. 1292.)

² “The essential elements of an insurer’s cause of action for equitable subrogation are as follows: (a) the insured [Warner Brothers] suffered a loss for which the defendant [Fireman’s Fund] is liable, either as the wrongdoer whose act or omission caused the loss or because the defendant is legally responsible to the insured for the loss caused by the wrongdoer; (b) the claimed loss was one for which the insurer [Ace American] was not primarily liable; (c) the insurer has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable; (d) the insurer has paid the claim of its insured to protect its own

B. Case law and analysis

1. Fortman and RLI

In this case, we are faced with conflicting decisions from different divisions of this district. In *Fortman, supra*, 221 Cal.App.3d 1394, Division One held that an equitable subrogation action could proceed against a primary insurer that initially breached its duty to settle a case within policy limits, resulting in a settlement that exceeded policy limits. By contrast, in *RLI, supra*, 141 Cal.App.4th 75, Division Five held that an equitable subrogation action *could not* proceed under the same circumstances. *RLI* rejected the reasoning of *Fortman*, and held that because the case resulted in a settlement rather than an excess judgment against the insured, any equitable subrogation action was barred. We discuss both cases below, along with additional cases that guide our determination, and conclude that it is appropriate to follow the reasoning of *Fortman* rather than that of *RLI*.

In *Fortman, supra*, 221 Cal.App.3d 1394, three-year-old Nichole Fortman was injured when she fell from a moving Jeep driven by her mother. (*Fortman, supra*, 221 Cal.App.3d at p. 1397.) The Jeep was covered with a molded shell that included a door handle manufactured by Austin Hardware and Supply, Inc. (*Ibid.*) Austin had a \$300,000 primary insurance policy from Safeco Insurance Company of America, and an excess insurance policy from U.S. Fire Insurance Company and Industrial Indemnity Company. (*Ibid.*) Before trial, Safeco refused offers to settle the case for \$125,000. (*Ibid.*) During trial, Austin settled with Fortman for the full amount of the Safeco policy, plus \$1,125,000 from U.S. Fire; U.S. Fire assigned its equitable subrogation claim to Fortman. (*Ibid.*) Trial continued against the manufacturer of the molded shell, and the jury was asked to apportion damages among the manufacturer, Fortman's mother, and Austin. (*Id.* at pp. 1397–1398.) The jury awarded Fortman nearly \$24 million, finding the mother 75 percent, the shell manufacturer 25 percent, and Austin 0 percent responsible. (*Id.* at p. 1398.)

Fortman brought an equitable subrogation claim. Safeco moved for summary judgment, arguing that because the jury found Austin not responsible for Fortman's injuries, equitable subrogation was not available because there had been no judgment against the insured in excess of the policy limits. (*Fortman, supra*, 221 Cal.App.3d at p. 1398.) The trial court granted the

interest and not as a volunteer; (e) the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer; (f) the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends; (g) justice requires that the loss be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and (h) the insurer's damages are in a liquidated sum, generally the amount paid to the insured. [Citations.]” (*Fireman's Fund v. Maryland, supra*, 65 Cal.App.4th at p. 1292, *italics omitted*.)

motion, and the Court of Appeal reversed. The court said that actions between liability insurers are not based on contract, but instead are based on “‘equitable principles designed to accomplish ultimate justice in the bearing of a specific burden.’” (*Id.* at p. 1399, quoting *American Auto. Ins. Co. v. Seaboard Sur. Co.* (1957) 155 Cal.App.2d 192, 196 [318 P.2d 84].)

The court noted that in Fortman’s underlying case, “Safeco repeatedly, and allegedly in bad faith, refused settlement offers below its policy limits. Had the case been settled for any of those amounts, U.S. Fire would have paid nothing. Instead, U.S. Fire actually paid \$1,125,000 toward the eventual settlement. If we adopted Safeco’s position, U.S. Fire would suffer that loss without a remedy.” (*Fortman, supra*, 221 Cal.App.3d at p. 1401.) Safeco argued that allowing an equitable subrogation action to proceed without an excess judgment against the insured could encourage collusive settlements, but the court rejected that argument: “In the equitable subrogation context before us, the excess insurer must show it actually paid an amount in excess of the primary insurer’s policy limits. Courts easily could distinguish equitable subrogation cases with facts suggesting a collusive settlement from cases like this one in which the excess insurer actually paid a settlement.” (*Id.* at p. 1402.) The court therefore rejected Safeco’s argument that a judgment was required before an excess insurer could recover from a primary insurer.

In *RLI*, Division Two of this district reached a different result. In that case, a driver was involved in a traffic accident that caused a victim’s death. (*RLI, supra*, 141 Cal.App.4th at p. 79.) The driver had a primary insurance policy with a limit of \$1 million, and an excess insurance policy with a limit of \$1 million. (*Ibid.*) The victim’s family sued, and offered to settle their claims for \$1 million. The primary insurer rejected the offer. (*Ibid.*) One year later, the case settled for \$2 million; each insurer paid \$1 million. (*Ibid.*)

The excess insurer then asserted a claim for equitable subrogation against the primary insurer. (*RLI, supra*, 141 Cal.App.4th at p. 79.) The trial court granted the primary insurer’s motion for judgment on the pleadings, and the Court of Appeal affirmed. The court noted that a “claim for equitable subrogation may be pursued against a primary insurer that unreasonably refuses to settle a case within its policy limits, thereby exposing its insured (or an excess insurer) to liability on the claim.” (*Id.* at p. 80.) The court held, however, that when a case resulted in a settlement, rather than a judgment, equitable subrogation was not available: “Without an excess judgment, the primary insurer’s refusal to settle is not actionable” (*Id.* at p. 82.) The court went on to say, “The subrogation complaint in this case alleges that the [underlying] lawsuit settled. Missing from the complaint is the critical allegation that an excess judgment was entered against [the driver] in the [underlying] lawsuit. Because there is not an excess judgment, [the driver] suffered no harm, and has no claim to assert against the primary insurer. As a

result, the excess insurer has no claim to assert against the primary insurer because the subrogation rights of the excess insurer are coequal to and derivative of the rights of the insured.” (*Ibid.*) The court concluded, “The excess insurer cannot sue the primary insurer for failure to settle within the limits of the primary insurer’s policy, absent an excess judgment against the insured.” (*Ibid.*)

The *RLI* court specifically rejected the reasoning of *Fortman*, saying it was “flawed” in three respects. We do not agree with this assessment. First, *RLI* said that *Fortman* conflicted with *Hamilton* (*RLI, supra*, 141 Cal.App.4th at p. 83), a conclusion we do not share for reasons discussed in the following part. Second, *RLI* said *Fortman* followed a rule relevant to equitable contribution rather than equitable subrogation.³ (*RLI*, at p. 83.) Discussing policy, *Fortman* did discuss principles relating to equitable contribution (see *Fortman, supra*, 221 Cal.App.3d at p. 1399), and *RLI* is correct that such principles are generally inapplicable in equitable subrogation cases. (*RLI, supra*, 141 Cal.App.4th at pp. 83–84.) Although *Fortman*’s discussion of policy may have blurred the line distinguishing these two equitable principles, we do not find *Fortman*’s reasoning and ruling to be unreliable as a result. The *Fortman* court based its decision on established equitable subrogation cases and principles, it fully recognized that the insurers were not co-obligors, and did not apply an equitable contribution analysis to determine liability. Third, *RLI* asserted that *Fortman* improperly relied on *Continental Casualty Co. v. Royal Ins. Co.* (1990) 219 Cal.App.3d 111 [268 Cal.Rptr. 193], in which the primary insurer abandoned its defense of the insured. (*RLI, supra*, 141 Cal.App.4th at p. 84, referencing *Fortman, supra*, 221 Cal.App.3d at pp. 1400–1401.) However, *Fortman* cited *Continental Casualty* in only a single paragraph, distinguishing equitable subrogation from third party bad faith claims. (*Fortman, supra*, 221 Cal.App.3d at pp. 1400–1401.) We do not find that *Fortman*’s passing citation to *Continental Casualty* undermines the strength of its main holding: Where an excess insurer can show actual damages as a result of the primary insurer’s failure to reasonably settle the case within primary policy limits, an excess judgment is not required to establish damages in an equitable subrogation case.

2. Hamilton and Isaacson

The *RLI* court stated, “The Supreme Court makes clear in *Hamilton* that a judgment in excess of the policy must be entered before there can be a claim

³ “ ‘Equitable subrogation allows an insurer that paid coverage or defense costs to be placed in the insured’s position to pursue a full recovery from another insurer who was primarily responsible for the loss. . . . [¶] Equitable contribution, on the other hand, applies to apportion costs among insurers that share the same level of liability on the same risk as to the same insured.’ ” (*Transcontinental Ins. Co. v. Insurance Co. of the State of Pennsylvania, supra*, 148 Cal.App.4th 1296, 1303.)

for breach of the primary insurer's duty to settle. Because *Fortman* is contrary to the holding in *Hamilton*, we cannot follow *Fortman*." (*RLI, supra*, 141 Cal.App.4th at p. 85.) We disagree that *Hamilton* requires a judgment to be entered before an insured or its assignee may recover for bad faith failure to settle within policy limits. Although the circumstances in *Hamilton* were dissimilar to the facts here, the *Hamilton* opinion, in dicta, specifically acknowledged that equitable subrogation could proceed under the circumstances of *RLI* and this case.

Hamilton focused on whether a stipulated judgment against an insured, coupled with an agreement not to enforce the judgment, was adequate evidence of damages in a breach of contract case. In the underlying action, clients of a dating service sued multiple franchises of the service, alleging that confidential conversations had been recorded and broadcast without the clients' permission. (*Hamilton, supra*, 27 Cal.4th at p. 722.) One franchise owner, VLP, was insured by Maryland Casualty Company with two successive commercial policies, each with a \$1 million limit. (*Ibid.*) The clients made a settlement demand of \$1 million to VLP, which Maryland denied. (*Id.* at p. 723.) Eventually the case settled without the participation of Maryland. The franchises agreed to stop recording private conversations, discount coupons were offered to class members, and some franchises—not including VLP—contributed cash to a settlement fund. (*Ibid.*) VLP agreed to have a stipulated judgment in the amount of \$3 million entered against it, and it assigned all claims against Maryland to the clients; in return, the clients agreed not to execute the judgment against VLP. (*Ibid.*)

The plaintiff-clients then sued Maryland for breach of contract. (*Hamilton, supra*, 27 Cal.4th at p. 723.) They moved for summary judgment, arguing that "the insurer had breached its contractual duties by failing to accept their offer to settle their claims against VLP for \$1 million and that the \$3 million stipulated judgment was presumptive evidence, which Maryland had done nothing to rebut, of VLP's damages from the breach." (*Id.* at p. 724.) The trial court agreed, and entered judgment in the amount of \$3 million for the plaintiffs. (*Ibid.*) The Supreme Court presented the question before it and its holding as follows: "[I]s the amount of the stipulated judgment presumptively binding on the insurer as to the damages suffered by the insured as a result of the alleged contract breach? We conclude it is not; a defending insurer cannot be bound to a settlement to which it has not agreed and in which it has not participated, even where the settlement has been approved under Code of Civil Procedure section 877.6." (*Id.* at p. 722.) The court added, "[I]n light of the settlement before trial and the covenant not to execute against the insured, the stipulated judgment is insufficient to prove that the insured suffered any damages from the insurer's breach of its settlement duty." (*Ibid.*)

The court reasoned, "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach,

regardless of policy limits. [Citations.] Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment” (*Hamilton, supra*, 27 Cal.4th at p. 725.) The facts of the case set *Hamilton* apart from that rule, however: “In this case, the underlying action did not proceed to trial. It was terminated by settlement, resulting in a *stipulated* judgment coupled with a covenant not to execute against the insured. The question is whether such a stipulated judgment may be treated as a presumptive measure of the damages the policyholder has suffered as a result of the insurer’s breach of contract.” (*Ibid.*) The court noted a line of cases holding that “settlements reached without the consent or participation of the defending insurer, and incorporating a covenant not to execute or similar device, are entitled to no weight in a later action against the insurer for failure to settle.” (*Id.* at p. 726.) It made no difference that the court had approved the settlement, because even court approval “cannot transform an agreed judgment that, by covenant, the insured will never have to pay, into a determination of the existence and extent of the insured’s liability.” (*Id.* at p. 729.) The court added, “A defending insurer cannot be bound by a settlement made without its participation and without any actual commitment on its insured’s part to pay the judgment, even where the settlement has been found to be in good faith for purposes of section 877.6.” (*Id.* at p. 730.) The focus of *Hamilton*, therefore, was whether there was sufficient evidence that the insured had suffered actual damages—not whether damages came in the form of an excess judgment versus an excess settlement.

The *Hamilton* court also referenced its decision in *Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775 [244 Cal.Rptr. 655, 750 P.2d 297] (*Isaacson*), and indicated that the holding of *Isaacson* could be applicable in a case such as this one. In that case, two doctors who were insured by an insolvent insurance company sought damages from the California Insurance Guarantee Association (CIGA) following settlement of a lawsuit relating to a series of unsuccessful back surgeries that left a patient in pain. The patient demanded a settlement of \$1 million, the limit of the doctors’ insurance policy. (*Id.* at p. 782.) After the insurer was determined insolvent and CIGA assumed the doctors’ defense, the patient demanded \$500,000, the limit of CIGA’s coverage. (*Ibid.*) CIGA refused to pay more than \$400,000. (*Ibid.*) At the mandatory settlement conference before trial, the doctors, “at the suggestion of the settlement judge, and with CIGA’s knowledge, agreed to pay \$100,000 in addition to CIGA’s \$400,000 and thus ensure a settlement.” (*Id.* at pp. 782–783.) The doctors then sued CIGA to recover the \$100,000 they contributed to the settlement.

The court held that CIGA’s liability was limited to fulfilling its duties as required by statute. (*Isaacson, supra*, 44 Cal.3d at p. 788.) Unlike an insurer, therefore, CIGA could not breach of the duty of good faith and fair dealing,

because such a duty arises only from a contractual relationship, not a statutory one. (*Id.* at p. 789.) CIGA nevertheless had a duty to accept a reasonable settlement offer: “Although CIGA’s obligations are imposed by the Guarantee Act, and not by a contractual relationship with the insured (or the Unfair Practices Act), we hold that CIGA’s statutory duty to defend and pay ‘covered claims’ encompasses a duty to accept a reasonable settlement offer in appropriate cases.” (*Id.* at p. 792.) Thus, “[i]f CIGA fails to accept a reasonable settlement offer within its statutory limit, in a case in which a judgment against the insured in excess of that limit is likely, it violates its statutory duty to pay and discharge ‘covered claims.’ It may thereby become liable to the insured for reimbursement if the insured expends his own funds to settle, within the statutory limit.” (*Ibid.*, fn. omitted.) “In order to recover reimbursement from CIGA following its refusal to settle a claim, an insured must prove that CIGA breached its duty to settle the case for a reasonable amount.” (*Id.* at p. 793.) Because liability in the doctors’ case was unclear, however, the court held that the doctors failed to prove that CIGA’s denial of the \$500,000 demand was unreasonable. (*Ibid.*)

■ Although *Isaacson* addressed CIGA’s statutory duties, the *Hamilton* opinion referenced the implications of *Isaacson* for cases directly involving insurers: “*Isaacson* indicates that when an insured, faced with the insurer’s unreasonable refusal to pay a settlement demand within the policy limits and exposed to potential personal liability substantially beyond the policy limits, actually contributes payment to conclude the settlement (in which the insurer also participates), the insured may recover the amount of his or her payment from the insurer in an action for bad faith failure to settle. In those circumstances, a bad faith action may be brought by the insured, or the claimant as the insured’s assignee, despite the absence of a litigated excess judgment.” (*Hamilton, supra*, 27 Cal.4th at p. 731.) The court contrasted the facts of *Hamilton*, where the insured neither contributed to the settlement nor risked execution of an excess judgment: “Where, as here, the insured, without the insurer’s agreement, stipulates to a judgment against it in excess of both the policy limits and the previously rejected settlement offer, and the stipulated judgment is coupled with a covenant not to execute, the agreed judgment cannot fairly be attributed to the insurer’s conduct, even if the insurer’s refusal to settle within the policy limits was unreasonable.” (*Ibid.*)

Here, the situation is more akin to *Isaacson* than *Hamilton*—Ace American alleged that Fireman’s Fund unreasonably refused to settle within policy limits, and as a result, Ace American (as Warner Brothers’ subrogee) actually contributed to the eventual settlement, in which Fireman’s Fund, as the primary insurer, also participated. There was no stipulated judgment or agreement not to execute, as in *Hamilton*. As the opinions in *Hamilton* and *Isaacson* indicate, this is a situation in which a bad faith action may be brought by the insured or the insured’s assignee, “despite the absence of a

litigated excess judgment.” (*Hamilton, supra*, 27 Cal.4th at p. 731; see also *Smith v. State Farm Mut. Auto. Ins. Co.* (1992) 5 Cal.App.4th 1104, 1114 [7 Cal.Rptr.2d 131] [“a judgment against the insured (or, if we read the *Isaacson* and *Continental Casualty* decisions correctly, a payment by the insured in settlement of a claim) is a condition to the insured’s right to assign to the claimant a cause of action for bad faith against the insurer.”].) We therefore reject the assertion in *RLI*, urged here by Fireman’s Fund, that *Hamilton* requires entry of a judgment against the insured before a claim arises for equitable subrogation.

Fireman’s Fund points to *RLI*’s reliance on a statement from *Hamilton* that a “pretrial settlement . . . ‘is insufficient to show, even rebuttably, that the insured has been injured to *any* extent by [the primary insurer’s] failure to settle, much less in the amount of the stipulated judgment.’” (*RLI, supra*, 141 Cal.App.4th at p. 82, quoting *Hamilton, supra*, 27 Cal.4th at p. 726.) But *Hamilton*’s focus was on the sufficiency of evidence of actual damages—not on whether the damages arose as a result of a settlement or a judgment. In the part *RLI* quoted, the *Hamilton* court already had noted the parties’ covenant not to execute the stipulated judgment, and then stated, “In these circumstances, the judgment provides no reliable basis to establish damages resulting from a refusal to settle, an essential element of plaintiffs’ cause of action.” (*Hamilton, supra*, 27 Cal.4th at p. 726.) Fireman’s Fund argues that “*Hamilton* was clear that an excess judgment is an essential element of a failure to settle claim.” We disagree. As discussed above, *Hamilton* focused on reliable proof of damages; it did not limit the form of that proof to an excess judgment versus an excess settlement.

3. Other California cases

Fireman’s Fund points to a number of other cases stating that an equitable subrogation action may not proceed without an excess judgment against the insured. Indeed, many cases include language to that effect. (See, e.g., *Finkelstein v. 20th Century Ins. Co.* (1992) 11 Cal.App.4th 926, 929 [14 Cal.Rptr.2d 305] (*Finkelstein*) [“It is well established that an insurance company is liable to an insured when the insurer unreasonably refuses to settle the case within the insured’s policy limits and a ‘judgment’ in excess of those limits is ultimately rendered against the insured.” (italics omitted)]; *Safeco Ins. Co. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43] (*Safeco*) [“A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits.”]; *Wolkowitz v. Redland Ins. Co.* (2003) 112 Cal.App.4th 154, 162 [5 Cal.Rptr.3d 95] [“In the Absence of an Excess Judgment Determining the Fact and Amount of Shamrock’s Liability, Redland Can Have No Liability for Alleged Bad Faith Refusal to Accept a Policy Limits Settlement Offer”];

Archdale v. American Intern. Specialty Lines Ins. Co., supra, 154 Cal.App.4th at p. 474 [“No cause of action for breach of contract based on an insurer’s failure to settle a claim exists until a judgment in excess of policy limits has been rendered against the insured.”].)

■ However, “[t]he holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning.” (*McGee v. Superior Court* (1985) 176 Cal.App.3d 221, 226 [221 Cal.Rptr. 421]; see also *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1097 [95 Cal.Rptr.2d 198, 997 P.2d 511] [“[T]he language of an opinion must be construed with reference to the facts presented by the case; the positive authority of a decision is coextensive only with such facts.”].) ■ A closer examination of the cases cited by Fireman’s Fund makes clear that the purpose behind the statements requiring a judgment in an underlying lawsuit is simply to ensure that a plaintiff has a reliable basis for alleging that damages have resulted from the insurer’s alleged breach of the duty to settle within policy limits—the same concern reflected in *Hamilton*. As noted above, two required elements for equitable subrogation are that the insurer has suffered damages caused by the defendant’s act or omission, and “the insurer’s damages are in a liquidated sum, generally the amount paid to the insured.” (*Fireman’s Fund v. Maryland*, *supra*, 65 Cal.App.4th at p. 1292.) A judgment may constitute reliable evidence of damages. (See *Crisci, supra*, 66 Cal.2d at p. 431 [“The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim.”].) But it does not follow that a judgment is the *only* manner by which an insured or subrogee may prove damages resulting from an unreasonable failure to settle within policy limits. (See, e.g., *Camelot by the Bay Condominium Owners’ Assn. v. Scottsdale Ins. Co.* (1994) 27 Cal.App.4th 33, 48–49 [32 Cal.Rptr.2d 354] [“[T]here is no explicit requirement for bad faith liability that an excess judgment is actually suffered by the insured, since the reasonableness analysis of settlement decisions is performed in terms of the probability or risk that such a judgment may be forthcoming in the future However, the actual excess judgment, if any, is highly relevant in any bad faith damages determination.”].)

For example, *RLI* relied on *Safeco, supra*, 71 Cal.App.4th 782, which was similar to *Hamilton* in that it involved a stipulated judgment and an agreement not to execute the judgment against the insured. In that case, several teenagers were involved in the death of a driver. The driver’s family sued the owners of the home where the teenagers had spent the day drinking before the incident that caused the driver’s death; the defendants’ auto insurer and homeowners’ insurer both defended the lawsuit. (*Id.* at p. 785.) The plaintiffs

and defendants stipulated to a judgment for \$645,000, but the defendants' homeowners' insurer, Safeco Insurance Company of America, did not agree to the settlement. (*Id.* at pp. 786, 787.) The auto insurer agreed to pay \$145,000, the plaintiffs agreed not to execute the remainder of the judgment against the defendants, and the defendants assigned their rights under the homeowners' policy to the plaintiffs. (*Ibid.*) The plaintiffs then sued the homeowners' insurer, Safeco, seeking the \$500,000 limit of the homeowners' policy. Safeco moved for summary judgment, arguing that it had no obligation to pay the stipulated judgment. (*Ibid.*) The trial court denied the motion, and Safeco petitioned for a writ in the Court of Appeal.

The court held that because Safeco had provided a defense in the underlying litigation, the plaintiffs "had no authority to settle the matter without the consent of Safeco," so "the stipulated judgment between the [homeowners] and the [plaintiffs] is unenforceable against Safeco." (*Safeco, supra*, 71 Cal.App.4th at p. 787.) The court also stated that where "the insurer is providing a defense but merely refuses to settle, the insured has no immediate remedy. A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits." (*Id.* at p. 788.) This is necessary, the court reasoned, because "[u]ntil judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable." (*Ibid.*) The court concluded, "Because we find that Safeco was providing a defense to the [defendants], Safeco was entitled to control the defense and to decide whether to litigate the [plaintiffs'] claim. If Safeco's decision to go to trial had resulted in a verdict above the policy limits, then Safeco's refusal to settle, if found to be unreasonable, could have rendered it liable for the full amount of the verdict. But until a litigated excess judgment is obtained, Safeco's refusal to settle is not actionable." (*Id.* at p. 789.)

Therefore, *Safeco*—like *Hamilton*—holds that a stipulated judgment entered into without the involvement of the insurer, coupled with an agreement not to execute the judgment on the insured, is not reliable proof of damages for the insurer's failure to settle within policy limits. Moreover, this case is unlike *Safeco* or *Hamilton* because here, Fireman's Fund consented to the excess settlement and contributed to it. This case does not present a situation where the parties settled without the insurer's consent while the insurer was actively defending the case, as in *Safeco* and *Hamilton*.⁴

⁴ Another case with similar facts is *Doser v. Middlesex Mutual Ins. Co.* (1980) 101 Cal.App.3d 883 [162 Cal.Rptr. 115], in which a passenger's heirs sued the estate of a pilot following a fatal small plane crash. The plaintiff heirs and the pilot's estate, without the involvement of the insurer, settled in an amount determined by plaintiffs' counsel, and the heirs agreed to release all claims against the estate. In exchange, the defendant estate assigned the heirs its rights to a bad faith action against the insurer. In the heirs' case against the insurer,

Fireman's Fund also cites *Wolkowitz, supra*, 112 Cal.App.4th 154 in support of its argument that a judgment is a required element of a failure to settle claim. In *Wolkowitz*, a man installed a "lift kit" on his car and was subsequently injured when he lost control of the car; he sued Shamrock Tire, Etc., Inc., the lift kit maker. (*Id.* at p. 157.) Shamrock tendered its defense to its insurer, Redland Insurance Company, and Redland later refused an offer to settle the case within policy limits. (*Ibid.*) Shamrock then declared bankruptcy. The bankruptcy trustee and the injured driver reached an agreement that "expressly provide[d] that [the driver] had a \$26,225,000 claim against the bankruptcy estate, and that the claim would be allowed (without objection by the trustee) as a general unsecured claim. It further provided that [the driver] would not seek any recovery from Shamrock, but would look solely to proceeds to be recovered from Redland." (*Id.* at pp. 158–159, italics & fn. omitted.) The trustee then sued Redland, alleging bad faith for failure to settle the driver's case within policy limits. (*Id.* at p. 159.) Redland successfully demurred, and the trustee appealed.

The Court of Appeal, relying on *Hamilton*, stated, "The question here is whether the [bankruptcy case] order allowing the claim constitutes a judicial determination of Shamrock's liability that accurately reflects Shamrock's actual liability to [the injured driver] and provides a reliable basis to establish damages proximately caused by Redland's refusal to settle. (*Hamilton, supra*, 27 Cal.4th at pp. 725–727, 730.) We conclude that the clear answer to this question is that it does not." (*Wolkowitz, supra*, 112 Cal.App.4th p. 165.) The court continued, "Quite obviously, the agreement between [the driver] and the trustee was not premised on the expectation that Shamrock or the bankruptcy estate would ever pay [the driver's] claim, but rather entirely upon a potential recovery from Redland, Shamrock's insurer, which recovery would be shared in some agreed ratio. As with the 'good faith' settlement in *Hamilton, supra*, 27 Cal.4th at page 730, the bankruptcy court's order was not a judicial finding that Shamrock was actually liable to [the driver] in the agreed amount." (*Wolkowitz, supra*, 112 Cal.App.4th at p. 165.) The court concluded, "Since, as we have explained, the allowed claim can provide no reliable basis to establish damages in any amount, the complaint does not properly allege damages *resulting from the refusal to settle*. We therefore conclude that Redland's demurrer was properly sustained on the ground of a failure to state a cause of action." (*Id.* at p. 166.) As in *Hamilton*, therefore, the focus of *Wolkowitz* was whether the parties' agreement was sufficient evidence of damages arising from a failure to settle. *Wolkowitz* does not hold that damages must take the form of a judgment rather than a settlement.

the Court of Appeal held that the collusive settlement reached without the participation of the insurer could not support a damages claim against the insurer.

Fireman's Fund also relies on *Archdale*, *supra*, 154 Cal.App.4th 449, in which an 18-wheeler collided with two other vehicles. A driver of one of the vehicles sued the truck driver and his employer, who were insured by AIS. (*Id.* at p. 457.) AIS allegedly failed to accept multiple reasonable settlement offers within its \$500,000 policy limit. (*Id.* at p. 455.) A jury trial resulted in a judgment of \$1,269,000 against the insureds. (*Ibid.*) AIS paid \$357,500 to the plaintiffs, which constituted the remainder of the policy limits after a settlement with another claimant involved in the same accident. (*Id.* at p. 458.) The plaintiffs, the truck driver, and driver's employer then sued AIS for breach of contract and breach of the duty of good faith and fair dealing. (*Ibid.*) The trial court granted AIS's motion for summary judgment based on the statute of limitations, and the appeal focused on when the cause of action against AIS accrued, and whether it was tolled by events in the underlying litigation.

The Court of Appeal stated, "A breach of the duty to settle within policy limits while the action is pending in the trial court presents only the possibility that a judgment might be rendered in excess of policy limits. Even if the insurer rejects a settlement offer within policy limits, it is not subject to liability if it successfully defends the litigation and obtains a complete defense verdict or a judgment is rendered that is below the settlement offer or within policy limits. The cause of action arises only upon entry of a judgment in excess of policy limits." (*Archdale*, *supra*, 154 Cal.App.4th at p. 474, italics omitted.) The court reasoned that "until the judgment is final it cannot be determined with certainty whether, and in what amount, the insured has been harmed." (*Id.* at p. 478, citing *Hamilton*, *supra*, 27 Cal.4th at pp. 725–728.) The court held that such claims are tolled until any appeal following the judgment is complete: "Had AIS prevailed on [its appeal], the judgment would have been reversed, and a retrial could have potentially altered the jury's comparative negligence finding so as to reduce the liability of [the defendants] to the policy limit, or to a figure below that limit, or to zero." (*Archdale*, *supra*, 154 Cal.App.4th at p. 478.) The running of a limitations period was therefore tolled until the judgment was complete following appeal, to ensure that the amount of damages was determined and ascertainable.

Here, Fireman's Fund cites *Wolkowitz* and *Archdale* for the proposition that "a judgment is a required element of a failure to settle claim."⁵ We do not read *Wolkowitz* or *Archdale* as supportive of that statement. The issue in each case was whether the damages claimed by the plaintiffs were fixed and

⁵ Fireman's Fund also cites *Finkelstein*, *supra*, 11 Cal.App.4th 926, saying that the trial court granted the insurer's motion for summary judgment "based on the fact that the underlying claim was resolved by a settlement, rather than a judgment." In fact, the underlying action in *Finkelstein* settled for less than the policy limits, and the Court of Appeal held that the possibility of damages for failure to settle "never ripened into an actionable event." (*Id.* at p. 930.) The court did not hold that the fact of the settlement alone barred the claim.

ascertainable, not whether the underlying cases had been litigated to judgment. The same was true in *Hamilton*, where the court considered whether a stipulated judgment with a covenant not to execute was sufficient evidence of damages. The focus of these cases was whether the insured had incurred measurable damages—not whether those damages had been reduced to a judgment.

Fireman's Fund argues that "a conventional settlement between the parties, which is not approved by the court and does not result in even a nominal judgment, does not establish the damages required to settle a claim." It also argues that "[w]ithout a judgment, there is nothing to establish whether and to what extent the case was worth more than the primary limits." But whether the settlement will ultimately be sufficient to prove Ace American's damages is not at issue in this appeal.⁶ Because this case is before us following a demurrer, issues of eventual proof are not relevant. "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872 [138 Cal.Rptr.3d 1, 270 P.3d 699].)

Ace American has alleged that Fireman's Fund unreasonably failed to settle the Franco action within policy limits, and that as a result, the eventual settlement of that case exceeded the policy limits. Ace American therefore has alleged that it was damaged in an ascertainable amount as a direct result of Fireman's Fund's failure to accept the Francos' reasonable, within-limits settlement offers. We see no persuasive reason to hold that either Warner Brothers or its assignee, Ace American, must suffer that loss with no remedy simply because the case reached an eventual settlement instead of being litigated through trial. Ace American's alleged damages are clear, liquidated, and certain, and Fireman's Fund participated in reaching the settlement. These facts set this case apart from *Hamilton*, *Safeco*, and *Wolkowitz*. As the *Fortman* court aptly noted, "Courts easily [can] distinguish equitable subrogation cases with facts suggesting a collusive settlement from

⁶ Isaacson stated that a settlement may be considered as evidence of damages: "[I]f an insurer wrongfully fails to provide coverage or a defense, and the insured then settles the claim, the insured is given the benefit of an evidentiary presumption. In a later action against the insurer for reimbursement based on a breach of its contractual duty to defend the action, a reasonable settlement made by the insured to terminate the underlying claim against him may be used as presumptive evidence of the insured's liability on the underlying claim, and the amount of such liability." (*Isaacson, supra*, 44 Cal.3d at p. 791.) *Hamilton* cautioned that even with court approval under Code of Civil Procedure section 877.6, a collusive settlement may not be sufficient evidence of damages. (*Hamilton, supra*, 27 Cal.4th at p. 722.) Thus whether the settlement ultimately will constitute sufficient evidence of damages is an issue for the trier of fact. Here, for purposes of a demurrer, Ace American has adequately alleged that it was damaged because it contributed to the settlement.

cases like this one in which the excess insurer actually paid a settlement.” (*Fortman, supra*, 221 Cal.App.3d at p. 1402.)

4. Other authorities

Fireman’s Fund also cites a California practice guide, which opines that “*RLI* seems correct and *Fortman* seems incorrect because Excess Insurer is subrogated to *Insured*’s rights against Primary Insurer (see ¶8:338) . . . and, as long as Primary Insurer is defending the action (even under a reservation of rights), Insured has no action for unreasonable refusal to settle until an excess judgment has been rendered.” (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2015) ¶ 8:345.3, p. 8-86, citing *Safeco, supra*, 71 Cal.App.4th at p. 788, and *Hamilton, supra*, 27 Cal.4th at p. 725.) Fireman’s Fund also notes that CACI No. 2334, the jury instruction for bad faith refusal to accept a reasonable settlement within policy limits, includes as an element, “That a monetary judgment was entered against [name of plaintiff] for a sum greater than the policy limits.”

These simple summaries, however, fall short in that they cast the issue in dualistic terms: either the insurer settled the case for a reasonable amount within primary policy limits, or the case went to trial and ended with an excess judgment against the insured. Cases are much more likely to settle than proceed to trial, however. The most recent data available from the Superior Courts of California show that in 2015, 37,502 cases were disposed of following trial, while 135,918 cases were disposed of before trial—thus, more than 78 percent of cases were resolved before trial. (See Judicial Council of Cal., Court Statistics Rep. (2015) p. xv.) Even one of the earliest equitable subrogation cases, *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654 [328 P.2d 198], noted that “[i]t is common knowledge that a large percentage of the claims covered by insurance are settled without litigation and that this is one of the usual methods by which the insured receives protection.” (*Id.* at p. 659.) Indeed, California statutes and case law encourage multiple settlement offers as a case develops. (See, e.g., *T. M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 281 [204 Cal.Rptr. 143, 682 P.2d 338] [“the policy of encouraging settlements is best promoted by making section 998 offers revocable” because a “party is more likely to make an offer pursuant to section 998 if that party knows that the offer may be revised if circumstances change or new evidence develops. . . . The more offers that are made, the more likely the chance for settlement.”].) To cast the issue in dualistic terms—either a reasonable settlement within primary policy limits or a fully litigated excess judgment—fails to account for cases like this one, where multiple settlement opportunities occur, and an unreasonable refusal to settle early in a case may result in measurable damages to the insured or excess insurer in the form of a later excess settlement.

5. Non-California cases

Cases from other jurisdictions support our conclusion. The Ninth Circuit, in an unpublished decision, recently considered whether an excess settlement could serve as the basis for an equitable subrogation action.⁷ (*RSUI Indemnity Co. v. Discover P & C Ins. Co.* (9th Cir. 2016) 649 Fed. Appx. 534.) The court considered the conflict between *Fortman* and *RLI*, and concluded that “the rule announced in *Fortman* is more likely to be adopted by the California Supreme Court because it more faithfully applies California insurance law.” (*RSUI*, at p. *2.) The Ninth Circuit discussed *Hamilton*’s distinction between a settlement to which an insured or excess insurer contributed, and a collusively inflated settlement or stipulated judgment to which an insured or excess insurer did not contribute. The Ninth Circuit noted that *Fortman* recognized this “critical distinction,” and stated that *Fortman* “applied this principle to disputes between contributing excess insurers and primary insurers: when an excess insurer, faced with a primary insurer’s unreasonable refusal to pay a settlement demand within the policy limits, actually contributes payment to conclude settlement, it may state a claim for equitable subrogation despite the absence of a litigated excess judgment. [*Fortman*, *supra*, 221 Cal.App.3d at p. 1398]. *Fortman*’s conclusion is consistent with *Hamilton* and *Issacson*. The collusive risk that *Hamilton* wished to avoid is not present when an excess insurer contributes to settle a case on behalf of an insured.” (*RSUI*, at p. *3.)

The Seventh Circuit, in an opinion by Judge Posner, also relied on *Fortman* in rejecting an argument that a judgment is required in an equitable subrogation action by an excess insurer: “Country Mutual [the primary insurer] argues that a breach of the insurer’s duty to act in good faith in settlement negotiations is not actionable unless, by refusing to settle, the insurer precipitates a trial that results in the entry of a judgment against the insured. This is not a ridiculous argument. If the temptation at which the duty is aimed is the temptation to gamble with the insured’s money, it is not obviously a violation merely to dawdle in settling until the golden moment of opportunity passes. But though the case law is sparse, we are pretty confident that the line should not be drawn here. *Fortman v. Safeco Ins. Co.*[, *supra*,] 221 Cal.App.3d 1394 The basic temptation of the insurer comes from the fact that its liability is capped at the policy limits, so that it can shift many of the losses of a risky strategy to the insured (or any excess insurer). It may dawdle in settling, hoping to drive a harder bargain and knowing that if it fails and the case goes to trial and it loses big, still most of the loss will fall

⁷ Unpublished federal opinions have persuasive value, and are not subject to California Rules of Court, rule 8.1115, which governs citation to unpublished California opinions. (*Harris v. Investor’s Business Daily, Inc.* (2006) 138 Cal.App.4th 28, 34 [41 Cal.Rptr.3d 108]; *Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 990 [134 Cal.Rptr.3d 214].)

on the insured or on an excess insurer rather than on itself. The fact that on the eve of trial it may throw in the towel because it sees no hope of winning should not excuse it from having failed to settle earlier on better terms if it would have settled earlier on those terms had all the risks of loss lain on itself.” (*Twin City Fire Ins. Co. v. Country Mutual Ins. Co.* (7th Cir. 1994) 23 F.3d 1175, 1181.) We agree with this reasoning.

In addition, most other jurisdictions that have considered this issue have found that an insured or excess insurer that contributes to a settlement can pursue the primary insurer for failing to accept reasonable settlements within primary limits. (See, e.g., *St. Paul Fire & Marine Ins. Co. v. Liberty Mutual Insurance Co.* (2015) 135 Haw. 449, 456 [353 P.3d 991] [in a case involving a postverdict settlement in excess of primary limits, “the public interest in encouraging reasonable settlement is best served by permitting an excess insurer to seek relief under the doctrine of equitable subrogation”]; *Scottsdale Ins. Co. v. Addison Ins. Co.* (Mo. 2014) 448 S.W.3d 818, 831–832 [where the underlying case settled, “an excess insurer who pays a third-party claim on behalf of its insured after a primary insurer refuses in bad faith to settle the claim has a right to equitable subrogation to obtain the amount paid from the primary insurer”]; *American Centennial Ins. Co. v. Canal Ins. Co.* (Tex. 1992) 843 S.W.2d 480, 483 [an excess carrier may bring an equitable subrogation action against the primary carrier in a case that settles in excess of the limits of the primary policy]; *Maine Bonding & Casualty Co. v. Centennial Ins. Co.* (1985) 298 Ore. 514, 525 [693 P.2d 1296] [allowing equitable subrogation by an excess insurer following a settlement where the claimant “came to insist upon a higher settlement figure than he would have if the claim had been handled more expeditiously”]; *Continental Casualty Co. v. Reserve Ins. Co.* (1976) 307 Minn. 5, 13–14 [238 N.W.2d 862] [holding that a judgment in the underlying action is not required in an action by an excess insurer against a primary insurer for failure to accept a reasonable settlement offer]; see also Windt, *Insurance Claims and Disputes* (6th ed. 2013) § 9:2 “[A] cause of action for a carrier’s breach of its duty to settle should accrue when an excess judgment is entered or an excess settlement agreement is entered into, at which time the insured will have been damaged by reason of the earlier failure to settle.”].)

6. Policy of encouraging settlement

“California’s public policy is to encourage settlement.” (*Tower Acton Holdings v. Los Angeles County Waterworks Dist. No. 37* (2002) 105 Cal.App.4th 590, 602 [129 Cal.Rptr.2d 640].) Fireman’s Fund argues that if California courts follow *Fortman* rather than *RLI*, settlements will be discouraged because “[p]rimary insurers would be hesitant to participate with excess insurers in settlements, for fear of the excess insurers turning around and

suing them.” However, our holding places no additional duties upon primary insurers that they do not ordinarily have. Primary insurers already have the duty to accept reasonable settlement offers within policy limits, and liability for resulting damages when they breach that duty. Moreover, our decision protects insureds, because insurers whose mishandling of settlement offers causes damages will be liable for the losses they cause. The *RLI* rule, on the other hand, leaves insureds without recourse when primary insurers mishandle reasonable early settlement offers, resulting in later excess settlements. Moreover, “when a primary insurer breaches its good-faith duty to settle within policy limits, it imperils the public and judicial interests in fair and reasonable settlement of lawsuits.” (*Continental Casualty Co. v. Reserve Ins. Co.* (1976) 307 Minn. 5, 9 [238 N.W.2d 862].)

■ In sum, we conclude that in an equitable subrogation action, “an excess insurer which has settled and discharged the insured’s liability may recover from the primary insurer an amount in excess of the primary insurer’s policy limits if the excess insurer can prove the primary insurer’s unreasonable refusal to settle within its policy limits resulted in loss to the excess insurer in an amount in excess of the policy limits of the primary insurer it would not otherwise have had.” (*Northwestern Mut. Ins. Co. v. Farmers’ Ins. Group* (1978) 76 Cal.App.3d 1031, 1050 [143 Cal.Rptr. 415].) An excess judgment is not a required element of a cause of action for equitable subrogation or breach of the duty of good faith and fair dealing; where the insured or excess insurer has actually contributed to an excess settlement, the plaintiff may allege that the primary insurer’s breach of the duty to accept reasonable settlement offers resulted in damages in the form of the excess settlement. We therefore reverse the judgment sustaining Fireman’s Fund’s demurrer, and remand for further proceedings.

DISPOSITION

The judgment is reversed. Ace American shall recover its costs on appeal.

Epstein, P. J., and Willhite, J., concurred.

Respondent’s petition for review by the Supreme Court was granted November 9, 2016, S237175. On March 15, 2017, review dismissed.

[No. B259800. Second Dist., Div. Eight. Aug. 8, 2016.]

MORLIN ASSET MANAGEMENT LP et al., Cross-complainants and
Appellants, v.
EDWARD M. MURACHANIAN, Cross-defendant and Respondent.

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Horvitz & Levy, Mitchell C. Tilner, Stephen E. Norris; Kuluva, Armijo & Garcia and Sherry L. Grguric for Cross-complainants and Appellants.

Williams Iagmin and Jon R. Williams for Cross-defendant and Respondent.

OPINION**GRIMES, J.—****SUMMARY**

This is an appeal from the grant of summary judgment on two cross-complaints for indemnity and apportionment of fault. Plaintiff Jose Luis Anguiano filed this lawsuit after he was injured when he slipped on the stairs in the common area of a commercial building. He was at the building to clean the carpets in the dental suite of a tenant in the building. Plaintiff sued the owners of the building and its managers, Morlin Asset Management LP and Morlin Management Corporation (the landlords), for negligence and premises liability. The landlords each filed virtually identical cross-complaints against Edward Murachanian (the tenant), a dentist who rents an office suite in the building. The tenant had hired plaintiff's employer to clean the carpets in his second-floor suite.

The tenant moved for summary judgment on the cross-complaints on the grounds that plaintiff claimed his injury was caused by a defect in the common areas of the building for which the landlords had the exclusive right of management and control, and the tenant's lease provided he was only liable to indemnify the landlords for injuries incurred within his suite.

The landlords opposed the motion, arguing there were material disputed facts, including whether plaintiff was at fault for spilling a bucket of soapy water in which he slipped and fell; whether the tenant was at fault for failing to fulfill his duty under the lease to notify the landlords that someone was coming to clean the carpet, thus depriving them of an opportunity to take steps to spare plaintiff from carrying heavy buckets of water up the stairway; and whether the stairway was defective. The landlords contended the determination of their rights to indemnity and apportionment of fault rested on how these disputed facts were resolved.

The trial court granted the tenant's motion for summary judgment, finding the lease obligated the tenant to indemnify the landlords only against claims for injuries occurring within the tenant's office suite, not in the common areas.

We affirm the judgments, as well as the court's order awarding attorney fees to the tenant.

FACTS

Plaintiff was an employee of Arax Carpet Co. Cross-defendant tenant engaged Arax to clean the carpets in his dental suite. Arax sent plaintiff and another man to do the work on October 4, 2012.

As he walked up a flight of stairs, plaintiff slipped, falling forward and suffering severe injuries. Plaintiff sued the landlords, claiming the stairs presented a dangerous condition because the treads and risers did not conform to the building code or industry standards in various respects.

During discovery, these facts came to light:

A medical report from Dr. Daniel Skenderian stated that, while carrying soapy water up a flight of stairs, plaintiff “had apparently spilled some water and slipped and fell face first, hitting his face and jaw.” Dr. Skenderian’s report stated that plaintiff “volunteered that there was soap in the water that made the spills on the stairs more slippery.” Dr. Skenderian later testified at his deposition that plaintiff corroborated the information in the medical records. Dr. Skenderian’s recollection of what plaintiff told him was that “he was carrying soapy water, water spilled, and he stepped in the spill and slipped.” A medical report and deposition testimony from Dr. Michelle Ward stated essentially the same thing: that plaintiff told her that he was carrying buckets of soapy water upstairs, the “bucket caught on the stair, water spilled and on his next step he slipped and fell forward.”

When plaintiff was asked in discovery to state facts upon which he based any contention that his actions or omissions were not the sole cause of the incident, plaintiff responded with the same allegations he made in the complaint about the dangerous condition of the stairs, in violation of statute or industry standards, and said: “As he climbed [the] stairs carrying heavy buckets of water, Plaintiff made contact with one or all of these dangerous conditions causing him to fall with great force on the steps.”

Ivan Bell, the building engineer for the property, was deposed and testified that he told the tenant he wanted to be notified “whenever Arax comes out” so that he could “make sure the hoses were run properly.” (This was because of a previous occasion when he “caught them [Arax] with the hose going up the stairs,” and he told the tenant that “it was a problem the way they were putting the hose” on that occasion.) Mr. Bell testified that he “saw them [Arax] do it wrong,” and he told the tenant that “[y]ou have to let me know every time they come.’ ”

In April and May 2014, the landlords filed cross-complaints against the tenant for equitable indemnity (alleging any injuries to plaintiff were caused

by the tenant); apportionment of fault; declaratory relief; and express indemnity under the terms of the lease. The landlords alleged the lease required the tenant to defend and indemnify them, and to purchase liability insurance naming them as additional insureds.

In June 2014, the tenant moved for summary judgment. He contended the lease agreement did not provide express indemnity for plaintiff's alleged injuries because the accident did not occur within his leased premises, but instead within the common areas; he did not cause or contribute to plaintiff's alleged injuries, so there was no basis for implied or equitable indemnity; and at all times he procured the necessary liability insurance naming the landlords as additional insureds.

The tenant's evidence included, among other evidence, a copy of the lease, containing this indemnification clause: "8.7 Indemnity. Except for Lessor's gross negligence or willful misconduct, ***Lessee shall indemnify, protect, defend and hold harmless*** the Premises, ***Lessor and its agents***, Lessor's master or ground lessor, partners and Lenders, ***from and against any and all claims, loss of rents and/or damages, liens, judgments, penalties, attorneys' and consultants' fees expenses and/or liabilities arising out of, involving or in connection with, the use and/or occupancy of the Premises by Lessee***. If any action or proceeding is brought against Lessor by reason of any of the foregoing matters, Lessee shall upon notice defend the same at Lessee's expense by counsel reasonably satisfactory to Lessor and Lessor shall cooperate with Lessee in such defense. Lessor need not have first paid any such claim in order to be defended or indemnified." (Italics & boldface added.)

The tenant was deposed six days after he filed his motion for summary judgment. He testified that several years before plaintiff's accident, Mr. Bell "asked us to inform them when we were going to have any work done such as a carpet cleaning or air conditioning service when we were having somebody come over onto the premises." "We'd notify Ivan Bell. So if he had any concerns or needed to be there when any of this work was being done by any of the contractors he had ample time and notice to be there." The tenant did not know whether his office staff notified Mr. Bell about the carpet cleaning that took place on the date of plaintiff's accident.

The landlords opposed the motion for summary judgment, contending the evidence established "that plaintiff created the condition which caused his fall"; that plaintiff was acting as an agent for the tenant; and that the tenant was responsible for plaintiff's actions. The landlords contended there were triable issues, including the extent of the agency and whether the tenant was negligent for creating the condition that caused or contributed to plaintiff's fall and injuries.

The trial court granted the tenant's motion for summary judgment on the landlords' claim for express indemnity, finding the lease obligated the tenant to indemnify the landlords only against claims "involving the Premises, which has a limited definition and does not include 'stairwells.'" Because it was undisputed that plaintiff was injured on the stairwells, within the common areas (defined as "all areas and facilities outside the Premises," including stairwells, the control of which is expressly reserved to the landlords), the trial court concluded the tenant had no indemnification obligation.

The court also granted summary judgment on the landlords' claims for equitable indemnity and apportionment of fault, reasoning it was undisputed that the tenant did not exercise any control over the common areas. The court rejected the landlords' agency theory, finding no law or facts to support the existence of an agency relationship between the tenant and plaintiff.

Judgments were entered in the tenant's favor on the cross-complaints, and the trial court awarded the tenant \$12,000 in attorney fees. The landlords filed timely appeals from the judgments and the attorney fee order.

Along with their opening brief, the landlords requested, and we now grant, judicial notice of documents showing plaintiff settled with the landlords and his complaint was dismissed with prejudice on June 2, 2015.

DISCUSSION

As we explain below, we conclude as a matter of law that the indemnification clause in the lease does not extend to claims or liabilities arising out of this accident in the common areas over which the tenant had no control. Summary judgment was therefore proper in this case.

1. *The Standard of Review*

We review an order granting summary judgment de novo, "considering all the evidence set forth in the moving and opposition papers except that 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].)

A cross-defendant moving for summary judgment must show "that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) "In performing our de novo review, we must view the evidence in a light favorable to [the landlords] as the losing party [citation], liberally construing [their] evidentiary submission while strictly scrutinizing [the

tenant's] own showing, and resolving any evidentiary doubts or ambiguities in [the landlords'] favor." (*Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763, 768 [107 Cal.Rptr.2d 617, 23 P.3d 1143].) Summary judgment is appropriate where "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).)

2. *The Lease Provisions*

We quoted above the indemnity clause in the parties' lease, requiring the tenant to indemnify and defend the landlords and their agents (except for their gross negligence or willful misconduct) against all claims and liabilities "arising out of, involving or in connection with, the use and/or occupancy of the Premises by [tenant]."

Both parties variously invoke several other provisions of the lease, and both point out that the lease must be construed as a whole. (Civ. Code, § 1641 ["The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."].)

The tenant points to the definitions of lease terms, including the leased premises, which are limited to suite No. 204; the common areas, which are outside the suite and include the stairwells; and provisions giving the landlords exclusive control and management of the common areas and the responsibility for keeping the common areas in good condition and repair. The landlords point to a provision exempting them from all liability for injury or damage to the person or property of the tenant or the tenant's employees, contractors or others "in or about the Premises," from any cause, whether the injury results from conditions arising "upon the Premises . . . or from other sources or places," and a provision requiring the tenant to maintain specifically described liability insurance. The landlords also point to the rules and regulations appended to the lease and initialed by the parties. These include a rule stating that the tenant "shall not employ any service or contractor for services or work to be performed in the Building except as approved by [landlords]."

3. *The Indemnity Clause Bars the Cross-complaints.*

The tenant agreed to indemnify the landlords for claims "arising out of, involving or in connection with" his use or occupancy of the dental suite. The landlords contend the term "arising out of" should be liberally construed in favor of the promisee (here, the landlords). For this proposition, the landlords cite *Vitton Construction Co., Inc. v. Pacific Ins. Co.* (2003) 110 Cal.App.4th 762, 766 [2 Cal.Rptr.3d 1] (and many other insurance cases), where the court

observed that “ ‘California courts have consistently given a broad interpretation to the terms “arising out of” or “arising from” in various kinds of insurance provisions.’ ” Here, the landlords say, “[w]ere it not for [the tenant’s] use of the leased premises to operate his dental office, including his hiring of Arax to clean the carpet within the leased premises, [plaintiff] would not have been ascending the stairwell and would not have been injured.”

■ But this is not an insurance case. And as the Supreme Court instructs, “[t]hough indemnity agreements resemble liability insurance policies, rules for interpreting the two classes of contracts do differ significantly.” (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 552 [79 Cal.Rptr.3d 721, 187 P.3d 424] (*Crawford*) [a “public policy concern influences to some degree the manner in which noninsurance indemnity agreements are construed”].) “For example, it has been said that if one seeks, in a noninsurance agreement, to be indemnified . . . regardless of the indemnitor’s fault . . . language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee.” (*Ibid.*) In accordance with this principle, the indemnification clause cannot be read as the landlords suggest.

Of course, “[i]n a remote sense,” the accident would not have occurred if the tenant had not hired Arax to clean the carpets in his dental suite, and in that sense, the accident could be said to arise from the tenant’s use of the suite. (See *Hollander v. Wilson Estate Co.* (1932) 214 Cal. 582, 584, 585 [7 P.2d 177] [construing the tenant’s agreement to indemnify for claims “ ‘arising . . . in or about or connected with’ ” the demised premises; “[i]n a remote sense, of course, the elevator [which dropped to the basement injuring the tenant] is a means of ‘connection’ between the street and the demised premises”; but elevator was “owned, controlled, operated and maintained exclusively by the defendant” and “can hardly be supposed to have been a subject within the scope of the lease”]; see also *City of Oakland v. Oakland etc. Sch. Dist.* (1956) 141 Cal.App.2d 733, 735, 737 [297 P.2d 752] (*City of Oakland*) [construing the lessee’s agreement to indemnify the lessor for claims “ ‘arising out of the use and occupation of the premises by the lessee’ ”; the indemnity clause did not apply to an injury incurred when a third party stepped in a hole in a walkway used for ingress and egress to and from the leased premises].)

To say the accident would not have occurred if the tenant had not hired Arax to clean the carpets does not mean the standard indemnity clause applies here. At oral argument, counsel for the landlords conceded that the landlords could not seek indemnity if a defect in the stairs for which they were responsible caused the accident. They point out that cases such as *Hollander* and *City of Oakland* involve circumstances where the accident is

indisputably caused by the lessor's negligent maintenance of the common area over which the lessor had exclusive control. This case is different, they say, because the tenant "offered no evidence that [the landlords] negligently maintained the stairwell or that a defect in the stairwell caused the accident." Further, they say, they offered evidence the accident was caused by plaintiff's negligence, Arax's negligent supervision of plaintiff, or the tenant's negligence in failing to notify the landlords of the carpet cleaning. These arguments are unavailing.

We are not persuaded the distinctions the landlords proffer have any relevance to the scope of the indemnification clause, an issue of contract interpretation that is unaffected by the ultimate cause of the accident.¹ The factual questions the landlords raise about plaintiff's negligence and Arax's negligent supervision relate only to the dispute between plaintiff and the landlords, which the parties have settled—not to the scope of the tenant's contractual indemnification obligation. Nor do the factual issues about the tenant's failure to notify Mr. Bell about the carpet cleaning have any relevance to the scope of the tenant's obligation to indemnify the landlords under the lease. At most, the failure to notify could arguably constitute breach of a rule in the lease (a finding we do not make), but no breach of contract claim is before us.

Finally, to the extent the landlords are suggesting they have a right to equitable indemnification, they are mistaken. The Supreme Court has held otherwise: "[W]hen parties by express contractual provision establish a duty in one party to indemnify another, 'the extent of that duty must be determined from the contract and not from the independent doctrine of equitable indemnity.' " (*E. L. White, Inc. v. Huntington Beach* (1978) 21 Cal.3d 497, 508 [146 Cal.Rptr. 614, 579 P.2d 505], italics omitted; see also 5 Witkin, *Summary of Cal. Law* (10th ed. 2005) *Torts*, § 123, p. 225 ["An express indemnity clause,

¹ At oral argument, counsel for the landlords cited *National Fire Ins. Co. v. Federal Ins. Co.* (N.D.Cal. 2012) 843 F.Supp.2d 1011 for the proposition that a lessee had a duty to indemnify a lessor for an accident that did not occur in the leased premises. In that case, a small child was killed when she fell off a hotel balcony, after wandering away from a party catered by an on-site restaurant in a hotel ballroom being used by the restaurant under the terms of its lease with the hotel. The restaurant's insurer sought reimbursement of its defense and settlement costs from the hotel's insurer. Cross-motions for summary judgment by both insurers were denied. (*Id.* at pp. 1012–1013.) The case turned on the court's interpretation of insurance policies, including questions whether the restaurant's insurer was obliged to defend and indemnify the hotel as an additional insured, whether the hotel had to first exhaust its self-insured retention, and whether the hotel's insurer provided only excess coverage with no obligation pending exhaustion of the restaurant's coverage limits. The short answer to the landlords' reliance on that case is simple: the principles governing insurance coverage are not the same principles governing noninsurance indemnity agreements. (See *Crawford, supra*, 44 Cal.4th at p. 552.)

rather than the equitable principles behind comparative indemnity, governs the scope of any duty to indemnify."].)

■ We hold that under the indemnity clause in this case, the injury to a third party that occurred outside the dental suite, in a common area over which the landlords have exclusive control, did not arise out of the tenant's use of the dental suite. It does not matter that the accident would not have happened but for the tenant hiring the third party to clean the carpets in the dental suite, and that the third party may have been at fault. The connection between the tenant's use of his suite and the accident in the stairwell over which the tenant had no control is too remote to have been within the contemplation of the parties when they entered into the lease. This construction of the indemnity clause is fully consistent with the law governing the interpretation of indemnification provisions (*Crawford, supra*, 44 Cal.4th at p. 552), and with the *Hollander* and *City of Oakland* cases construing similar language, albeit in distinguishable circumstances. The trial court properly granted summary judgment.

The only basis the landlords assert for reversal of the attorney fee order is that the summary judgments were erroneous. Because we have concluded otherwise, we likewise affirm the attorney fee order.

DISPOSITION

The judgments and the order awarding attorney fees are affirmed. Respondent shall recover his costs on appeal.

Rubin, Acting P. J., and Flier, J., concurred.

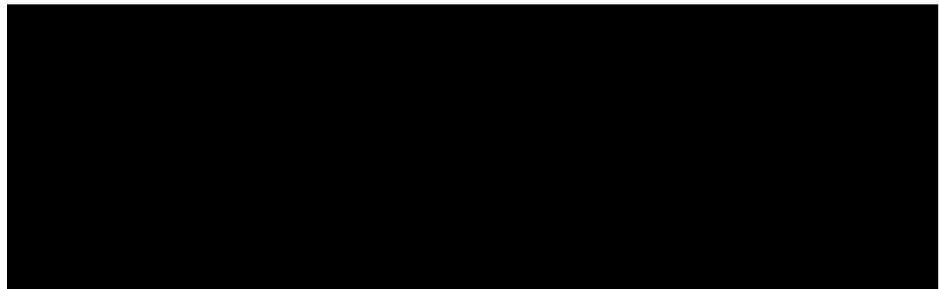
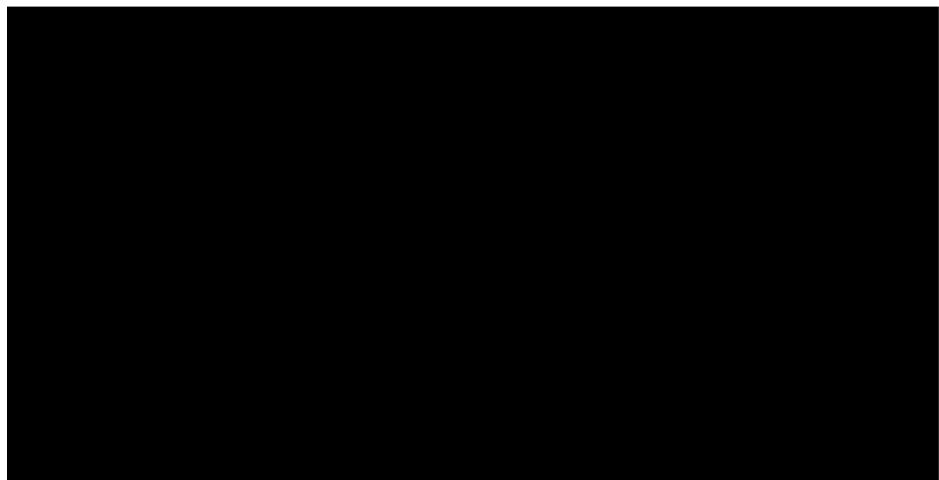
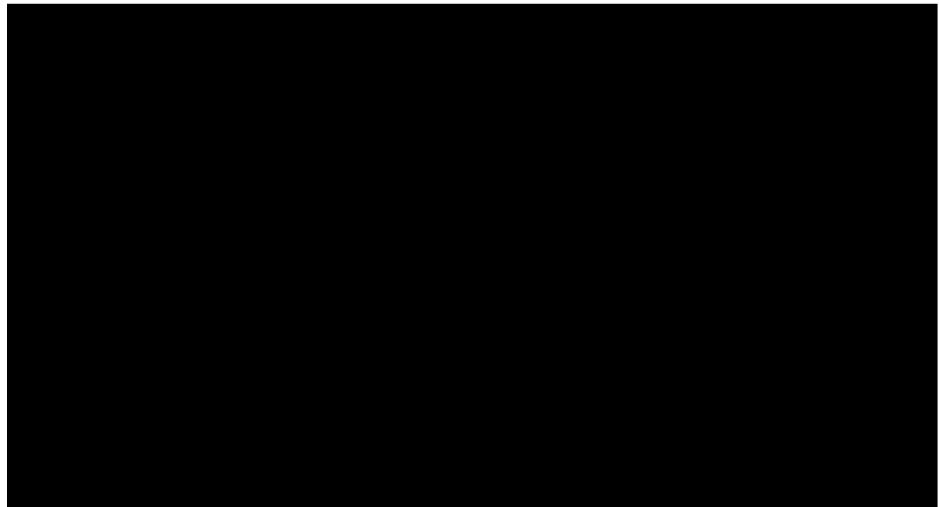
[No. B259868. Second Dist., Div. Four. Aug. 8, 2016.]

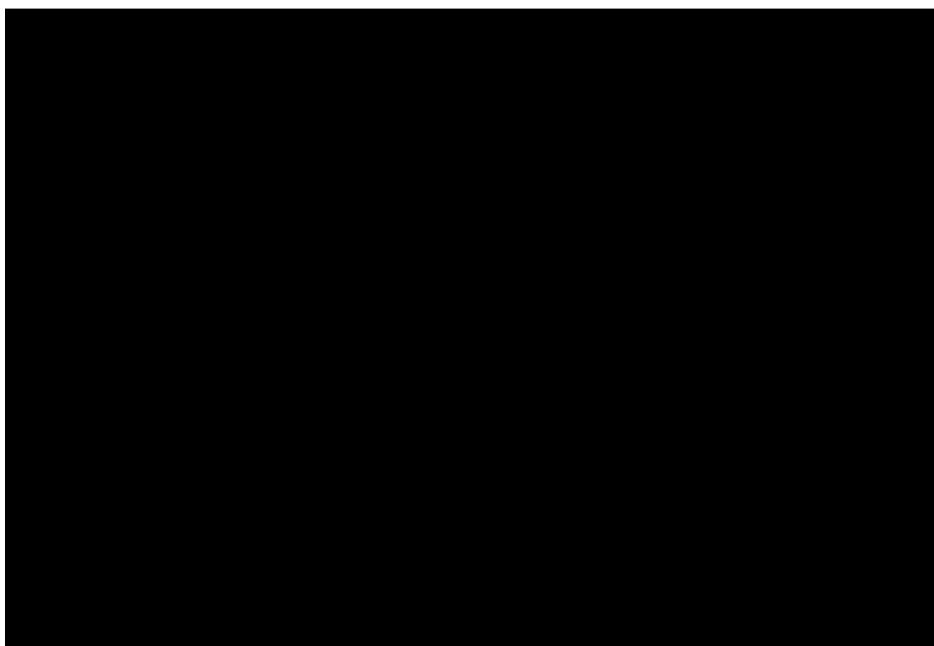
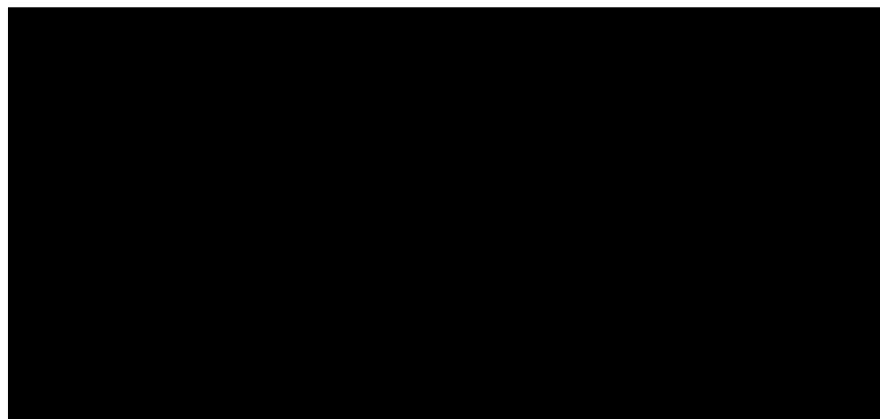
CODY WEISS, Plaintiff and Respondent, v.
CITY OF LOS ANGELES et al., Defendants and Appellants.

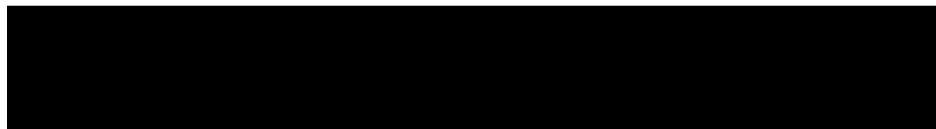
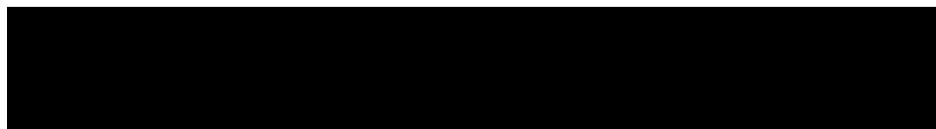
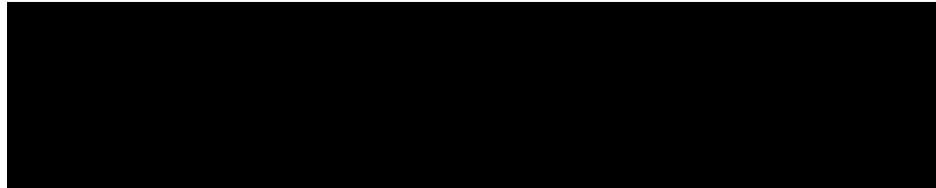
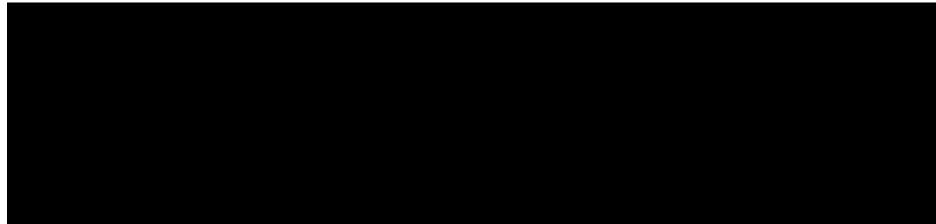
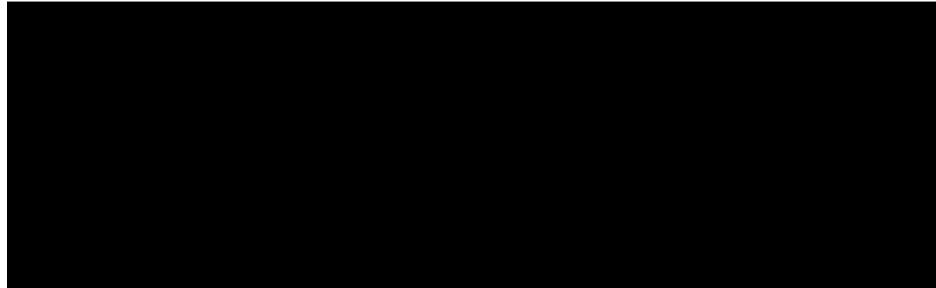
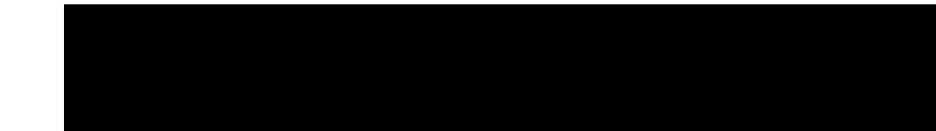
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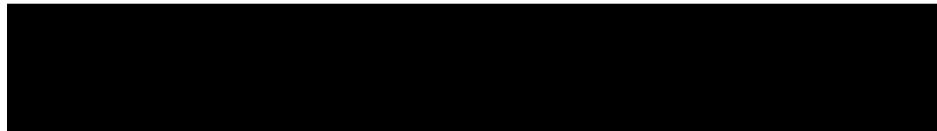
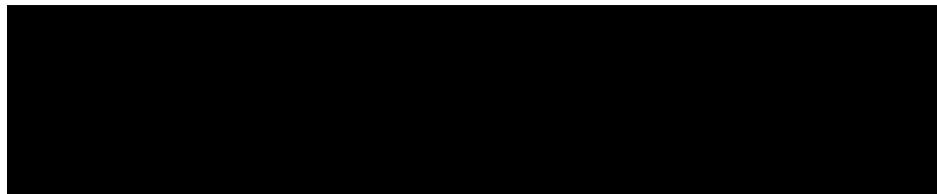
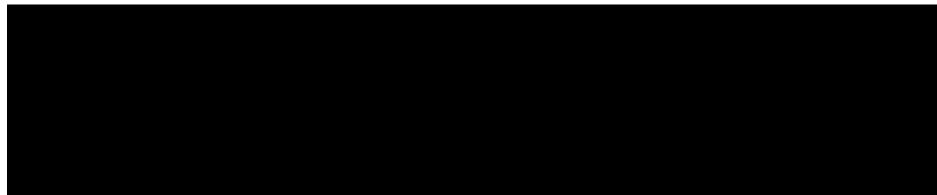
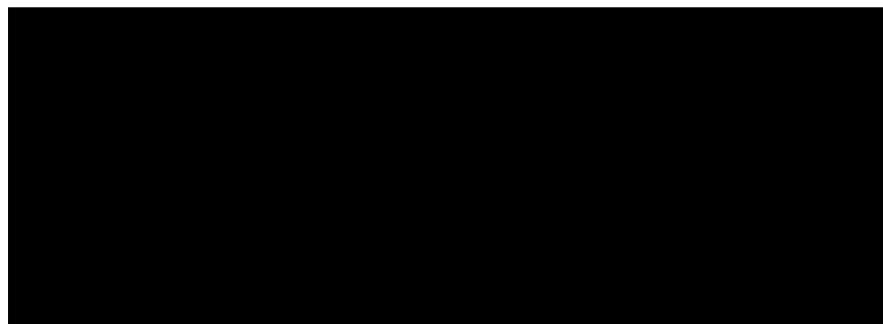
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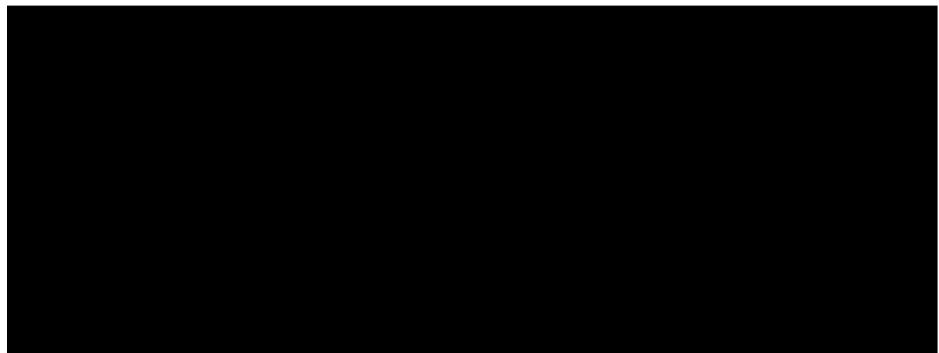
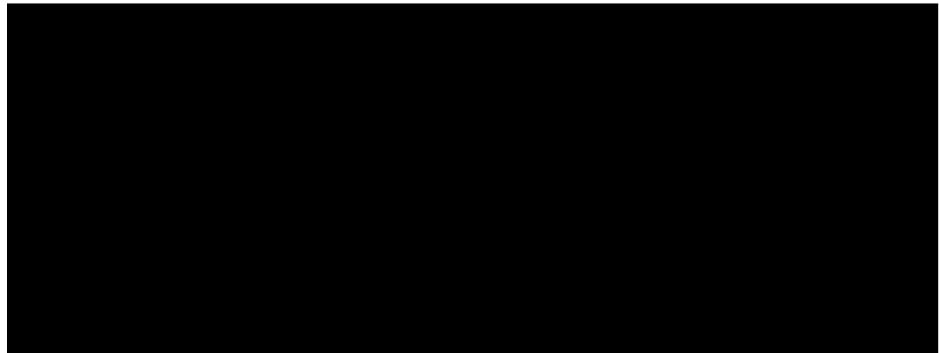
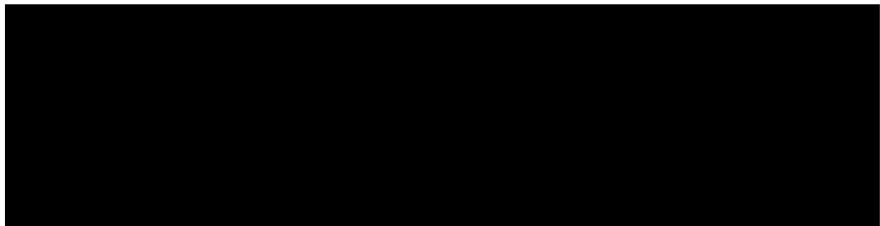
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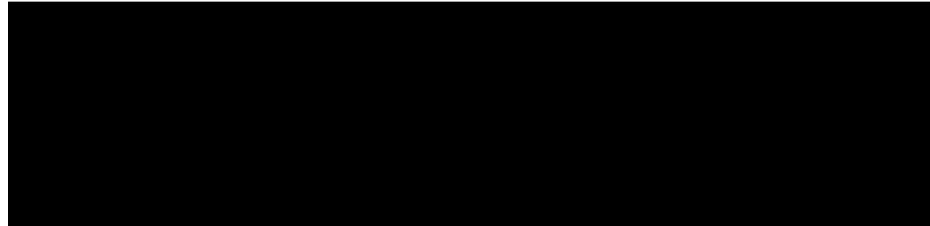
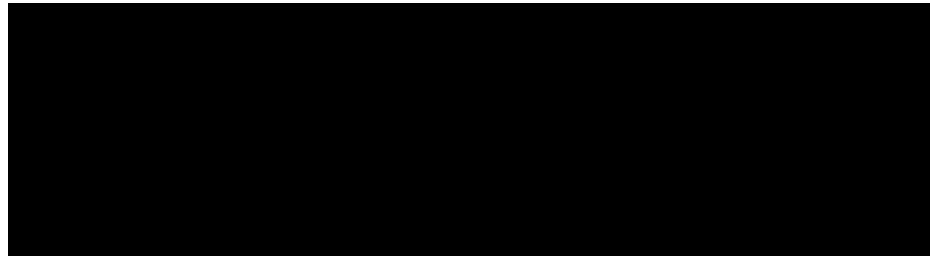












COUNSEL

Michael N. Feuer, City Attorney, Thomas S. Peters, Chief Deputy City Attorney, Ronald S. Whitaker, Assistant City Attorney, and Gerald Masahiro Sato, Deputy City Attorney, for Defendant and Appellant City of Los Angeles.

Manatt, Phelps & Philips and Michael M. Berger for Defendant and Appellant Xerox Business Services, LLC.

Ahdoot & Wolfson, Theodore Walter Maya; Zimmerman Reed, Caleb Lucas-Hansen Marker and Bradley Christopher Buhrow for Plaintiff and Respondent.

OPINION

WILLHITE, J.—When a person challenges a parking citation, the Vehicle Code provides three potential levels of review: initial review, administrative hearing, and de novo appeal to the superior court. (Veh. Code, §§ 40215, subds. (a)–(c), 40230, subds. (a), (d).)¹ As to the initial review, section 40215,

¹ All undesignated section references are to the Vehicle Code.

subdivision (a) provides, in substance, that the request for initial review is made to “the issuing agency,” that the “issuing agency shall cancel” the citation if certain specified circumstances are satisfied, and that “[t]he issuing agency shall advise the processing agency, if any, of the cancellation.”

In this appeal by the City of Los Angeles (City) and Xerox Business Services, LLC (Xerox) from the trial court’s grant of petitioner Cody Weiss’s petition for a writ of mandate, we consider whether the City, as the “issuing agency” for notice of parking violations in the City (see § 40202), must conduct the “initial review” of challenged citations (§ 40215, subd. (a)), or whether it may delegate that duty to Xerox, its “processing agency” (§ 40200.6, subd. (a)) with which it contracts “for the processing of notices of parking violations” (§ 40200.5, subd. (a)).² Based on the language of section 40215, subdivision (a) and relevant legislative history, we hold, as did the trial court, that the City is required to conduct the initial review, and cannot contract with Xerox to perform that duty. Therefore, we affirm the trial court’s issuance of a writ of mandate. We also affirm the trial court’s award of approximately \$722,000 in attorney fees to Weiss pursuant to the California private attorney general statute, Code of Civil Procedure section 1021.5.

BACKGROUND³

I. Weiss’s Citation and Petition

In March 2012, Weiss received a parking citation for a violation of Los Angeles Municipal Code section 80.69(c), for exceeding a two-hour posted time limit on La Jolla Avenue in Los Angeles. Weiss timely contested the citation by filing an online statement claiming his vehicle “was not parked . . . in excess of two hours.” He provided no evidence to support his statement; he simply “decline[d] responsibility” for the parking violation, and “request[ed] that this citation be dismissed immediately.” In April 2012, after an initial review performed by Xerox, Weiss received a letter advising him that an initial review had been performed and the citation would not be cancelled. Although Weiss could have sought administrative review of this denial, he did not. Instead, he paid the \$55 citation.

In January 2013, Weiss filed the instant petition seeking a writ of mandate directing the City and Xerox to provide a legally sufficient initial review, in

² Among other things, “‘citation’ means . . . notice of parking violation.” (§ 41601.) We use the terms interchangeably.

³ The record does not contain the evidence presented at trial. We therefore rely on the trial court’s summary of the evidence in its statement of decision. At this court’s request, the parties have lodged a copy of a request for judicial notice containing excerpts of legislative history presented to the trial court. We (as did the trial court) take judicial notice of that document.

compliance with section 40215, subdivision (a), once an alleged violator exercises his or her right to challenge a parking citation under that statute.⁴

II. *First Trial Phase*

The trial court bifurcated the trial on the issues raised by Weiss's petition. In the first phase of the trial, the trial court deferred the question whether Xerox, a processing agency, was authorized by section 40215 to perform initial reviews. Rather, the court first considered only Weiss's claim that the initial review process, as currently constituted, did not comply with the statutory obligations of the initial review under the Vehicle Code, in that (among other assertions) it was too rigid and did not provide sufficient discretion to dismiss citations. As most of the evidence presented in this phase of the trial is largely immaterial to the issues on appeal, we summarize only certain portions.

Since 1985, the City has contracted with Xerox to act as its processing agency. As part of Xerox's processing duties, the City delegates the duty under section 40215, subdivision (a) to conduct the initial review of contested citations. Xerox is paid based on the number of parking citations processed per month, but does not receive additional compensation to conduct initial reviews.

Xerox performs the initial reviews through its parking violations bureau (Bureau), which is staffed by a subcontractor. About 5 percent of parking citations issued by the City result in a request for an initial review. In fiscal year 2013, Xerox conducted 135,291 initial reviews.

The initial review is conducted by Bureau clerks, who must adhere to 46 business processing rules (BPR), drafted by the City (or by Xerox and approved by the City). Each BPR contains scenarios regarding common complaints and specific types of citations (e.g., citations involving parking meters, disabled person placards and license plates, and residential parking permits). Clerks receive training on the BPRs when hired, when BPRs are changed, and at weekly meetings. The City also issues memoranda to provide guidance.

When considering a contested citation, the Bureau clerk refers to the applicable BPR, if any; if that BPR permits dismissal of a citation, the clerk

⁴ In addition to seeking a traditional writ of mandate, Weiss's case initially was filed as a putative class action, and alleged violations of Business and Professions Code section 17200 et seq. (Unfair Competition Law), 42 United States Code section 1983 (section 1983), and the California Public Records Act, Government Code section 6250 et seq. (PRA). The trial court stayed these claims pending its determination as to the petition for writ of mandate.

dismisses it. If no BPR addresses the particular challenge, but a motorist has presented sufficient evidence to overcome a citation, clerks are instructed to refer the matter to a supervisor for a decision. The motorist learns the result of the initial review through one of 97 form letters drafted and approved by the City, on City letterhead, sent to the motorist by Xerox.

Considering this (and other) evidence, the court concluded that, setting aside the issue whether Xerox was authorized to conduct the initial review, the City's system of initial review complied with the Vehicle Code requirements in the scope of the review, in the fairness of its procedure to the motorist, and in the fairness of its substantive decisionmaking process.

III. Second Trial Phase

In the second phase of the trial, the trial court considered the question at issue in this appeal: whether section 40215, subdivision (a) requires that the City, as the issuing agency, conduct the initial review, rather than its processing agency, Xerox. At the court's request, the parties briefed the issue extensively. In its ruling, the court reviewed the statutory framework, its legislative history (including pertinent existing, amended and repealed Veh. Code sections), and case law. Conceding that the question was close, the court concluded that changes to the statutory scheme in 1995 reflected the Legislature's intent to place a nondelegable duty to perform the initial review under section 40215, subdivision (a) on the City, the public agency that issues parking citations.

In September 2014, after Weiss dismissed his remaining claims, the court entered judgment in Weiss's favor.⁵ The court issued a peremptory writ of mandate, ordering the City, as the issuing agency, to conduct the initial review of contested parking citations, pursuant to section 40215, subdivision (a), and "not to contract, subcontract, or otherwise delegate [its] duty to make such initial review decisions to any other entity or 'processing agency.'" Xerox was permanently enjoined from making initial review decisions as described in section 40215, subdivision (a).

IV. Attorney Fees

After extensive posttrial briefing, Weiss was awarded \$721,994.81 in attorney fees pursuant to the private attorney general fee statute, Code of Civil Procedure section 1021.5. The City and Xerox timely appealed from the judgment and order awarding attorney fees. We consolidated the appeals.

⁵ Weiss dismissed the class allegations, and Unfair Competition Law and section 1983 claims following trial on the writ petition. At trial, the court found Weiss's claim for violation of the PRA moot.

DISCUSSION⁶

I. *The Writ of Mandate*

A. *Standing*

Before considering the principal issue in this case—whether section 40215, subdivision (a) requires the City, as the issuing agency, to perform the initial review of contested parking citations—we must first consider Xerox’s contention that Weiss lacks standing to seek a writ of mandate.⁷

■ A traditional writ of mandate under Code of Civil Procedure section 1085 is a way to compel a public entity to perform a legal, typically ministerial, duty. Under this statute, the trial court reviews an administrative action to determine if an agency’s action “was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful [or] procedurally unfair [Citations.] ‘Although mandate will not lie to control a public agency’s discretion, that is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion. [Citation.]’” (*Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995 [109 Cal.Rptr.2d 454].)

“As a general rule, a party must be ‘beneficially interested’ to seek a writ of mandate. [Citation.] ‘The requirement that a petitioner be “beneficially interested” has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. [Citations.]’” (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165 [127 Cal.Rptr.3d 710, 254 P.3d 1005] (*Save the Plastic Bag*).) “The beneficial interest must be direct and substantial. [Citations.]” (*Ibid.*)

In the instant case, Weiss unsuccessfully challenged his own parking citation at the initial review, then elected to pay the fine rather than pursue further appeal. Given his choice to pay the fine rather than pursue further review, he lacks a beneficial interest in the outcome of this mandamus

⁶ Our discussion and resolution of all issues on appeal has been greatly assisted by the trial court’s thoughtful analysis.

⁷ Xerox raises another preliminary issue, asserting that “nowhere in the complaint did Weiss press the narrow charge on which he prevailed, i.e., that the City—and the City alone—had to perform the initial review. It is simply not in the complaint.” Xerox is mistaken. The petition specifically alleges that, under section 40215, subdivision (a), once “an alleged violator . . . submits a request for an initial review, . . . the statute imposes a mandatory duty upon the issuing agency (the City) to engage in an initial review.” (Italics added.)

proceeding (he has paid the fine and his citation cannot be overturned), and thus he lacks general standing to pursue mandamus relief. (*Save the Plastic Bag*, *supra*, 52 Cal.4th at p. 165; see *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361–362 [87 Cal.Rptr.2d 654, 981 P.2d 499] (*Associated Builders*)).

In the trial court, relying on these principles, Xerox demurred to Weiss's petition on the ground that he lacked standing. The trial court overruled the demurrer, concluding that Weiss has standing under the "public interest" exception to pursue mandamus seeking prospective injunctive and declaratory relief. On appeal, Xerox challenges the court's ruling. We conclude that the trial court's ruling is squarely within the doctrine of public interest standing.

■ "The exercise of jurisdiction in mandamus rests to a considerable extent in the wise discretion of the court." (*McDonald v. Stockton Met. Transit Dist.* (1973) 36 Cal.App.3d 436, 440 [111 Cal.Rptr. 637], citing *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100–101 [162 P.2d 627] (*Bd. of Soc. Welfare*).) Under the doctrine of public interest standing, " ‘where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.’ " [Citation.]" (*Save the Plastic Bag*, *supra*, 52 Cal.4th at p. 166.) Indeed, California "courts have repeatedly applied the 'public right/public duty' exception to the general rule that ordinarily a writ of mandate will issue only to persons who are 'beneficially interested.' [Citation.]" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1116–1117 [40 Cal.Rptr.2d 402, 892 P.2d 1145].) In determining whether a petitioner has public interest standing, the court also considers the burden on those who have a beneficial interest, and would have general standing, but who may be disinclined or ill-equipped to seek review. (See *Driving Sch. Assn. of Cal. v. San Mateo Union High Sch. Dist.* (1992) 11 Cal.App.4th 1513, 1518–1519 [14 Cal.Rptr.2d 908] (*Driving School*).)

In the instant case, given that the standing issue was raised by demurrer, we (as did the trial court) accept as true all facts properly pleaded in the petition. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6 [40 Cal.Rptr.3d 205, 129 P.3d 394].) Weiss alleged that the City issued 8,000 parking citations per day, or 5.7 million over a 24-month period in 2009–2010, generating revenue of \$335 million, or nearly 3 percent of the City's budget, but failed to comply with its statutory duties in performing the initial review required by section

40215.⁸ Based on these allegations, the trial court concluded there was “no question that ensuring that the City follows the proper procedure for [processing and collecting] parking tickets is a matter of public right.” Further, the court also agreed with Weiss’s allegations that only a short window of time is available within which to mount such a challenge,⁹ and that typically only a minimal fine is at issue on any individual citation. Thus, given the burden of mounting a challenge to the initial review procedure, it was unlikely an individual motorist would do so. Accordingly, the court determined that Weiss had public interest standing to seek prospective relief, because unless such standing is available, the important public interest raised by his petition would be effectively insulated from judicial review.¹⁰ (See *Driving School, supra*, 11 Cal.App.4th at p. 1519 [public interest standing granted for writ seeking order that school district desist charging tuition for drivers’ education because individual students were unlikely to have the financial resources or interest to challenge the district’s statutory authority].)

The trial court’s reasoning is unassailable, and certainly not an abuse of discretion. It falls well within the proper bounds of public interest standing, and serves the purpose of that doctrine: to promote “‘the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.’ [Citations.]” (*Save the Plastic Bag, supra*, 52 Cal.4th at p. 166.)

B. Whether the City Must Conduct the Initial Review of Contested Parking Citations

Having determined that Weiss has standing to seek prospective relief by writ of mandate, we turn to whether the trial court properly issued the writ. Because resolution of that question rests on statutory interpretation (i.e., whether § 40215, subd. (a) requires the City, as the issuing agency, to conduct the initial review of contested parking citations), we review the trial court’s ruling de novo. (*Marlton Recovery Partners, LLC v. County of Los Angeles* (2015) 242 Cal.App.4th 510, 517 [195 Cal.Rptr.3d 156].)

⁸ The evidence produced at the time of trial showed that the City issued about 2.5 million parking citations per year, generating nearly \$158 million in revenue.

⁹ With respect to the time within which a citation may be challenged, section 40215, subdivision (a) provides: “For a period of 21 calendar days from the issuance of a notice of parking violation or 14 calendar days from the mailing of a notice of delinquent parking violation, exclusive of any days from the day the processing agency receives a request for a copy or facsimile of the original notice of parking violation pursuant to Section 40206.5 and the day the processing agency complies with the request, a person may request an initial review of the notice by the issuing agency.”

¹⁰ The court also found, however, that the public interest in according Weiss standing to seek retroactive relief was not significant and was outweighed by competing considerations. That conclusion is not at issue.

1. Issuing, Processing and Reviewing Parking Violations

For relevant background, we begin with a brief review of certain portions of the statutory framework governing the issuance, processing, and review of parking citations.

Effective July 1, 1993, the Legislature revised the Vehicle Code statutory scheme governing parking citations to remove them from criminal court jurisdiction, and, in its place, provide administrative procedures for review of contested citations followed by superior court review. (*Love v. City of Monterey* (1995) 37 Cal.App.4th 562, 566 [43 Cal.Rptr.2d 911].) The Legislature found that the enforcement of parking violations in criminal courts imposed an unnecessary burden on motorists and the public and that, “[w]ith the enactment of appropriate fiscal and procedural safeguards, cities, counties . . . and other public entities can collect most . . . parking penalties, and fairly resolve most contested parking violations without court involvement.” (Stats. 1992, ch. 1244, § 1.)” (*Id.* at pp. 566–567.)

■ Section 40202 governs the issuance of parking citations. As all parties in the present case recognize, only a peace officer or employee of the municipality may issue a notice of parking violation under section 40202. (Cf. 85 Ops.Cal.Atty.Gen. 83, 84 (2002) [general law city may not contract with a private vendor to issue parking violations].) Also, the municipality (here, the City) is the “issuing agency” within the meaning of the Vehicle Code.

Under section 40200.3, subdivision (a), an issuing agency may act as its own agent for purposes of “processing” parking citations (see *Lockheed Information Management Services Co. v. City of Inglewood* (1998) 17 Cal.4th 170, 185 [70 Cal.Rptr.2d 152, 948 P.2d 943] (*Lockheed*)), or it may contract with another government agency or private vendor for “processing . . . prior to filing . . . pursuant to Section 40230.” (§ 40200.5.)¹¹

Although the Vehicle Code does not define the term “processing” (*Lockheed, supra*, 17 Cal.4th at p. 185), it does define the term “processing agency”: it is “the contracting party responsible for the processing of the notices of parking violations and notices of delinquent parking violations.” (§ 40200.6, subd. (a).) An issuing agency that contracts with a processing agency must “establish written policies and procedures pursuant to which the contracting party shall provide services.” (§ 40200.6, subd. (b).) Under the statutory scheme, the issuing agency “shall be responsible for all actions

¹¹ As we explain below, section 40230 governs the appeal of a contested citation to the superior court, which is the third level of review provided by the section 40215, subdivision (c).

taken by the contracting parties and shall exercise effective oversight over the parties,” which “includes, at a minimum,” conducting an annual review of the processing agency’s services and of complaints lodged against the agency, and establishing procedures to investigate and resolve such complaints. (§ 40200.6, subd. (c).)

■ When a person contests a parking citation, the statutory scheme provides three potential levels of review: initial review, administrative hearing, and de novo appeal to the superior court. (§§ 40215, subds. (a)–(c), 40230, subds. (a), (d).) With respect to the initial review, section 40215, subdivision (a) provides in relevant part that “a person may request an initial review of the notice by the issuing agency. The request may be made by telephone, in writing, or in person. There shall be no charge for this review. If, following the initial review, the issuing agency is satisfied that the violation did not occur, that the registered owner was not responsible for the violation, or that extenuating circumstances make dismissal of the citation appropriate in the interest of justice, the issuing agency shall cancel the notice of parking violation The issuing agency shall advise the processing agency, if any, of the cancellation. The issuing agency or the processing agency shall mail the results of the initial review to the person contesting the notice, and, if following that review, cancellation of the notice does not occur, include a reason for that denial [and] notification of the ability to request an administrative hearing” (§ 40215, subd. (a).)

■ A person who remains dissatisfied following the initial review may seek a second level administrative review (after depositing the amount of the parking penalty with the processing agency or demonstrating a financial inability to do so). (§ 40215, subd. (b).) That administrative hearing may be conducted in person or by mail, and must “provide an independent, objective, fair, and impartial review of contested parking violations” (§ 40215, subd. (c)(3)), conducted by a qualified examiner whom the issuing agency appoints or with whom it contracts, and who must satisfy certain criteria. (See § 40215, subd. (c)(4)(A)–(B).) Also, the hearing must be conducted in accordance with written procedures established and approved by the issuing agency. (§ 40215, subd. (c)(3).) The issuing agency need not produce any evidence at the administrative hearing other than the citation and DMV information identifying the vehicle’s registered owner. A properly prepared citation is *prima facie* evidence that the violation in question occurred. (§ 40215, subd. (c)(5).) Following an administrative hearing, the examiner’s written decision must be delivered to the person contesting the citation and, if the citation has not been cancelled, must state a reason for the denial. (§ 40215, subd. (c)(6).)

■ A person who remains dissatisfied following an administrative hearing may invoke the third and final level review: a de novo appeal to the

superior court. (§ 40230, subd. (a).) As before, a copy of a properly prepared notice of parking violation citation constitutes *prima facie* evidence of the facts constituting the violation. (*Ibid.*)

2. *Interpretation of Section 40215, Subdivision (a)*

a. *Plain Meaning*

■ “Our task in construing a statute is to ascertain and give effect to the Legislature’s intent. [Citation.] We begin by examining the words of the statute, giving them their usual and ordinary meaning and construing them in the context of the statute as a whole. [Citations.]” (*Leonte v. ACS State & Local Solutions, Inc.* (2004) 123 Cal.App.4th 521, 526–527 [19 Cal.Rptr.3d 879] (*Leonte*).) “‘If the plain, commonsense meaning of a statute’s words is unambiguous, the plain meaning controls.’ [Citation.] ‘We consider extrinsic aids, such as legislative history, only if the statutory language is reasonably subject to multiple interpretations.’ [Citation.]” (*City of Alhambra v. City of Los Angeles* (2012) 55 Cal.4th 707, 719 [149 Cal.Rptr.3d 247, 288 P.3d 431].)

As we have observed, in pertinent part, section 40215, subdivision (a) provides that a person who wishes to contest a parking violation “*may request an initial review of the notice by the issuing agency*. . . . If, following the initial review, *the issuing agency* is satisfied that the violation did not occur, that the registered owner was not responsible for the violation, or that extenuating circumstances make dismissal of the citation appropriate in the interest of justice, *the issuing agency* shall cancel the notice of parking violation *The issuing agency shall advise the processing agency, if any, of the cancellation.*” (§ 40215, subd. (a), italics added.)

■ On its face, this language seems clear and unequivocal: the request for initial review is made to the issuing agency, and if the issuing agency is satisfied that dismissal is appropriate, it must advise the processing agency of the cancellation. Thus, the statute appears to contemplate that the issuing agency, not the processing agency, must conduct the initial review. ■ However, as the trial court recognized, we cannot examine the statute in isolation; in determining the meaning of its language and whether it contains an ambiguity, we must consider it in light of the statutory scheme as a whole. (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743 [110 Cal.Rptr.2d 828, 28 P.3d 876].)

b. *Ambiguity*

Viewing section 40215, subdivision (a) in light of section 40200.5, subdivision (a), an inconsistency appears. As here relevant, section 40200.5,

subdivision (a) provides that “an issuing agency may elect to contract” with a private vendor such as Xerox “for the processing of notices of parking violations . . . prior to filing with the court pursuant to Section 40230.” (Italics added.) A “filing with the court pursuant to Section 40230” refers to the filing of a de novo appeal to the superior court after an adverse ruling at the administrative hearing level of review provided by section 40215, subdivision (b). (§ 40230, subd. (a).) Thus, because an appeal to the superior court is the third level of review of a contested parking citation, and because section 40200.5, subdivision (a) allows the issuing agency to contract with the processing agency “for the processing of notices of parking violations” up to that appeal stage, it can be argued that the “processing” function performed by the processing agency may include the initial review of a contested citation. (See *Lockheed*, *supra*, 17 Cal.4th at p. 186 [finding the term “processing” in § 40200.5, subd. (a) ambiguous].) In other words, under this reading of section 40200.5, a private vendor could assume all processing duties, including initial review, so long as the issuing agency retained full responsibility for the vendor’s actions, adopted written policies and procedures, and conducted “effective oversight.” (See § 40200.6, subd. (c).)

■ To resolve the ambiguity in the statutory scheme created by the juxtaposition of sections 40215, subdivision (a) and 40200.5, subdivision (a), we “may consider a variety of extrinsic aids, including the apparent purpose of the statute. [Citation.]” (*Leonte*, *supra*, 123 Cal.App.4th at p. 527.) Where possible, significance is to be attributed to every word and phrase (*Orange County Employees Assn. v. County of Orange* (1991) 234 Cal.App.3d 833, 841 [285 Cal.Rptr. 799]), and sections or parts of a statute should be harmonized by considering them in the context of the statutory framework as a whole. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].)

Particularly germane to our analysis are the initial revision of the relevant Vehicle Code provisions effective in July 1993—sections 40200.5, 40200.6, 40200.7, 40215, and 40230—and certain revisions adopted in 1995.

c. 1993 Revision

As we have noted, in 1993 the Legislature revised the Vehicle Code to remove parking citations from the criminal courts. The 1993 revision maintained the prior definition of a “processing agency” contained in section 40200.6, subdivision (a) (“If a contract is entered into pursuant to Section 40200.5, . . . ‘processing agency’ means the contracting party responsible for the processing of the notices of parking violations and notices of delinquent parking violations.”). (Stats. 1986, ch. 939, § 15, p. 3269; see Stats. 1992, ch. 1244, §§ 12, 13, pp. 5925–5926.) It also contained an amended version of

section 40200.5, which preserved the issuing agency's authority to contract with a processing agency ("an issuing agency may elect to contract with the county, with a private vendor, or with any other city or county issuing agency [with an exception not pertinent] . . . for the processing of notices of parking violations and notices of delinquent parking violations, prior to filing with the court pursuant to Section 40230"). (Stats. 1992, ch. 1244, § 12, p. 5925.)

In providing for an initial review of contested citations, the 1993 revision repealed former section 40200.7, and replaced it with a new statute of the same designation. The 1993 version of section 40200.7 provided in relevant part: "For a period of 21 days from the issuance of the notice of parking violation or 10 days from the mailing of the notice of delinquent parking violation, a person may request *review by the processing agency, or at the discretion of the processing agency, by the issuing agency*, of the issuance of a notice of parking violation or a notice of delinquent parking violation . . ." (Stats. 1992, ch. 1244, § 14, p. 5926, *italics added*.)

The 1993 revision also repealed former section 40215 (Stats. 1992, ch. 1244, § 25, p. 5930), and replaced it with a new version. Subdivision (a)(1) of the new version of section 40215 provided in relevant part: "(a) If a person contests a notice of parking violation or a notice of delinquent parking violation, *the processing agency shall do the following: [¶] (1) The processing agency shall either investigate with its own records and staff or request that the issuing agency investigate the circumstances of the citation* with respect to the contestant's written explanation of reasons for contesting the parking violation. If, based upon the results of that investigation, *the processing agency* is satisfied that the violation did not occur or that the registered owner was not responsible for the violation, *the processing agency* shall cancel the notice of parking violation and make an adequate record of the reasons for canceling the notice. *The processing agency shall mail the results of the investigation to the person who contested the notice of parking violation or the notice of delinquent parking violation.*" (Stats. 1992, ch. 1244, § 26, p. 5930, *italics added*.)

This version of section 40215 also provided for a second level administrative review in subdivision (b): "(b) . . . [¶] (1) The person requesting an administrative review shall indicate *to the processing agency* his or her election for a review by mail or personal conference. [¶] . . . [¶] (3) The administrative review shall be conducted before an examiner designated to conduct the review by the issuing agency's governing body or chief executive office. [¶] In addition to any other requirements of employment, an examiner shall demonstrate those qualifications, training, and objectivity prescribed by the issuing agency's governing body or chief executive as are necessary and which are consistent with the duties and responsibilities set forth in this article. The examiner's continued employment, performance evaluation, compensation, and benefits shall not be directly or indirectly linked to the amount

of fines collected by the examiner. [¶] . . . [¶] (5) The review shall be conducted in accordance with the written procedure established by the posing [sic] or processing agency which shall ensure fair and impartial review of contested parking violations. *The agency's final decision may be delivered personally to the person by the examiner or to the person by first-class mail.*" (Stats. 1992, ch. 1244, § 26, p. 5930, italics added.)

Finally, the 1993 revision added section 40230 to the Vehicle Code, which provided for judicial review of the result of the administrative hearing ("Within 20 days after the mailing of the final decision described in subdivision (b) of Section 40215, the contestant may seek review by filing an appeal to the justice or municipal court, where the same shall be heard de novo, except that the contents of the processing agency's file in the case shall be received in evidence. . . ."). (Stats. 1992, ch. 1244, § 33, p. 5933.)

Considering these provisions of the 1993 legislation, the following salient points appear: (1) the Legislature authorized an issuing agency to contract with a processing agency for the processing of notices of parking violations (§§ 40200.5, 40200.6); (2) at the initial level of review of contested citations, it authorized the processing agency (or, at the processing agency's discretion, the issuing agency) to investigate the circumstances of the citation (§ 40215, subd. (a)(1)) and conduct the initial review (§ 40200.7), and gave the processing agency the authority to make the decision whether to cancel the citation (§ 40215, subd. (a)(1)); (3) at the level of administrative review, it permitted an administrative appeal from the processing agency's initial review decision, to be conducted by examiners of the processing agency meeting qualifications set by the issuing agency (§ 40215, subd. (b)); and (4) it provided for de novo judicial review of the processing agency's administrative decision. (§ 40230).¹²

d. 1995 Amendments

In 1995, the Legislature made several changes significant to our issue. First, it repealed section 40200.7, which had expressly provided that the processing agency may conduct initial reviews. (Stats. 1995, ch. 734, § 6, p. 5498.) Second, it repealed the former version of section 40215, which had given the processing agency the authority to investigate challenged citations. (Stats. 1995, ch. 734, § 15, p. 5502.) Third, it replaced the former version of section 40215 with a new statute of the same number. This new section 40215,

¹² Subsequent "cleanup amendments" effective in 1993 (*Lockheed, supra*, 17 Cal.4th at p. 194) made changes to certain details in sections 40200.5, 40200.7, 40215, and 40230 not material to the current issue. (See Stats. 1993, ch. 1093, §§ 6 (amending § 40200.5), 7 (amending § 40200.7), 10 (amending § 40215), and 13 (amending § 40230), pp. 6161, 6163, 6165.) We therefore do not describe them.

subdivision (a) includes the provisions regarding initial review that are at issue in the present case, assigning responsibility for conducting the initial review to the “issuing agency,” giving that agency the authority to determine whether to cancel the citation, and requiring it to inform the processing agency of its decision.¹³ Fourth, the Legislature eliminated any reference to the authority of the “processing agency” to conduct the initial review and decide whether to cancel the citations. (Stats. 1995, ch. 734, § 15, p. 5502.) Finally, the new section 40215, subdivision (b) eliminated a provision requiring that notice of a request for an administrative review be given to the processing agency, and replaced it with language specifying that any second level administrative hearing would review the results of the *issuing agency’s* initial review: “If the person is dissatisfied with the results of the initial review, the person may request an administrative hearing of the violation no later than 21 calendar days following the mailing of the results of the *issuing agency’s initial review.*” (*Ibid.*, italics added.)

■ Legislative deletion of an express statutory provision is presumed to effect “‘a substantial change in the law’ [citation].” (*Barajas v. City of Anaheim* (1993) 15 Cal.App.4th 1808, 1814 [19 Cal.Rptr.2d 764].) Considered in their entirety, the 1995 changes strongly suggest that by repealing section 40200.7 and former section 40215, and replacing them with a new section 40215, the Legislature intended to give sole authority to conduct the initial review to the issuing agency, and to preclude delegation of that duty to the processing agency. No other rational explanation comports with the breadth of the modifications eliminating references to the processing agency’s authority.

Despite these sweeping changes, however, the 1995 amendments left an ambiguity: they did not amend section 40200.5 to reflect the elimination of the processing agency’s authority to conduct the initial review. Section 40200.5 continued to provide, as it does now,¹⁴ that the issuing agency could contract with a processing agency “for the processing of notices of parking violations and notices of delinquent parking violations, *prior to filing with the*

¹³ The 1995 version of section 40215, subdivision (a), as does the current version, states in relevant part that “a person may request an initial review of the notice by the issuing agency. . . . If, following the initial review, the issuing agency is satisfied that the violation did not occur, that the registered owner was not responsible for the violation, or that extenuating circumstances make dismissal of the citation appropriate in the interest of justice, the issuing agency shall cancel the notice of parking violation or notice of delinquent parking violation. The issuing agency shall advise the processing agency, if any, of the cancellation.” (Stats. 1995, ch. 734, § 15, p. 5502.)

¹⁴ Later amendments to section 40200.5 made minor changes not pertinent to our analysis. (Stats. 1996, ch. 305, § 74, p. 2310; Stats. 2008, ch. 13, § 1, p. 35.)

court pursuant to Section 40230." (Italics added.)¹⁵ It thus might be read in isolation, without considering the 1995 changes, as suggesting that the issuing agency may contract with the processing agency to conduct the initial review under section 40215, subdivision (a), because that review occurs before the judicial review encompassed by section 40230. This failure to amend section 40200.5 to conform to the changes made by the 1995 legislation is the root of the ambiguity that appears when juxtaposing the current versions of sections 40215, subdivision (a) and 40200.5, subdivision (a).

■ However, given the history of the relevant statutes as we have traced them, it is unreasonable to conclude that by failing to amend section 40200.5, subdivision (a) to align it with the 1995 changes, the Legislature intended to leave in place the authority of the processing agency to conduct the initial review. Rather, in light of the specificity with which the 1995 amendments eliminated the authority of the processing agency to conduct any aspect of the initial review, and placed that authority on the issuing agency, the most rational explanation of the apparent inconsistency between sections 40215, subdivision (a) and 40200.5, subdivision (a) is that the failure to amend section 40200.5, subdivision (a) to comport with the 1995 changes was a legislative oversight. In other words, it is unreasonable to assume that by failing to amend section 40200.5, the Legislature intended to retain the authority of the processing agency to conduct the initial review and undo the changes it so clearly made in the 1995 amendments. Thus, we conclude that the most reasonable construction of the statutory scheme is that section 40215, subdivision (a) means what it says. A request for initial review of a contested citation is a request for "an initial review of the notice by the *issuing agency*," not the processing agency, and "[i]f, following the initial review, *the issuing agency* is satisfied that the violation did not occur, that the registered owner was not responsible for the violation, or that extenuating circumstances make dismissal of the citation appropriate in the interest of justice, *the issuing agency* shall cancel the notice of parking violation" and "advise the processing agency, if any, of the cancellation." (§ 40215, subd. (a), italics added.) This language, and the 1995 changes deleting any reference to the processing agency's authority to conduct the initial review, compel the conclusion that the issuing agency (here, the City) must conduct the initial review, and cannot delegate that duty by contract to the processing agency (here, Xerox).

e. *Later Legislative History*

Our conclusion is further supported by legislative documents leading up to a 2008 amendment of section 40200.5.

¹⁵ Section 40230 (as here relevant) was unaffected by the 1995 legislation, and continued to refer to the third level of review of a contested citations: judicial de novo appeal from "the final [administrative] decision described in subdivision (b) of Section 40215." (Stats. 1995, ch. 734, § 18, p. 5505.)

In February 2007, Assembly Bill No. 602 (2007–2008 Reg. Sess.) (Assembly Bill No. 602) was proposed to amend section 40200.5. An analysis of Assembly Bill No. 602 by the Assembly Committee on Transportation notes that existing law permitted local agencies issuing parking citations to contract with private vendors to process citations up to the point of seeking de novo court review, and permitted motorists challenging a citation “to request an initial review . . . by *the issuing agency.*” (Assem. Com. on Transportation, analysis of Assembly Bill No. 602 (2007–2008 Reg. Sess.) as introduced Feb. 21, 2007, p. 1, italics added.) As proposed, Assembly Bill No. 602 would have prohibited local governments from contracting with private vendors to conduct second level administrative hearings if the same vendor also processed parking violations on the theory that a vendor that earned a profit per ticket paid, and was also paid to conduct administrative hearings, had an inherent conflict of interest.

Assembly Bill No. 602 was amended in June 2007. Notes from the Senate Rules Committee’s third reading of Assembly Bill No. 602 state that a person wishing to contest a parking citation could “request a free initial review by the issuing agency within 21 days.” (Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Assembly Bill No. 602 (2007–2008 Reg. Sess.) as amended June 20, 2007, p. 2.) In addition, Assembly Bill No. 602 would require a contract with a private entity for processing parking citations to be based on a fixed rate or on the number of notices processed, so there would be no financial incentive for fines collected or notices upheld, and would require a written reason following a denial an initial review or administrative hearing stating why a citation was not cancelled.

Assembly Bill No. 602 was amended again in April 2008. The committee analysis reiterates that, among other things, the bill would require a processing entity to be paid on a fixed rate or based on the number of notices processed, and require a written statement as to why a citation was upheld following an initial review or administrative hearing. The Governor signed Assembly Bill No. 602 in May 2008. Section 40200.5 as amended provides that if an issuing agency contracts with a private vendor for the provision of examiners for administrative hearings, the contract must “be based on either a fixed monthly rate or on the number of notices processed and shall not include incentives for the processing entity based on the number of notices upheld or denied or the amount of fines collected.” (§ 40200.5, subd. (c).) As amended, section 40215 also requires a written reason for denial after initial review or administrative hearing, and made other changes not relevant here.

■ In determining the legislative purpose in amending a statute, the court considers the state of the law as it existed prior to the amendment. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1481 [61

Cal.Rptr.2d 341].) The development and history of Assembly Bill No. 602 reflects that, before 1995, the Legislature believed a processing agency could perform initial reviews of parking citations. However, after deleting section 40200.7 and amending section 40215 in 1995, the Legislature provided that only the issuing agency could conduct the initial review. This is persuasive authority of the Legislature's intent in amending section 40215. ■■■ The California Supreme Court agreed, stating in *dictum* in *Lockheed*, that "the 1995 legislation . . . removed certain responsibilities from the purview of a contract 'processing agency.' The amendments require the issuing agency itself to conduct the 'initial review' (i.e., investigation and cancellation if appropriate) of a contested ticket and to set formal hearing procedures." (*Lockheed, supra*, 17 Cal.4th at p. 196.)

f. Conclusion

■■■ In short, we agree with the trial court's interpretation of the statutory scheme: section 40215, subdivision (a) requires the City, as the issuing agency, to conduct the initial review of contested parking citations, and does not permit delegation of that duty to its processing agency, Xerox.

C. The Home Rule Does Not Apply

The City contends that its right to home rule overrides the statutory scheme. We disagree.

■■■ Los Angeles is a charter city for purposes of "home rule" authority. (Cal. Const., art. XI, § 5(a).) ■■■ A charter city "ha[s] exclusive power to legislate over 'municipal affairs.'" (Cawdry v. City of Redondo Beach (1993) 15 Cal.App.4th 1212, 1218 [19 Cal.Rptr.2d 179], citing Fisher v. City of Berkeley (1984) 37 Cal.3d 644, 704 [209 Cal.Rptr. 682, 693 P.2d 261].) The home rule represents "an 'affirmative constitutional grant to charter cities of 'all powers appropriate for a municipality to possess . . .' and [includes] the important corollary that 'so far as 'municipal affairs' area concerned,' charter cities are 'supreme and beyond the reach of legislative enactment.'" (State Building & Construction Trades Council of California v. City of Vista (2012) 54 Cal.4th 547, 556 [143 Cal.Rptr.3d 529, 279 P.3d 1022].)

The home rule provision was enacted on the premise that a municipality is more aware than the state of its own needs. "[I]f a chartered city legislates with regard to municipal affairs the charter prevails over general state law" (*R & A Vending Services, Inc. v. City of Los Angeles* (1985) 172 Cal.App.3d 1188, 1192 [218 Cal.Rptr. 667] (*R & A Vending Services*)), and its legitimate exercise of home rule is exempt from state general law. (*Home Gardens Sanitary Dist. v. City of Corona* (2002) 96 Cal.App.4th 87 [116 Cal.Rptr.2d 638].)

■ The Legislature has characterized the processing of parking citations prior to an administrative hearing under section 40215, subdivisions (b) and (c) as a “core” municipal affair. (*Lockheed*, *supra*, 17 Cal.4th at pp. 183–184.) But *Lockheed* specifically declined to decide whether the administration of parking citations was a matter of home rule. (*Id.* at p. 202, fn. 22.)¹⁶

In the instant case, the trial court concluded that the administration of parking citations is a core municipal function for purposes of the home rule doctrine. However, it also found that the doctrine of home rule applies only where “a chartered city *legislates* with regard to municipal affairs” in conflict with state law. (*R & A Vending Services*, *supra*, 172 Cal.App.3d at p. 1192, italics added.) We agree. The subject matter of the municipal affair at issue is governed by contract, not ordinance. The City has long outsourced its duty to perform initial review of parking citations by way of a contract, not pursuant to a municipal ordinance, regulation or provision of the City Charter. No legislative act regulates the activity that can be characterized as a municipal affair for purposes of home rule. Thus, as the trial court concluded, the home rule doctrine does not apply.

II. Attorney Fees

The City and Xerox contend that Weiss is not entitled to attorney fees under Code of Civil Procedure section 1021.5. We conclude otherwise.

A. The Standard of Review

“On appeal from an award of attorney fees under section 1021.5, ‘‘the normal standard of review is abuse of discretion. . . .’’ [Citations.]” (*Serrano v. Stefan Merti Plastering Co., Inc.* (2011) 52 Cal.4th 1018, 1025–1026 [132 Cal.Rptr.3d 358, 262 P.3d 568] (*Serrano*).) Abuse of discretion standard means “we should not reverse unless ‘the record establishes there is no reasonable basis’ for the trial court’s action. [Citation.] Particularly in a case such as this, fully briefed and argued before the same trial court

¹⁶ The cases on which the City relies to support its argument that the home rule covers contracts that pertain to municipal affairs, are inapposite. (See *Associated Builders*, *supra*, 21 Cal.4th at p. 363; *Johnson v. Bradley* (1992) 4 Cal.4th 389, 394–398 [14 Cal.Rptr.2d 470, 841 P.2d 990]; *Estrada v. City of Los Angeles* (2013) 218 Cal.App.4th 143, 152–153 [159 Cal.Rptr.3d 843].) None of these cases addresses the question at issue, i.e., whether a contract between a city and a private vendor is a *legislative act* covered by the home rule doctrine, even where the contract touches on municipal affairs. The cases support the undisputed principle that the manner “‘in which a city chooses to contract is a municipal affair.’” (See *Associated Builders*, *supra*, 21 Cal.4th at p. 364.) Weiss has not challenged the City’s authority to enact ordinances governing the manner by which it may or does enter a contract, or its ability to do so.

which heard (and partially granted) the petition, this is not an insignificant point.” (*Williams v. San Francisco Bd. of Permit Appeals* (1999) 74 Cal.App.4th 961, 965 [88 Cal.Rptr.2d 565], disapproved on another point in *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1226, fn. 4 [117 Cal.Rptr.3d 342, 241 P.3d 840] (*Whitley*)).

B. Private Attorney General Fees

■ “[Code of Civil Procedure section 1021.5 authorizes an award of fees when (1) the action ‘has resulted in the enforcement of an important right affecting the public interest,’ (2) ‘a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons . . . ,’ and (3) ‘the necessity and financial burden of private enforcement . . . are such as to make the award appropriate’ [Citations.]” (*Serrano, supra*, 52 Cal.4th at p. 1026.) The party seeking fees must prevail on all the statutory requirements. (*Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72, 81 [49 Cal.Rptr.2d 348].) The third factor of Code of Civil Procedure section 1021.5 does not apply where, as here, a plaintiff’s action produces no monetary recovery. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 934–935 [154 Cal.Rptr. 503, 593 P.2d 200] (*Woodland Hills*).) The purpose of the statute is to encourage private parties to vindicate important public rights that might otherwise lie fallow. (*Punsky v. Ho* (2003) 105 Cal.App.4th 102, 109 [129 Cal.Rptr.2d 89], disapproved on another point in *Whitley, supra*, 50 Cal.4th at p. 1226, fn. 4; *Nelson v. County of Los Angeles* (2003) 113 Cal.App.4th 783, 795 [6 Cal.Rptr.3d 650] [“fundamental purpose of section 1021.5 . . . is ‘to provide some incentive for the plaintiff who acts as a true private attorney general, prosecuting a lawsuit that enforces an important public right and confers a significant benefit, despite the fact that his or her own financial stake in the outcome would not by itself constitute an adequate incentive to litigate.’ ”].)

1. Enforcement of Important Right Affecting Public Interest

■ Code of Civil Procedure section 1021.5 permits a fee award “‘in any action which has resulted in the enforcement of *an important right affecting the public interest*’ regardless of its source—constitutional, statutory or other.’” (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 683 [186 Cal.Rptr. 589, 652 P.2d 437] (*Folsom*).) In enacting section 1021.5, “the Legislature was focused on public interest litigation in the conventional sense: litigation designed to promote the public interest by enforcing laws that a governmental or private entity was violating, rather than private litigation that happened to establish an important precedent.” (*Adoption of Joshua S.* (2008) 42 Cal.4th 945, 956 [70 Cal.Rptr.3d 372, 174 P.3d 192].)

The City and Xerox contend that, to the extent Weiss may be said to have been successful in this litigation, the sole issue on which he prevailed—obtaining an order that only City personnel may conduct an initial review—falls short of being an “important” right. They underestimate the significance of the result.

■ In making its substantive mandamus determination, the trial court found that by his writ petition Weiss sought, among other things, to invalidate the City’s long-standing policy of having a private vendor conduct initial review of contested parking citations issued by the City. Although Weiss initiated this action with grand ambitions—class action allegations and several additional claims and, as the court observed, the aim of eliminating the initial review procedure altogether—he achieved more modest success. Nevertheless, as the court also found, the limited nature of Weiss’s success did not preclude a fee award; it merely required that any award Weiss received be reduced accordingly. (See *Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 382, 394 [134 Cal.Rptr.3d 696] (*Robinson*).) The court observed that, in California, the courts take a “broad, pragmatic view of what constitutes a ‘successful party.’” (See *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565 [21 Cal.Rptr.3d 331, 101 P.3d 140].) The pivotal fact is the impact of an action, not how it is litigated. (*Folsom, supra*, 32 Cal.3d at p. 685.) A plaintiff may still recover Code of Civil Procedure section 1021.5 fees in an action deemed moot if the litigation objection has been achieved. (See *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311 [193 Cal.Rptr. 900, 667 P.2d 704].)

■ At trial, Weiss was successful in obtaining injunctive and declaratory relief ending Xerox’s unlawful but long-standing practice of conducting initial reviews, and compelling the City to comply with its statutory duty to perform that task. “[T]he public always has a significant interest in seeing that legal strictures are properly enforced” (*Woodland Hills, supra*, 23 Cal.3d at p. 939.) “In litigation concerning the application of statutorily based rights . . . determining the ‘importance’ of the particular ‘vindicated’ right, courts should generally realistically assess the significance of that right in terms of its relationship to the achievement of fundamental legislative goals.” (*Id.* at p. 936; see *Robinson, supra*, 202 Cal.App.4th at p. 394.)

The City and Xerox argue that the result of Weiss’s litigation is unimportant, because the trial court concluded that the City’s current system, under which Xerox conducts the initial review, is fair. From this finding, they extrapolate the conclusion that having the City conduct the initial review will not achieve any future benefit for motorists who challenge their parking citations. They also cite *Yagman v. Garcetti* (C.D.Cal., July 9, 2014, No. CV

14-2330-GHK (Ex)) 2014 WL 3687279, in which the plaintiff filed a putative class action against various City officials objecting to the requirement that motorists deposit the parking fine in order to obtain administrative review of a contested citation. In dismissing the case, the district court rejected the plaintiff's apparent contention ("plaintiff seems to argue") that the City's initial review is not reliable because, among other things, "it is conducted by a company with whom the City contracts," reasoning "[i]f anything, that the review is conducted by a third party enhances fairness." (*Id.* at pp. *2-*3.)

But the City and Xerox's argument, and their reliance on *Yagman*, miss the point. Gauging the importance of the result achieved by Weiss's litigation lies not in whether it unearthed an unfair initial review system, or in whether review conducted by the City will be any better (a result only the future will tell). It lies in whether, by placing the responsibility for conducting the initial review on the only agency authorized by the Legislature to conduct it, and taking it away from the agency whose previous authority the Legislature specifically eliminated, the result of Weiss's litigation enforced an important public right. In that light, it is difficult to imagine a more fundamental public right than that the tribunal deciding a litigant's fate, even a tribunal convened at the first level of review to determine whether a litigant is liable for a parking violation, be a tribunal properly convened under the law and authorized by law to make the decision.

That the current initial review procedure is fair speaks well of the City and Xerox's intent in implementing and using it. But the point of the litigation was to enforce an important public right. The Legislature has decreed, in effect, that Xerox has no power to conduct the review at all. In fiscal year 2013 alone, Xerox conducted 135,291 initial reviews, and did so in violation of section 40215, subdivision (a). The result of Weiss's litigation—an adjudication compelling the City to comply with its statutory duty to conduct the initial review, and precluding the illegal delegation of that duty to Xerox—ensures that the Legislature's policy of requiring the City to perform the initial review will be followed. Even though the current system manifested no unfairness, that result enforces an important public right affecting the public interest: only a tribunal convened by law and authorized to conduct the initial review will do so.

2. *Significant Benefit Conferred on a Large Class*

The City and Xerox also maintain that the grant of writ relief did not confer a significant benefit on a large class of persons. Indeed, they insist it

conferred no benefit even on Weiss himself. However, a significant benefit justifying an award of private attorney general fees under Code of Civil Procedure section 1021.5 “need not represent a ‘tangible’ asset or a ‘concrete’ gain but . . . may be recognized simply from the effectuation of a fundamental constitutional or statutory policy.” (*Woodland Hills, supra*, 23 Cal.3d at p. 939; see *County of Colusa v. California Wildlife Conservation Bd.* (2006) 145 Cal.App.4th 637, 655 [52 Cal.Rptr.3d 1] [same].)

Of course, the enforcement through litigation of a constitutional or statutory policy does not necessarily confer a significant public benefit. (*Woodland Hills, supra*, 23 Cal.3d at pp. 939–940.) The trial court found that by effectuating the proper interpretation of section 40215, subdivision (a), Weiss effected an important change because public policy favors the City’s review of parking citations. The trial court reasoned that the City (which has constituents) is more accountable than is a private entity like Xerox. In light of the City’s greater accountability and concomitant accessibility, members of the public are more likely to feel they will receive or have received a fair evaluation of a contest of a parking citation from a public agency charged with the nondelegable duty to review that challenge at the outset. In the end, the court had “little doubt” this action “conferred a significant benefit to a large group of people: motorists who park their cars in the City and receive a parking ticket. Those motorists will have the initial review of their parking tickets performed by the issuing agency,” not Xerox, a private contractor or its subcontractor.

In addition, the claim that Weiss obtained nothing more than a “minor revision” of the system was belied by the actions of the City and Xerox. In successfully obtaining a stay pending the outcome of this appeal, the City and Xerox argued that the writ and judgment would necessitate a “complete changeover by requiring the City to perform the initial parking ticket review.” As the trial court noted, “[t]his is hardly a minor procedural benefit.”

In short, in upholding the award of attorney fees, we need go no further. The trial court’s finding as to the second element of Code of Civil Procedure section 1021.5 was not an abuse of discretion. Inasmuch as we hold that the only two section 1021.5 factors at issue are satisfied,¹⁷ we end our discussion here.

¹⁷ By not addressing the final factor, appellants impliedly concede that “‘the necessity and financial burden of private enforcement are such as to make the award appropriate.’” (*Woodland Hills, supra*, 23 Cal.3d at p. 941.) In addition, neither appellant takes issue with the method of calculation or amount of the attorney fees awarded.

DISPOSITION

The judgment is affirmed. Weiss is awarded his costs on appeal.

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

Appellant's petitions for review by the Supreme Court were denied November 22, 2016, S237260.

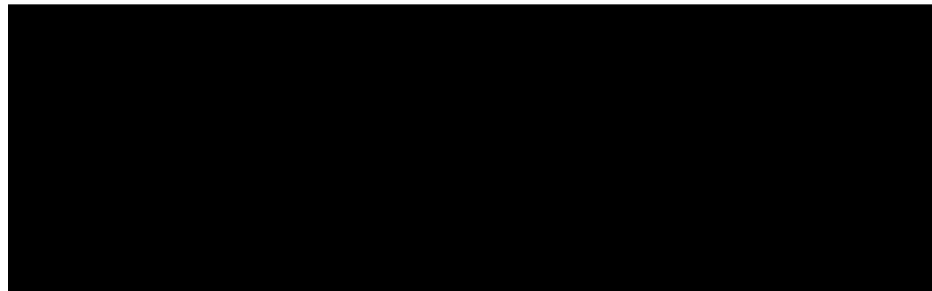
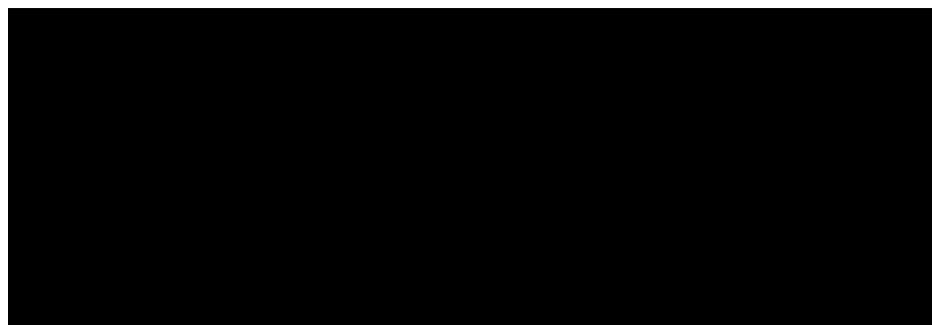
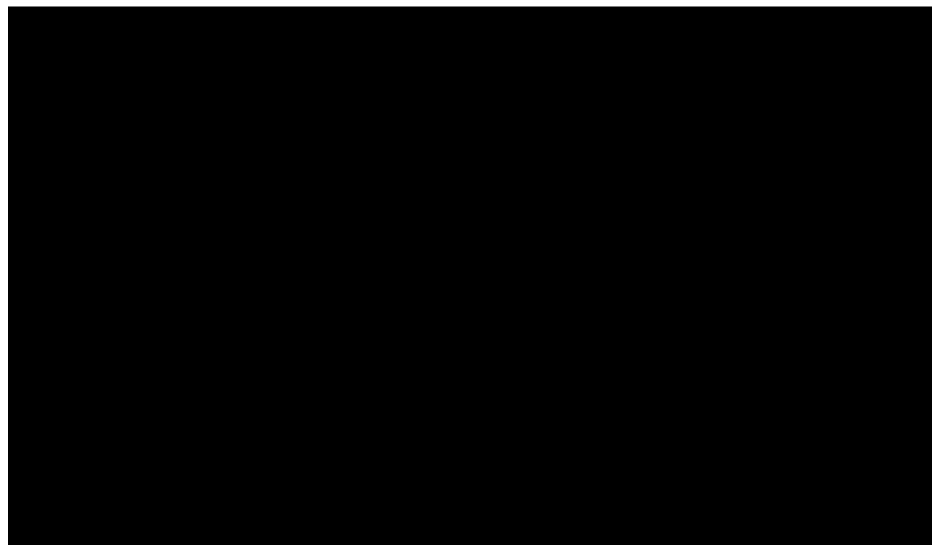
[No. A145322. First Dist., Div. One. Aug. 8, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
KELLYMAY RACHELL WATTS, Defendant and Appellant.

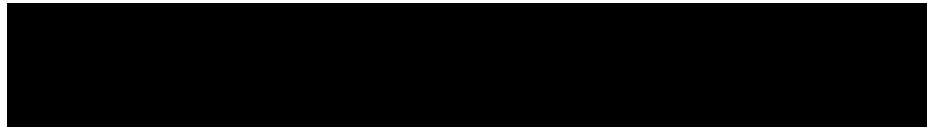
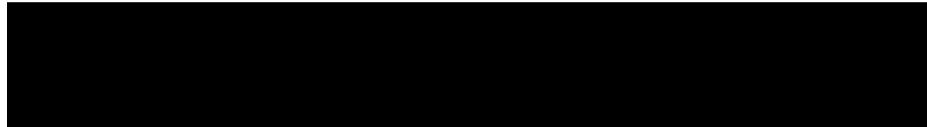
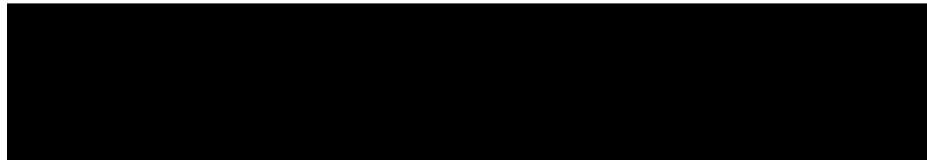
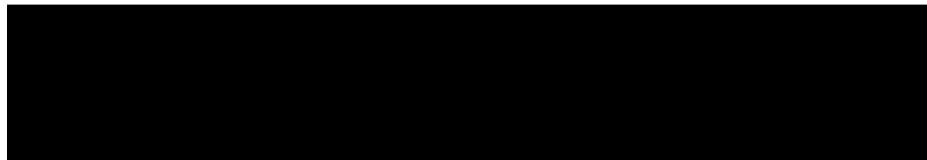
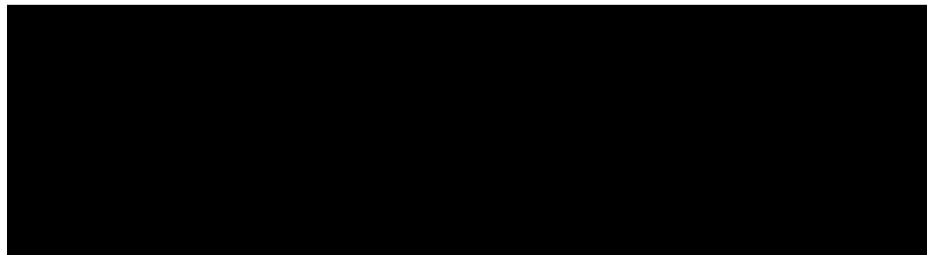
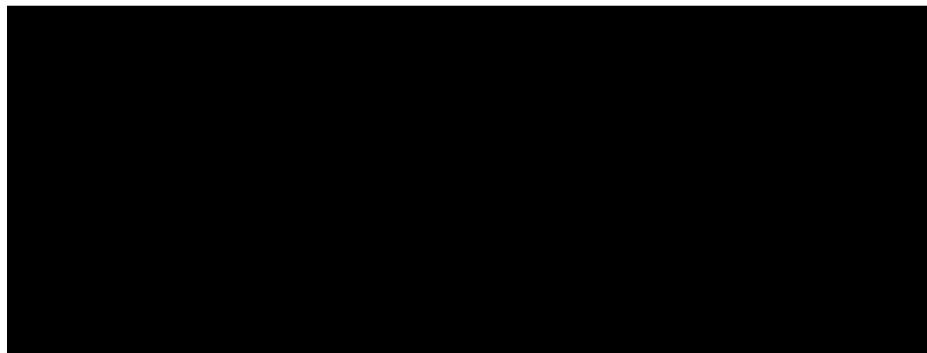
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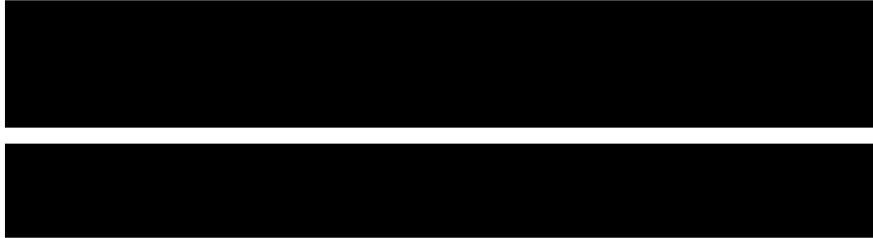
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COUNSEL

Randall H. Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, and Huy T. Luong, Deputy Attorney General, for Plaintiff and Respondent.

OPINION

HUMES, P. J.—Defendant Kellymay Rachell Watts appeals from an order granting probation following her plea of no contest to possession of methamphetamine for sale. Her appellate counsel asked this court for an independent review of the record to determine whether there are any arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436 [158 Cal.Rptr. 839, 600 P.2d 1071].) We requested briefing on whether the criminal laboratory analysis (crime-lab) fee imposed under Health and Safety Code¹ section 11372.5 is subject to penalty assessments, which are proportionately levied on some monetary charges imposed on criminal defendants. We did so because a recent decision from the Appellate Division of the Nevada County Superior Court, *People v. Moore* (2015) 236 Cal.App.4th Supp. 10 [187 Cal.Rptr.3d 132] (*Moore*) concluded, contrary to the weight of authority, that the crime-lab fee is not subject to penalty assessments. Although we decline to adopt *Moore*'s rationale, we agree with its holding that the crime-lab fee is not subject to penalty assessments. As a result, we order the penalty assessments imposed on the crime-lab fee stricken but otherwise affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2015, a Fort Bragg police officer found Watts in possession of 3.86 grams of methamphetamine and 1.16 grams of heroin, as well as

¹ All further statutory references are to the Health and Safety Code unless otherwise noted.

assorted drug paraphernalia.² “[N]umerous text messages . . . indicating sales of controlled substances” were found on Watts’s cell phone. Watts was charged with a felony count of possession of heroin for sale.³ Under a plea agreement, she pleaded no contest to that count, which was amended to refer to methamphetamine instead of heroin.

The trial court suspended imposition of the sentence and placed Watts on probation for 36 months subject to various conditions, including that she serve 120 days in county jail. Among other fines and fees, the court imposed “the \$190 [crime-lab] fee under [section] 11372.5 of the Health and Safety Code,” and an addendum to the probation order stated that the \$190 “[f]ee imposed include[d] penalty assessments and surcharges as required.” Watts did not object to the imposition of the crime-lab fee or the associated assessments.⁴

II.

DISCUSSION

Watts argues on appeal that the \$50 crime-lab fee authorized by section 11372.5 is not subject to penalty assessments and that the trial court therefore erred by imposing an additional \$140. We agree.

A. *Monetary Charges Imposed in Criminal Cases.*

We begin by describing three different categories of monetary charges that may be imposed on a criminal defendant and that are relevant to the issues in this appeal.⁵ We do so because these categories are ill-defined. As

² The facts in this paragraph are drawn from the probation report.

³ The charge was brought under section 11378.

⁴ Penal Code section 1237.2 prohibits appeals in which the sole issue raised involves “the erroneous imposition or calculation of fines, penalty assessments, surcharges, fees, or costs” if the defendant does not first object or seek correction in the trial court. That statute became effective on January 1, 2016, however, and does not affect this appeal, which was filed in June 2015. (See Pen. Code, § 3 [Pen. Code provisions not retroactive “unless expressly so declared”].) Nor did Watts forfeit her claim despite her failure to object below to the imposition of penalty assessments on the crime-lab fee. “ ‘ “[U]nauthorized sentences,” ’ ” that is, “obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings[,] are not waivable” (*People v. Smith* (2001) 24 Cal.4th 849, 852 [102 Cal.Rptr.2d 731, 14 P.3d 942]), and we may address a claim of error in the imposition of assessments even if there was no objection at the time of sentencing. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157 [119 Cal.Rptr.2d 922, 46 P.3d 388] (*Talibdeen*)).

⁵ Other categories of monetary charges that we do not discuss include restitution fines, which are clearly exempted from penalty assessments under the various assessment statutes. (See, e.g., Pen. Code, § 1464, subd. (a)(3)(A).)

one justice aptly observed in 2009, the Legislature has created an “increasingly complex system of fines, fees, and penalties,” leaving it “doubtful that criminal trial lawyers and trial court judges have the ability to keep track of the myriad . . . charges that now attach to criminal convictions.” (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1533 [98 Cal.Rptr.3d 1] (conc. opn. of Kriegler, J.).) This justice correctly predicted that “[t]he system, as it exists, is likely to only become more complicated in the immediate future.” (*Castellanos*, at p. 1534; see *People v. Hamed* (2013) 221 Cal.App.4th 928, 939 [164 Cal.Rptr.3d 829] [recognizing increasing difficulty of accurately imposing penalty assessments].) Making sense of the system is particularly difficult because the Legislature has described criminal monetary charges with a variety of terms, such as fine, fee, assessment, increment, and penalty, while sometimes assigning different meanings to the same term.

The first category of monetary charges that may be imposed includes charges to punish the defendant for the crime. (*People v. Sorenson* (2005) 125 Cal.App.4th 612, 617 [22 Cal.Rptr.3d 854].) These charges are often referred to as base fines (see *ibid.*), and throughout this opinion we shall refer to them as such with the understanding that statutes sometimes use the term “fine” with a broader meaning. Trial courts often have discretion over whether and in what amount to impose base fines.

The second category of charges that may be imposed includes charges to cover a particular governmental program or administrative cost. (See, e.g., Pen. Code, § 1465.8, subds. (a) & (b); *People v. Alford* (2007) 42 Cal.4th 749, 756 [68 Cal.Rptr.3d 310, 171 P.3d 32] [discussing court security fee under Pen. Code, § 1465.8].) These charges are usually referred to as fees and, as with base fines, trial courts often have discretion over whether to impose them.

The third category of charges includes penalty assessments, which, when applicable, inflate the total sum imposed on the defendant by increasing certain charges by percentage increments. All current penalty assessments are legislatively expressed as a certain dollar amount “for every ten dollars (\$10), or part of (\$10),” for the particular fine, penalty, or forfeiture that is subject to the assessments. (Pen. Code, § 1464, subd. (a)(1).) Thus, for example, if the base fine is \$100 and the penalty assessment is \$2 for every \$10 imposed, the penalty assessment increases the defendant’s base fine by \$20, or 20 percent. If the same penalty assessment is imposed on a base fine of \$105, the penalty assessment is \$22, and the percentage increase is slightly more than 20 percent. For the sake of simplicity, we shall refer to penalty assessments in terms of the percentage by which they increase every \$10 of a subject charge.

The first penalty assessments were created over half a century ago. (See, e.g., *People v. Aronow* (1955) 130 Cal.App.2d Supp. 898, 899–900 [279 P.2d 840] [discussing penalty assessment under former Vehicle Code section 773].) In 1980, various penalty assessments were consolidated into a single one under Penal Code section 1464. (Stats. 1980, ch. 530, § 4, pp. 1476–1477; Assem. Com. on Criminal Justice, Analysis of Assem. Bill No. 493 (1979–1980 Reg. Sess.) as amended Jan. 28, 1980.) In subsequent years, six more assessments were created that, like the assessment under Penal Code section 1464, apply to “every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses.” (Pen. Code, § 1464, subd. (a).) Although these “parasitic” assessments punish a defendant in the sense that they increase the total monetary charge imposed, they were created in large part to generate revenue and are deposited into various state and county funds. (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1374 [133 Cal.Rptr.3d 431] [characterizing assessments as “punitive fundraising measures”]; see, e.g., Pen. Code, § 1464, subds. (e) & (f).)

B. *The Crime-lab Fee Is Not Subject to Penalty Assessments.*

With these categories in mind, we turn to examine whether the crime-lab fee was subject to the seven penalty assessments that the parties agree are potentially applicable: (1) the 100 percent state penalty under Penal Code section 1464, subdivision (a)(1); (2) the 20 percent state surcharge under Penal Code section 1465.7, subdivision (a); (3) the 50 percent court-construction penalty under Government Code section 70372, subdivision (a)(1); (4) the 70 percent county penalty under Government Code section 76000, subdivision (a)(1); (5) the 20 percent emergency-medical-services penalty under Government Code section 76000.5, subdivision (a)(1); (6) the 10 percent Proposition 69 DNA penalty under Government Code section 76104.6, subdivision (a)(1); and (7) the 40 percent state-only DNA penalty under Government Code section 76104.7, subdivision (a). All together, these assessments increase the charges to which they apply by a total of 310 percent.

The question we must resolve here is whether the \$50 crime-lab fee is a “fine, penalty, or forfeiture” subject to penalty assessments. If it is, it was subject to a 310 percent increase.⁶ If it is not, it should have been imposed in the amount of \$50.

⁶ The parties agree that, if penalty assessments applied, the trial court should have imposed them in the amount of \$155 (310 percent of \$50), not \$140. It seems that a different figure, \$190, which appears in a preprinted form provided by the probation department, resulted through a failure to account for the increase in the state-only DNA penalty from 10 percent when it was originally enacted to the current 40 percent. (Stats. 2006, ch. 69, § 18, p. 1251.)

For the answer to this question, we start by looking at the statute establishing the crime-lab fee. Under section 11372.5, subdivision (a) (section 11372.5(a)), anyone convicted of an enumerated crime, including the one of which Watts was convicted, is required to “pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense. The court shall increase the total fine necessary to include this increment. [¶] With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court shall, upon conviction, impose a fine in an amount not to exceed fifty dollars (\$50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law.”

“As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature’s intent so as to effectuate the law’s purpose.” (People v. Scott (2014) 58 Cal.4th 1415, 1421 [171 Cal.Rptr.3d 638, 324 P.3d 827].) We first consider the statutory language, “giving [it] a plain and commonsense meaning.” (Ibid.) “When [that] language . . . is clear, we need go no further.” [Citation.] But where a statute’s terms are unclear or ambiguous, we may ‘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.’ (Ibid.) We review issues of statutory interpretation de novo. (People v. Prunty (2015) 62 Cal.4th 59, 71 [192 Cal.Rptr.3d 309, 355 P.3d 480].)

Initially, we address and reject the Attorney General’s contention that our state “Supreme Court . . . unequivocally established that the [crime-lab] fee is subject to penalty assessments” in *Talibdeen*, *supra*, 27 Cal.4th 1151. In *Talibdeen*, the trial court imposed the fee but no associated penalty assessments, and the People did not object. (*Id.* at p. 1153.) The Court of Appeal then imposed the state penalty under Penal Code section 1464 and county penalty under Government Code section 76000, reasoning that both penalties were mandatory.⁷ (*Talibdeen*, at p. 1153.) The issue before the Supreme Court was whether the People had forfeited their appellate demand for penalty assessments, and such a forfeiture would have occurred only if the assessments were deemed discretionary. (*Ibid.*; see People v. Smith, *supra*, 24 Cal.4th at p. 853.) Interpreting Penal Code section 1464 and Government Code section 76000, *Talibdeen* determined that the two assessments were mandatory, and it therefore affirmed the Court of Appeal’s imposition of them. (*Talibdeen*, at pp. 1153–1154, 1157.)

⁷ The other five penalty assessments listed above had not yet been established at the time *Talibdeen*, *supra*, 27 Cal.4th 1151 was decided.

■ We disagree with the Attorney General that *Talibdeen*, *supra*, 27 Cal.4th 1151 establishes that the crime-lab fee is subject to penalty assessments. “[I]t is axiomatic that cases are not authority for propositions not considered.” (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 [119 Cal.Rptr.2d 903, 46 P.3d 372].) The defendant in *Talibdeen* never argued that the assessments were inapplicable, and the Supreme Court never mentioned section 11372.5’s language. Instead, the court focused on whether the statutes establishing the state and county penalties gave a sentencing court discretion to waive those assessments, based on a provision allowing waiver “[i]n any case where a person convicted of any offense, to which this section applies, is in prison until the fine is satisfied.” (*Talibdeen*, at p. 1154, quoting Pen. Code, § 1464, subd. (d).) Thus, the court assumed, but never decided, that sentencing courts are required to impose penalty assessments on the crime-lab fee. Consequently, *Talibdeen* is not authority for the proposition that penalty assessments apply to the fee. Nor are other decisions that cite *Talibdeen* for that proposition without further analysis. (E.g., *People v. Taylor* (2004) 118 Cal.App.4th 454, 456 [12 Cal.Rptr.3d 923].)

Having concluded that *Talibdeen*, *supra*, 27 Cal.4th 1151 is not binding on us, we turn back to the language of section 11372.5(a) and note its internal inconsistency. The first paragraph of the provision characterizes the crime-lab fee as a “criminal laboratory analysis fee,” but the second paragraph characterizes the \$50 charge as a “fine.” (§ 11372.5(a), italics added.) For reasons we shall discuss, we conclude that the most sensible interpretation is that the Legislature intended the crime-lab fee to be exactly what it called it in the first paragraph, a fee, and not a fine, penalty, or forfeiture subject to penalty assessments.

We disagree with the Court of Appeal decisions that have failed to differentiate between these two paragraphs in concluding that the crime-lab fee is necessarily subject to penalty assessments. The leading case is *People v. Martinez* (1998) 65 Cal.App.4th 1511 [77 Cal.Rptr.2d 492] (*Martinez*), in which the Second District Court of Appeal primarily relied on an earlier decision of the Fifth District Court of Appeal, *People v. Sierra* (1995) 37 Cal.App.4th 1690 [44 Cal.Rptr.2d 575] (*Sierra*), which had held that the drug-program fee under section 11372.7 is subject to penalty assessments.⁸ (*Martinez*, at p. 1522, citing *Sierra*, at p. 1693.) In language similar to that in section 11372.5(a), section 11372.7 provides that “[t]he court shall increase the total fine, if necessary, to include this increment [the drug-program fee], which shall be in addition to any other penalty prescribed by law.” (§ 11372.7,

⁸ The trial court chose not to impose a drug-program fee here “[b]ased on [Watts’s] financial circumstances.” That fee, unlike the crime-lab fee, is conditioned on a defendant’s ability to pay. (§ 11372.7, subd. (b).)

subd. (a.) The Fifth District observed that the statute “defines the drug program fee as an increase to the ‘total fine’ and later as a fine in addition ‘to any *other penalty*.’ . . . In other words, section 11372.7, subdivision (a) describes itself as both a fine and/or a penalty.” (*Sierra*, at p. 1695.) Thus, the court reasoned, penalty assessments were required because they must be imposed “‘upon every *fine, penalty, or forfeiture*.’” (*Ibid.*, quoting Gov. Code, § 76000; see also Pen. Code, § 1464, subd. (a).)

Relying on the Fifth District’s reasoning, the Second District concluded that the crime-lab fee must also be subject to penalty assessments because section 11372.5 “defines the [subject] fee as an increase to the total fine.” (*Martinez, supra*, 65 Cal.App.4th at p. 1522.) *Martinez* also cited an earlier case in which the Second District had “held [that] the [crime-lab] fee is a fine” in the context of determining whether that fee has to be included on the abstract of judgment. (*Ibid.*, citing *People v. Sanchez* (1998) 64 Cal.App.4th 1329, 1332 [76 Cal.Rptr.2d 34] [reasoning that § 11372.5 describes crime-lab fee “as an increment of a fine”].) Several subsequent published decisions, primarily from the Second District, have followed *Martinez* and held that the crime-lab fee is subject to penalty assessments. (E.g., *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1251–1252 [68 Cal.Rptr.3d 134]; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1257 [82 Cal.Rptr.2d 231]; see also *People v. Sharret* (2011) 191 Cal.App.4th 859, 863–864 [120 Cal.Rptr.3d 195].)

More recently, however, the Appellate Division of the Nevada County Superior Court rejected the reasoning of *Sierra, supra*, 37 Cal.App.4th 1690, and by extension *Martinez, supra*, 65 Cal.App.4th 1511, and held that the crime-lab fee is not subject to penalty assessments.⁹ (*Moore, supra*, 236 Cal.App.4th at pp. Supp. 15–19 & fn. 4.) *Moore* pointed out that the Second District Court of Appeal had concluded in *People v. Vega* (2005) 130 Cal.App.4th 183 [29 Cal.Rptr.3d 700] (*Vega*) that the crime-lab fee was not “punishment” under Penal Code section 182, subdivision (a) because it is an administrative fee, not a fine, and therefore cannot be imposed on defendants convicted of a conspiracy to commit one of the crimes listed in section 11372.5. (*Vega*, at pp. 194–195; *Moore*, at pp. Supp. 15–16.) *Moore* criticized *Sierra*’s focus on the phrase “‘fine, penalty, or forfeiture’” in the statutory language governing assessments, which “sent the *Sierra* . . . court[] on [its] . . . mission[] to decide whether the . . . drug program fee[] [was] somehow punitive, or rather an administrative reimbursement.” (*Moore*, at

⁹ “Appellate division decisions have persuasive value, but they are of debatable strength as precedents and are not binding on higher reviewing courts.” (*Velasquez v. Superior Court* (2014) 227 Cal.App.4th 1471, 1477, fn. 7 [174 Cal.Rptr.3d 541].)

p. Supp. 16.) *Moore* believed that mission “amounted to a fool’s errand” because of the imprecision of the language used to characterize various fines and fees in the relevant statutes.¹⁰ (*Ibid.*)

Moore found more significant section 11372.5(a)’s direction that a trial court “shall increase the total fine necessary to include this increment,” that is, the crime-lab fee. (*Moore, supra*, 236 Cal.App.4th at p. Supp. 17, quoting § 11372.5(a).) *Moore* pointed out that Penal Code section 1463, subdivision (l) defines “total fine” . . . as including *both* the base fine *and* the penalty assessments levied thereon.” (*Moore*, at p. Supp. 17.) Thus, in contrast to *Sierra, supra*, 37 Cal.App.4th 1690, which reasoned that the crime-lab fee must be a “fine” because it is added to the “total fine,” *Moore* determined that the fee is not part of the base fine subject to penalty assessments but instead is added to the total amount owed by the defendant after the assessments are calculated. (*Moore*, at pp. Supp. 17–18.) *Moore* concluded that “[t]he inclusion of these [crime-lab] . . . fees into the base fine, and then the subsequent improper levy of penalty assessments upon a fee that is not part of the ‘base fine’ upon which such penalty assessments must be calculated according to Penal Code section 1463, subdivision (l)(1) is patent error.” (*Moore*, at p. Supp. 17.)

■ Although we agree with *Moore*’s conclusion that the crime-lab fee is not subject to penalty assessments, we disagree with the decision’s reliance on Penal Code section 1463 in interpreting the phrase “total fine.” (*Moore, supra*, 236 Cal.App.4th at p. Supp. 17.) To begin with, that statute provides that “[t]he following definitions shall apply to terms *used in this chapter*”—that is, chapter 1 of title 11 of part 2 of the Penal Code. (Pen. Code, § 1463, *italics added*.) This definition does not apply to the crime-lab fee because section 11372.5 is not contained within that chapter. (See *People v. Grayson* (2000) 83 Cal.App.4th 479, 485 [99 Cal.Rptr.2d 701] [definition that “applies[d] ‘[f]or the purposes of this part’” applied only to specified part of Health & Saf. Code].) Furthermore, even if it otherwise would be proper to rely on Penal Code section 1463, subdivision (l)’s definition in interpreting “total fine” as used in section 11372.5(a), there is no basis to conclude that the Legislature intended that definition to apply: section 11372.5, which has always contained the term “total fine,” was enacted more than a decade *before* the definitions in section 1463 were established. (Stats. 1991, ch. 189, § 18, pp. 1451–1452; Stats. 1980, ch. 1222, § 1, p. 4140.)

¹⁰ *Moore, supra*, 236 Cal.App.4th Supp. 10 levied the same criticism at *Vega*, 130 Cal.App.4th 183 [29 Cal.Rptr.3d 700], even though *Vega* addressed the term “punishment” under Penal Code section 182, subdivision (a), not the phrase “fine, penalty, or forfeiture” under the statutes governing penalty assessments. (*Vega*, at pp. 194–195; see *Moore*, at p. Supp. 16.)

But while the rationale of *Moore* is not compelling, neither is the rationale of *Martinez*, *Sierra*, or the courts that have followed them, under which section 11372.5(a)'s references to the phrases "total fine," "fine," and "any other penalty" somehow establish that the crime-lab fee constitutes a "fine" or "penalty" within the meaning of the statutes governing penalty assessments. As to the statute's reference to "total fine," we fail to perceive how the fact that the crime-lab fee increases the "total fine" necessarily means the fee is itself a "fine" subject to penalty assessments. Nothing about the statute's use of the phrase "total fine" is inconsistent with the conclusion that the crime-lab fee simply gets added to the overall charge imposed on the defendant after penalty assessments are calculated. And as to the statute's references to the word "fine" and the phrase "any other penalty," they appear only in section 11372.5(a)'s second paragraph, which applies only to offenses "for which a fine is not authorized by other provisions of law." As we explain below, since there are currently no such offenses covered by section 11372.5, in our view the language in the second paragraph does not control over the language in the first paragraph, which currently applies to all covered offenses.

Section 11372.5's legislative evolution bolsters the conclusion that the Legislature's characterization of the crime-lab fee as a "criminal laboratory analysis fee" reflects an intent to treat the charge as an administrative fee not subject to penalty assessments in circumstances that are not governed by the second paragraph of subdivision (a). When section 11372.5 was originally enacted in 1980, it required every person convicted of an enumerated offense to, "as part of any *fine* imposed, pay an *increment* in the amount of fifty dollars (\$50) for each separate offense." (Stats. 1980, ch. 1222, § 1, p. 4140, *italics added*.) This portion of the statute was later amended to require every person convicted of a covered offense to "pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense." (Stats. 1983, ch. 626, § 1, p. 2527.) The elimination of the reference to the fee's being part of the "fine imposed" and its renaming from an "increment" to a "fee" strongly suggest that the Legislature did not intend the fee to be a "fine, penalty, or forfeiture" because section 11372.5 calls it something else.

Even if we were to accept, as other courts have concluded, that the Legislature's choice of the word "fee" to describe the crime-lab fee is not determinative, the crime-lab fee cannot be fairly characterized as fitting into any of the categories of monetary charges subject to penalty assessments. First, the fee is clearly not a "forfeiture," which refers to the forfeiture of bail. (See, e.g., Pen. Code, § 1464, subd. (c); *Martinez*, *supra*, 65 Cal.App.4th at p. 1520.) Second, fines and penalties constitute punishment. (*People v. Alford*,

supra, 42 Cal.4th at p. 757 [fines]; *People v. High* (2004) 119 Cal.App.4th 1192, 1199 [15 Cal.Rptr.3d 148] [penalties].) The crime-lab fee, on the other hand, is a fixed charge that is “imposed to defray administrative costs,” not “for retribution and deterrence.” (*Vega, supra*, 130 Cal.App.4th at p. 195; see also *People v. Wallace* (2004) 120 Cal.App.4th 867, 876 [16 Cal.Rptr.3d 152] [“fee” is “more nonpunitive term” than “fine”].) As *Vega* explained, “It is clear to us [that] the main purpose of . . . section 11372.5 is not to exact retribution against drug dealers or to deter drug dealing (given the amount of money involved in drug trafficking a \$50 fine would hardly be noticed) but rather to offset the administrative cost of testing the purported drugs the defendant transported or possessed for sale in order to secure his [or her] conviction. The legislative description of the charge as a ‘laboratory analysis fee’ strongly supports our conclusion, as does the fact [that] the charge is a flat amount, it does not slide up or down depending on the seriousness of the crime, and the proceeds from the fee must be deposited into a special ‘criminalistics laboratories fund’ maintained in each county by the county treasurer.” (*Vega*, at p. 195).¹¹ Although *Vega* is not directly on point because it addressed whether the crime-lab fee could be imposed at all, not whether it was subject to penalty assessments, the decision persuades us that the fee is by its nature not punishment and therefore not a “fine” or “penalty” except in circumstances in which the second paragraph of section 11372.5(a) may apply.

■ Being unconvinced by the rationale of other authorities that have failed to grapple with the different language used in section 11372.5(a)’s two paragraphs, we turn to consider how the second paragraph should be interpreted. As we have said, the second paragraph establishes that in the case of an offense “for which a fine is not authorized by other provisions of law,” the crime-lab fee acts as a fine and is, in turn, subject to penalty assessments. The most reasonable interpretation of the phrase “not authorized by other provisions of law” is that it refers to offenses for which no separate fine is *permitted* to be imposed. (See Black’s Law Dict. (8th ed. 2004) p. 143 [defining “authorize” as “[t]o formally approve; to sanction”].) Under this interpretation, the second paragraph does not apply to Watts’s offense. Although “[m]any criminal statutes provide for the imposition of a base fine in addition to a jail or prison sentence . . . [w]here the criminal statute does

¹¹ We are aware that a different division of the Second District Court of Appeal concluded that the crime-lab fee *is* punishment in the context of determining whether to stay the fee under Penal Code section 654. (*People v. Sharret, supra*, 191 Cal.App.4th at p. 869.) *Sharret* does not address *Vega*, however, and is unpersuasive for a number of reasons, including that it assumed that the fee is a “fine” and therefore constitutes punishment. (*Sharret*, at pp. 869–870.)

not prescribe [such a] fine, [Penal Code] section 672 authorizes the trial court to impose a fine.” (*People v. Uffelman* (2015) 240 Cal.App.4th 195, 197 [192 Cal.Rptr.3d 438].) Under Penal Code section 672, a trial court may impose a fine of up to \$10,000 for any felony or up to \$1,000 for any misdemeanor “punishable by imprisonment in any jail or prison . . . in relation to which no fine is [otherwise] prescribed.” (Pen. Code, § 672; see *People v. Breazell* (2002) 104 Cal.App.4th 298, 302–304 [127 Cal.Rptr.2d 901].) ■ Here, although the statute under which Watts was convicted, section 11378, does not provide for a base fine, the offense is punishable by imprisonment in county jail (§ 11378; Pen. Code, § 1170, subd. (h)) and is thus subject to a fine under Penal Code section 672.

■ Although we believe that it makes the most sense to interpret the second paragraph of section 11372.5(a) to apply only to offenses for which no separate fine is permitted to be imposed, we recognize that there are presently no such offenses subject to the crime-lab fee. In other words, the second paragraph of section 11372.5(a) has no current application and, in that sense, is surplusage. “It is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage,” and “[a]n interpretation that renders statutory language a nullity is obviously to be avoided.” (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1038–1039 [175 Cal.Rptr.3d 601, 330 P.3d 912].) Section 11372.5(a) lists 29 offenses that are subject to the crime-lab fee. Of them, two no longer exist (former § 11380.5; Bus. & Prof. Code, former § 4230); three are subject to a fine under the criminalizing statute itself (Health & Saf. Code, §§ 11357, subds. (a) & (c), 11379.6, subd. (a)); eight are subject to a fine of up to \$20,000 under section 11372, subdivision (a) (Health & Saf. Code, §§ 11350, 11351, 11351.5, 11352, 11355, 11359, 11360, subd. (a), 11361); and the remaining 16 are punishable by confinement in either prison or county jail and are therefore subject to a fine under Penal Code section 672. (Health & Saf. Code, §§ 11358, 11363, 11364, 11368, 11375, 11377, 11378, 11378.5, 11379, 11379.5, 11380, 11382, 11383, 11390, 11391, 11550).¹² Thus, the second paragraph of section 11372.5(a) apparently describes a null set.

¹² Although sections 11377, subdivision (c) and 11550, subdivision (d) authorize the imposition of a \$70 fine for AIDS education, that fine “is expressly intended to be additional to any fines [a] court may impose” for the various offenses subject to it, and a base fine under Penal Code section 672 may be imposed on those who violate section 11377 (or, by extension, § 11550). (*People v. Clark* (1992) 7 Cal.App.4th 1041, 1044–1046 [9 Cal.Rptr.2d 726].) The AIDS-education fine may also be imposed for a conviction under section 11350, which is, as already indicated, subject to a base fine of up to \$20,000 as well. (§§ 11350, subd. (c), 11372, subd. (a).)

We have been unable to trace the root of this interpretive difficulty to amendments either to section 11372.5 or to the laws governing other fines. A substantially similar second paragraph of subdivision (a) was present in section 11372.5 as originally enacted by Senate Bill No. 1535 (1980–1982 Reg. Sess.) (Senate Bill 1535). (Stats. 1980, ch. 1222, § 1, p. 4140.) At the time, section 11372.5 covered 17 offenses, two of which were subject to base fines under the statute itself (former § 11357, subds. (a) & (c)), five of which were subject to base fines under former section 11372 (former §§ 11350, 11351, 11352, 11359, 11360, subd. (a)), and 10 of which were subject to base fines under Penal Code former section 672. (Health & Saf. Code, §§ 11358, 11363, 11364, 11368, 11377, 11378, 11378.5, 11379, 11379.5, 11383.) In other words, a separate fine was permitted for each of the covered offenses at the time section 11372.5 was enacted as well.

■ Nor have we been able to trace the reason for the inclusion of the second paragraph of section 11372.5(a). There is some suggestion in the legislative history of Senate Bill 1535 that this paragraph was added “because often individuals convicted of crimes are placed on probation or sent to prison in lieu of a fine and the \$50 surcharge would be collected only when a fine is imposed.” (Legis. Analyst, analysis of Senate Bill No. 1535 (1979–1980 Reg. Sess.) as amended July 8, 1980, p. 3.) It may be that the second paragraph was added to address the concern that because the first paragraph refers to the crime-lab fee’s being added to the “total fine”—as well as, in language that was later removed from the statute, to the crime-lab fee’s being “part of any fine imposed”—the crime-lab fee could not be imposed in any case in which a separate fine was not *actually* imposed, whether or not it *could* be imposed. But to read “not authorized by other provisions of law” to mean “not imposed” is too strained an interpretation of the statutory language. Ultimately, the rule against surplusage “is not absolute” and “will be applied only if it results in a *reasonable* reading of the legislation.” (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 234–235 [45 Cal.Rptr.2d 207, 902 P.2d 225].)

■ Giving the second paragraph’s words their ordinary meaning, we conclude that Watts’s offense, like all the others presently covered by section 11372.5, is not one “for which a fine is not authorized by other provisions of law.”¹³ As a result, the first paragraph’s characterization of the crime-lab fee as a fee is controlling, and penalty assessments should not have been imposed on it.

¹³ In holding that the crime-lab fee is not subject to penalty assessments, we do not rule out the possibility that future statutory changes could render the second paragraph of section 11372.5(a) applicable to a particular offense, in which case the fee *would* be subject to assessments.

III.

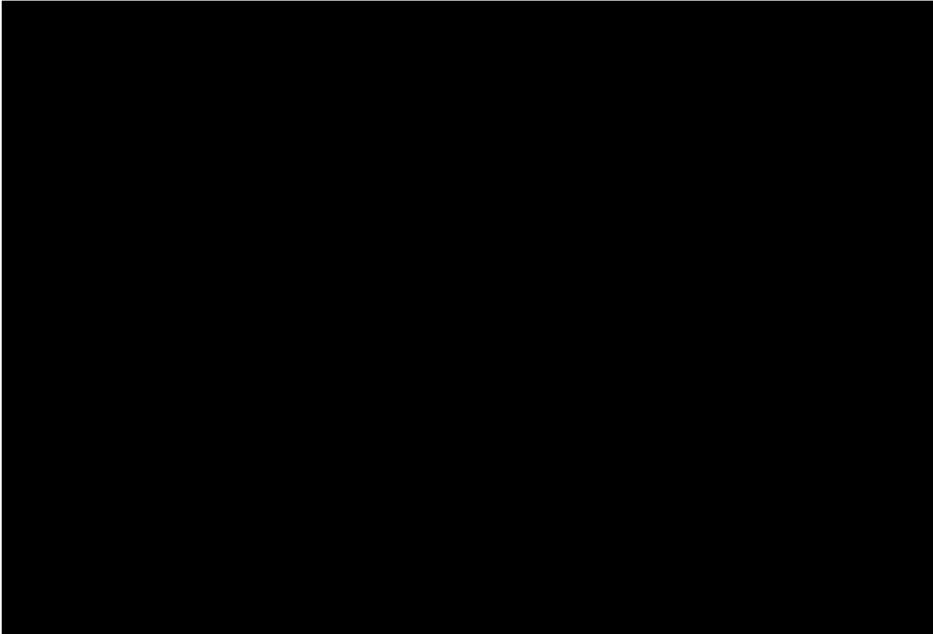
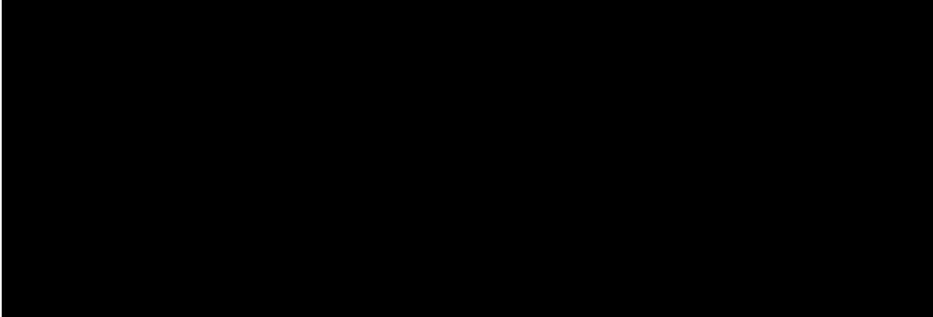
DISPOSITION

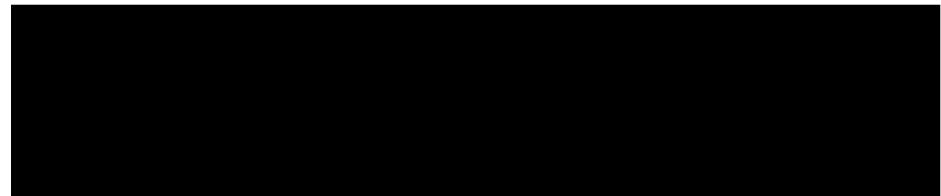
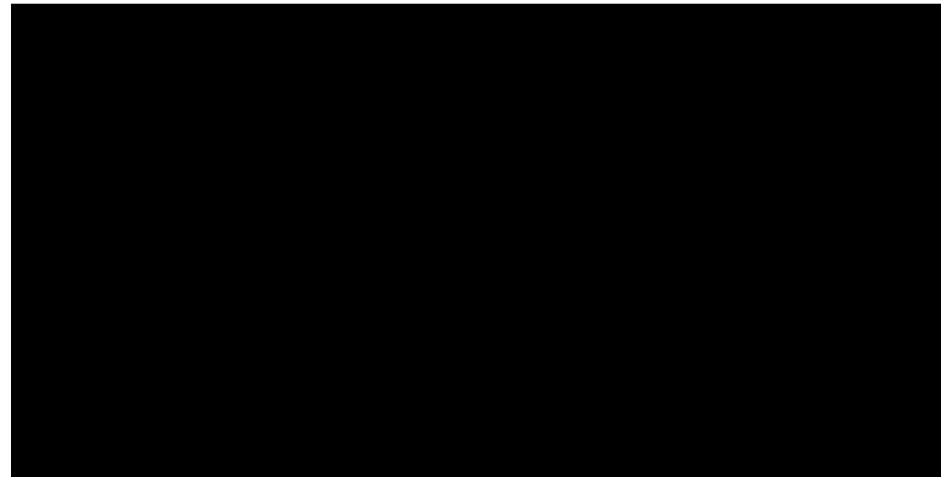
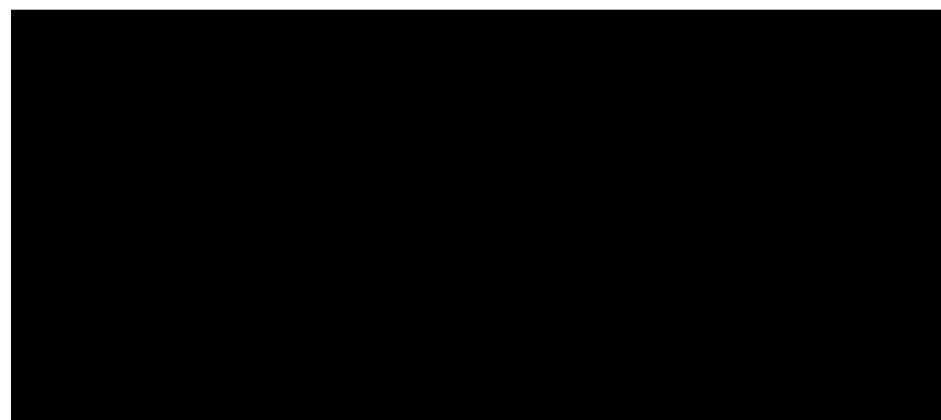
The May 20, 2015 order granting probation is modified to strike the penalty assessments imposed on the crime-lab fee under section 11372.5, reducing the amount due from \$190 to \$50. As so modified, the order is affirmed.

Margulies, J., and Banke, J., concurred.

[No. B265690. Second Dist., Div. Eight. July 15, 2016.]

PAULA CRUZ et al., Plaintiffs and Appellants, v.
CITY OF CULVER CITY et al., Defendants and Respondents.





OPINION

RUBIN, J.—Plaintiffs Paula Cruz and four of her neighbors appeal from the order dismissing as an anti-SLAPP action their complaint against the City Council of the City of Culver City (the council) and five of its council members for allegedly violating the state’s open meeting laws. We reject plaintiffs’ contentions that the action is exempt from the anti-SLAPP provisions because it concerned the public interest, and affirm because there is no probability plaintiffs will prevail on the merits.

FACTS AND PROCEDURAL HISTORY

Culver City residents Paula Cruz, Ronald Davis, John Heyl, James Province, and Nadine F. Province sued the City of Culver City (the city) for violating the state’s open meeting law (Gov. Code, § 54950 et seq.; Ralph M. Brown Act (the Brown Act)), alleging that the council violated the Brown Act in two ways: (1) by discussing a change to parking restrictions in their neighborhood even though it was not on the agenda and (2) by taking action on that issue when the council implicitly decided that the new challenge to those restrictions could proceed as an appeal of an earlier denial by city staff members.

The parking restrictions were imposed in 1982 when residents of Farragut Drive complained that parishioners of nearby Grace Evangelical Lutheran Church (the church) jammed their street with parked cars during church services.¹ In 2004, the council adopted an ordinance for the establishment of preferential parking zones throughout the city and included the 1982 Farragut Drive parking restrictions as one such zone.

In 2013, the council adopted regulations governing the establishment and regulation of preferential parking/residential parking permit zones. These regulations delegated to a “Traffic Committee” comprised of city staff members in the traffic engineering department the ability to administer and implement those regulations.²

In April 2014, a lawyer for the church sent a letter to city traffic analyst Gabriel Garcia seeking information about the application process for a change to the existing Farragut Drive parking restrictions pursuant to the 2013 parking regulations. Garcia wrote back one month later that the city engineer was unable to act on such a request because the 2013 regulations did not

¹ Among those taking part in the 1982 parking dispute were current plaintiff and appellant Ronald Davis, and plaintiffs’ counsel, Herbert L. Greenberg.

² The scope of this ordinance is in dispute, an issue we discuss below.

provide a means by which nonresidents could seek modification of the conditions imposed in a residential parking permit zone.

On August 1, 2014, the church sent a letter to Councilmember Andrew Weissman complaining about Garcia's response and asking to address the council about the "onerous parking restrictions" on Farragut Drive.

At the council's August 11, 2014 meeting, Weissman mentioned the church's letter during the portion of the meeting set aside for the receipt and filing of correspondence from the public. Following a six-minute discussion with then-Mayor Meghan Sahli-Wells and public works director and city engineer, Charles D. Herbertson, the church's request to review the Farragut Drive parking restrictions was placed on the agenda for the next council meeting on September 8, 2014.³

In November 2014, plaintiffs filed a complaint seeking declaratory relief that the city and its five council members had violated the Brown Act by discussing the church's letter and by acting upon it by placing it on the agenda for the next meeting, even though the 2013 parking regulations did not provide for such action.⁴

The city brought an anti-SLAPP motion (Code Civ. Proc., § 425.16), seeking to dismiss plaintiffs' action because the city's alleged misconduct arose from First Amendment activity and because plaintiffs could not show a probability of prevailing on the merits. The city contended that it had done nothing more than have preliminary discussions with staff members concerning the church's letter in order to have the matter placed on a future agenda, as expressly permitted by the Brown Act.

Plaintiffs contended their action was exempt from the anti-SLAPP provisions because it concerned a matter affecting the public interest. They also contended that the council's discussions and actions were so substantive that they fell outside the statutory exceptions. The trial court agreed with the city, granted the anti-SLAPP motion, and dismissed the complaint.

³ It is the nature of that discussion and the decision to place the item on the next agenda that give rise to this action. In the discussion part of our opinion, we will set forth a transcript of the events.

⁴ In addition to Weissman, the complaint named Councilmembers Meghan Sahli-Wells (the mayor), Michael O'Leary, Jim B. Clarke, and Jeffrey Cooper. For ease of reference, we will refer to all defendants collectively as the city.

DISCUSSION

1. *The Law Governing Anti-SLAPP Motions*

Code of Civil Procedure section 425.16 was enacted to address a sharp rise in the number of “[l]awsuits 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).)⁵ The statute provides that 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.” (*Id.*, subd. (b)(1).)

■ The trial court undertakes a two-step process when considering a defendant’s anti-SLAPP motion. First, the trial court determines whether the defendant has shown the challenged cause of action arises from protected activity. The trial court reviews the pleadings, declarations, and other supporting documents to determine what conduct is actually being challenged, not whether that conduct is actionable. The defendant does not have to show the challenged conduct is protected as a matter of law; only a *prima facie* showing is required. (*People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 822 [150 Cal.Rptr.3d 224].) If the defendant shows the challenged conduct was taken in furtherance of his First Amendment rights of free speech, petition, and to seek redress of grievances, the trial court must then determine whether the plaintiff has shown a probability of prevailing on the claim. (*People ex rel. Fire Ins. Exchange*, at p. 822.)

We review the trial court’s ruling on an anti-SLAPP motion independently, engaging in the same two-step process. (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 478 [99 Cal.Rptr.3d 394].) We do not weigh credibility or the weight of the evidence. Instead, we accept as true the evidence favorable to the plaintiff and evaluate the defendant’s evidence only to determine if it has defeated the plaintiff’s evidence as a matter of law. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 [46 Cal.Rptr.3d 638, 139 P.3d 30].)

The anti-SLAPP provisions do not apply to certain public interest lawsuits. Section 425.17, subdivision (b) provides: “Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general

⁵ Such actions are commonly referred to as strategic lawsuits against public participation, or SLAPP actions. All further undesignated section references are to the Code of Civil Procedure, unless otherwise noted.

public if all of the following conditions exist: [¶] (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision. [¶] (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons. [¶] (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter."

2. *The Brown Act*

■ The Brown Act requires that most meetings of a local agency's legislative body be open to the public for attendance by all. (Gov. Code, § 54953, subd. (a).) Among its provisions, the Brown Act requires that an agenda be posted at least 72 hours before a regular meeting and forbids action on any items not on that agenda. (Gov. Code, § 54954.2, subd. (a)(1).) "The [Brown] Act thus serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies. [Citation.]" (*Epstein v. Hollywood Entertainment Dist. II Bus. Improvement Dist.* (2001) 87 Cal.App.4th 862, 868 [104 Cal.Rptr.2d 857].) Either the district attorney or any interested person may bring an action for mandamus or injunctive or declaratory relief in order to stop or prevent violations of the Brown Act "or to determine the applicability of this chapter to ongoing actions or threatened future actions of the legislative body . . ." (Gov. Code, § 54960, subd. (a).)

There are three exceptions to the Brown Act's agenda requirement. Even if an item is not on the agenda, "members of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights under [Government Code] Section 54954.3. In addition, on their own initiative or in response to questions posed by the public, a member of a legislative body or its staff may ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities. Furthermore, a member of a legislative body, or the body itself, subject to rules or procedures of the legislative body, may provide a reference to staff or other resources for factual information, request staff to report back to the body at a subsequent meeting concerning any matter, or take action to direct staff to place a matter of business on a future agenda." (Gov. Code, § 54954.2, subd. (a)(2).)

3. *The Council's Discussion Concerning the Church's Letter*

What follows is a transcript of the portion of the August 11, 2014 council meeting where the church's letter was discussed:⁶

"MAYOR MEGHAN SAHLI-WELLS: May I have a motion to receive and file correspondence.

"Councilperson Mehaul O'Leary: So moved.

"Councilperson Jim Clarke: Second.

"MAYOR SAHLI-WELLS: A motion and a second.

"Martin Cole: And Madam Mayor as the City Council is voting on this motion that includes items that were received by the City Clerk's office up 'til 4 o'clock this afternoon and they are about evenly split between items A-1 and A-2.

"Secretary: That motion passes 5 AYES.

"Councilperson Andrew Weissman: Madam Mayor may I ask a question regarding one of the items that we just received and filed?

"MAYOR SAHLI-WELLS: Yes.

"Weissman: It's a letter from Ilbert Philips regarding the parking district in and around Farragut and Franklin. And it was directed to me, I think it was directed to me because when we had the discussion a number of months ago regarding the consolidated districts I'm the one that raised the issue of an appeal from a decision or non-decision by the City Engineer, and I would like to ask for consensus to agendize the issue. Apparently the staff's position is that the avenue of appeal only applies to residents since it's a residential parking district. Perhaps I wasn't sufficiently clear the night we discussed the appeal, but I would like to, I'd like to discuss it again. And get some clarification with regard to what the actual intent was.

"MAYOR SAHLI-WELLS: So the agenda item that you're proposing is to discuss the appeal process?

"Weissman: and the . . .

⁶ Although the record contains a video recording of the exchange, which we have viewed, it did not include a transcript. We asked the parties to provide a transcript and have augmented the appellate record to include that transcript.

“MAYOR SAHLI-WELLS: Or this specific case?

“Weissman: Well we could do it I guess we could do it one of two ways and maybe staff, Mr. Herbertson may be here, can assist me. I think we either agendize an item for discussion of the specific parking district or we can have a discussion of what it was that we intended to do when we provided for a right of appeal when we consolidated the parking districts?

“O’Leary: And would you like to put on hold the appeal time? [indistinct] and timing . . .

“Weissman: I don’t think, based on staff’s position, there is no appeal time cuz there’s no right to appeal.

“O’Leary: Okay.

“MAYOR SAHLI-WELLS: I’m comfortable discussing the issue.

“Clarke: So am I.

“MAYOR SAHLI-WELLS: Alright.

“Weissman: May I ask, just ask, Mr. Herbertson for some clarification as to what staff’s preferred direction is on this?

“Charles Herbertson: Staff’s preference would be to just take up the issue of the parking, specifically regarding the parking on Farragut as opposed to whether or not business or non-resident should be able to appeal a parking district. The reason for that is it’s a very rare circumstance—first time I can remember that this has come up where there’s been a desire to change the parking district once it’s been formed, by an affected nearby business or in this [case] a church. So just I would recommend that we just discuss this particular item as opposed to a more general the idea of an appeal, but that of course is up to the City Council. If, if we are going to agendize that I would recommend that we notify both the Church, and as well as everybody in the district, so they would have the opportunity to come in and state their case.

“O’Leary: And is there a time frame by which an appeal can umm, is that going to be an issue?

“Herbertson: No, there’s no time frame Councilman Weissman was saying the process, least as we’ve interpreted it at the Staff level, doesn’t really allow for an appeal per se but they can always come to directly to the City Council at any time. It’s, it’s your policy that you’ve adopted so at any point

in each time a district is formed the city council effectively has the ability to hear any objections to that district at any time, so.

“MAYOR SAHLI-WELLS: In regards to the timing, I believe that this is one of the oldest parking districts in Culver City if I’m not mistaken, so it’s not based on a new decision or restriction it’s based on existing conditions, is that correct?

“Weissman: I think it’s—I don’t want to speak for the Church, but I think it’s evolving conditions. I think the, when the parking district was first established twenty-plus years ago, it was based on one set of circumstances, and I think those circumstances have evolved. The neighborhood has changed, and I think what, what we would be doing would be looking at the nature of and justification for continuing the district in its current iteration or deciding that we want to do something different.

“Herbertson: Yes, you know I don’t have the history right in front of me, but what Councilman Weissman said is correct. My recollection is that the limits on the district have changed at least a couple of times I think over the years so it is an old district but the restrictions have been changed over time and certainly, it’s possible also that other things have also changed as well as for other uses in the area, etc. So it would be appropriate to take a fresh look at it if that’s the, the council’s desire to do so.

“MAYOR SAHLI-WELLS: Alright.

“Herbertson: Okay.

“MAYOR SAHLI-WELLS: Thank You.”

4. *The Public Interest Exception Does Not Defeat the Anti-SLAPP Motion*

■ Section 425.17 was enacted to curb the “‘disturbing abuse’” of the anti-SLAPP provisions. (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 316 [86 Cal.Rptr.3d 288, 196 P.3d 1094], quoting § 425.17, subd. (a).) The public interest exception applies to only those actions brought solely in the public interest. It does not apply to an action that seeks a more narrow advantage for a particular plaintiff. (*Club Members for an Honest Election*, at pp. 316–317.) As a result, section 425.17, subdivision (b) does not apply to a party seeking any personal relief. (*Club Members for an Honest Election*, at p. 315.)

We look to the allegations of the complaint and the scope of relief sought in order to determine whether the public interest exception applies. (*Tourgemian v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1460 [166 Cal.Rptr.3d 729].)⁷

Plaintiffs contend they have satisfied all three requirements of the exception because (1) they have asked for nothing other than a declaration that the city's conduct violated the Brown Act, which would provide them no greater relief than the public at large would receive; (2) a judgment in their favor would provide a significant benefit to the public; and (3) private enforcement was necessary because no one else stepped up to challenge the city's action, and plaintiffs will incur legal fees without a concomitant damages award should they prevail. The city contends that plaintiffs have an individual stake in the outcome that defeats application of the public interest exception.

Our examination of the complaint tips the balance in the city's favor. The complaint alleges that the city grandfathered in the Farragut Drive parking restrictions in 2004, and then, pursuant to the 2013 parking regulations, delegated to the traffic engineer exclusive authority regarding changes to preferential parking zones. The traffic engineer later refused the church's requests to modify the Farragut Drive parking restrictions, prompting the church's August 1, 2014 letter to Weisman.

Plaintiffs allege that contrary to the 2013 parking regulations, the council decided (1) to remove the traffic engineer's exclusive jurisdiction over parking zone modification issues; (2) that it had original jurisdiction over the matter; and (3) that the Farragut Drive residents would have to re-petition the city to keep their restrictions in place. Plaintiffs also allege that the council did not inform the public "and in particular Farragut residents" that the city's traffic engineer believed the church had no *per se* right to appeal to the council, and instead decided that such a right was available. As part of this, plaintiffs allege, the council discussed substantive issues concerning the church's viewpoint on the need for changes to the parking zone.

Finally, plaintiffs alleged that they submitted a cease and desist letter to the city that "clearly describes the past action of the council on August 11, 2014," that the conduct violated the Brown Act, and that the city has not provided an unconditional commitment to "cease, desist from, and not repeat the past action that plaintiffs alleged in their aforesaid cease-and-desist letter."⁸

⁷ As a result, we hereby deny plaintiffs' request that we judicially notice the city's March 2016 resolution directing a study of the Farragut Drive parking restrictions.

⁸ Plaintiffs provided a copy of the cease-and-desist letter in opposition to the city's anti-SLAPP motion. In it, plaintiffs complain that the council violated the 2013 parking regulations by providing the church with "non-existent appellate rights" and by ordering staff

■ Distilled, plaintiffs alleged that the council had no authority to hear an appeal by the church regarding the Farragut Drive parking restrictions, and asked the city to stop taking further actions in that regard. Keeping the parking restriction at status quo would directly benefit plaintiff Farragut Drive homeowners. In short, plaintiffs sought personal relief in the form of a halt to any attempts by the church to undo the long-standing parking restrictions. As a result, the public interest exception to the anti-SLAPP provisions does not apply.

5. Plaintiffs Are Unlikely to Prevail on the Merits

Plaintiffs do not dispute that the city has satisfied the first prong of an anti-SLAPP motion—that its statements concerning the parking restrictions and its direction to place the issue on a future agenda were forms of protected activity under the First Amendment. The issue we must decide is whether plaintiffs have carried their burden of showing it is probable they will prevail on the merits.

■ We begin with the three Brown Act exceptions to discussing or acting upon non-agenda items: (1) members of a legislative body, or their staff, may briefly respond to statements made or questions posed by persons exercising their right to publicly testify at a hearing; (2) either on their own initiative or in response to a question posed by the public, the legislative body or its staff may ask a question for clarification, make a brief announcement, or make a brief report on their own activities; and (3) subject to its rules or procedures, a legislative body may ask staff to provide factual information, report back at a later time, or place an item on a future agenda. (Gov. Code, § 54954.2, subd. (a)(2).)

Although plaintiffs characterize the council's comments and questions concerning the church's ability to challenge the Farragut Drive parking restrictions as something substantive and substantial, we disagree. Based on our reading of the transcript and viewing of the video recording, Weisman did no more than ask for clarification as to the appropriate avenue of response to the church's letter. Engineer Herbertson answered those questions and advised the council that the matter could be placed on a future agenda, with all parties given notice and an opportunity to comment. Therefore, the discussion itself falls within all three statutory exceptions.

Finally, plaintiffs contend they will likely prevail on the merits because the city's actions—placing the parking restriction issue on the next agenda—violated the rules and procedures in the 2013 parking regulations, which

to take a fresh look at the Farragut Drive parking restrictions. The letter asked the city to "cease and desist discussions and action related to its meeting on August 11, 2014."

plaintiffs contend prohibited what was effectively an appeal of the traffic engineer's statement that the regulations provided for no such appeal. (Gov. Code, § 54954.2, subd. (a)(2) [subject to rules of procedures of legislative body, staff can be directed to place a matter on the agenda].)

■ We see two fundamental problems with this contention. First, as we read the statute, it requires the legislative body to follow its rules or procedures in regard to setting agendas, and does not address whether a matter was wrongly placed on the agenda for other reasons. To hold otherwise would convert the Brown Act into a vehicle for challenging agendized matters because opponents believe the legislative body lacks authority to act for reasons unrelated to the policies behind the open meeting law. If the 2013 parking regulations barred the city from acting, that issue was ripe for discussion by plaintiffs when the matter was heard at the next council meeting.

Second, as we read the record, city staffers concluded the 2013 parking regulations applied to parking zone issues raised by only the residents of an affected area, not by organizations or businesses located in or near the parking zone. It was on that basis that the church's attempt to appeal was administratively rejected, and it was that concern that led the city, acting on advice of its traffic engineer, to conclude it still possessed the authority to reconsider parking restrictions in response to a challenge such as that brought by the church. We have read the 2013 parking regulations, and agree that they are silent on the type of challenge raised here. Under plaintiffs' interpretation, however, the city could never reconsider long-standing parking restrictions no matter how much conditions had changed, so long as the challenge came from someone other than the residents of that zone. We reject that interpretation, and on that basis as well conclude that plaintiffs are not likely to prevail on the merits.

DISPOSITION

The order dismissing plaintiffs' action under the anti-SLAPP provisions is affirmed. Respondents shall recover their costs on appeal.

Bigelow, P. J., and Flier, J., concurred.

On August 8, 2016, the opinion was modified to read as printed above.

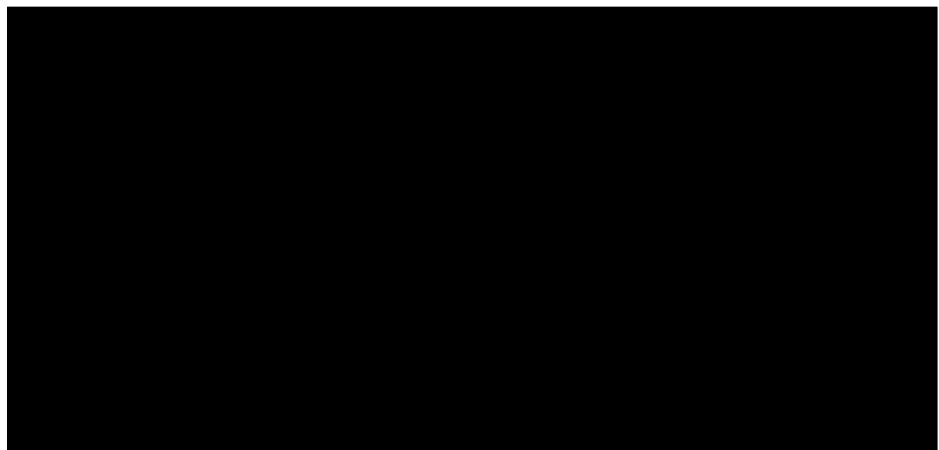
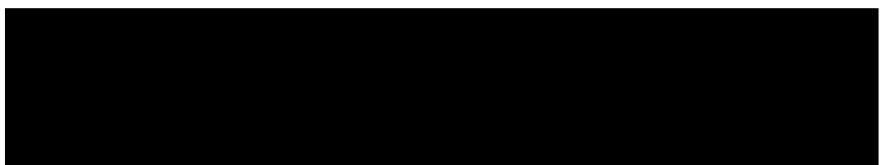
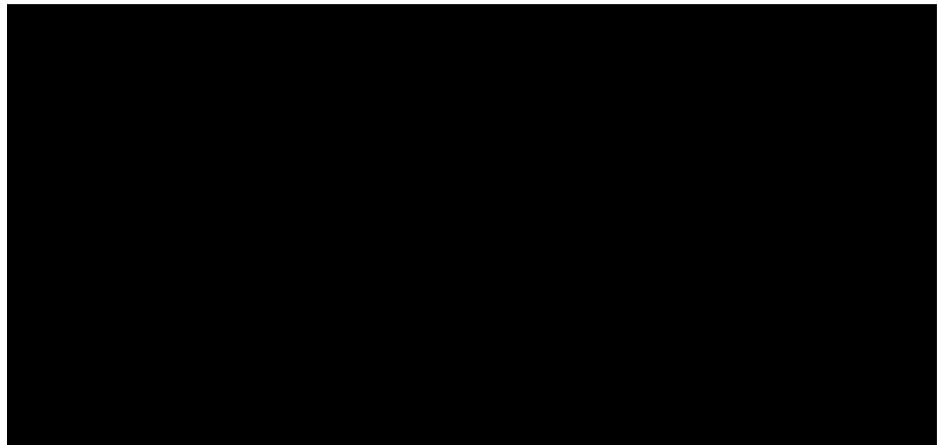
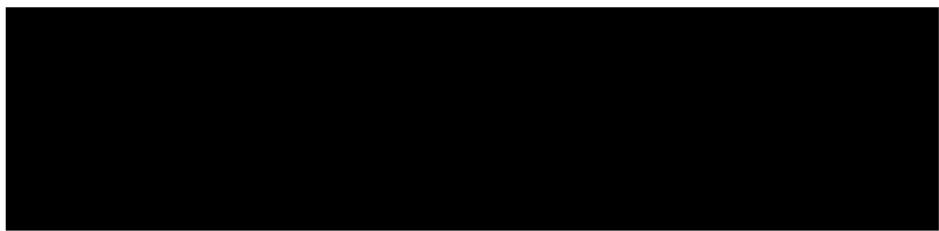
[No. E063272. Fourth Dist., Div. Two. Aug. 9, 2016.]

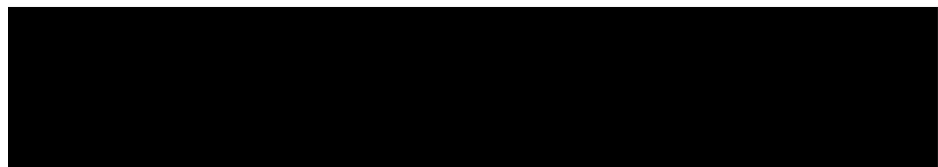
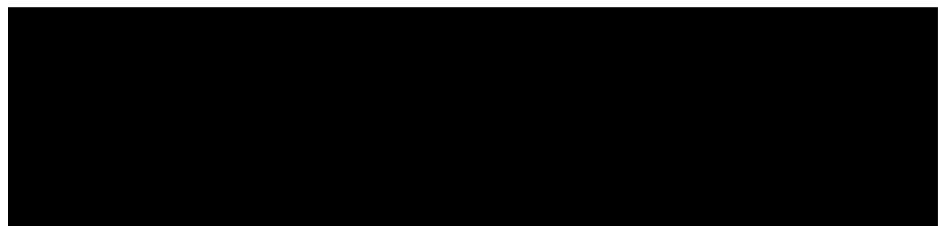
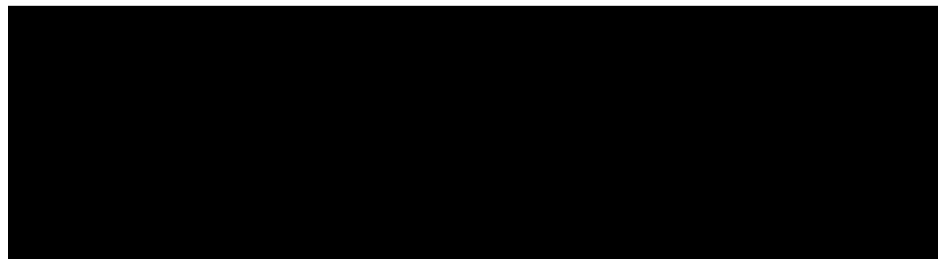
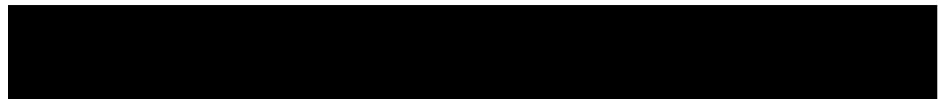
RANCHO MIRAGE COUNTRY CLUB HOMEOWNERS ASSOCIATION,
Plaintiff and Respondent, v.
THOMAS B. HAZELBAKER, Individually and as Co-trustee, etc., et al.,
Defendants and Appellants.

[REDACTED]

[REDACTED]

[REDACTED]







COUNSEL

Matthew T. Ward for Defendants and Appellants.

Epsten Grinnell & Howell and Anne L. Rauch for Plaintiff and Respondent.

OPINION

HOLLENHORST, J.—Defendants and appellants Thomas B. Hazelbaker and Lynn G. Hazelbaker own, through their family trust, a condominium in the Rancho Mirage Country Club development. Defendants made improvements to an exterior patio, which plaintiff and respondent Rancho Mirage Country Club Homeowners Association (Association) contended were in violation of the applicable covenants, conditions and restrictions (CC&Rs). The parties mediated the dispute pursuant to the Davis-Stirling Common Interest Development Act (Davis-Stirling Act or the Act), codified at sections 4000 to 6150 of the Civil Code¹ (formerly §§ 1350–1376). The mediation resulted in a written agreement. Subsequently, the Association filed the present lawsuit, alleging that defendants had failed to comply with their obligations under the mediation agreement to modify the property in certain ways.

While the lawsuit was pending, defendants made modifications to the patio to the satisfaction of the Association. Nevertheless, the parties could not

¹ Further undesignated statutory references are to the Civil Code.

reach agreement regarding attorney fees, which the Association asserted it was entitled to receive as the prevailing party.

The Association filed a motion for attorney fees and costs, seeking an award of \$31,970 in attorney fees and \$572 in costs. The trial court granted the motion in part, awarding the Association \$18,991 in attorney fees and \$572 in costs. Defendants argue on appeal that the trial court's award, as well as its subsequent denial of a motion to reconsider the issue, are erroneous in various respects.²

For the reasons discussed below, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In November 2011, defendants applied for and received approval from the Association's architectural committee to make certain improvements to the patio area of their property. Subsequently, however, the Association contended that defendants had made changes that exceeded the scope of the approval, and which would not have been approved had they been included in defendants' November 2011 application.

On June 19, 2012, the Association sent defendants a request for alternative dispute resolution pursuant to former section 1369.510 et seq., identifying the disputed improvements and proposing that the parties mediate the issue. Defendants accepted the proposal, and a mediation was held on April 8, 2013. A "Memorandum of Agreement in Mediation" dated April 9, 2013, was reached, signed by two representatives of the Association, its counsel, and Thomas Hazelbaker (but not Lynn Hazelbaker). The agreement called for defendants to make certain modifications to the patio in accordance with a plan newly approved by the Association; specifically, to install three openings, each 36 inches wide and 18 inches high, in a side wall of the patio referred to as a "television partition" in the agreement, and to use a specific color and fabric for the exterior side of the drapery. The agreement provided for the modifications to be completed within 60 days from the date of the agreement. It also provided for a special assessment on defendants' property to pay a portion of the Association's attorney fees incurred to that point, and included a prevailing party attorney fees clause with respect to any subsequent legal action "pertaining to the enforcement of or arising out of" the agreement.

The modifications described in the mediation agreement were not completed within 60 days. The parties each blame the other for that circumstance.

² The Association did not file a cross appeal challenging the trial court's award of less than the full amount requested.

On September 4, 2013, the Association filed the present lawsuit, asserting two causes of action: (1) for specific performance of the mediation agreement, and (2) for declaratory relief. Subsequently, the parties reached agreement regarding modifications to the property, slightly different from those agreed to in mediation; instead of three 36-inch-wide openings, two openings of 21 inches, separated by a third opening 52 inches wide, were installed in the wall, and a different fabric than the one specified in the mediation agreement was used for the drapery. The modifications were completed by defendants in September 2014. The parties could not reach a complete settlement, however, because they continued to disagree about who should bear the costs of the litigation.

On October 15, 2014, the Association filed a motion seeking attorney fees and costs pursuant to section 5975, subdivision (c). The motion sought \$31,970 in attorney fees, plus \$572 in costs. On October 30, 2014, the hearing of the matter, initially set for November 10, 2014, was continued to November 25, 2014, on the court's own motion. Defendants filed their opposition to the motion on November 14, 2014.

At the November 25, 2014 hearing on the motion, the trial court noted that defendants' "paperwork was not timely and the Court did not consider it."³ The court further observed that the bills submitted by the Association in support of its motion were heavily redacted, sometimes to the point where it could not "tell what's going on." The court declined to review unredacted bills in camera, and further remarked that "if I can't tell what's going on, I'm not awarding those fees." At the conclusion of the hearing, the court took the matter under submission.

On December 2, 2014, the trial court issued a minute order granting the Association's motion, but awarding less than the requested amount, \$18,991 in attorney fees, plus \$572 in costs. The trial court denied the Association's motion with respect to fees incurred prior to the mediation, awarding \$3,888.50 in "[p]lost mediation fees" incurred by one law firm on behalf of the Association "starting 60 days post mediation," and \$15,102.50 in "litigation fees" incurred by another law firm. With respect to the "[p]lost mediation fees," the court commented as follows: "The court had great difficulty determining the nature of the billings because so much information was redacted from the billings. All doubts were resolved in favor of the homeowner."

Judgment was entered in favor of the Association on December 17, 2014, and on January 14, 2015, a notice of entry of judgment was filed. On January

³ Defendants concede that their opposition to the motion for attorney fees was filed late, only seven court days before the hearing. (See Code Civ. Proc., § 1005, subd. (b) [opposition papers due nine court days before hearing].)

21, 2015, defendants filed a motion for reconsideration of the trial court's order regarding fees and costs. On February 27, 2015, after a hearing, the trial court denied the motion as untimely, further noting that the motion "did not set forth any new facts, law, or a chance in circumstances."

II. DISCUSSION

A. *The Association's Lawsuit Is an "Action to Enforce the Governing Documents" Under the Davis-Stirling Act.*

■ This case presents the question of whether the Davis-Stirling Act, and particularly the fee-shifting provision of section 5975, subdivision (c), applies to an action to enforce a settlement agreement arising out of a mediation conducted pursuant to the mandatory alternative dispute resolution requirements of the Act. We conclude that it does apply in at least some circumstances, and more specifically that it applies to the facts of this case.

■ "The Davis-Stirling Act, enacted in 1985 [citation], consolidated the statutory law governing condominiums and other common interest developments." (*Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th 73, 81 [14 Cal.Rptr.3d 67, 90 P.3d 1223] (*Villa De Las Palmas*).) "The Davis-Stirling Act includes provisions addressing alternative dispute resolution (ADR), including the initiation of such nonjudicial procedures, the timeline for completing ADR, and the relationship between ADR and any subsequent litigation." (*Grossman v. Park Fort Washington Assn.* (2012) 212 Cal.App.4th 1128, 1132 [152 Cal.Rptr.3d 48] (*Grossman*).) Among other things, the legislation provides that "[a]n association or a member may not file an enforcement action in the superior court unless the parties have endeavored to submit their dispute to alternative dispute resolution pursuant to this article." (§ 5930, subd. (a).)

The Act also includes the following mandatory attorney fees provision: "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." (§ 5975, subd. (c).) This language has been interpreted to allow recovery of not only litigation costs, but also reasonable attorney fees and costs expended in prelitigation alternative dispute resolution (ADR) pursuant to the Davis-Stirling Act. (*Grossman, supra*, 212 Cal.App.4th at p. 1134 [interpreting former § 1354, later renumbered as § 5975 without substantive change].)

In *Grossman*, although the parties participated in a mediation prior to the litigation, there is no indication that the mediation produced any sort of agreement, and the complaint was explicitly framed as an action to enforce a specific provision of the CC&Rs at issue. (*Grossman, supra*, 212 Cal.App.4th

at pp. 1131, 1133.) In contrast, the mediation between the parties in this case did produce an agreement, and the complaint was framed as an action to enforce that agreement. *Grossman* therefore does not directly address whether the Association's claim for attorney fees and costs is properly treated as falling within the scope of the Davis-Stirling Act. *Grossman* in essence interprets the term "action" in section 5975 to encompass both the mandatory prelitigation ADR efforts and any subsequent litigation "to enforce the governing documents." (*Grossman, supra*, at p. 1134; § 5975.) But is a lawsuit to enforce an agreement that was reached during mediation (or another form of ADR) an action "to enforce the governing documents," in the meaning of section 5975, where the mediation was initiated pursuant to the Davis-Stirling Act? In our view, that question must be answered in the affirmative, at least in circumstances similar to those of this case, for the reasons discussed below.

■ We must construe the words of a statute in context and with reference to the entire scheme of law of which they are a part. (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043 [12 Cal.Rptr.3d 343, 88 P.3d 71].) The Davis-Stirling Act is intended, among other things, to encourage parties to resolve their disputes without resort to litigation, by effectively mandating prelitigation ADR. (See § 5930, subd. (a) [enforcement action in civil court may not be filed until parties have "endeavored to submit their dispute" to ADR; § 5960 [in determining amount of fee and cost award, court "may consider whether a party's refusal to participate in [ADR] before commencement of the action was reasonable"].] Narrowly construing the phrase "action to enforce the governing documents" to exclude actions to enforce agreements arising out of that mandatory ADR process would discourage such resolutions, and encourage gamesmanship. For example, a party might agree to a settlement in mediation without any intention of fulfilling its settlement obligations, but simply to escape the cost-shifting provisions of the Davis-Stirling Act.⁴ It is unlikely, therefore, that a narrow construction is preferable.

■ Moreover, the gravamen of the Association's complaint is that defendants have not taken certain steps to bring their property into compliance with the applicable CC&Rs. The relief sought by the complaint is an order requiring defendants to take those steps, and a declaration of the parties' respective rights and responsibilities. The circumstance that the steps to bring the property into compliance with CC&Rs were specified in a mediation agreement does not change the underlying nature of the dispute between the parties, or the nature of the relief sought by the Association. Indeed, the parties' agreement was the product of a mediation conducted

⁴ We here speak in hypotheticals; we do not suggest a finding that defendants have engaged in such gamesmanship.

explicitly pursuant to the ADR requirements of the Davis-Stirling Act. We see nothing in the Davis-Stirling Act that suggests we should give more weight to the form of a complaint—its framing as an action to enforce a mediation agreement—than to the substance of the claims asserted and relief sought, in determining whether an action is one “to enforce the governing documents” in the meaning of section 5975.

We hold, therefore, that the present case is an “action to enforce the governing documents,” in the meaning of section 5975.⁵ As such, the trial court properly considered the Davis-Stirling Act as the basis for any recovery, as the Association requested in its motion for attorney fees and costs. (*Parrott v. Mooring Townhomes Assn., Inc.* (2003) 112 Cal.App.4th 873, 879–880 [6 Cal.Rptr.3d 116] [because party sought recovery pursuant to fee-shifting statute, standards for contractual fee-shifting clauses inapplicable].)

B. *The Trial Court Did Not Abuse Its Discretion by Determining the Association to Be the Prevailing Party.*

Defendants contend the trial court erred by determining the Association to be the prevailing party. We find no abuse of discretion.

■ The analysis of who is a prevailing party under the fee-shifting provisions of the Act focuses on who prevailed “on a practical level” by achieving its main litigation objectives; the limitations applicable to contractual fee-shifting clauses, codified at section 1717, do not apply.⁶ (*Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1574 [26 Cal.Rptr.2d 758].) We review the trial court’s determination for abuse of discretion. (*Villa De Las Palmas, supra*, 33 Cal.4th at p. 94.) “ ‘The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced

⁵ It bears mention that our conclusion here may not apply to every action to enforce a settlement agreement arising out of ADR conducted pursuant to the Davis-Stirling Act. Consider the situation of a dispute arising regarding the application of CC&Rs, resolved at mediation by an agreement for one party to buy the other party’s property, with payments to be made on a specified schedule. Suppose the payments are not made on time, and a lawsuit to enforce the settlement is brought. It would be difficult to characterize such an action as one to “enforce the governing documents,” at least in the same sense as the action at issue in this appeal. But we may leave for another day the question of whether a dispute like our hypothetical would nevertheless fall within the scope of section 5975.

⁶ Section 1717 provides that when an action on a contract “has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party” for the purpose of an award of attorney fees pursuant to a contractual prevailing party clause. (§ 1717, subd. (b)(2).) Because section 1717 is inapplicable to this case, we need not and do not discuss in detail defendants’ arguments that rest on application of that section.

from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.”” (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1339 [104 Cal.Rptr.3d 219, 223 P.3d 77] (*Goodman*).)

The trial court’s determination that the Association prevailed on a practical level is not beyond the bounds of reason. The Association wanted defendants to make alterations to their property to bring it in compliance with the applicable CC&Rs, specifically, by installing openings in the side wall of the patio, and altering the drapery on the patio. The Association achieved that goal, with defendants completing the modifications to the patio in September 2014.

■ Defendants focus on the circumstance that the modifications that were ultimately made to the property differed in some details from those contemplated by the mediation agreement. This argument, however, frames the issue improperly. The “action” at issue in the section 5975 analysis includes not only the litigation in the trial court, but also the prelitigation ADR process. (*Grossman, supra*, 212 Cal.App.4th at p. 1134.) The objective of the Association’s enforcement action, including the prelitigation ADR process, is reasonably characterized broadly as seeking to force defendants to bring their property into compliance with the CC&Rs. It was successful in achieving that goal.

Moreover, the differences between the terms of the mediation agreement and the actual modifications that defendants made, and which the Association accepted, are reasonably viewed as de minimis. The openings installed in the patio wall were of different dimensions than were contemplated in the mediation agreement, but nevertheless openings were installed, to the satisfaction of the Association; different fabric was used, but nevertheless the exterior color of the drapery was brought into conformity with the rest of the development. And defendants concede (indeed, insist) that the changes between the terms of the mediation agreement and the final modifications to the property were motivated by physical necessity—the dimensions of the existing wall and its supporting beams, the unavailability of the specified fabric for drapery. Defendants cannot point to any success in any aspect of the litigation itself; prior to the motion for attorney fees at issue, the only significant events in the litigation were the filing of the complaint and the answer. The trial court therefore did not exceed the bounds of reason in determining the Association achieved its main litigation objectives as a practical matter.

■ Defendants argue that the trial court abused its discretion by refusing to consider their late-filed opposition papers and supporting evidence, and that consideration of that evidence “undoubtedly would have mitigated in

favor of [defendants] and necessarily a different ruling as to the prevailing party determination.” This argument fails in several respects. First, a trial court has broad discretion to accept or reject late-filed papers. (Cal. Rules of Court, rule 3.1300(d).) Defendants made no attempt to seek leave to file their opposition late, and made no attempt to demonstrate good cause for having failed to adhere to the applicable deadline. The circumstance that they were, at the time, appearing in propria persona, does not establish good cause. (See *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638–639 [178 Cal.Rptr. 167] (8) (“When a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys [citations]. Further, the in propria persona litigant is held to the same restrictive rules of procedure as an attorney [citation].” (fn. omitted).) The trial court acted well within its discretion when it declined to consider defendants’ opposition papers.⁷

Second, defendants are incorrect that consideration of their opposition would likely have made any difference in the trial court’s determination of the prevailing party. Defendants sought to introduce evidence that the terms of the mediation agreement could not be precisely implemented, and evidence of the Association’s “delay and unwillingness to address ambiguities in the agreement.” Even accepting these points as true, however (and they are disputed at least in part by the Association), they would not likely have altered the trial court’s analysis of which party prevailed in the action. The fact remains, as discussed above, the Association contended defendants had altered their property in a manner that was inconsistent with the applicable CC&Rs, and sought successfully to force defendants to make modifications to bring the property into compliance. Because the Association achieved that main litigation objective, it was properly considered to have prevailed in the action as a practical matter, even though the only judgment resulting from the case related to the award of fees and costs, not the merits of the complaint.⁸

In short, the trial court reasonably found the Association to be a prevailing party, for purposes of making an award of attorney fees and costs under the Davis-Stirling Act.

⁷ Defendants’ arguments to the contrary rely heavily on case law from the summary judgment context. This reliance is out of place. Even if a motion for attorney fees is the last issue remaining in a case, it is not, as defendants put it, a “case dispositive motion” in the same sense that a motion for summary judgment is.

⁸ Like the trial court, we need not address the Association’s contention that defendants not only filed their opposition late, but also never properly served the documents and supporting evidence on the Association.

C. *The Trial Court Did Not Abuse Its Discretion in Determining the Amount of Fees and Costs to Award.*

Defendants argue that the trial court abused its discretion in determining its award of fees and costs in several different respects. We find no abuse of discretion.

Once the trial court determined the Association to be the prevailing party in the action, it had no discretion to deny attorney fees. (§ 5975; *Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1152 [132 Cal.Rptr.3d 886] [language of § 5975 reflects legislative intent to award attorney fees as a matter of right when statutory criteria are satisfied].) The magnitude of what constitutes a reasonable award of attorney fees is, however, a matter committed to the discretion of the trial court. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095–1096 [95 Cal.Rptr.2d 198, 997 P.2d 511].) As noted above, in reviewing for abuse of discretion, we examine whether the trial court exceeded the bounds of reason. (*Goodman, supra*, 47 Cal.4th at p. 1339.) In so doing, we presume the “trial court impliedly found ‘every fact necessary to support its order.’ ” (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116, fn. 6 [81 Cal.Rptr.2d 471, 969 P.2d 564], citing *Murray v. Superior Court* (1955) 44 Cal.2d 611, 619 [284 P.2d 1].)

Here, the trial court explicitly took into account the circumstance that the Association had already recovered a portion of its attorney fees pursuant to the agreement of the parties, and awarded fees only for fees incurred starting 60 days after the mediation, when the agreed-upon modifications should have been completed. The court also excluded any award with respect to billings that did not provide sufficient “information” for it to “tell what’s going on.” The amount actually awarded was substantially less than the total amount requested, and defendants have not pointed to anything suggesting the amount is unreasonable on its face, given the circumstances of the case. We therefore find no manifest abuse of discretion in the court’s award.

Defendants argue that the trial court did not have enough information to support its findings, pointing to the trial court’s comments about heavy redaction of the billing records. The trial court specified, however, that it awarded no fees with respect to billing items it considered to be excessively redacted, and that it resolved any doubts about the appropriateness of billing entries in favor of defendants. Moreover, unlike some other jurisdictions, California law does not require detailed billing records to support a fee award; “[a]n attorney’s testimony as to the number of hours worked is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.” (*Steiny & Co. v. California Electric Supply Co.*

(2000) 79 Cal.App.4th 285, 293 [93 Cal.Rptr.2d 920].) Furthermore, “[a]n award for attorney fees may be made in some instances solely on the basis of the experience and knowledge of the trial judge without the need to consider any evidence.” (*Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215, 227 [168 Cal.Rptr. 525].) Defendants’ arguments about the sufficiency of the documentation submitted by the Association in support of its request for attorney fees are without merit.⁹

Defendants also suggest that the trial court erred by not articulating in more detail its findings with respect to how it arrived at the number that it did for an award of attorney fees and costs. It is well settled, however, that the trial court was not required to issue any explanation of its decision with regard to the fee award. (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 101 [100 Cal.Rptr.3d 152] [“We adhere to our earlier conclusion that there is no general rule requiring trial courts to explain their decisions on motions seeking attorney fees.”].) To be sure, appellate review may well be “hindered” by the lack of any such explanation. (*Martino v. Denevi* (1986) 182 Cal.App.3d 553, 560 [227 Cal.Rptr. 354].) Without explanation, an award may appear arbitrary, requiring remand if the appellate court is unable to discern from the record any reasonable basis for the trial court’s decision. (E.g., *Gorman, supra*, at p. 101 [“It is not the absence of an explanation by the trial court that calls the award in this case into question, but its inability to be explained by anyone, either the parties or this appellate court.”].) Here, the trial court’s reasoning is not so inscrutable, as discussed above.

D. Judgment Was Properly Entered Against Both Defendants.

Defendants argue that judgment was not properly entered against Lynn Hazelbaker, because she was not a signatory to the mediation agreement. This argument was not raised in the trial court, however, and “[a]s a general rule, ‘issues not raised in the trial court cannot be raised for the first time on appeal.’” (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417 [194 Cal.Rptr. 357, 668 P.2d 664].) Moreover, the argument

⁹ Moreover, defendants never objected to the adequacy of the documentation submitted by the Association in support of its motion for attorney fees, either at the hearing on the motion, or in their late-filed opposition papers. The court raised the issue of excessive redactions on its own motion, not at the prompting of defendants. As such, even if defendants’ challenge to the adequacy of the evidentiary basis for the trial court’s award of fees had merit, it would have been forfeited. (See *Robinson v. Grossman* (1997) 57 Cal.App.4th 634, 648 [67 Cal.Rptr.2d 380] [party that failed to object to the trial court that the opposing party’s attorney fees were not sufficiently documented waived the right to object on appeal to the amount of the fee award].)

is without merit. It depends on the characterization of the action as no more than an action on a contract, rather than an action to enforce the CC&Rs, which we rejected above. Moreover, Lynn Hazelbaker was jointly represented by the same attorneys as Thomas Hazelbaker during the periods of the case when they have been represented by counsel, and joined with him in every filing, both in the trial court and in this court.¹⁰ An award of attorney fees to the Association against both Thomas and Lynn Hazelbaker is appropriate.

E. *The Trial Court Did Not Err by Denying Defendants' Motion for Reconsideration.*

Defendants argue that the trial court erred by denying their motion for reconsideration as untimely. They are incorrect. Judgment was entered on December 17, 2014, while defendants' motion was filed on January 21, 2015. "A trial court may not rule on a motion for reconsideration after entry of judgment." (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 192 [26 Cal.Rptr.3d 790].)

Defendants further contend that the trial court should have treated their untimely motion for reconsideration as a timely motion for new trial, and granted it. However, defendants' asserted bases for demanding a "new trial"—really, a new hearing on the issue of attorney fees, since no trial, or any other disposition on the merits of the complaint, ever occurred—are all contentions we have discussed above, and rejected. Defendants' January 21, 2015 motion was properly denied on the merits, even if it could be construed as timely filed.

F. *The Association Is Entitled to Appellate Attorney Fees.*

■ The Association correctly asserts that if it prevails in this appeal it is entitled to recover its appellate attorney fees. "A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise." (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499 [45 Cal.Rptr.2d 624].) Neither section 5975, nor any other provision of the Davis-Stirling Act, precludes recovery of appellate attorney fees by a prevailing party; hence they are recoverable.

¹⁰ For example, defendants' opposition to the Association's motion for attorney fees and costs is entitled "Declaration of Thomas B. Hazelbaker in Opposition to Plaintiff's Motion for Attorneys' Fees and Costs," but the heading indicates the document was filed on behalf of both Thomas B. Hazelbaker and Lynn G. Hazelbaker, as "Defendants, In Pro Per," and Lynn Hazelbaker filed no separate opposition to the motion.

III. DISPOSITION

The judgment is affirmed. The Association is awarded its costs and attorney fees on appeal, the amount of which shall be determined by the trial court.

Ramirez, P. J., and Miller, J., concurred.

[No. E064710. Fourth Dist., Div. Two. Aug. 9, 2016.]

PULTE HOMES CORPORATION, Plaintiff and Appellant, v.
WILLIAMS MECHANICAL, INC., Defendant and Respondent.

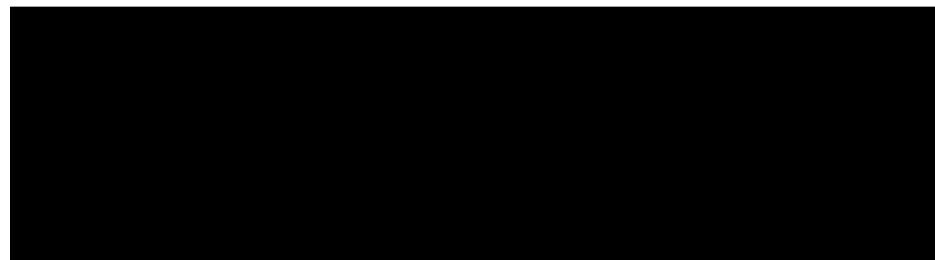
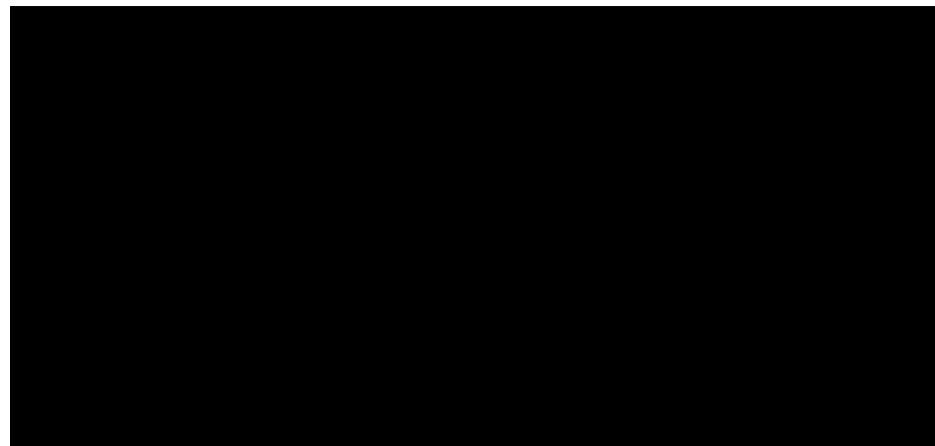
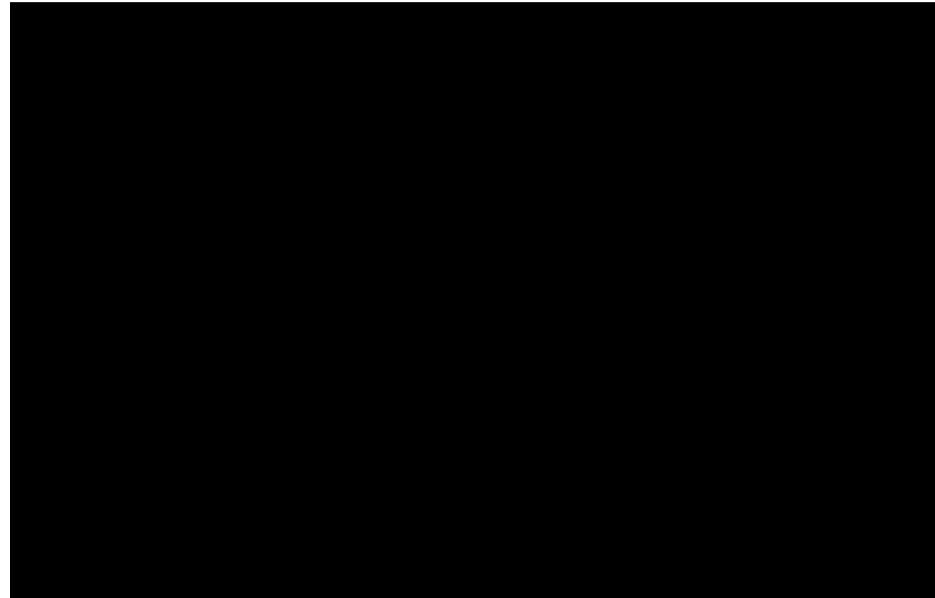
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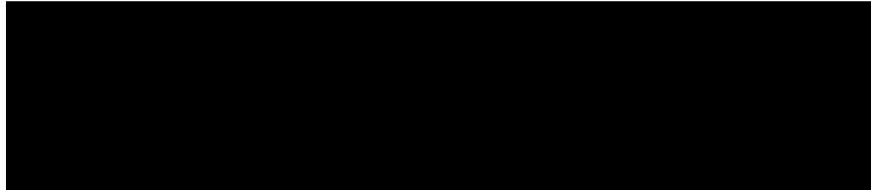
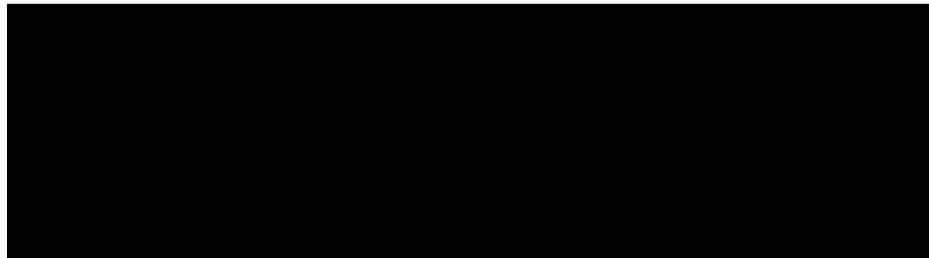
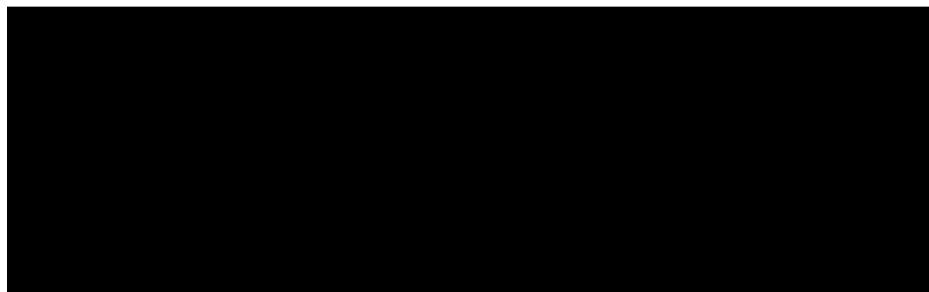
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COUNSEL

Graham & Associates and Bruce N. Graham for Plaintiff and Appellant.

Morrow & White, William D. Morrow; Geoffrey A. Kraemer and Jesse S. Abrams for Defendant and Respondent.

OPINION

RAMIREZ, P. J.—Pulte Homes Corporation (Pulte) filed this action against Williams Mechanical, Inc. (Williams), for defective performance of a plumbing subcontract. Even before the action was filed, however, Williams was defunct; first, it was suspended by the Secretary of State, and thereafter, it dissolved voluntarily.

Pulte served Williams by effecting service on an attorney whom Williams had designated as its agent for service of process. The attorney, however, did

not notify Williams of the action; he also did not identify or notify Williams's liability insurer. Williams, of course, failed to respond to the complaint, and Pulte obtained a default judgment.

Pulte then notified Williams's liability insurer of the default judgment. About four and a half months later, the insurer retained counsel to represent Williams, and Williams's counsel filed a motion to set aside the default judgment. The trial court granted the motion.

Pulte appeals, contending:

(1) Williams lacks the capacity to defend this action because it has been suspended.

(2) Williams failed to establish that it was entitled to relief from the default and default judgment.

We will hold that the trial court abused its discretion by ruling that Williams was entitled to relief. Accordingly, we need not decide whether Williams had the capacity to defend.

I

FACTUAL BACKGROUND

The following facts are taken from the evidence submitted in connection with the motion to set aside.¹

On February 16, 2011, Williams was suspended by the Secretary of State. On June 29, 2012, while Williams was still suspended,² its sole director filed a certificate of dissolution.

According to the records of the Secretary of State, Williams's agent for service of process was Matt H. Morris. Morris was an attorney. On November 25, 2013, Pulte served a summons and complaint on Morris by substituted service. Morris admitted that he received the summons and complaint, but he

¹ Pulte contends the trial court should have sustained its objections to Williams's evidence. We need not decide this issue because ultimately, we conclude that, even assuming the evidence was admissible, the trial court erred.

² According to a "Certificate of Status," issued by the Secretary of State: (1) as of September 15, 2015, Williams was dissolved, and (2) Williams's entire status history consisted of a suspension on February 16, 2011. We conclude that Williams was not relieved of the suspension before it dissolved.

did not take any action in response because Williams was dissolved and because he had no information about Williams's liability insurance carrier(s).

Actually, Williams's liability insurer was First Specialty Insurance Corp. (First). On April 2, 2015, Pulte's attorney contacted First and notified it of the litigation. He provided a copy of the default judgment and a "cursory case summary." First's adjuster asked him for "copies of all relevant documents including but not limited to contracts, payment records, pleadings, defect list, and evidence of damages." On April 3, 2015, and on "several" subsequent occasions, First's adjuster again requested documents "pertinent to [First]'s coverage investigation." On July 20, 2015, Pulte's attorney provided some, though not all, of the requested documents.

According to First's adjuster, between April 2 and July 20, 2015, she was "led to believe" that the underlying litigation involved only one home; on July 20, 2015, she realized for the first time that it involved "up to 26 homes." On August 17, 2015, First retained counsel to represent Williams. On August 21, 2015, Williams's counsel filed the motion to set aside.

II

PROCEDURAL BACKGROUND

In 2013, Pulte filed this action against Williams. In it, Pulte seeks \$69,576 based on Williams's allegedly negligent performance of a subcontract for the installation of plumbing in two residential construction projects.

Williams failed to file a timely response to the complaint. On January 7, 2014, the trial court entered Williams's default.³ On March 10, 2015, it entered a default judgment against Williams.

On August 21, 2015, Williams filed a motion to set aside the default and the default judgment. The motion was brought under Code of Civil Procedure section 473, subdivision (b), on the ground that Williams's failure to respond to the complaint was due to its own mistake, inadvertence, surprise, or excusable neglect. Alternatively, the motion was also brought under Code of Civil Procedure section 473.5, on the ground that Williams had not received actual notice of the proceedings. Finally, the motion was also brought on the nonstatutory equitable ground of extrinsic mistake.

³ Pulte's request for entry of default was mailed to the correct street address but the wrong unit number. Morris testified that he did not remember receiving the request for entry of default. Williams, however, has never argued that it is entitled to relief on this ground.

In its opposition, Pulte argued, among other things, that Williams was a suspended corporation and therefore lacked the capacity to file the motion.

In reply, Williams argued that it was actually a dissolved corporation, and therefore it had the capacity to file the motion under Corporations Code section 2010, subdivision (a), which, as relevant here, provides that a dissolved corporation “continues to exist for the purpose of winding up its affairs, [including] prosecuting and defending actions by or against it . . .” (Italics added.)

The trial court granted the motion. In its minute order, it stated: “Court finds current status is: [d]issolved [c]orporation.” Thus, it set aside the default and the default judgment.

Acting on Pulte’s supersedeas petition, which Williams did not oppose, we stayed the trial court proceedings for the duration of the appeal.

III

THE EFFECT OF WILLIAMS’S SUSPENSION AND DISSOLUTION*

.....

IV

WILLIAMS’S RIGHT TO RELIEF

Pulte contends that Williams failed to establish that it was entitled to relief from the default and default judgment.

The trial court did not expressly rule that Williams had established a right to relief. It also did not specify whether it was granting relief under Code of Civil Procedure section 473, subdivision (b), under Code of Civil Procedure section 473.5, or under its equitable powers. However, “[j]udgments and orders of the lower courts are presumed to be correct on appeal. [Citation.]’ [Citation.] ‘We imply all findings necessary to support the judgment, and our review is limited to whether there is substantial evidence in the record to support these implied findings. [Citations.]’ [Citations.] Furthermore, ‘[w]e will uphold the decision of the trial court if it is correct on any ground.’” (*Virtanen v. O’Connell* (2006) 140 Cal.App.4th 688, 709–710 [44 Cal.Rptr.3d 702].)

*See footnote, *ante*, page 267.

A. *Relief Under Code of Civil Procedure Section 473.*

Code of Civil Procedure section 473, subdivision (b), as relevant here, provides: “The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.”

Williams’s motion was filed less than six months after entry of the default judgment, but more than six months after entry of its default. The trial court therefore could not set aside the default under Code of Civil Procedure section 473. And because it could not set aside the default, it also could not set aside the default judgment under Code of Civil Procedure section 473, because that would be “‘an idle act.’” (*Howard Greer Custom Originals v. Capritti* (1950) 35 Cal.2d 886, 888 [221 P.2d 937].) “If the judgment were vacated, it would be the duty of the court immediately to render another judgment of like effect, and the defendants, still being in default, could not be heard in opposition thereto. . . .” (*Id.* at p. 889; accord, *Weiss v. Blumencranc* (1976) 61 Cal.App.3d 536, 541 [131 Cal.Rptr. 298]; *Koski v. U-Haul Co.* (1963) 212 Cal.App.2d 640, 643 [28 Cal.Rptr. 398].)

We therefore conclude that Williams was not entitled to relief under Code of Civil Procedure section 473.

B. *Relief Under Code of Civil Procedure Section 473.5.*

Code of Civil Procedure section 473.5, subdivision (a), as relevant here, provides: “When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action.”

It is undisputed that Attorney Morris received actual notice. It is also undisputed that, when Williams dissolved, he was its agent for service of process. Williams argues, however, that service on an agent does not provide actual notice to the principal, citing *Rosenthal v. Garner* (1983) 142 Cal.App.3d 891 [191 Cal.Rptr. 300].

In *Rosenthal*, the Rosenthals sued Garner and mailed the summons and complaint to Attorney Duffy. Previously, Duffy had represented Garner in related litigation. However, Duffy did not tell Garner about the Rosenthals’

suit. The Rosenthals served Garner by publication and then obtained a default judgment against him. (*Rosenthal v. Garner, supra*, 142 Cal.App.3d at p. 894.)

The appellate court held that Garner was entitled to have the default set aside based on lack of actual notice. (*Rosenthal v. Garner, supra*, 142 Cal.App.3d at pp. 895–898.) In particular, it held that actual notice to Duffy was not actual notice to Garner. It stated: “[R]espondents assert that Civil Code section 2332 constructive notice is sufficient to vitiate a motion to set aside a default judgment. But Civil Code section 18 distinguishes actual notice from constructive notice by their very definitions. [Citation.] And it has been held ‘... that section 2332 of the Civil Code should not be applied to meet the requirement of actual knowledge.’ [Citation.] [...] To read ‘actual notice’ as imputed notice would stand Civil Code section 18 on its head. We hold that the reference in Code of Civil Procedure section 473.5 to ‘actual notice’ means genuine knowledge of the party litigant and does not contemplate notice imputed to a principal from an attorney’s actual notice.” (*Id.* at p. 895, fns. omitted.)

■ We may accept that imputed notice is not actual notice to an individual defendant; however, it can be actual notice to a corporate defendant. “[A] corporation, as an artificial entity created by law, can only act in its affairs through its natural person agents and representatives.” (*CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1146 [16 Cal.Rptr.3d 555].) Thus, a person cannot have actual notice through an agent, but a corporation can have actual notice *only* through an agent who has the appropriate authority.

Presumably notice to the board of directors or to the president of a corporation would be sufficient to constitute actual notice; indeed, in the case of a functioning corporation, it is arguable that it is necessary. (See Corp. Code, § 300, subd. (a) [“all corporate powers shall be exercised by or under the direction of the board”]; *Jeppi v. Brockman Holding Co.* (1949) 34 Cal.2d 11, 17 [206 P.2d 847] [“‘The executive officer of a corporation is something more than an agent. He is the representative of the corporation itself.’”].) Here, however, Williams dissolved in 2012 and has been wound up; presumably it no longer has any directors, officers, agents or employees. At least under these circumstances, we believe that notice to the person designated by the corporation as its agent for service of process *is* actual notice. An agent for service of process has the necessary authority because the corporation has expressly held that person out to the world as authorized to receive notice of actions. Indeed, in the case before us, if actual notice to Morris was not sufficient to make a default judgment stick, who else was there?

At oral argument, counsel for Williams suggested that, in the case of a defunct corporation, the entity entitled to actual notice is its insurance company. He relied on *Melendrez v. Superior Court* (2013) 215 Cal.App.4th 1343 [156 Cal.Rptr.3d 335], which held that, when a dissolved corporation has been wound up, its attorney-client privilege is held, and can be waived by its insurance companies. (*Id.* at pp. 1356–1357.) *Melendrez* reasoned that Evidence Code section 953, subdivision (d) provides that, when the client is a corporation that is “no longer in existence,” the holder of the privilege is a “‘successor, assign, trustee in dissolution, or any similar representative’” of the corporation. (*Melendrez, supra*, at pp. 1355–1356.) It held that “[t]his language is broad enough to encompass an insurer when the insurer’s policy is the corporation’s only remaining asset and the insurer is defending a claim asserted against the corporation that is covered under that policy.” (*Id.* at p. 1357, fn. 18.) We lack any similar statutory authority to treat First as Williams’s successor for purposes of “actual notice to a party” within the meaning of Code of Civil Procedure section 473.5, subdivision (a). The only doctrine we can think of that treats the insurer as the successor of its insured is subrogation, and that does not apply unless the insurer has already paid a claim against the insured. (*AMCO Ins. Co. v. All Solutions Ins. Agency, LLC* (2016) 244 Cal.App.4th 883, 895–896 [198 Cal.Rptr.3d 687].)

We therefore conclude that Williams had actual notice of the action, and therefore it was not entitled to relief under Code of Civil Procedure section 473.5.

C. *Equitable Relief.*

■ “Apart from any statute, courts have the inherent authority to vacate a default and default judgment on equitable grounds such as extrinsic fraud or extrinsic mistake. [Citations.]” (*Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 97 [199 Cal.Rptr.3d 282].)

“‘One ground for equitable relief is extrinsic mistake—a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits.’ [Citation.] But for a party to qualify for such equitable relief on this basis, courts have developed a three-part test: first, the defaulted party must demonstrate it has a meritorious case; second, it must articulate a satisfactory excuse for not presenting a defense to the original action; and third, the moving party must demonstrate diligence in seeking to set aside the default once it was discovered. [Citation.]” (*Lee v. An* (2008) 168 Cal.App.4th 558, 566 [85 Cal.Rptr.3d 620].)

“Because of the strong public policy in favor of the finality of judgments, equitable relief from a default judgment or order is available only in

exceptional circumstances. [Citation.]” (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1229–1230 [113 Cal.Rptr.3d 147].)

“We review a challenge to the trial court’s denial of a motion to vacate a default on equitable grounds for abuse of discretion. [Citation.]” (*Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 862 [92 Cal.Rptr.3d 717].)

1. *Forfeiture.**

.....

2. *A satisfactory excuse.*

■ “Extrinsic mistake exists when the ground for relief is not so much the fraud or other misconduct of one of the parties as it is the excusable neglect of the defaulting party to appear and present his claim or defense. [Citation.]” (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 503 [52 Cal.Rptr.3d 862].) “Relief on the ground of extrinsic fraud or mistake is not available to a party if that party has been given notice of an action yet fails to appear, without having been prevented from participating in the action. [Citation.]” (*Ibid.*)

■ Statutory law allows an action against a dissolved corporation, although the plaintiff’s recovery is limited to the corporation’s “undistributed assets, including, without limitation, any insurance assets held by the corporation that may be available to satisfy claims.” (Corp. Code, § 2011, subd. (a)(1)(A).) It also allows the plaintiff in an action against a dissolved corporation to serve the summons and complaint on “any agent upon whom process might be served at the time of dissolution.” (Corp. Code, § 2011, subd. (b).) If it is an extrinsic mistake for the corporation’s erstwhile agent to ignore the summons and complaint simply because the corporation has been dissolved, then a judgment against a dissolved corporation would be subject to being set aside at almost any time, which would be inconsistent with these statutes.

In this case, Morris did not even try to notify anyone on behalf of Williams. Williams now claims that Morris “did not have any means of notifying anyone.” However, there was no *evidence* of that. Morris testified that Williams was dissolved, but he did not testify that he did not know how to reach any of the former directors, officers, or employees of Williams; he also did not testify that he did not have access to Williams’s books and records. Likewise, he testified that he did not have any information

*See footnote, *ante*, page 267.

regarding Williams's insurance carriers, but he did not testify that he had no way of obtaining that information. Finally, as he was an attorney, and as he said that he did not know who Williams's insurance carriers were, obviously he knew that they had an interest in defending the action.

■ We need not decide whether Morris owed a *duty* to either Williams or First to make an effort to notify them. We recognize that he was no longer Williams's attorney. Also, it is at least arguable that Williams's dissolution terminated his authority to act as its agent for service of process. He had no past or present relationship whatsoever with First. (Certainly he was not likely to get paid for his efforts.) Still, in light of the statutory directive that a dissolved corporation may be served by serving its agent for service of process at the time of dissolution, anybody who steps up to be a corporation's agent for service of process faces at least the possibility of being served on behalf of the corporation after it has dissolved. We therefore hold that a dissolved corporation cannot claim excusable neglect when its agent for service of process at the time of dissolution has not made any effort to notify it and has not shown that an effort, if made, would have failed.

Accordingly, we conclude that Williams did not show a satisfactory excuse.

3. *Diligence.*

Williams does not dispute that the diligence (or lack thereof) of First must be imputed to it. (See *Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139, 1149 [131 Cal.Rptr.2d 393] ["a blameless insured" can be denied relief from default based on "the inexcusable neglect of its insurer"].)

First became aware of the default judgment on April 2, 2015, at the latest. It responded by asking Pulte's counsel for "all relevant documents." With the possible exception of the pleadings, the specific documents that it requested—"contracts, payment records, . . . defect list, and evidence of damages"—related to the validity (or the amount) of Pulte's underlying claim; they did not relate to coverage or to the validity of the default judgment.

First claims it did not receive any documents until July 20, 2015, and even then it did not receive all the documents it had requested. This is not a sufficient excuse for its failure to file a motion for equitable relief in the interim.

The declaration of First's adjuster contains no plain statement that First failed to file a motion earlier *because* it had not yet received the documents. She described the documents that she requested as "pertinent" to a coverage

investigation, but she did not state that First was unable to determine coverage without them. Pulte's counsel had already given her a summary of the case (albeit a "cursory" one). She also did not state that any of the documents that she eventually received resolved any previously murky coverage issue.

She did claim that, until she received the documents, she was "led to believe" that the underlying litigation involved only one home. However, she did not explain why it would matter whether the underlying litigation involved one home or 26 homes. Finally, even after she received the documents, she delayed another month before retaining counsel for Williams. She did not explain this additional delay.

We therefore conclude that Williams did not show diligence.

V

DISPOSITION

The order appealed from is reversed. The trial court is directed to reinstate the default and the default judgment. Pulte is awarded costs on appeal against Williams.

Hollenhorst, J., and McKinster, J., concurred.

[No. F070067. Fifth Dist. Aug. 9, 2016.]

WATSON BOWMAN ACME CORPORATION, Plaintiff and Appellant, v.
RGW CONSTRUCTION, INC., Defendant and Appellant.

[REDACTED]

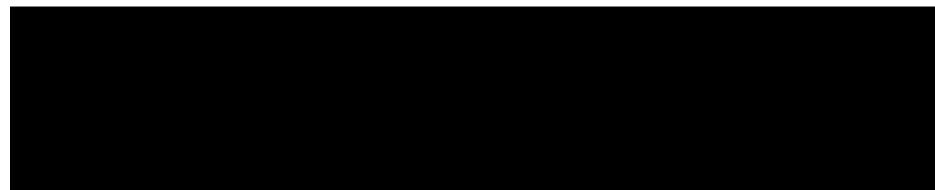
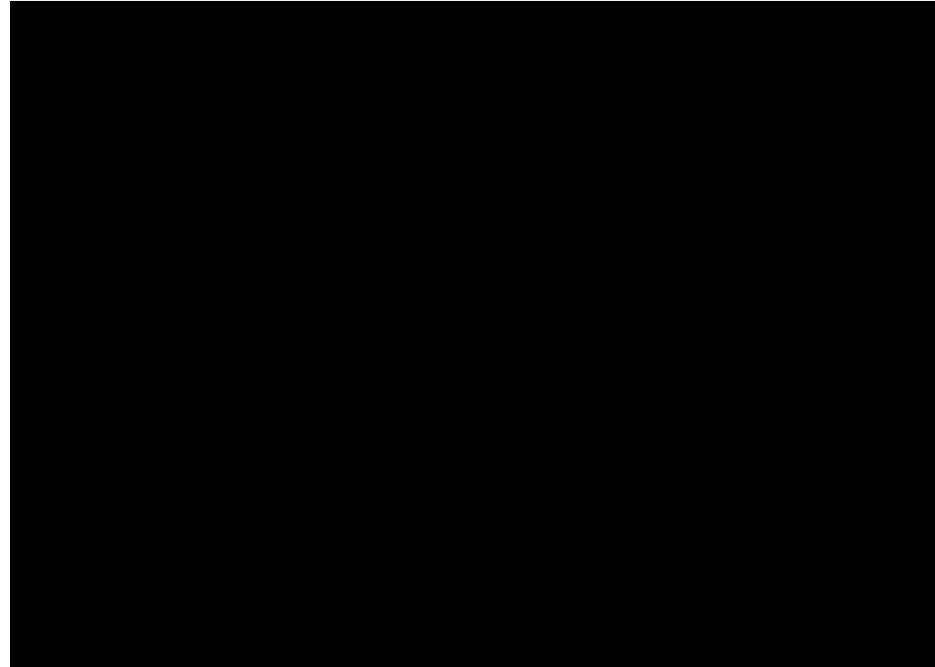
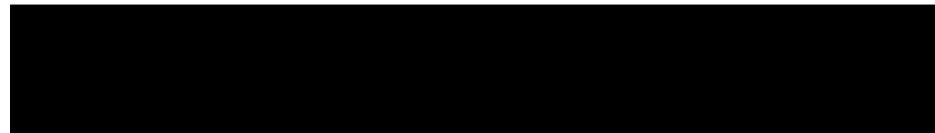
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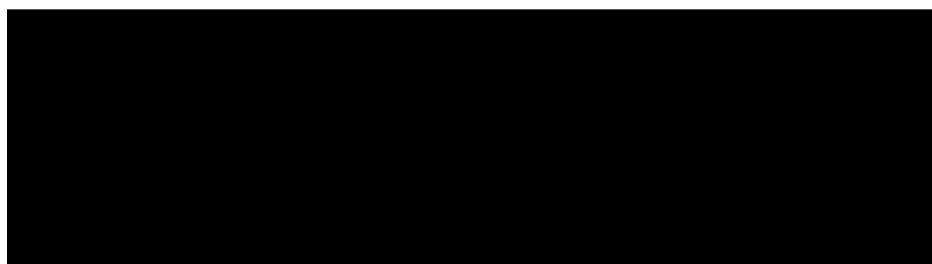
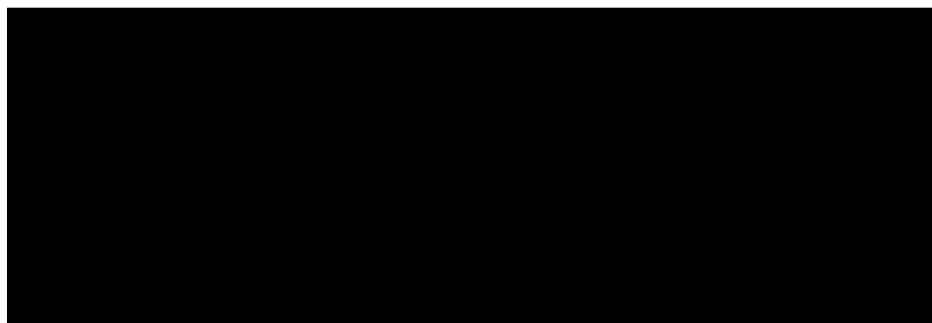
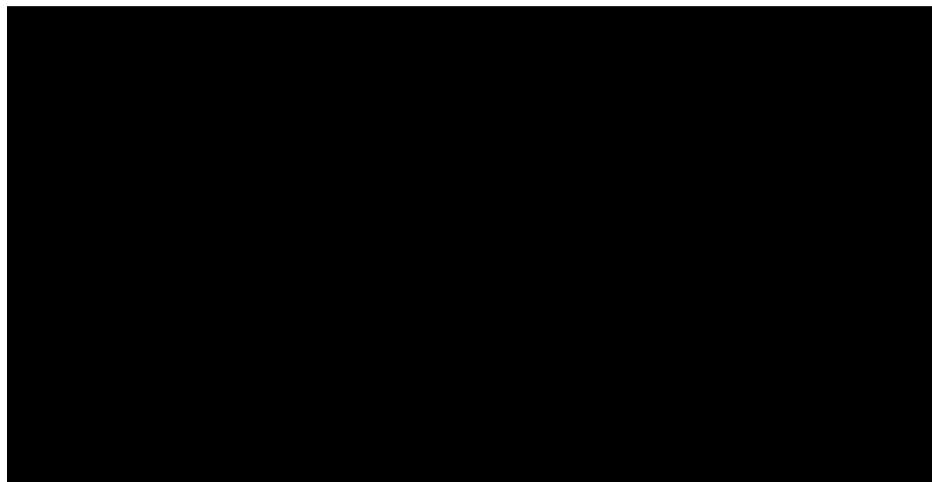
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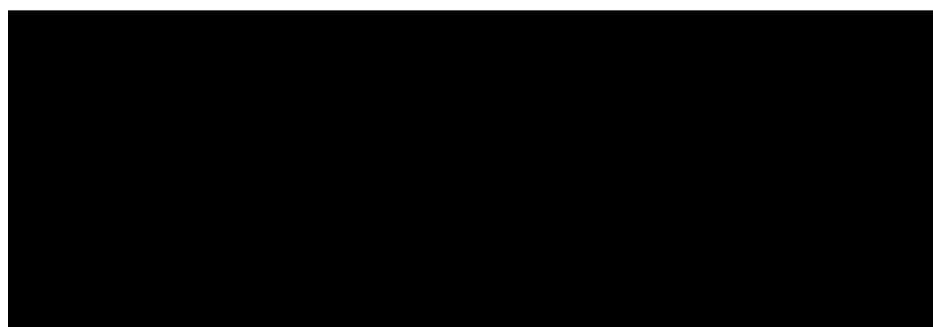
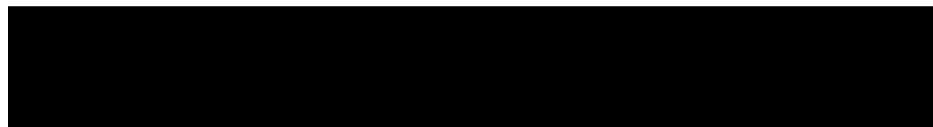
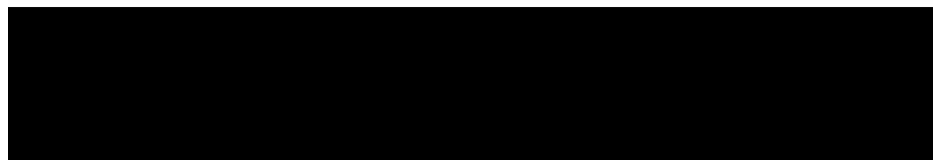
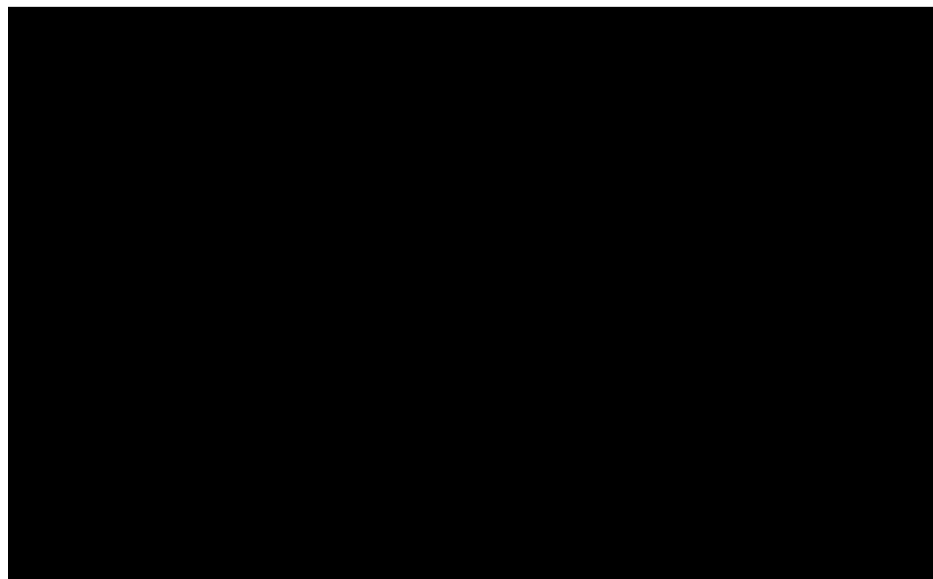
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COUNSEL

Lax & Stevens, Paul A. Lax; McCormick, Barstow, Sheppard, Wayte & Carruth and Todd W. Baxter for Plaintiff and Appellant.

Ralls Gruber & Niece, John W. Ralls and W. Samuel Niece for Defendant and Appellant.

OPINION**FRANSON, J.—****INTRODUCTION**

RGW Construction, Inc. (RGW), was the successful low bidder on a Department of Transportation (Caltrans) project for the construction of a Highway 99 overpass near Merced. RGW entered into a contract with Watson Bowman Acme Corporation (Watson) for the delivery of 146 sealed expansion joints for use on the overpass. Caltrans rejected Watson's two-cell expansion joint but subsequently approved Watson's larger, four-cell expansion joint for the project.

Watson and RGW disagreed on the compensation owed Watson for delivery of the four-cell expansion joints. Watson filed a breach of contract action, contending it was entitled to an adjustment of the price on RGW's original purchase order because the items ordered were changed. Watson argues that RGW's purchase order was ambiguous as to exactly what was ordered because the references to Caltrans's specifications were not consistent with the specific description that used the two-cell expansion joint's model

number. Watson argues parol evidence showed it advised RGW that the two-cell expansion joint would not be approved by Caltrans and, despite this warning, RGW specifically requested a quote from Watson for the less expensive two-cell model. Thus, Watson argues that its subsequent delivery of a four-cell expansion joint to satisfy Caltrans's specifications should be regarded as a change order that entitles it to an adjustment of the contract price. RGW disagrees, arguing that the price quoted for the two-cell expansion joint was the applicable price because the purchase order, which Watson signed, unambiguously stated the expansion joints would conform to all of Caltrans's specifications.

The trial court concluded that RGW's purchase order was ambiguous and allowed the jury to decide what the contract meant and what price was appropriate. The jury decided in favor of Watson, finding the amount of the subject agreement was \$605,990. After deductions for the amounts RGW previously paid on the contract and the amount owed RGW on its cross-complaint, the jury awarded Watson damages of \$383,032.

On appeal, RGW contends its purchase order unambiguously included Watson's warranty that the proposed expansion joints would conform to Caltrans's specifications and, based on the unambiguous contract language, this court can reverse the jury's verdict and direct the entry of judgment in favor of RGW. In its cross-appeal, Watson contends the trial court erroneously denied its request for prejudgment interest under Civil Code section 3287.

We conclude the trial court correctly (1) determined that RGW's purchase order was ambiguous and (2) allowed the jury to evaluate the conflicting parol evidence before deciding the meaning of the contract. We further conclude that the price adjustment owed to Watson for the change in the order was sufficiently certain to meet the statutory requirements for an award of prejudgment interest.

We therefore affirm the judgment, except for its failure to award prejudgment interest to Watson.

FACTS

Parties

Plaintiff Watson designs, manufactures and supplies expansion joint components to the construction industry. Watson is owned by BASF Corporation.

Defendant RGW is a general contractor licensed by the State of California. About 90 percent of RGW's work is on public contracts. Robert Purdy, one

of the principals of RGW, testified RGW had built more bridges than he could count and estimated the total volume at over \$1.5 billion.

Caltrans is not a party to this litigation. It is an agency of the State of California that contracts for the construction of highways and related structures. In 2009, Caltrans presented to the public for competitive bidding a project located in Merced County and referred to as the Route 99 undercrossing to Black Rascal Canal bridge. Caltrans selected RGW as the qualified firm with the lowest, complete bid for the project. The contract between Caltrans and RGW was designated “Contract No. 10-OK0204.”

The trial court described the relationship among Watson, RGW and Caltrans by telling the jury that Caltrans was the owner of the project, RGW was the prime contractor, and Watson was a supplier to RGW.

Bid Documents

The notice to bidders issued by Caltrans consisted of four layers of documents: (1) the “STANDARD SPECIFICATIONS” issued by Caltrans in July 1999; (2) the standard plans dated 2004; (3) the project plans approved March 9, 2009; and (4) the bid book dated July 13, 2009. Section 51 of the standard specifications addressed concrete structures and stated that joints must be constructed in conformance with (1) the requirements of that section’s provision addressing expansion joints and (2) the details shown on the plans. Pursuant to section 51 of the standard specifications, joints in concrete structures shall be sealed with “joint seals” or “joint seal assemblies.” Joint seal assemblies have a higher movement rating (over 50 millimeters) than the various types of joint seals. Joint seal assemblies shall consist of metal or metal and elastomeric assemblies that are anchored or cast into a recess in the concrete over the joint. A joint sealed by an assembly must resist the intrusion of foreign material and water and must provide traffic with a bump free passage. Pursuant to section 51-1.12F(3)(c) of the standard specifications, joint seal assemblies “shall be furnished and installed in joints in bridge decks as shown on the plans and as specified in the special provisions.”

On August 28, 2009, Caltrans issued “Addendum No. 2” for the project, which revised certain special provisions, including the special provision in section 10-1.57 for the joint seal assemblies. The addendum also revised the “Bid Item List” in the bid book to include “Item 133,” which was described as “JOINT SEAL ASSEMBLY (MR 101 MM-160 MM).”¹

¹ Item 133 replaced item 81 (Item 81), which had described a joint seal assembly with a movement rating of 100 millimeters. Initially, Watson submitted a quote on Item 81 that proposed delivering its “WaboStripSeal Type R” at a price of \$238 per unit.

Revised section 10-1.57 of the special provisions was a page and a half long and required the contractor to submit complete working drawings for each joint seal assembly to the Offices of Structure Design in conformance with the provisions of the standard specifications addressing plans and working drawings. “The Contractor shall allow [Caltrans’s] Engineer 28 days to review the drawings after a complete set has been received.” After final working drawing approval, the contractor was required to provide a set of corrected prints of all working drawings to Caltrans’s engineer.

Watson’s September Quotation

September 23, 2009, was bid day for the project. Watson sent RGW its quotation No. 092698-02 for 146 units described as “JOINT SEAL ASSEMBLY (MR 101-106MM) [¶] WaboModular BET-1200 Strip Seal” at a unit price of \$3,940, with estimated shipping and handling of \$29,750 and one day of field service at \$1,000 (Quote 02). Quote 02’s total quote price was \$605,990.

The second page of Quote 02 identified items or services included in the price and stated curb cover plates were excluded from the price. That page also stated: “Documents utilized to develop this quote: [¶]—plans and specs with addenda 1–4.”

Phone Discussions

In early October 2009, Caltrans awarded the contract to RGW, the low bidder. When Paul Biesinger, Watson’s sales manager for the region that included California, learned RGW was the successful bidder, he contacted RGW to see if Watson would be selected to furnish joint seal assemblies for the project. Biesinger was directed to John Pitsch, a grading and paving estimator for RGW.

During the telephone conversation between Pitsch and Biesinger, Pitsch said that Watson’s quote was very high or about twice the low number submitted. Biesinger tried to get more information from Pitsch about who the competitors were and what numbers they quoted, but Pitsch would not provide specific information. Biesinger thought the other quotes might be low because a skew angle was involved, which changes Caltrans’s interpretation of the width of the joint’s gap, and the competition might not have been aware of that fact. Skew refers to the angle of the joint seal assemblies in relation to the direction of vehicle travel. Biesinger described skew using a comparison to the hypotenuse of a right triangle. Measuring the gap created by a joint using a hypotenuse (i.e., a diagonal line across the gap) will yield a larger dimension than measuring straight across the gap. Biesinger testified

that Caltrans treats the size of a joint as being bigger when the angle is skewed. Biesinger stated that he had been involved in jobs with one degree of skew and that small amount of skew was enough for Caltrans to change the size of the joint seal system. For this project, the skew angle was 61 degrees.²

Biesinger tried to explain skew to Pitsch and raised the possibility that the competitors were quoting a system that would be too small. Biesinger stated that Pitsch did not seem to understand the issue and did not want to listen to Biesinger's explanation, despite Biesinger's many past experiences with the issue.

Biesinger testified that Pitsch requested another "quote based on the description of the joint alone without skew angle involved, without the spec involved." In this context, "description" referred to the joint's movement rating of 101 to 160 millimeters—roughly four to six inches. Biesinger testified that he then made a further attempt to explain skew and that a joint based on the bid item description would not be approved by Caltrans. Biesinger testified that Pitsch asked specifically for a quote based on the bid item—that is, based on the movement rating. Biesinger testified, "I gave him what he wanted. I went to my boss, asked for permission, explained the situation to him, which I've done many times." Biesinger's boss gave him permission to submit another quote.

Pitsch's testimony provided a different version of the telephone conversation with Biesinger. Pitsch stated that, as a result of the conversation, he expected that Biesinger might submit a new quote for the joint seal assemblies. Pitsch did not expect Watson to submit a new quote for products that would not meet all the plans and specifications. Instead, he thought Watson would submit a quote for a joint seal assembly that would be accepted by Caltrans.

Watson's November Quotation

On November 12, 2009, Watson sent RGW a new quotation numbered 092598-06 (Quote 06). The quote offered to furnish 146 units of "JOINT SEAL ASSEMBLY (MR 101-106MM) [¶] WaboModular STM600 w/ bulk-head plates" at a price of \$1,304 per unit, with an estimated shipping and handling charge of \$15,867 and one day of field service at \$1,000. The first paragraph of text in quotation began: "We are pleased to submit this quotation for your acceptance. Any contract arising from this quotation shall be expressly limited to the WBA terms and conditions of sale available upon

² Watson contends that Caltrans Addendum No. 2 modified the requirements for the joint seal assemblies by showing that they were to be installed at a 61-degree angle across the roadway rather than perpendicular to the direction of travel.

request or by visiting our website at www.wbacorp.com. Your acceptance of this quotation shall be deemed an acceptance of these terms and conditions unless otherwise expressly consented to in writing by Watson.” (Some capitalization omitted.)

The second page of Quote 06 tracked language in Quote 02 by stating: “Documents utilized to develop this quote: [¶]—plans and specs with addenda 1–4.” The last page of Quote 06 included a signature block below a line stating “I have read and agree to all the terms of this agreement.” The paragraph below the signature block, stated in part: “[Watson] MAKES NO REPRESENTATIONS, WARRANTIES, OR GUARANTEES OF ANY KIND, EITHER EXPRESS OR IMPLIED INCLUDING, WITHOUT LIMITATION, ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE with respect thereto, including, but not limited to, any inaccuracy or ambiguity, or any results to be obtained therefrom.”

Biesinger faxed Quote 06 to Pitsch and spoke with him by telephone. Pitsch told Biesinger he was not the one making the decisions on who RGW would use for expansion joints and told Biesinger to deal with David Aboujudom from that point on. Aboujudom, an estimating manager at RGW and a registered civil engineer, was Pitsch’s superior. When Biesinger spoke with Aboujudom, Aboujudom had both Watson’s Quote 02 for the four-cell system and Quote 06 for the two-cell system. Biesinger testified, “I started over again with the fact that I did not feel that that two-cell system would be approved. [¶] And he was in the same mindset as John Pitsch was. He just wanted movement rating alone. He didn’t seem to understand the skew angle part of it changing the size of the system.”

Biesinger testified that he spoke with Aboujudom twice and explained both times about the skew angle, the difference between the two products quoted, and his expectation that Caltrans would not approve a two-cell joint. He stated that Aboujudom’s response was to still want the quote based on the joint movement rating without considering the skew. We note that Aboujudom’s approach may have been rational: Biesinger testified that his experience on Caltrans’s projects included situations where a contractor took a joint that Biesinger did not believe would meet the specifications and, nevertheless, it was accepted by Caltrans. Thus, Aboujudom may have decided to run the two-cell model by Caltrans on the chance it might be approved, which would have saved RGW almost \$400,000.

Aboujudom testified about the telephone conversations with Biesinger. When asked if he understood that Watson’s quote would not meet all of the plans and specifications, Aboujudom answered, “No. Absolutely not.” Aboujudom also testified that he did not ask Biesinger why there was a

\$400,000 difference between Quote 02 and Quote 06 and that he did not recall discussing with Biesinger the skew involved in the design of the project.

RGW's Purchase Order

On November 15, 2009, Aboujudom signed a three-page purchase order (trial exhibit 412). Pitsch sent two original purchase orders to Biesinger, asking him to sign, initial and return one original while retaining the other for Watson's files. The purchase order stated that Watson, as seller, agreed to deliver 146 units of "Joint Seal Assembly (MR 101-106mm)" for a unit price of \$1,304. The total amount of the purchase order, \$222,957.68, including shipping, handling, field service and Merced County tax of 8.25 percent. Underneath the foregoing information, the purchase order included the following:

"*Quote Number/Price confirmation Number—092598-06*

"*Shop drawings to be approved prior to fabrication.*

"*Wabco Modular STM600 w/bulkhead plates*

"*Price firm for delivery up to 6 months from quote date*" (Original italics.)

The foregoing language, along with the line "*Per Plans and specifications with addenda 1–4,*" contained in Quote 06, is relevant to the interpretation of the contract formed by the parties and the dispute over what precisely Watson agreed to provide—a particular model number (STM600) or a product that complied with Caltrans's specifications.

The first page of the purchase order contained signature blocks at the bottom and, immediately above the signature blocks, the following paragraph: "Acceptance copy must be signed and returned immediately. Seller by signing this order, by acknowledging the order or by delivering purchases described above, warrants that seller has read and agrees to the terms and conditions on the face of and attached to this order; that seller has read and is familiar with the *contract documents described above or otherwise incorporated herein* as fully as if written herein; and that all purchases hereunder will be and are furnished in accordance with the terms of this order, the contract documents and seller's samples (if any) approved by the contractor." (Some capitalization omitted & italics added.)

Provisions on the second and third page of the purchase order that are relevant to interpreting the parties' contract are in paragraphs numbered 8, 16,

17, 21 and 24. The text of those provisions is set forth in the parts of this opinion analyzing their meaning.

On December 18, 2009, Watson's controller, Michael Turchiarelli, counter-signed and dated the purchase order. Watson contends the signed purchase order was returned to RGW with Watson's "Terms and Conditions of Sale" attached. Watson also contends its terms and conditions of sale became part of the contract because the purchase order incorporated Quote 06 and Quote 06 referred Watson's terms and conditions of sale and expressly disclaimed warranties of fitness for a particular purpose and warranties of merchantability.

Caltrans's Rejection of Two-cell Model

After the purchase order was signed, Watson prepared shop drawings for submission to Caltrans for approval. In February 2010, Caltrans sent RGW a letter rejecting the shop drawings for the joint seal assembly and marking its reasons on the returned drawings. Those reasons referred to a maximum width, measured in the direction of vehicular traffic, of 75 millimeters and stated the submission was not adequate.

On March 1, 2010, RGW returned the rejected drawings to Watson with a cover letter directing Watson to revise and resubmit. In RGW's view, it simply was asking Watson to comply with the contract and submit drawings for a product that would satisfy Caltrans's specifications. In contrast, Watson now views the correspondence as written directions to provide a product different from the one described in the purchase order—in essence, a change order under paragraph 16 of the purchase order (see fn. 13, *post* [text of par. 16]).

In response to RGW's direction, Watson resubmitted drawings for the four-cell system described in Quote 02. RGW presented the new drawings to Caltrans and the four-cell system was approved.

In September 2010, Watson resubmitted its Quote 02 and requested a change to the purchase order to reflect the original price in Quote 02 of \$605,990. Eventually Watson manufactured four-cell joint seal assemblies for the project per the specifications contained in Quote 2.

In May 2011, Watson again informed RGW that Watson needed a change order before it would ship the joint seal assemblies. RGW responded with a letter stating that it expected delivery of the assemblies on or about June 1, 2011, at the executed purchase order price of \$207,251. Watson did not deliver the assemblies and, on June 2, 2011, a law firm representing RGW

sent Watson a letter stating: "If W[atson] continues to maintain that it is entitled to additional money for providing these joint seal assemblies, then W[atson's] claim should be arbitrated pursuant to Purchase Order Term and Condition No. 16. As stated therein, W[atson] 'shall not delay performance pending determination of the amount of such an adjustment.' "

Watson's reply letter, dated June 8, 2011, stated its legal counsel had advised shipping the assemblies based on the express understanding that RGW would tender the amount of \$222,957.68 to its lawyer's trust account and that amount would be payable to Watson unconditionally upon RGW's receipt of the first shipment of assemblies. The letter also stated that Watson was rescinding prior settlement offers and intended to pursue payment in full. In accordance with its letter, Watson shipped half of the assemblies in June 2011 and the rest in August 2011. There were some problems with the assemblies that resulted in project delays and repair costs, which RGW addressed in its cross-complaint.

PROCEDURAL HISTORY

Pleadings

In June 2012, Watson filed a complaint against RGW, Caltrans and an unnamed surety company. In October 2012, Watson filed a first amended complaint, which is the operative complaint in this litigation. Watson asserted causes of action against RGW for breach of contract and unjust enrichment.

Watson's breach of contract cause of action alleged that RGW revised its order by changing the joint seal assemblies for the project from the model STM600 referred to in Quote 06—a quote that RGW requested—to the model BET 1200 that Watson previously offered in Quote 02. Watson alleged RGW refused to pay the price of \$605,990 quoted by Watson for the model BET 1200 joint seal assemblies or any amount in excess of the \$207,251 price quoted for the model STM600 joint seal assemblies. Watson alleged it was damaged in the amount of \$605,990 as a result of RGW's refusal to pay.

Watson's unjust enrichment cause of action alleged it provided 146 units of the model BET 1200 joint seal assemblies based on the reasonable belief that RGW had agreed to the quoted price of \$605,990. Watson also alleged that RGW received a benefit from and was enriched by the assemblies provided by Watson and from withholding Watson's compensation for the assemblies. Watson estimated the benefit RGW received was no less than \$605,990.

RGW's answer to Watson's first amended complaint denied liability. Also, RGW filed a cross-complaint alleging that Watson breached its obligations

under the purchase order by delivering defective joint seal assemblies, which caused \$134,810 in damages.

Jury Trial

The jury trial was held in April 2014. The special verdict form's sole question about Watson's complaint against RGW asked, "What was the amount of the subject agreement?" The jury found the amount was \$605,990. On RGW's cross-complaint, the jury found that the joint seal assemblies furnished by Watson were defective and that RGW suffered \$111,771.08 in damages as a result of those defects.³ Based on these figures and the parties' stipulation that RGW previously paid Watson \$111,186.60,⁴ the jury determined the net amount owed by RGW to Watson was \$383,032.32.

RGW challenged the jury's verdict by filing a motion for judgment notwithstanding the verdict, or alternatively for a new trial. In June 2014, the court heard RGW's motions and Watson submitted a request to include prejudgment interest of over \$136,000 in the final award.

In August 2014, the trial court issued two written orders. First, the court denied Watson's request for prejudgment interest, stating it was untimely because Watson had not made a motion prior to the entry of judgment or, alternatively, in the form of a motion for new trial. Second, the court denied RGW's motion for judgment notwithstanding the verdict and its motion for a new trial.

Later in August, RGW filed a notice of appeal from the judgment and the order denying its motion for judgment notwithstanding the verdict. Watson filed a notice of cross-appeal, challenging the denial of prejudgment interest and protecting itself on certain adverse evidentiary rulings made during the trial.

DISCUSSION

I. *Breach of Contract**

³ The jury's resolution of the claims raised in RGW's cross-complaint are not challenged in the appeal or cross-appeal. Accordingly, the facts relevant to those claims are not described in this opinion.

⁴ RGW made two payments to Watson. The first was for \$88,147. The second, made in November 2013, was for \$23,039.60. The payments were intended to cover the difference between the price listed in the purchase order and RGW's damages for the cost of repairs and 16 days of delay.

*See footnote, *ante*, page 279.

II. *Prejudgment Interest*

Watson's cross-appeal challenges the trial court's order denying its request for prejudgment interest as untimely. Watson contends it made a timely request and the award of prejudgment interest was mandatory under Civil Code section 3287, subdivision (a).

A. *Basic Legal Principles*

1. *Statutory Text*

■ Civil Code section 3287, subdivision (a) provides: "A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt." Under this provision, the trial court has no discretion—it must award prejudgment interest from the first day there exists both a breach and a liquidated claim. (*North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 828 [76 Cal.Rptr.2d 743] (*Rogers*)).

2. *Interest as Damages*

■ Conceptually, prejudgment interest is an element of damages, not a cost of litigation. (*Rogers, supra*, 65 Cal.App.4th at p. 830.) Prejudgment interest compensates the plaintiff for the loss of the use of property or money during the period before the judgment is entered. (*Id.* at p. 828.) This conceptual foundation affects the timing and manner for requesting an award of prejudgment interest.

3. *The Certainty Requirement*

■ From a plaintiff's perspective, prejudgment interest compensates for the loss of the use of the money during the period between the assertion of the claim and the rendition of judgment. (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 906 [197 Cal.Rptr. 348] (*Chesapeake*).) Obviously, the plaintiff loses the use of the money whether or not the amount owed is certain and, consequently, compensation was not the Legislature's sole consideration when it adopted Civil Code section 3287.

From the defendant's perspective, the certainty requirement promotes equity because liability for prejudgment interest occurs only when the defendant knows or can calculate the amount owed and does not pay. (*Chesapeake, supra*, 149 Cal.App.3d at p. 906.) In *Chesapeake*, the court

acknowledged the tension between compensating the plaintiff's loss and fairness to the defendant, stating: "These competing policy considerations have led the courts to focus on the defendant's knowledge about the amount of the plaintiff's claim. The fact the plaintiff or some omniscient third party knew or could calculate the amount is not sufficient. The test we glean from prior decisions is: did the defendant actually know the amount owed or from reasonably available information could the defendant have computed that amount. Only if one of those two conditions is met should the court award prejudgment interest." (*Id.* at p. 907, italics omitted.)

Under this test for certainty as to amount, a dispute or denial of *liability* does not make the *amount of damages* uncertain. (*Wisper Corp. v. California Commercial Bank* (1996) 49 Cal.App.4th 948, 958 [57 Cal.Rptr.2d 141].) As stated by our Supreme Court: "Generally, the certainty required of Civil Code section 3287, subdivision (a), is absent when the amounts due turn on disputed facts, but not when the dispute is confined to the rules governing liability." (*Olson v. Cory* (1983) 35 Cal.3d 390, 402 [197 Cal.Rptr. 843, 673 P.2d 720], italics added (*Olson*).) In that case, the court determined the salary and pension benefits owed to the members of the plaintiff class were readily calculable amounts for purposes of awarding prejudgment interest. (*Ibid.*)

■ Disputes about the amount owed do not automatically create uncertainty. The Supreme Court has "held that even a dispute as to the *amount* of alleged damages (from an earthquake) did not prevent those damages from 'being made certain by calculation' within the meaning of [Civil Code] section 3287 where the amount of recovery closely approximated plaintiff's claims." (*Leff v. Gunter* (1983) 33 Cal.3d 508, 520 [189 Cal.Rptr. 377, 658 P.2d 740] (*Leff*.)) In that case, a readily ascertainable value of the plaintiff's share of a development project was established by (1) the difference between (a) an uncontested appraisal of the completed building and (b) the amount of the mortgage against the property (2) divided by the plaintiff's conceded one-sixth share in the original venture. (*Id.* at p. 519.) The court noted, "Defendants offered no evidence to contradict [the] valuations" of the three components used to calculate damages. (*Id.* at p. 520.) Consequently, the court reversed the trial court's denial of prejudgment interest and remanded the case for the calculation and award of such interest. (*Id.* at pp. 520–521.)

■ A general principle of practical import, not expressly adopted by our Supreme Court but easily inferred from its discussions of certainty, is that the manner in which a case is litigated can affect the ultimate resolution of the certainty question. (See *Olson, supra*, 35 Cal.3d at p. 402 ["amounts due turn on disputed facts"]; *Leff, supra*, 33 Cal.3d at p. 520 [no evidence contradicted components used in plaintiff's calculations; recovery closely approximated plaintiff's claims].)

4. Certainty and Changes to Construction Contracts

■ The certainty requirement has been applied to the amount owed under construction contracts for extra work or changes in the work. Such contracts might state the amount owed is (1) based on a cost-plus formula, (2) the reasonable value of the extra work done, or (3) based on the agreement of the parties. (See *Macomber v. State of California* (1967) 250 Cal.App.2d 391, 401 [58 Cal.Rptr. 393].) Generally, a cost-plus formula permits the damages to be made certain by calculation and prejudgment interest is recoverable under such contracts. (*Anselmo v. Sebastiani* (1933) 219 Cal. 292, 301–303 [26 P.2d 1]; *Schmidt v. Waterford Winery, Ltd.* (1960) 177 Cal.App.2d 28, 34 [1 Cal.Rptr. 874] [amount due “might be made certain by reference to well-established value plus computation”].) Under contracts where the plaintiff is entitled to no more than the reasonable value of the extra work done, that value typically is ascertained by the trier of fact after considering conflicting evidence. (*Macomber v. State of California*, *supra*, at p. 401.) Consequently, damages in such cases are regarded as unliquidated and prejudgment interest is not mandatory. (*Ibid.*) Where the contractual amount owed is based on the agreement of the parties, the amount due may be made certain by the agreement of the parties or an admission. (*Pilch v. Milikin* (1962) 200 Cal.App.2d 212, 228 [19 Cal.Rptr. 334] [“defendant knew the amount of the sum owing, and he admitted the fact upon the trial”].)

5. Offsets Do Not Create Uncertainty as to the Balance Due

■ “‘Ordinarily, where the amount of a demand is sufficiently certain to justify the allowance of interest thereon, the existence of a set-off, counter-claim, or cross claim which is unliquidated will not prevent the recovery of interest on the balance of the demand found due from the time it became due.’” (*Worthington Corp. v. El Chicote Ranch Properties, Ltd.* (1967) 255 Cal.App.2d 316, 325 [63 Cal.Rptr. 203].) The phrase “the balance of the demand” means the liquidated sum minus the offset. (*Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal.App.2d 274, 285 [38 Cal.Rptr. 597].) Thus, prejudgment interest is calculated on the *net* amount owed and, therefore, the defendant is not required to pay interest on the portion of the debt rightfully withheld. (*Id.* at pp. 285–286.) The rationale for this rule is that the plaintiff was never entitled to payment of more than the net amount and, therefore, was damaged only by the withholding of the net amount. (*Id.* at p. 286.)

The application of the rule about offsets to RGW’s successful cross-complaint is not a source of controversy. Thus, the calculation of any prejudgment interest owed to Watson must be based on the *net amount owed* under the contract—that is, \$494,219 (\$605,990 minus \$111,771)—and must take into account the timing and amount of RGW’s two payments.

6. Standard of Review

Where the facts are not in dispute or, alternatively, have been established by findings of the trial court supported by substantial evidence, appellate courts independently review whether and when the plaintiff's damages were made certain or capable of being made certain by calculation. (*KGM Harvesting Co. v. Fresh Network* (1995) 36 Cal.App.4th 376, 390–391 [42 Cal.Rptr.2d 286].) This standard of review can be phrased in terms of the test adopted in *Chesapeake* (see pt. II.A.3., *ante*): “On appeal, we independently determine whether damages were ascertainable for purposes of the statute, absent a factual dispute as to what information was known or available to the defendant at the time” (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 151 [139 Cal.Rptr.3d 880]).

B. Timeliness and Format of Request

1. Watson's Pleadings

Watson's initial complaint included a prayer for “interest as provided by law.” Watson's first amended complaint reiterated the request for “interest as provided by law,” but addressed interest in more detail. Paragraph 32 of the first amended complaint stated that Watson “is entitled to the payments owed by RGW as well as interest on the money that RGW has wrongfully withheld at the statutory rate. The interest runs from the date that the payments became due until the date that they are paid.” These statements clearly notified RGW that Watson sought both prejudgment and postjudgment interest on the amount owed. (See *Rogers, supra*, 65 Cal.App.4th at p. 829 [prayer seeking “‘such other and further relief as may be proper”’ is adequate basis for award of prejudgment interest].)

We also note that the breach of contract cause of action in Watson's first amended complaint identified the price of \$605,990 provided in Quote 02, alleged RGW had refused to pay that price, and alleged Watson “has been damaged in the amount of \$605,990.”

2. Watson's Postjudgment Request

The following is the chronology of events surrounding Watson's written request for prejudgment interest:

April 21, 2014: The jury completed the special verdict form.

May 16, 2014: RGW filed a motion for judgment notwithstanding the verdict, or alternatively for a new trial.

June 11, 2014: Hearing on RGW's motion for judgment notwithstanding the verdict, or alternatively for a new trial.

June 19, 2014: The judgment was filed.¹³

June 27, 2014: Watson filed its request for prejudgment interest.

July 18, 2014: Notice of entry of judgment was served on RGW by Watson's attorneys.

August 5, 2014: Order denying Watson's request for prejudgment interest was filed.

August 6, 2014: Order denying RGW's motion for judgment notwithstanding the verdict, or alternatively for a new trial was filed.

Later in August 2014, the parties filed their notices of appeal and cross-appeal. To summarize, Watson made its request for prejudgment interest eight days after the judgment was filed, which was before the 15-day period contained in Code of Civil Procedure section 659, subdivision (a)(2), expired.

Watson's request (1) referred to its complaint and a trial exhibit, (2) set forth the legal basis for the award of prejudgment interest, and (3) provided detailed calculations of prejudgment interest to August 2014. The calculation took into account the \$111,771 awarded to RGW on this cross-complaint, RGW's payment of \$88,147 to Watson in June 2013, and RGW's payment of \$23,039.60 to Watson in November 2013.

3. *Timing of Request for Prejudgment Interest*

■ No statutes specify the timing or mechanism for seeking prejudgment interest. (*Steiny & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, 294 [93 Cal.Rptr.2d 920] (*Steiny*).) Similarly, no rule of court specifies when prejudgment interest must be sought. (*Ibid.*) California Rules of Court, rule 3.1802 states, "The clerk must include in the judgment any interest awarded by the court." ■ This rule imposes a mandatory duty on the

¹³ The proposed form of judgment was faxed to the court by Watson's attorneys. The proposed judgment did not explicitly refer to prejudgment interest, but provided for postjudgment interest at 10 percent and included the following item: "(4) Additional sums due, if any, are as follows: _____." Nothing in the record shows that Watson regarded this item as a request for prejudgment interest, much less communicated that intention to the court and RGW. The trial court struck the fourth item from the proposed judgment before signing, dating and filing the document as its judgment.

clerk, but only tenuously implies that a request for prejudgment interest must be made before a judgment is entered.

In *Steiny*, the court concluded that the award of interest after entry of the judgment was proper where the complaint requested prejudgment interest and the parties stipulated that request for interest would be adjudicated in a postjudgment hearing. (*Steiny, supra*, 79 Cal.App.4th at p. 294.) In *Rogers, supra*, 65 Cal.App.4th 824, the court stated that, at the latest, a request for prejudgment interest could be pursued as part of a motion under Code of Civil Procedure section 657, subdivision 5, on the ground of “‘inadequate damages.’” (*Rogers, supra*, at p. 830.) The court stated such a motion would be timely if made within the “time limits for a motion for new trial (Code Civ. Proc., § 659).” (*Ibid.*)

In the present case, there is no dispute that Watson’s request for prejudgment interest was made less than 15 days after the judgment was filed. As such, the request was made within the statutory time limit for motions under Code of Civil Procedure section 657. (Code Civ. Proc., § 659, subd. (a)(2).) Consequently, we conclude Watson’s request for prejudgment interest was timely.

4. Proper Format of a Request for Prejudgment Interest

The trial court denied Watson’s request for prejudgment interest “as untimely made.” The court then stated that requests “must be made by way of a motion prior to entry of judgment or in the form of a motion for new trial.” The court’s order implies that it regarded the form of Watson’s request as procedurally improper. Consequently, we consider whether the format of Watson’s request rendered it defective. In particular, we consider whether the request qualifies as a motion under Code of Civil Procedure section 657.¹⁴

■ As a general rule, a new trial may be granted pursuant to Code of Civil Procedure section 657 only if the request conforms to the statutory procedures. (*Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 726 [60 Cal.Rptr.2d 698] (*Shapiro*).) We interpret this general rule as applying not only to new trials but to requests for modification under Code of Civil Procedure section 657. The statutory procedures set forth

¹⁴ Code of Civil Procedure section 657 covers motions for new trial and also authorizes a decision to “be modified” on the grounds specified in the subdivisions of that section. A request for prejudgment interest is not a request for a new trial (an opportunity to present evidence to a trier of fact), but a request to modify the decision to include an award of prejudgment interest. Consequently, we use the phrase “motion under Code of Civil Procedure section 657” rather than “motion for new trial” to describe a motion under that section seeking modification of a judgment to include prejudgment interest.

in Code of Civil Procedure section 659 require the motion to (1) designate the grounds upon which it is made and (2) state “whether the same will be made upon affidavits or the minutes of the court, or both.” (Code Civ. Proc., § 659, subd. (a); see also 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 48, pp. 634–635 [statutory requirements for motion for new trial].)

First, the fact that Watson’s request was not labeled as motion for new trial or as a motion for modification under Code of Civil Procedure section 657 does not render its format defective. (See *Shapiro, supra*, 52 Cal.App.4th at p. 728 [styling a request as a motion to vacate, rather than a motion for new trial, was of no consequence]; see 8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, § 47, pp. 632–634 [motion improperly labeled].)

Second, compliance (or substantial compliance) with the requirements of subdivision (a) of Code of Civil Procedure section 659 depends upon whether the request provides the relevant information to the opposing party and the court and gives the adverse party a reasonable opportunity to oppose the request on its merits. (*Nichols v. Hast* (1965) 62 Cal.2d 598, 600 [43 Cal.Rptr. 641, 400 P.2d 753] (opn. of Traynor, C. J.); see *Shapiro, supra*, 52 Cal.App.4th at pp. 727–728.) These functions are satisfied when the written request designates the grounds upon which it is made. Here, Watson’s request clearly identified (1) the relief requested (i.e., the addition of prejudgment interest to the amount of the judgment) and (2) the grounds upon which the request was based—specifically, Civil Code section 3287, subdivision (a) and its contention that the damages were a liquidated sum. Furthermore, Watson provided RGW a sufficient opportunity to oppose the request, as is evident from the written opposition filed by RGW with the court. Consequently, we conclude Watson’s request provided RGW with the sufficient notice and a reasonable opportunity for opposition, thus satisfying the purpose and requirements of Code of Civil Procedure section 659, subdivision (a).

Third, the requirement that a motion under Code of Civil Procedure section 657 designate “whether the same will be made upon affidavits or the minutes of the court, or both” (Code Civ. Proc., § 659, subd. (a)), is not a jurisdictional. (*Nichols v. Hast, supra*, 62 Cal.2d at p. 600.) Moreover, the specific statement of the grounds for Watson’s request was sufficient to imply that it was made on the minutes of the court and the exhibits and testimony presented at trial. (*Id.* at p. 601.) Therefore, we conclude that Watson’s request substantially complied with the statute even though it did not expressly state whether it was “made upon affidavits or the minutes of the court, or both.” (Code Civ. Proc., § 659, subd. (a).)

In summary, we conclude that the format of Watson's request for prejudgment interest was not defective and, therefore, we proceed to the merits of the request.

C. *Watson's Claim That a Change Order Was Required*

1. *Watson's Theory of Liability*

Watson's respondent's brief contends that after Caltrans rejected the two-cell joint seal assemblies, a change order for a different price was required pursuant to paragraph 16 of the purchase order. Watson also contends that "RGW refused to issue a change order and claimed it was only required to pay for the rejected joint seals . . . , not for the joint seals it received and incorporated into the completed project."

The foregoing contentions made by Watson are consistent with the arguments it pursued in the trial court. The trial court described Watson's contentions in the court's instructions to the jury by stating: "Watson Bowman claims that the original contract was modified or changed. Watson Bowman must prove that the parties agreed to the modification. RGW denies that the contract was modified." The jury impliedly found Watson's theory of liability was correct and a change order for a different price was required when it answered the first question in the special verdict form in Watson's favor.

2. *Watson's Theory of Damages*

The jury's implied finding that a change order for a different price was required by the contract meant the jury also had to determine what that different price should have been. To assist the jury in making this determination, the trial court gave general instructions about the damages to be awarded in a breach of contract case, stating that if a party proved its breach of contract claim, "you also must decide how much money will reasonably compensate that party for the harm caused by the breach. This compensation is called damages. The purpose of such damages is to put the non-breaching party in as good a position as it would have been if the other party had performed as promised." As to the amount, the court stated: "The non-breaching party also must prove the amount of its damages according to the following instructions. It does not have to prove the exact amount of damages. You must not speculate or guess in awarding damages." The court then stated that Watson claimed damages for nonpayment.¹⁵

¹⁵ Thus, the court did not instruct the jury that if Watson proved the contract had been modified and RGW breached the modified contract, the jury must find the modified contract

These instructions addressing damages were applied by the jury in answering the first question of the special verdict form. That question asked, “What was the amount of the subject agreement?” The jury found the amount was \$605,990.

3. *The Evidence and Arguments Presented to the Jury*

■ Whether the change order price of \$605,990 was sufficiently certain for purposes of awarding prejudgment interest must be evaluated in the context of not only the historical facts that occurred before the litigation, but also the arguments and evidence presented to the jury. (See *Olson, supra*, 35 Cal.3d at p. 402; *Leff, supra*, 33 Cal.3d at p. 520.) The foundation for the parties’ arguments about whether a change order was contractually required and the amount of any such order was paragraph 16 of the purchase order. Paragraph 16 stated that if Watson furnished different or changed items by reason of written instructions from RGW, “the amount of the adjustment shall be by mutual agreement of the parties; however, if no such agreement is reached, the adjustment shall be determined by arbitration.” Paragraph 16 also addressed the possibility that a supplier might withhold delivery of the changed items during the negotiations of the price adjustment by providing: “Nothing provided herein shall excuse the Seller from proceeding with the furnishing of the items as changed.”

Watson and RGW never expressly agreed to the amount of the adjustment and never submitted the matter to arbitration pursuant to paragraph 16 of the purchase order. Thus, the amount owed by RGW to Watson for changing the order to four-cell joint seal assemblies was never rendered certain by an express agreement of the parties or by an arbitration award.

The evidence relied upon by Watson for the amount owed on the contract was Quote 02, from September 2009, and its price of \$605,990 for the 146 units of WaboModular BET-1200 joint seal assemblies. In September 2010, Watson requested a change to the purchase order to reflect the original price in Quote 02 of \$605,990. RGW did not present evidence addressing the value of those units. Instead, RGW focused on the question of liability and its theory that there was no change order requiring a price adjustment.

During closing argument, counsel for Watson addressed how the jury should answer the question in the special verdict about the amount of the subject agreement. Counsel asked the jury to “[l]ook at their Paragraph 16, look at the terms, consider the revised and resubmit letter, and decide if a

price was a particular amount. Similarly, the court did not instruct the jury to perform specific calculations or use a particular formula to determine Watson’s damages for the alleged breach of contract

change order was merited, if a change order was deserved by Watson.” As to amount, he stated, “So I guess I would put in this one 605,990. That’s the amount of the bid day quote. That’s the cost of the four-cell joints.”

Counsel for RGW told the jury that the “fundamental issue here is whether Watson Bowman is going to be held to the terms of the contract it signed.” In other words, RGW argued that there had been no change order or modification of the contract formed when Watson signed the purchase order. As a result, counsel for RGW addressed the question in the special verdict form about “the amount of the subject agreement” by arguing the correct answer was \$222,957.68—the amount typed on the first page of the purchase order.

The jury answered the first question on the special verdict form by finding the amount of the subject agreement was \$605,990. This amount was (1) stated in Quote 02 in 2009, (2) requested by Watson in its request for a change order in 2010, (3) identified as the amount of Watson’s damages in its first amended complaint in 2012 and (4) suggested by Watson’s attorney in closing argument in 2014.

4. Analysis

Watson’s entitlement to prejudgment interest under Civil Code section 3287, subdivision (a) depends on whether the compensation RGW owed Watson for delivering the four-cell joint seal assemblies was “certain, or capable of being made certain by calculation” for purposes of the statute. Based on the principles set forth in *Olson* and *Leff*, we conclude the requisite level of certainty was achieved and Watson is entitled to prejudgment interest.

Applying the test set forth in *Chesapeake*, *supra*, 149 Cal.App.3d 901, we conclude that RGW could have determined the amount owed from “reasonably available information.” (*Id.* at p. 907.) RGW had possession of Quote 02 and had been informed by Watson, in prelitigation correspondence and in later in pleadings, what Watson regarded as the appropriate price for the four-cell joint seal assemblies. RGW has argued the amount was uncertain, but has not identified any additional information about price or value that was not in its possession at the time the joint seal assemblies were delivered in August 2011. Moreover, like the defendants in *Leff*, RGW “offered no evidence to contradict” the amount asserted by Watson. (*Leff*, *supra*, 33 Cal.3d at p. 520.) Therefore, as a practical matter, this case involved a dispute over liability and not a dispute about the amount owed in the event that RGW lost on the liability question. Consequently, it was not a case in which the “amounts due turn on disputed facts.” (*Olson*, *supra*, 35 Cal.3d at p. 402; see *Leff*, *supra*, at p. 520 [no evidence contradicted components used in plaintiff’s calculations].)

Therefore, we conclude that the amount of damages awarded for RGW's breach of contract was sufficiently certain for purposes of Civil Code section 3287, subdivision (a). Consequently, Watson is entitled to prejudgment interest.

D. *Paragraph 2 of the Purchase Order**

.....

III. *Protective Cross-appeal**

.....

DISPOSITION

The judgment is affirmed, except insofar as it failed to award Watson prejudgment interest. The case is remanded to the trial court for the purpose of calculating and awarding Watson prejudgment interest. Watson shall recover its costs on the appeal and cross-appeal.

Poochigian, Acting P. J., and Smith, J., concurred.

*See footnote, *ante*, page 279.

[No. A143765. First Dist., Div. One. Aug. 10, 2016.]

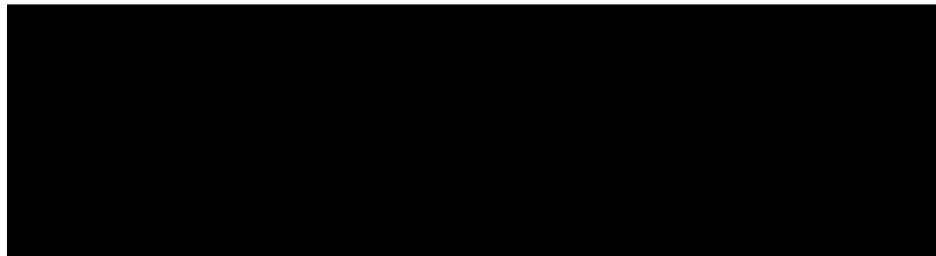
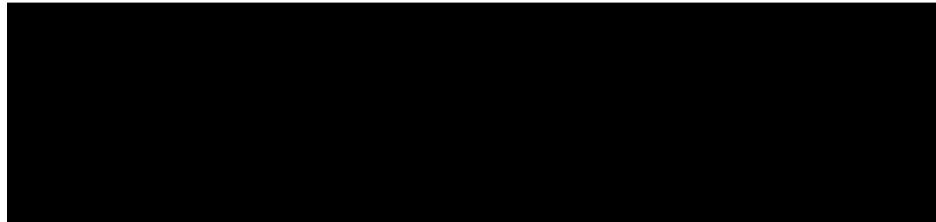
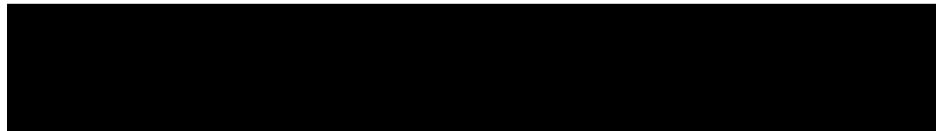
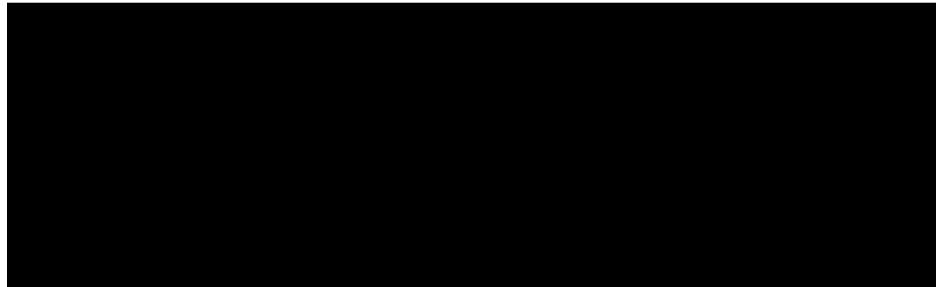
LIDIA C. BORRAYO, Plaintiff and Appellant, v.
G. JAMES AVERY, Defendant and Respondent.

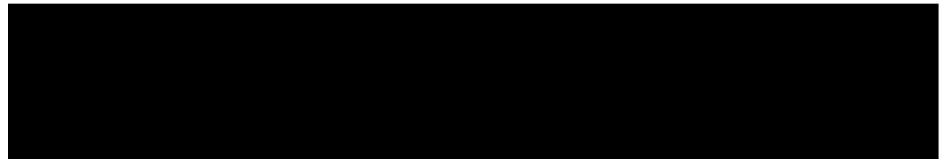
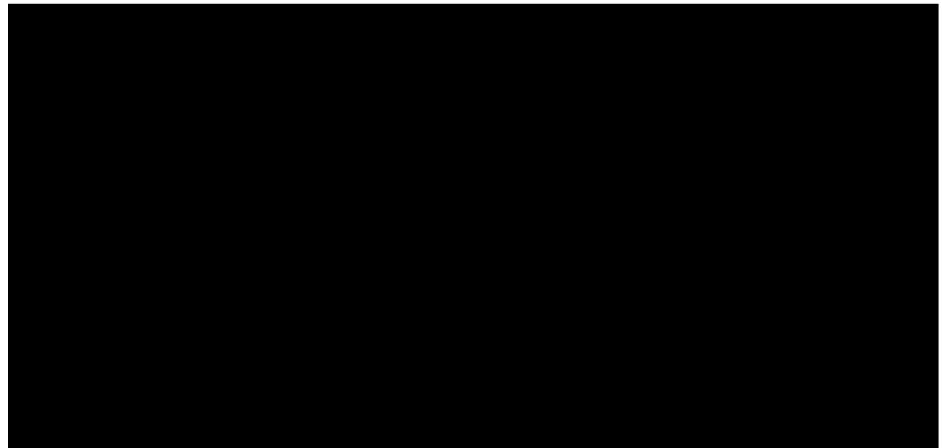
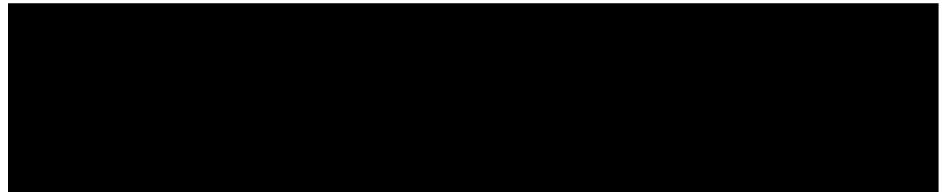
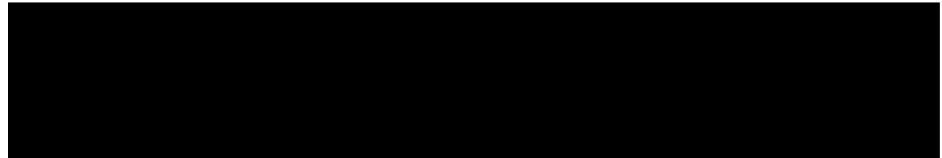
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COUNSEL

Law Offices of Michael E. Adams and Michael E. Adams for Plaintiff and Appellant.

Oium Reyen & Pryor, Virgil F. Pryor and Bret R. Landess for Defendant and Respondent.

OPINION

DONDERO, J.—Plaintiff Lidia C. Borrayo sued defendant Dr. G. James Avery, alleging he had engaged in medical malpractice during the course of treating her for a condition known as thoracic outlet syndrome. Defendant moved for summary judgment, which the trial court granted after sustaining his objection to her sole expert witness's declaration. On appeal, plaintiff argues that this expert witness, a physician licensed to practice medicine in Mexico, was qualified to provide an opinion about the standard of care to which defendant was held. We agree and reverse.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. *Background*

For many years, plaintiff worked for eight to 10 hours a day in silk-screen production. The work involved repetitive motions such as pushing her right arm back and forth and lifting fabric up and down, producing 200 canvasses per day, each using three colors.

On May 19 and 20, 2008, Dr. Abraham Castrejon Pineda, a physician licensed in Mexico, performed orthopedic examinations of plaintiff.

On March 5, 2009, plaintiff sought treatment from defendant. At that time, she presented with long-standing complaints of intense pain in her right shoulder and scapula, numbness and swelling, painful grip, and weakness when raising her right elbow. After examining her and reviewing MRI results, defendant diagnosed her as having severe thoracic outlet syndrome (TOS)¹ on the right side, secondary to repetitive stress at work. He recommended that she undergo surgery to rectify the condition.

On September 4, 2009, defendant performed the recommended surgery on plaintiff. The surgery involved the removal of the right first rib. Plaintiff

¹ TOS refers to a constellation of symptoms which arise due to compression of blood vessels or brachial plexus nerves in the space between the clavicle and the first rib (i.e., the thoracic outlet). Compression of the brachial plexus nerves causes a variety of symptoms, including pain in the shoulder and scapula area; pain, numbness, swelling and tingling in the arm or hand; reduced grip strength; and weakness when raising the arm. Thoracic outlet syndrome commonly arises in patients whose occupation requires repetitive motion, which causes inflammation, which in turn results in compression of the brachial plexus nerves.

suffered adverse symptoms approximately 12 months following the surgery, including pain upon moving her right arm, as well as difficulty in swallowing food.

On August 3, 2011, defendant referred plaintiff to Dr. James Kelly, a surgeon who performs clavicular stabilization surgery.

On July 13, 2012, defendant and Kelly evaluated plaintiff together and reviewed the results of an MRI. Based on this evaluation, both doctors ultimately concluded plaintiff was not a candidate for stabilization surgery because her right sternoclavicular joint was “not frankly unstable.”

B. Procedural History

On November 2, 2012, plaintiff filed a complaint against defendant for medical malpractice.

On June 3, 2014, defendant filed a motion for summary judgment. In his moving papers, he asserted plaintiff could not establish an essential element of her claim because the medical care and treatment he had provided to her fell within the standard of care. In support, he included a declaration from Dr. Jason T. Lee, who stated that defendant had appropriately performed the surgical procedure and had provided appropriate postoperative care and follow-up care. Lee also offered the opinion that plaintiff’s subsequent development of pain and instability of the sternoclavicular joint was caused by her underlying medical condition.

On August 8, 2014, plaintiff filed her opposition to defendant’s motion, submitting a declaration from Pineda, who opined that defendant had destabilized plaintiff’s right sternoclavicular joint during her surgery when he removed the first rib by carelessly or unskillfully cutting or disrupting ligaments that hold the right sternoclavicular joint in place.

In his reply brief filed on August 15, 2014, defendant objected to Pineda’s declaration, contending his opinions were speculative and lacked foundation. He also asserted plaintiff had failed to establish that Pineda was sufficiently familiar with the applicable standard of care.

On September 2, 2014, the trial court filed its order granting defendant’s motion for summary judgment. The court sustained defendant’s evidentiary objection, concluding Pineda had supplied “absolutely no information about the appropriate standard of care in the United States. There is no information whether Dr. Pineda has spoken with American doctors or reviewed American publications regarding the treatment of thoracic outlet syndrome in the United

States.” The court found plaintiff had failed to meet her burden of production to establish a triable issue of material fact regarding whether defendant had breached the standard of care.

Judgment for defendant was entered on September 25, 2014. This appeal followed.

DISCUSSION

A. *Summary Judgment Standard of Review*

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850–851 [107 Cal.Rptr.2d 841, 24 P.3d 493], our Supreme Court described a party’s burdens on summary judgment motions as follows: “[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court’s action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. . . . ¶¶ . . . [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question.” (Fns. omitted; see *Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878 [116 Cal.Rptr.2d 158].)

We review de novo the trial court’s decision to grant the summary judgment motion. (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336 [113 Cal.Rptr.3d 279, 235 P.3d 947]; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67–68 [99 Cal.Rptr.2d 316, 5 P.3d 874].) The trial court’s stated reasons for granting summary judgment are not binding on us because we review its ruling, not its rationale. (*Coral Construction, Inc. v. City and County of San Francisco*, at p. 336; *Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196 [133 Cal.Rptr.2d 199].) A court’s decision to exclude expert testimony is reviewed for abuse of discretion. (*People v. Bolin* (1998) 18 Cal.4th 297, 321–322 [75 Cal.Rptr.2d 412, 956 P.2d 374].)

B. Importance of Expert Testimony in Medical Malpractice Cases

■ “[I]n any medical malpractice action, the plaintiff must establish: “(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional’s negligence.”” (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606 [90 Cal.Rptr.2d 396]; *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 468, fn. 2 [71 Cal.Rptr.3d 707] (*Avivi*)).

■ Opinion testimony from a properly qualified witness is generally necessary to demonstrate the elements for medical malpractice claims. (*Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, 108, fn. 1 [83 Cal.Rptr.2d 145, 972 P.2d 966]; *Avivi, supra*, 159 Cal.App.4th at p. 467, fn. 1.) Evidence Code section 720, subdivision (a) provides: “A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.”

■ When a defendant health care practitioner moves for summary judgment and supports his motion with an expert declaration that his conduct met the community standard of care, the defendant is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence. (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984–985 [263 Cal.Rptr. 878].) ■ As noted above, the trial court sustained defendant’s evidentiary objections to Pineda’s declaration based solely on its conclusion that the declaration did not demonstrate he was qualified to opine on the practice of medicine in the United States. This was an abuse of discretion.

C. The Standard of Care’s Locality Factor

■ At one time, in medical malpractice cases generally, the standard of care required “that a physician or surgeon have the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same locality.” (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 86 [147 P.2d 604].) More recently, however, “the Supreme Court has formulated the standard of care as that of physicians in similar *circumstances* rather than similar *locations*.” (*Avivi, supra*, 159 Cal.App.4th at p. 468, original italics.) Today, “neither the Evidence Code nor Supreme Court precedent requires an

expert witness to have practiced in a particular locality before he or she can render an opinion in an ordinary medical malpractice case." (*Avivi*, at p. 472, italics added.)

For example, in *Avivi*, the appellate court concluded an orthopedist who lived and practiced in Israel was sufficiently qualified to provide an opinion about the standard of care in Southern California for the treatment of an arm fracture despite never being board certified by any United States medical board, nor providing any treatment to patients in the United States. (*Avivi, supra*, 159 Cal.App.4th at p. 471.) The court reasoned "the appropriate test for expert qualification in ordinary medical malpractice actions is whether the expert is familiar with circumstances similar to those of the respondents; familiarity with the standard of care in the particular community where the alleged malpractice occurred, while relevant, is generally not requisite . . ." (*Avivi*, at p. 465.) The court also observed that "[g]eographical location may be a factor considered in making that determination, but, by itself, does not provide a practical basis for measuring similar circumstances." (*Avivi*, at p. 470.) In sum, while locality is a circumstance that may be considered, it is not determinative.

It is important to recall the historical background of the locality factor: "[T]he theory supporting the rule that the expert must be familiar with the degree of care used in the particular locality where the defendant practices 'is that a doctor *in a small community or village, not having the same opportunity and resources for keeping abreast of the advances in his profession, should not be held to the same standard of care and skill as that employed by physicians and surgeons in large cities.*' [Citation.] In earlier days, when there was little intercommunity travel, the courts required personal experience with the practice of physicians in the particular community where the plaintiff was treated as the basis of the expert's testimony concerning the degree of care which should have been used." (*Sinz v. Owens* (1949) 33 Cal.2d 749, 754 [205 P.2d 3], some italics added (*Sinz*.)) The locality requirement thus appears to have been designed to "level the playing field" for physicians who had less access to advanced medical techniques.

Sixty-seven years ago our Supreme Court observed: " 'Today, with the rapid methods of transportation and easy means of communication, the horizons have been widened, and the duty of a doctor is not fulfilled merely by utilizing the means at hand in the particular village where he is practicing. So far as medical treatment is concerned, the borders of the locality and community have, in effect, been extended so as to include those centers readily accessible where appropriate treatment may be had which the local physician, because of limited facilities or training, is unable to give.' " (*Sinz, supra*, 33 Cal.2d at p. 755.) Obviously, our horizons are much wider today

than at the time *Sinz* was decided, and it is not unreasonable to extend them across international boundaries. Importantly, defendant does not suggest to us that the standard of care in Mexico is *higher* than the standard of care in the United States. Thus, there does not appear to be any inherent unfairness in allowing Pineda to offer his opinion on defendant's conduct.

In fact, defendant fails to offer any explanation as to how the conditions or circumstances of plaintiff's treatment in California would differ from those in Mexico. Citing to Code of Civil Procedure section 437c, subdivision (d), he instead asserts it is plaintiff's burden to present evidence that the standard of care in Mexico is the same as the standard of care in the United States. That statute provides: "Supporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. An objection based on the failure to comply with the requirements of this subdivision, if not made at the hearing, shall be deemed waived." (*Ibid.*) The last sentence of this provision arguably suggests that the burden of proof actually falls on the party making the evidentiary objection, in this case defendant.²

Regardless, with the locality issue placed in its proper perspective, Pineda's declaration does not suggest to us that he is unqualified to render an opinion in this case. His declaration and attached curriculum vitae reveal that he has practiced as an orthopedic surgeon for more than 30 years, and is licensed as a specialist in orthopedic surgery. He has also performed over 500 orthopedic surgeries, including approximately 10 to 12 TOS surgeries, and approximately six to eight surgeries to repair dislocated or subluxated sternoclavicular joints. Pineda stated that through his training and experience he was familiar with the standard of care for TOS surgeries, as well as with how sternoclavicular joints can be dislocated or subluxated. Additionally, he had personally performed orthopedic examinations of plaintiff both before and well after her surgery, and claimed to be knowledgeable in the interpretation of medical films, including X-rays, CT scans, and MRI's. In our view, Pineda's declaration shows he possesses the "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates," as required by Evidence Code section 720, subdivision (a).

■ While not determinative, we also note Pineda's declaration reflects some familiarity with the standard of care for the performance of orthopedic

² In finding that the locality factor is not the controlling assessment when considering medical expert testimony at summary judgment, we have pointed out the relevant features of Dr. Pineda's background and familiarity with the particular case and appellant. Importantly, we find nothing in the expert declaration from respondent to indicate we should disregard appellant's expert declaration at summary judgment.

surgeries in the United States, as his resume also shows he has attended at least one professional conference in the United States. To the extent Pineda's expertise is subject to question, we note "if a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes to the weight of his testimony rather than to its admissibility." (*Brown v. Colm* (1974) 11 Cal.3d 639, 643 [114 Cal.Rptr. 128, 522 P.2d 688] (*Brown*).) ■ Professor Wigmore affirms the general rule that "a medical doctor possesses a professional experience which gives him a knowledge of the trustworthy authorities and the proper sources of information, as well as a degree of personal observation of the general subject matter enabling him to estimate the plausibility of the views expressed." (*Brown*, at p. 644, citing 2 Wigmore, Evidence (1940) § 665b, pp. 784–785.) Locality does not necessarily make one doctor a better expert over another physician. "The unmistakable general trend in recent years has been toward liberalizing the rules relating to the testimonial qualifications of medical experts. . . . [¶] There are sound and persuasive reasons supporting this trend toward permitting admissibility more readily, rather than rigidly compelling rejection of expert testimony." (*Brown*, at pp. 645–646.)

The focus here is whether the medical expert witness has sufficient skill or experience in the field of medical practice involved in the malpractice claim, such that his testimony will assist the jury in the search for the truth. "Where a witness has disclosed sufficient knowledge, the question of the degree of knowledge goes more to the weight of the evidence than its admissibility." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38 [210 Cal.Rptr. 762, 694 P.2d 1134] (*Mann*)).

■ It must also be remembered that nothing we have said prevents defendant from vigorously cross-examining Pineda at trial. As stated by our Supreme Court in *Brown, supra*, 11 Cal.3d at p. 646: "[I]f the threshold test of general testimonial qualifications is found to be met and the witness is permitted to testify on direct examination, he is subject to as penetrating a cross-examination as the ingenuity and intellect of opposing counsel can devise. This inquiry may challenge not only the knowledge of the witness on the specific subject at issue, but also the reasons for his opinion and his evaluation of any written material upon which he relied in preparation for his testimony. [Citation.] Further, a defendant is free to argue that the witness' testimony is not entitled to acceptance or credibility because he lacks personal acquaintance with the subject at the time the alleged negligent act occurred, and defendant may produce his own witnesses in rebuttal. These measures are more than adequate to protect a defendant's interests."

Defendant also contends that even if Pineda's declaration was improperly excluded, it lacks evidentiary value "because it fails to identify any facts,

evidence or basis for the opinions asserted therein.” However, the trial court did not sustain defendant’s objection on that basis, instead relying solely on the locality factor. Because the court rejected Pineda’s declaration for all purposes, it had no occasion to reach the further issue of whether the declaration lacked sufficient evidentiary value. We decline to address that issue in the first instance on appeal.

■ A trial court “will be deemed to have abused its discretion if the witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury.” (*Mann, supra*, 38 Cal.3d at p. 39.) Such is the case here. Accordingly, we conclude the trial court abused its discretion in sustaining defendant’s locality objection. In light of our conclusion, we need not address the parties’ remaining arguments.

DISPOSITION

The judgment is reversed.

Humes, P. J., and Margulies, J., concurred.

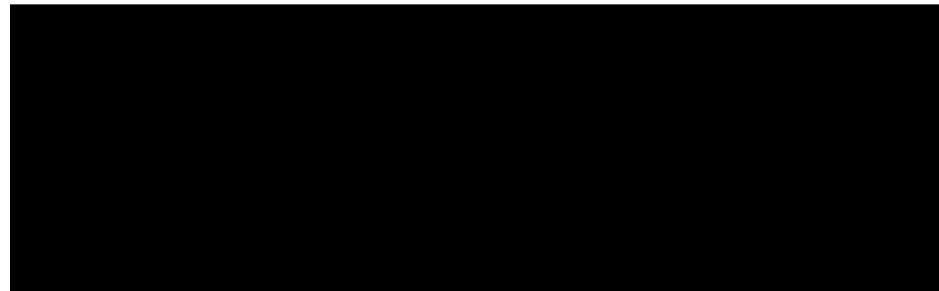
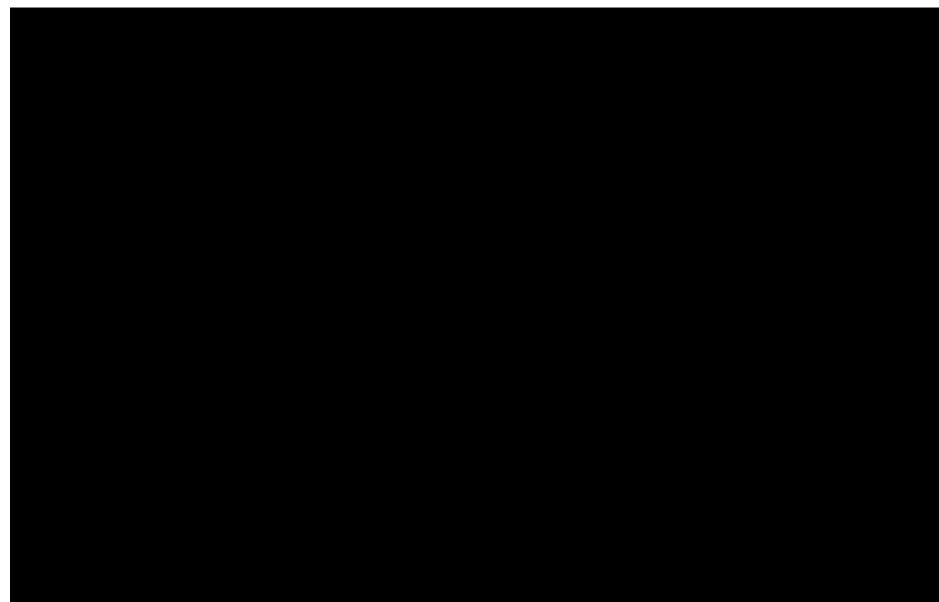
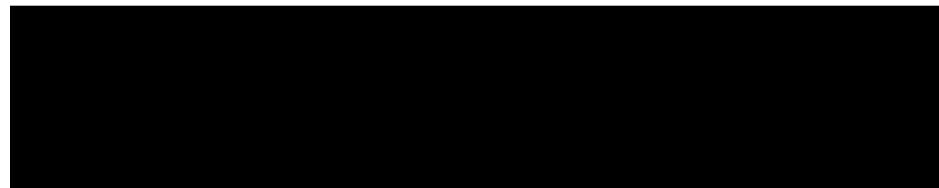
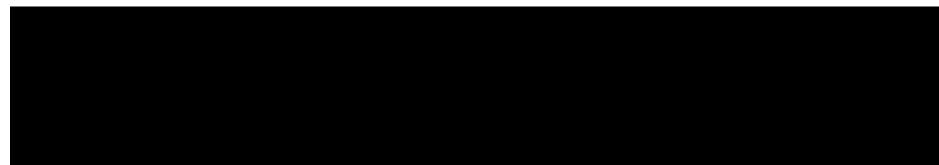
[No. E062624. Fourth Dist., Div. Two. Aug. 10, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
CLIFTON LEE GIBSON, Defendant and Appellant.

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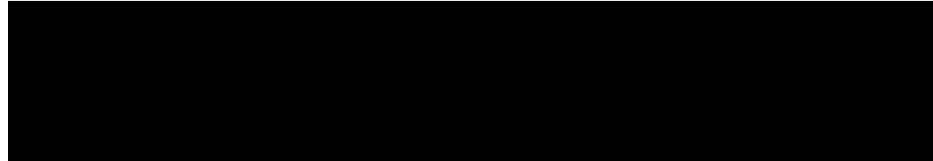
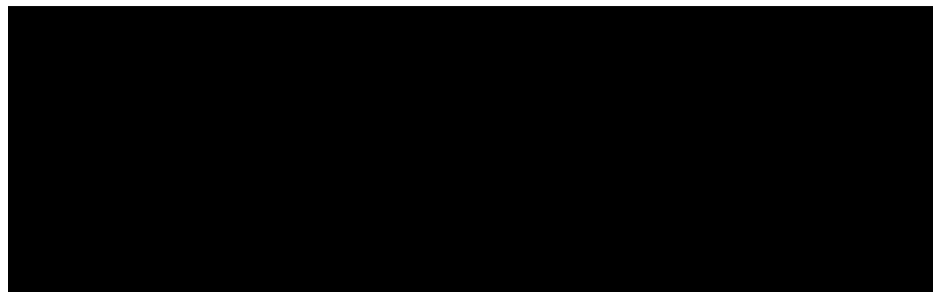
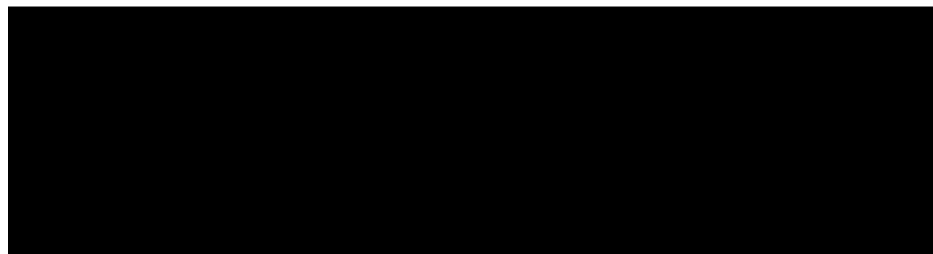
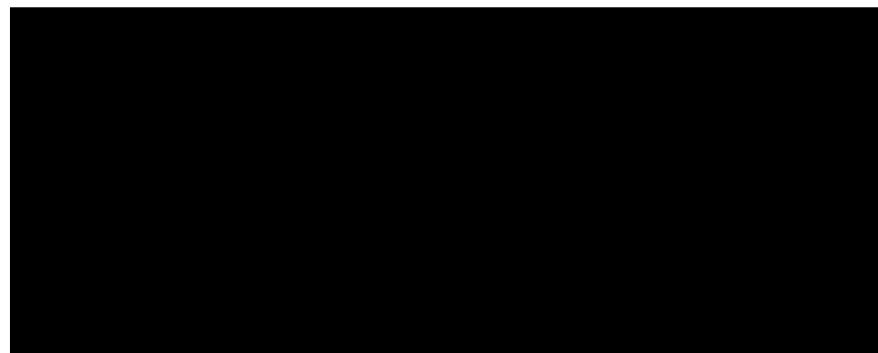


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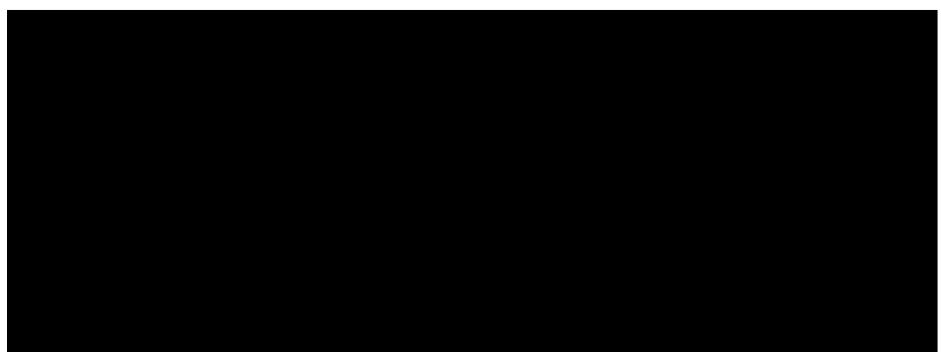
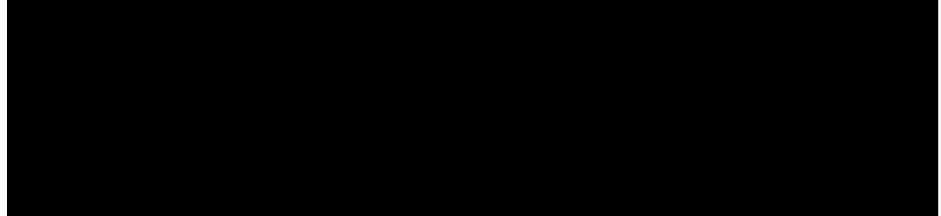
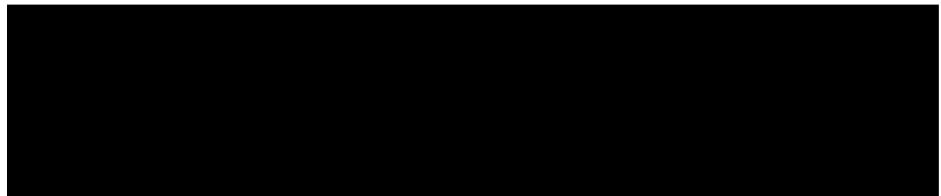
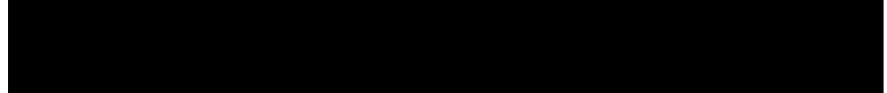
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COUNSEL

Center for Juvenile Law and Policy, Loyola Law School and Sean K. Kennedy for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

RAMIREZ, P. J.—In 1996, defendant Clifton Lee Gibson was tried as an adult and convicted of first degree murder with special circumstances (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17)),¹ assault with a firearm (§ 245, subd. (a)(2)), and robbery (§ 211), which were committed when he was 17 years old, with two adult codefendants. He was ultimately sentenced to life without possibility of parole (LWOP) for the murder, consecutive to a determinate term of 12 years four months in prison. In 2014, he filed a petition to recall his sentence pursuant to section 1170, subdivision (d)(2), which was denied by the trial court on the ground he failed to demonstrate he had been rehabilitated or that he was remorseful. Defendant appealed.

On appeal, defendant argues the trial court (1) improperly limited applicability of section 1170, subdivision (d)(2) relief to juvenile defendants who did not actually kill the victim; (2) abused its discretion in denying the petition

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

despite evidence to support the existence of all the statutory factors; and (3) “flouted *Miller* and *Gutierrez*.² We affirm.

BACKGROUND

The facts of the crime are taken from our opinion in the original appeal filed by defendant following his conviction (*People v. Gibson* (Sept. 9, 1998, E019971) [nonpub. opn.]): On June 8, 1994, in Big Bear, California, defendant, his brother Daniel, and a friend Jeffory Paxton approached a station wagon in which four men were sleeping. (*Ibid.*) The defendant and his companions wanted money for gas. (*Ibid.*) Paxton banged on the driver’s side window with a cocked nine-millimeter gun and demanded the men’s wallets. (*Ibid.*) The men complied with Paxton’s request, offering no resistance. (*Ibid.*) Paxton’s gun discharged, and subsequently defendant fired a shot from his .22 revolver. (*Ibid.*) The bullet from defendant’s revolver struck and killed one the men, while the bullet from Paxton’s gun struck another of the men, who suffered permanent injuries. (*Ibid.*)

After the shooting, defendant and his companions drove away, crashing their car during their flight. (*People v. Gibson, supra*, E019971.) At the time of the shooting, defendant was 17 years old, and had no prior criminal record. (*Ibid.*) Defendant alleged Paxton was the ringleader and primary participant in the crime. (*Ibid.*)

Defendant was charged with murder with special circumstances (§§ 187, subd. (a), 190.2, subd. (a)(17) [felony murder]; count 1); attempted murder (§§ 664, 187, subd. (a); count 2); and robbery (§ 211; count 3). It was further alleged that in the commission of all three counts, defendant and Paxton personally used a firearm (§ 12022.5, subds. (a) & (d)), and that defendant and Paxton personally inflicted great bodily injury as to the robbery victim. (§ 12022.7).³ Following a jury trial, defendant was convicted of first degree murder with a true finding of the felony-murder special circumstance, assault with a firearm (§ 245, subd. (a)(2)) as a lesser offense within attempted murder on count two, and robbery. Defendant was sentenced to LWOP on count one, consecutive to a determinate sentence of 18 years four months for the balance of the convictions and enhancement allegations.

In 1998, on direct appeal, the convictions were affirmed, but the matter was remanded for resentencing to correct the improper imposition of multiple

² Referring to *Miller v. Alabama* (2012) 567 U.S. 460 [183 L.Ed.2d 407, 132 S.Ct. 2455], and *People v. Gutierrez* (2014) 58 Cal.4th 1354 [171 Cal.Rptr.3d 421, 324 P.3d 245] (*Gutierrez*).

³ Additional allegations that a principal was armed with a firearm (§ 12022, subd. (a)(1)) and relating to Paxton’s prior convictions were pled, but are not relevant here.

enhancements for count 3. (*People v. Gibson, supra*, E019971.) On remand, defendant was resentenced to LWOP followed by a consecutive determinate term of 12 years four months, for the balance of the convictions and enhancement allegations.

On April 25, 2014, defendant filed a petition for recall of his sentence pursuant to section 1170, subdivision (d)(2). The People opposed the petition. After an evidentiary hearing, the court denied the petition. The court concluded that section 1170, subdivision (d)(2) applied to an aider and abettor, or the nonkiller, and found that defendant did not establish he had been rehabilitated or that he felt remorse. Defendant appeals this ruling.

DISCUSSION

1. *Development of Statutory and Decisional Law Affecting Sentences for Juveniles Convicted of Special Circumstances Murder.*

In order to provide context for our discussion, we provide a brief review of the statutory enactments and landmark decisions which govern our analysis. We begin with the year of defendant's offense, 1994.⁴ At that time, Penal Code section 190.5, subdivision (a), prohibited the imposition of the death penalty upon any person who was under the age of 18 at the time of the commission of the crime.

Subdivision (b) of section 190.5 provided that "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." Prior to 2014, this section was interpreted to mean that 16 or 17 year olds who commit special circumstance murder *must* be sentenced to LWOP, *unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life. (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1141 [33 Cal.Rptr.2d 791], disapproved by *Gutierrez, supra*, 58 Cal.4th at pp. 1370–1371.) Defendant was sentenced to LWOP two years after the *Guinn* decision was published.

In 2010, the United States Supreme Court decided that the Eighth Amendment prohibited the imposition of an LWOP sentence on a juvenile offender who committed a nonhomicide crime and, while the

⁴ A criminal defendant is entitled to the application of statutes in effect at the time his offense was committed. (See *Miller v. Florida* (1987) 482 U.S. 423, 435–436 [96 L.Ed.2d 351, 107 S.Ct. 2446].)

defendant need not be guaranteed eventual release from the life sentence, he must have some realistic opportunity to obtain release before the end of the life term. (*Graham v. Florida* (2010) 560 U.S. 48, 74–75 [176 L.Ed.2d 825, 130 S.Ct. 2011].) Also in December 2010, State Senator Yee introduced Senate Bill No. 9 (2011–2012 Reg. Sess.) (Senate Bill 9) to the California Senate, an act to amend Penal Code section 1170, adding subdivision (e)(1). (Later renumbered § 1170, subd. (d)(2), with modifications.) This amendment permitted persons who were under the age of 18 at the time of the commission of an offense for which the defendant was sentenced to LWOP to petition for recall and resentencing after serving not less than 10 years, nor more than 15 years of that term as of January 1, 2012.

■ On June 25, 2012, the United States Supreme Court revisited the issue of LWOP sentences for juveniles in holding that the Eighth Amendment forbade a sentencing scheme that mandated LWOP for juvenile offenders convicted of first degree murder because it precludes consideration of the juvenile’s chronological age and its hallmark features. (*Miller v. Alabama*, *supra*, 567 U.S. at pp. 477–478 [132 S.Ct. at pp. 2468–2469].) In so holding, however, the Supreme Court cautioned that “Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” (*Id.* at p. 480 [132 S.Ct. at p. 2469].) In other words, the “categorical bar” on LWOP terms for juveniles applied “only to nonhomicide crimes.” (*Id.* at p. 473 [132 S.Ct. at p. 2465].)

On September 30, 2012, the Legislature enacted Senate Bill 9, which went into effect on January 1, 2013. In its final version, the provision affecting juveniles sentenced to LWOP was renumbered as section 1170, subdivision (d)(2), and a defendant could bring a petition for recall and resentencing after serving 15 years, rather than 10, as in the original version. Effective January 1, 2014, the Legislature passed Senate Bill No. 260 (2013–2014 Reg. Sess.), which added sections 3051, 3046, subdivision (c), and 4801 to the Penal Code. That section requires the Board of Parole Hearings to conduct a youth offender parole hearing during the 15th, 20th, or 25th year of a juvenile offender’s incarceration, depending on the offender’s controlling offense. (§ 3051, subd. (b)(1)–(3).) However, by its terms, section 3051 does not apply to cases in which the offender was sentenced to LWOP. (§ 3051, subd. (h).)

■ On January 25, 2016, the United States Supreme Court held that *Miller*’s holding that mandatory LWOP sentences for juvenile homicide

offenders violated the Eighth Amendment announced a new substantive rule that was retroactive in cases on collateral review. (*Montgomery v. Louisiana* (2016) 577 U.S. ____ [193 L.Ed.2d 599, 136 S.Ct. 718, 734, 736].) The court also held that giving *Miller* retroactive effect does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory LWOP. (*Montgomery, supra*, at p. ____ [136 S.Ct. at p. 736].) Instead, allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity will not be forced to serve a disproportionate sentence. (*Ibid.*)

We now examine defendant's claims of error pertaining to the denial of his petition to recall his LWOP sentence.

2. *The Decision to Recall a Sentence Pursuant to Section 1170, Subdivision (d)(2) Is Discretionary.*

Defendant argues that the trial court abused its discretion in denying his recall petition. He also asserts that reversal is required because the trial court incorrectly interpreted the statute as applying only to persons convicted of murder who were not the actual killers, and that in denying the petition, the lower court "flouted *Miller* and *Gutierrez*." While we agree the trial court misconstrued certain language relating to one factor to be considered, any error was harmless.

■ Section 1170, subdivision (d)(2), permits a defendant serving an LWOP sentence to file a petition seeking recall and resentencing if he was under the age of 18 at the time of the commission of the offense, providing his offense did not involve torture, and providing the victim was not a public safety official. Section 1170, subdivision (d)(2)(E) requires the court to conduct a hearing to consider whether to recall the sentence. There are several factors to be considered by the court in determining whether to recall and resentence. (§ 1170, subd. (d)(2)(F).)

These provisions authorize a court to recall the sentence and to resentence defendant under certain conditions, but the language is permissive, not mandatory. The court has the discretion to recall the sentence previously ordered and to resentence the defendant in the same manner as if the defendant had not previously been sentenced, providing that any new sentence is no greater than the original sentence. (§ 1170, subd. (d)(2)(G).)

The statute thus confers broad discretion on the trial court in considering relevant factors and determining whether to recall the sentence. This is the same discretion that is exercised pursuant to section 190.5, subdivision (b), which confers discretion upon the trial court to sentence a 16- or 17-year-old

juvenile convicted of special circumstance murder to life without parole or to 25 years to life. (See *Gutierrez, supra*, 58 Cal.4th at pp. 1360–1361.) Sentencing decisions are reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847 [62 Cal.Rptr.3d 588, 161 P.3d 1146]; *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 976–977 [60 Cal.Rptr.2d 93, 928 P.2d 1171].) Under this standard, a trial court's exercise of discretion will not be disturbed unless the trial court exercised it 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].)

a. *Section 1170, Subdivision (d)(2) Is Not Limited to Aiders/Abettors or Nonkillers.*

Defendant argues the trial court incorrectly held that section 1170, subdivision (d)(2) is limited to those convicted of first degree murder under felony-murder or aider/abettor theories who were not the actual killers. At the time of the hearing on the petition, the People orally argued that Senate Bill 9 was not intended for persons like defendant, referring to unspecified legislative history; instead, the People argued it was intended for accomplices. The trial court agreed that the felony-murder factor was intended to apply to persons who were aiders/abettors or the nonkiller. We disagree with the lower court's interpretation, but our conclusion does not compel a conclusion that the petition should have been granted.

■ In interpreting this statutory provision, we follow well-settled principles: Our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Gutierrez, supra*, 58 Cal.4th at p. 1369.) We first look to the statutory language, the words themselves, as the most reliable indicator of legislative intent. (*Ibid.*; see also *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007 [239 Cal.Rptr. 656, 741 P.2d 154].) “‘When the language is clear and unambiguous, there is no need for construction.’” (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002 [279 Cal.Rptr. 236] (*Nathaniel C.*)) We give the language its usual and ordinary meaning. (*Gutierrez, supra*, 58 Cal.4th at p. 1369.) Courts should “strive to give meaning to every word of the statute and to avoid constructions that render words, phrases, or clauses superfluous.” (*Klein v. United States of America* (2010) 50 Cal.4th 68, 80 [112 Cal.Rptr.3d 722, 235 P.3d 42].) We will “decline to follow the plain meaning of a statute only when to do so would inevitably frustrate the manifest purpose of the legislation as a whole or lead to absurd results.” (*Nathaniel C., supra*, 228 Cal.App.3d at p. 1002, citing *People v. Belletti* (1979) 24 Cal.3d 879, 884 [157 Cal.Rptr. 503, 598 P.2d 473].)

Instead, “ ‘[w]e examine the statutory language in the context in which it appears, and adopt the construction that best harmonizes the statute internally and with related statutes. [Citations.]’ ” (*People v. Whitmer* (2014) 230 Cal.App.4th 906, 917 [179 Cal.Rptr.3d 112], citing *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1149 [35 Cal.Rptr.3d 373].) We review questions of statutory construction de novo. (*People v. Christman* (2014) 229 Cal.App.4th 810, 816 [176 Cal.Rptr.3d 884].)

■ Section 1170, subdivision (d)(2)(A)(i), provides that when a defendant who was under 18 years of age at the time of the commission of the offense for which he was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may petition the court for recall and resentencing. This provision does not apply to defendants sentenced to LWOP for an offense where the defendant tortured the victim, or where the victim was a public safety official. (§ 1170, subd. (d)(2)(A)(ii).)

■ A petition pursuant to section 1170, subdivision (d)(2) must include the defendant’s statement that he or she was under 18 years of age at the time of the crime, was sentenced to LWOP, and include a statement describing his or her remorse and work towards rehabilitation, as well as defendant’s statement that one of the following is true: (1) the defendant was convicted pursuant to felony-murder or aiding and abetting murder provisions of the law, (2) the defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall, (3) the defendant committed the offense with at least one adult codefendant, (4) the defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation. (§ 1170, subd. (d)(2)(B).)

The court must hold a hearing to consider whether to recall the sentence if it finds by a preponderance of the evidence that the statements in the petition are true. (§ 1170, subd. (d)(2)(E).) At the hearing, the court may consider certain factors, including, but not limited to, the factors set out in the defendant’s statement pursuant to section 1170, subdivision (d)(2)(B). (§ 1170, subd. (d)(2)(F).) One such factor is whether “[t]he defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.” (§ 1170, subd. (d)(1)(F)(i).)

■ In construing statutes, we must rely on the usual, ordinary import of the language used. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 622 [10 Cal.Rptr.3d 205, 85 P.3d 2].) The “ ‘ ‘ordinary and popular’ ’ ” meaning of the word “or” is well settled as having a disjunctive meaning. (*Ibid.*) The plain and ordinary meaning of the word “or” is well established: it indicates an intention to

designate separate, disjunctive categories. (*Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 30 [115 Cal.Rptr.3d 416], citing *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 [183 Cal.Rptr. 520, 646 P.2d 191], among other authorities.) In the case of section 1170, subdivision (d)(2)(B)(i), the Legislature used the word “or” between “felony murder” and “aiding and abetting.” In so doing, it described two separate, disjunctive categories of persons serving LWOP sentences who would be eligible to petition: one type includes persons whose first degree murder liability was established under the felony-murder doctrine; the other type includes persons whose murder liability was established under aider/abettor principles.

By referring to felony murder as a theory disjoined from aider and abettor liability, it appears more likely the Legislature intended to include persons who would have been convicted of a lesser degree of homicide but for the fact it occurred during the commission of a dangerous felony. Any other interpretation renders the inclusion of the reference to “felony murder” as surplusage. The fact that the legislation does not extend to persons convicted of premeditated or deliberate murder bolsters our interpretation.

At the hearing, the People argued that “[Senate Bill] 9 was not meant for him. When you look through the legislative history, it was meant for accomplices, felony murders, it wasn’t meant for the executioner.” We reviewed the legislative history and found no evidence of such an intention. Had the Legislature intended to limit relief to persons convicted under a theory of vicarious liability but who were not the actual killers, it could have said that relief was limited to juveniles convicted under a theory of vicarious liability.

■ In none of the legislative materials is there a reference to a requirement that relief be limited to persons who did not actually commit the homicide. (Sen. Bill 9) Instead, section 1170, subdivision (d)(2) constitutes a legislative “act of lenity” designed to permit defendants to secure a “‘modification downward’ ” of their sentences, in much the same way that section 1170.126 does for “Three Strike” defendants. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1304 [155 Cal.Rptr.3d 856].)

■ There is nothing in the legislative history of section 1170, subdivision (d)(2), or in our review of the cases interpreting the statute, evincing an intent to restrict the right to seek recall and resentencing to persons convicted as accomplices or aiders and abettors. We therefore agree with the defendant’s argument that the trial court erroneously stated that relief was limited to persons who did not actually cause the death. However, the trial court’s view of legislative intent did not result in a summary denial of the petition, so any error was harmless. An ineligible defendant would not have been granted a hearing on the petition pursuant to section 1170, subdivision (d)(2)(B)(i).

■ Further, under section 1170, subdivision (d)(2)(F), the felony-murder factor was but one of several circumstances to be considered by the trial court at the hearing in deciding whether or not to recall the sentence originally imposed. In this case, the trial court properly based its decision on two appropriate factors, which are supported by the record, so any error was harmless. (See *People v. Price* (1991) 1 Cal.4th 324, 492 [3 Cal.Rptr.2d 106, 821 P.2d 610], citing *People v. Avalos* (1984) 37 Cal.3d 216, 233 [207 Cal.Rptr. 549, 689 P.2d 121] [“When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper.”]; see also *People v. Leonard* (2014) 228 Cal.App.4th 465, 503 [175 Cal.Rptr.3d 300] [applying same rationale to motions per *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 [53 Cal.Rptr.2d 789, 917 P.2d 628]], citing *People v. Cluff* (2001) 87 Cal.App.4th 991, 998 [105 Cal.Rptr.2d 80].)

b. *The Trial Court Did Not Abuse Its Discretion*

Defendant presented numerous certificates and documents in support of his petition. Other than the certificates and the “chronos,”⁵ the information provided to the court in support of the petition consisted of documents prepared by defendant himself. Of these documents, the great majority of them were created after the enactment of Senate Bill 9. There is thus a self-serving quality to much of the information submitted in support of the petition.

The People drew attention to the fact that nearly one-half of the exhibits point to rehabilitative efforts made just in the two years prior to the hearing. The trial court agreed with the points raised by the People in their opposition to the petition, in which the People asserted defendant’s statements of remorse and work towards rehabilitation were neither credible nor adequate given the length of time defendant had to work on those issues. The People also noted that defendant’s statements of remorse were not believable and that he made excuses for his behavior on the night of the crime. The trial court agreed.

Defendant argues in his reply brief that there is insufficient evidence to support the trial court’s findings that he did not demonstrate remorse or rehabilitation, citing the testimony of the defense expert that he believed defendant was sincerely remorseful. The record supports the court’s conclusion: the majority of defendant’s efforts at rehabilitation, as evidenced by the

⁵ A “chrono” is a Department of Corrections and Rehabilitation form 128-B, which is used to document information about inmates and inmate behavior. (Cal. Code Regs., tit. 15, § 3000.)

exhibits submitted in support of his petition, postdate the enactment of Senate Bill 9. A trier of fact could reasonably conclude that defendant's efforts were not reflective of genuine remorse or rehabilitation. Moreover, the trial court was free to reject the opinion of the expert because it was based on the late actions and expressions of the defendant. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 362–363 [97 Cal.Rptr.3d 412, 212 P.3d 692] [trial court may reject expert opinion where the basis of the opinion is unreliable hearsay or other unreliable sources of information].)

The court's misunderstanding that section 1170, subdivision (d)(2) was intended for nonkillers was but one factor out of many that were considered by the trial court. The remaining factors were properly considered and there was substantial evidence to support the trial court's ruling on the petition. The finding of one proper factor is sufficient to justify the court's decision. (See *People v. Castaneda* (1999) 75 Cal.App.4th 611, 615 [89 Cal.Rptr.2d 367] [regarding factors in aggravation to justify upper term], citing *People v. Cruz* (1995) 38 Cal.App.4th 427, 433–434 [45 Cal.Rptr.2d 148].) There was no abuse of discretion.

3. *The Trial Court Did Not “Flout Miller and Gutierrez.”*

Defendant argues that the trial court's ruling “flout[ed] *Miller* and *Gutierrez*.” Specifically, he asserts that the recent decisions barring mandatory LWOP terms for juveniles require that the defendant be permitted “to present all types of mitigation and that the sentencing authority is required to meaningfully consider” it. Moreover, he argues that the trial court refused to weigh all of the applicable factors, and that such refusal “transcends a statutory violation and has the potential to violate the ‘evolving standards of decency’ and the requirement of ‘individualized sentencing’ required by the Eighth Amendment.” Because of the limited focus of section 1170, subdivision (d)(2), we disagree.

■ The recent holding of *Miller v. Alabama*, *supra*, 567 U.S. at pages 472–473 [132 S.Ct. at page 2465] does not hold that an LWOP sentence may never be imposed upon a person who was under the age of 18 at the time of the offense. It merely requires a trial court, in exercising its discretion, to consider the “distinctive attributes of youth” and how those attributes “diminish the penological justifications for imposing the harshest sentences on juvenile offenders” before imposing LWOP on a juvenile. (*Ibid.*)

■ In *Gutierrez*, *supra*, 58 Cal.4th at page 1379, the California Supreme Court considered the constitutionality of section 190.5 in light of the pre-*Miller* line of cases interpreting the statute as creating a presumption favoring LWOP. The court held that section 190.5, applicable to persons who were 16

or 17 at the time of their offenses, did not create a presumption favoring LWOP, disapproving of *People v. Quinn, supra*, 28 Cal.App.4th 1130 and its progeny. (*Gutierrez, supra*, 58 Cal.4th at p. 1387.) Instead, it adopted an interpretation of section 190.5 that requires a sentencing court to take into account mitigating factors relating to “‘the distinctive attributes of youth,’” in deciding whether to impose LWOP or a term of 25 years to life. (*Gutierrez, supra*, 58 Cal.4th at p. 1390.) In reaching this conclusion, the California Supreme Court reasoned that *Miller* does not compel a resentencing to a lesser term where the court, in its discretion, concludes that LWOP is appropriate. (*Gutierrez, supra*, 58 Cal.4th at pp. 1379, 1380.)

■ Neither *Miller* nor *Graham* held that LWOP sentences could never be lawfully imposed on a person who was under the age of 18 at the time of the offense. Those cases only held that mandatory life without possibility of parole for a juvenile was improper and that imposition of the harshest punishment on a juvenile requires individualized sentencing that takes into account an offender’s “‘youth [and all that accompanies it].’” (*Gutierrez, supra*, 58 Cal.4th at p. 1377, quoting *Miller v. Alabama, supra*, 567 U.S. at p. 477 [132 S.Ct. at p. 2468].)

■ Nor does section 1170, subdivision (d)(2) mandate resentencing of all persons who were under the age of 18 at the time of their offenses who were sentenced to LWOP. If it were intended to be so, the Legislature would have drafted a statute mandating recall and resentencing for all persons sentenced to LWOP for crimes committed before they were 18. It would not have set out circumstances to be weighed by the court in exercising discretion to either recall the sentence, or not to recall it.

■ Finally, as *Gutierrez* makes clear, section 1170, subdivision (d)(2) is not a substitute for the initial exercise of discretion pursuant to section 190.5 at the initial sentencing, and does not eliminate the constitutional doubts arising from a presumption in favor of LWOP under the pre-*Miller* line of cases.⁶ (*Gutierrez, supra*, 58 Cal.4th at p. 1385.) The court pointed out that

⁶ This precise question is addressed in *In re Willover* (Cal.App.). We note that at least one court has expressed the view that section 1170, subdivision (d)(2) remedied any defect in the imposition of an LWOP sentence imposed before *Miller*, and that the statutory procedure under section 1170, subdivision (d)(2) constitutes an adequate remedy at law foreclosing relief by way of habeas corpus. However, that case is pending review by the Supreme Court. (*In re Kirchner* (2016) 244 Cal.App.4th 1398 [199 Cal.Rptr.3d 416], review granted May 18, 2016, S233508.) For the reasons explained in *Gutierrez*, we disagree with that conclusion.

section 1170, subdivision (d)(2)(G) requires a court that has recalled a sentence to “‘resentence the defendant in the same manner as if the defendant had not previously been sentenced.’” This gives rise to the risk that, even after granting a petition to recall a sentence, the court might apply the same presumption on resentencing. (*Gutierrez*, at p. 1384.) The court also observed that notwithstanding the potential mechanism for resentencing, an LWOP sentence imposed pre-*Miller* remains fully effective. (*Gutierrez, supra*, 58 Cal.4th at p. 1360.)

■ The trial court did not “flout *Miller* and *Gutierrez*” because the vehicle defendant chose to implement does not compel a review of the constitutionality of an LWOP sentence imposed upon a defendant who was under the age of 18 at the time of his crime. Defendant chose to file a petition to recall and resentence him pursuant to section 1170, subdivision (d)(2), a discretionary application addressed to the court’s consideration of circumstances showing the defendant has rehabilitated himself or demonstrated remorse. It is not a vehicle for reconsidering the constitutionality of a sentence in light of the “distinctive attributes of youth,” as required by *Miller* and its progeny, in light of an improper presumption favoring imposition of LWOP.

■ Defendant could have filed a petition for writ of habeas corpus, seeking retroactive application of *Miller* on collateral review. (See *Montgomery v. Louisiana, supra*, 577 U.S. ____ [193 L.Ed.2d 599, 136 S.Ct. 718, 734]; see also *In re Rainey* (2014) 224 Cal.App.4th 280, 287–290 [168 Cal.Rptr.3d 719], review granted June 11, 2014, S217567 [decided before *Montgomery*, but reaching the same conclusion].) We do not foreclose that option here if defendant has not already availed himself of that remedy, notwithstanding our conclusion that the trial court did not abuse its discretion: defendant’s sentence was imposed at a time when *Guinn* was the prevailing authority and he would be entitled to a new sentencing hearing at which the *Miller* criteria were properly considered, if that was not done.⁷ We simply hold that based on the material presented to the trial court in support of a recall petition filed pursuant to section 1170, subdivision (d)(2), the trial court did not abuse its discretion.

⁷ However, the record does not include the original sentencing proceedings, so we cannot determine if the court found defendant to be someone for whom LWOP would be an appropriate sentence in the first instance. (See *Gutierrez, supra*, 58 Cal.4th at p. 1380.)

DISPOSITION

The judgment is affirmed.

Hollenhorst, J., and Slough, J., concurred.

Appellant's petition for review by the Supreme Court was denied November 16, 2016, S237364.

[No. A145411. First Dist., Div. Four. Aug. 10, 2016.]

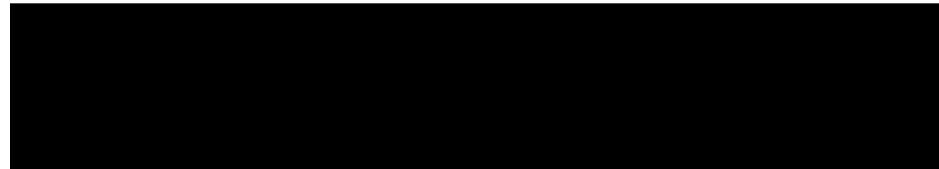
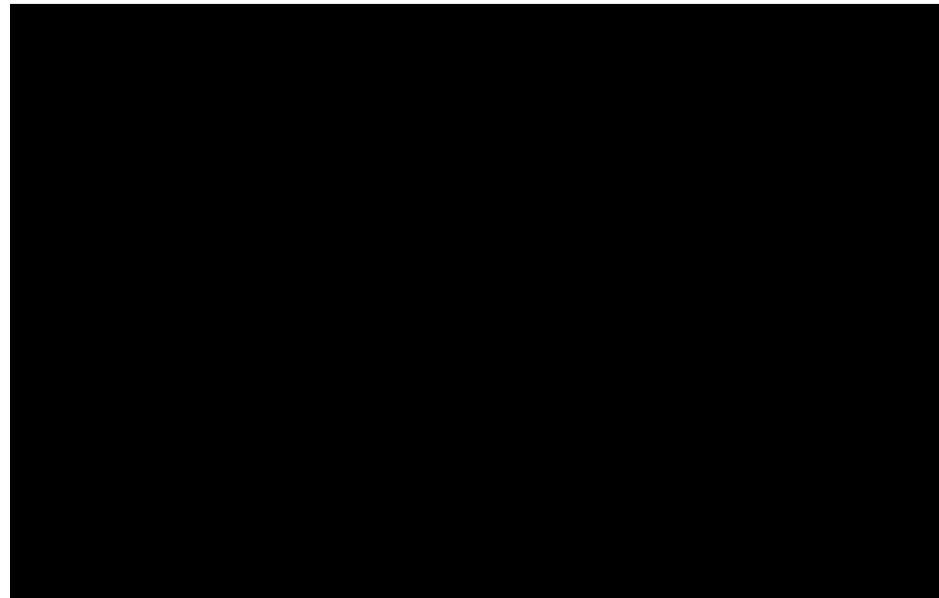
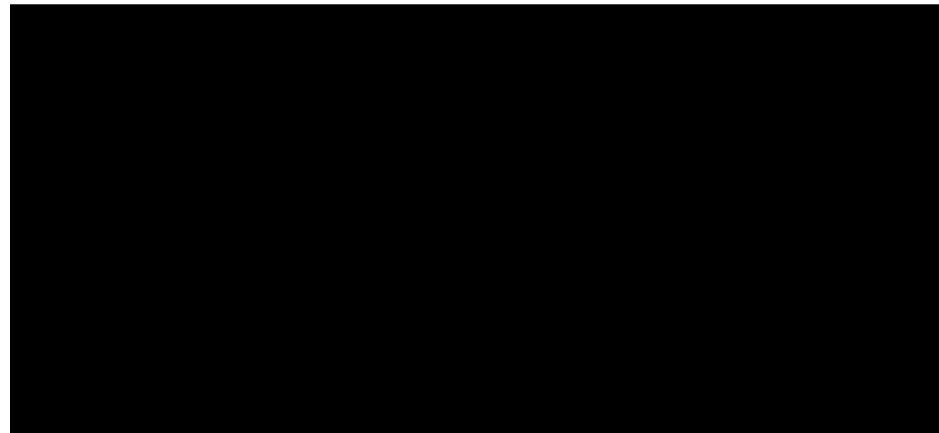
In re ANA C., a Person Coming Under the Juvenile Court Law.
THE PEOPLE, Plaintiff and Respondent, v.
ANA C., Defendant and Appellant.

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, S237208.

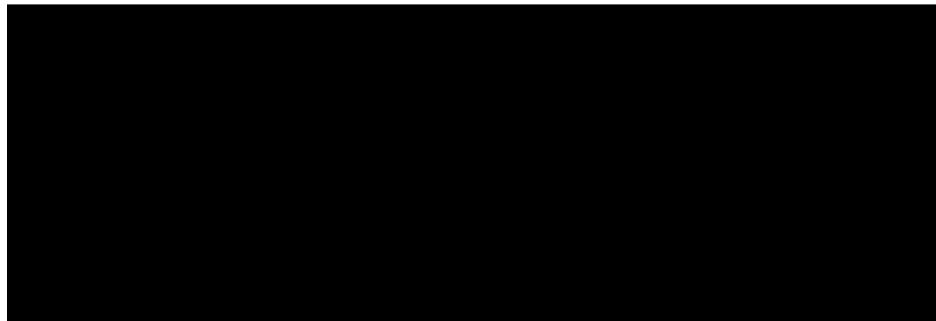
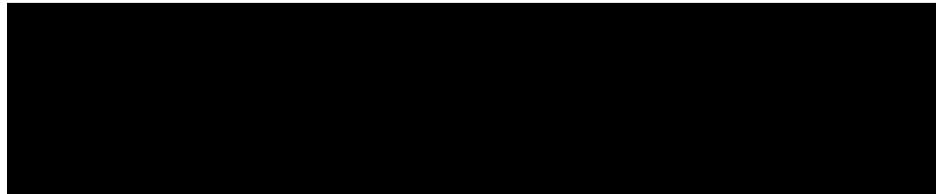
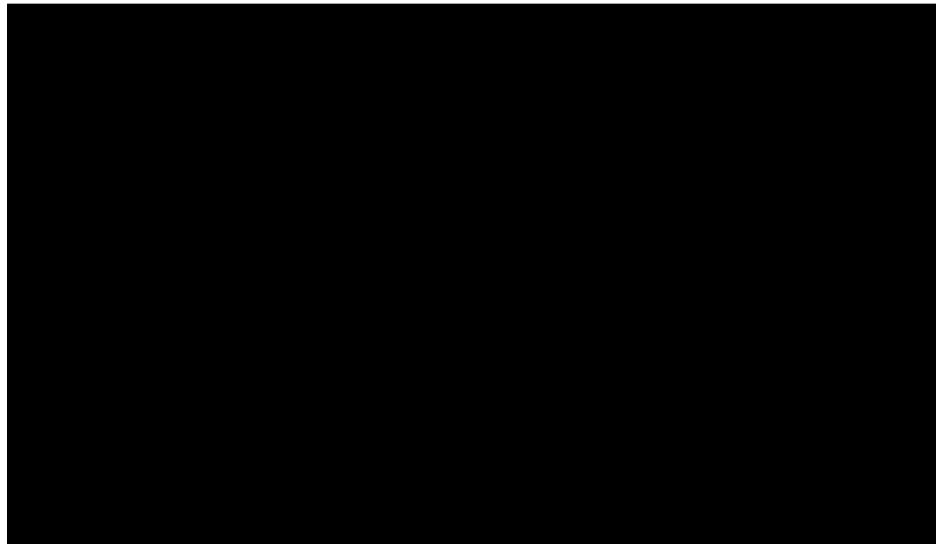
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COUNSEL

Christopher Love, 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 Huy T. Luong, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

STREETER, J.—Ana C. (Minor), a ward of the juvenile court, appeals a dispositional order continuing her wardship, removing her from parental custody, committing her to the San Mateo County juvenile rehabilitation facility, the Margaret J. Kemp Camp for Girls (Girls Camp), and imposing various conditions of probation. The sole focus of her appeal is on whether six of these probation conditions are facially unconstitutional for vagueness. We vacate one of the challenged conditions and modify two others, but otherwise affirm.

I. BACKGROUND

In August 2014, Minor, then 17 years old, was arrested following a joyriding incident involving a stolen car. According to the probation report, a

California Highway Patrol officer spotted the car driving erratically on Highway 101 and initiated a traffic stop, but the car accelerated to a speed exceeding 90 miles per hour and eventually crashed along the side of a freeway off-ramp. Appellant and two friends emerged from the car. The two others, one of whom was Minor's boyfriend, Eduardo F., fled the scene, but Minor was arrested. Minor falsely reported to the arresting officer that she had been driving. The officer determined that Eduardo F. had been driving, which was confirmed when, following Eduardo F.'s later arrest, he admitted to having been the driver. There was also evidence that, before the crash, Minor had been drinking. Following her arrest, she submitted to a blood test, which showed a blood-alcohol level of 0.01 percent.

Based on this incident, the district attorney filed a petition under section 602 of the Welfare and Institutions Code¹ charging Minor with stealing a vehicle (Veh. Code, § 10851, subd. (a)), driving a vehicle with wanton disregard for the safety of others (Veh. Code, § 2800.2), possession of stolen property (Pen. Code, § 496, subd. (a)), selling a vehicle without the vehicle registration number (Veh. Code, § 10751, subd. (a)), displaying a false license plate (Veh. Code, § 4463, subd. (a)(1)), resisting a peace officer (Pen. Code, § 148, subd. (a)(1)), possessing burglary tools (Pen. Code, § 466), giving false information to a peace officer (Veh. Code, § 31), and falsely reporting a crime to a peace officer (Pen. Code, § 148.5, subd. (a)). Minor admitted two misdemeanor counts (resisting arrest, and falsely reporting a crime) and the remaining counts were dismissed.

In August and September 2014, the juvenile court sustained the section 602 petition, as modified, and declared Minor to be a ward of the court with a maximum confinement time of 14 months, detaining her in the custody of her mother, and imposing various conditions of probation. Among the conditions of probation was a curfew requiring Minor to be home between 10:00 p.m. and 6:00 a.m.; a stay-away order barring Minor from seeing Eduardo F.; a ban on possession or use of alcohol, drugs or tobacco (the Alcohol, Drugs and Smoking Ban); a ban on possession of drug paraphernalia (the Drug Paraphernalia Ban); and a requirement that Minor attend school regularly (the School Attendance Requirement). For the first 30 days of Minor's wardship, the court placed her under house arrest in her mother's home, subject to electronic monitoring (the Electronic Monitoring Condition). Minor was directed to "obey all rules and regulations of the Electronic Monitoring Program," and, while she was subject to electronic monitoring, the probation department was given discretion to detain her for up to five days in juvenile hall for any "violation of Court orders or the Electronic Monitoring Agreement."

¹ Unless otherwise specifically designated, all further statutory references are to the Welfare and Institutions Code.

Within three weeks of the declaration of her wardship, according to a probation report, Minor left her mother's home without permission and cut her electronic monitoring bracelet from her ankle. As a result, she was charged in a second section 602 petition with misdemeanor vandalism, and in a section 777 notice of probation violation she was charged with violating the terms of her probation. On November 5, 2014, Minor admitted the vandalism allegation, and her maximum confinement time was extended to 18 months. Minor was detained in juvenile hall for 27 days, and ordered to participate in family preservation services so that she and her mother could receive counseling assistance designed to facilitate successful at-home completion of her probation. The Electronic Monitoring Condition, which was limited by its terms to a 30-day period, was vacated.

Upon a referral from the probation department based on a report that Minor left her mother's home in violation of her curfew, on March 19, 2015, Minor was found to have violated her probation. The court ordered 30 days of detention in juvenile hall and committed Minor to the G.I.R.L.S. Program, an out-of-home placement,² but stayed the G.I.R.L.S. Program commitment in order to give Minor another chance to demonstrate that she could meet the terms of her probation while detained at home. At the section 777 hearing, in light of the reportedly strained relationship between Minor and her mother, the court ordered mediation in addition to the previously ordered family preservation services.

In April 2015, according to a probation report, Minor left her mother's home in violation of her curfew again, this time for a period of several days. After finding Minor to be in violation of her probation, on June 15, 2015, the juvenile court determined that in-home detention had failed, removed Minor from her mother's custody, and ordered her into the G.I.R.L.S. Program at Girls Camp (the June 15 Dispositional Order). The June 15 Dispositional Order was structured to anticipate what would occur once Minor completed phase one of the G.I.R.L.S. Program. When released from Girls Camp, Minor was to begin phase two of the G.I.R.L.S. Program and was to return to her

² According to the website of the San Mateo County Probation Department, the "G.I.R.L.S. (Gaining Independence and Reclaiming Lives Successfully) Program is based on gender-responsive principles Gender-responsiveness is the idea that our girls commit crimes for different reasons than boys, therefore if we can address those issues we can reduce their criminal risk. . . . [¶] Referrals to the G.I.R.L.S. Program are made at the pre-trial and dispositional hearing stages. . . . The G.I.R.L.S. program is a three phase program with phase I beginning in custody [at Girls Camp]." (San Mateo Co. Probation Dept., G.I.R.L.S. Program <<http://probation.smcgov.org/girls-program>> [as of Aug. 10, 2016].) In light of the references to the G.I.R.L.S. Program in the appellate record, and for purposes of clarity in setting forth the probationary context here, we take judicial notice, on our own motion, of the official explanation of this program found on the website of the San Mateo County Probation Department. (See Evid. Code, §§ 452, subd. (c), 459, subd. (a); *Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134 [219 Cal.Rptr. 661] [judicial notice may be taken of official acts of county].)

mother's custody, but would remain subject to the conditions of probation that were originally imposed on her in September 2014, with some additions and modifications.

Several of the added conditions in the June 15 Dispositional Order focused on alcohol and drug use and on Internet activity.³ To prevent interference with chemical testing for drug usage, Minor was barred from "consum[ing] any poppy seed products or other substances known to adulterate or interfere with chemical testing" (the Poppy Seed Products Ban). To track Minor's Internet activities, the court imposed an electronic search condition requiring Minor to surrender, upon demand by her probation officer or a peace officer, all encryption keys or passwords to electronic devices used by her. And to prevent deletion of digital data from any of her electronic devices, the court ordered that "[t]he Minor shall not possess or utilize any program or application, on any electronic data storage device, that automatically or through a remote command deletes data from that device" (the Data Deletion Tools Ban).

The June 15 Dispositional Order also reinstated the Electronic Monitoring Condition, placing Minor under electronically monitored house arrest for at least 30 days following her release from Girls Camp. Minor's probation officer was given discretion, as appropriate, to extend the time Minor will be subject to the electronic monitoring, to detain Minor at Girls Camp for violation of electronic monitoring program rules, to lift or impose house arrest, and to adjust Minor's curfew. The June 2015 Dispositional Order stated: "During the Minor's time in the Girls Program, the probation officer has the discretion . . . to place the Minor on and vacate the Electronic Monitoring Program, . . . or House Arrest/Supervision, and to impose or adjust a curfew."

Minor timely appealed, and now argues that the Alcohol, Drugs and Smoking Ban, the Drug Paraphernalia Ban, the Poppy Seed Products Ban, the Electronic Monitoring Condition, the Data Deletion Tools Ban, and the School Attendance Requirement are unconstitutionally vague.⁴

³ There was evidence in one of the probation reports that Minor's mother had seen images of her on Facebook using alcohol.

⁴ The notice of appeal specifies the June 15 Dispositional Order as the order appealed from. Even though four of the six probation conditions challenged in the appeal were originally imposed in September 2014, there is no issue of appealability here since all six of the challenged probation conditions were either imposed or reimposed in the June 15 Dispositional Order and are fully set forth in that order. (Cf. *In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1137 [116 Cal.Rptr.3d 84] (*Shaun R.*) [in juvenile probation case where a probationer appealed from a 2009 dispositional order and sought to bring a vagueness challenge to multiple

II. DISCUSSION

A. Applicable Law in Probation Cases Involving Claims of Facial Vagueness

■ It is just as true for juveniles as it is for adults that probationers “ ‘do not enjoy ‘the absolute liberty to which every citizen is entitled.’ ”’ (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1350 [159 Cal.Rptr.3d 335] (*Pirali*).) If anything, “[t]he permissible scope of discretion in formulating terms of juvenile probation is even greater than that allowed for adults. ‘[E]ven where there is an invasion of protected freedoms ‘the power of the state to control the conduct of children reaches beyond the scope of its authority over adults’ ’ [Citation.] This is because juveniles are deemed to be ‘more in need of guidance and supervision than adults, and because a minor’s constitutional rights are more circumscribed.’ [Citation.] Thus, ‘ ‘ ‘a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court.’ ”’ (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910 [106 Cal.Rptr.3d 584] (*Victor L.*)).

■ Whether adults or juveniles, however, probationers “ ‘are not divested of all constitutional rights. ‘A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a [constitutional] challenge on the ground of vagueness. . . .’ ’ [Citation.]”’ (*Pirali, supra*, 217 Cal.App.4th at p. 1350.) “The prohibition on vagueness is rooted in ‘ ‘ ‘ordinary notions of fair play and the settled rules of law,’ and a statute that flouts it ‘violates the first essential of due process.’ ’ ’ [Citation.] This concern for fair warning is aimed at ensuring that a ‘ ‘ ‘person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited, so that he may act accordingly.’ ’ ’ [Citation.] The fear is that vague laws will ‘ ‘ ‘trap the innocent.’ ’ ’ [Citation.] More broadly, ‘ ‘ ‘a law that is ‘void for vagueness’ . . . ‘impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’ ”’ (*In re Kevin F.* (2015) 239 Cal.App.4th 351, 357–358 [191 Cal.Rptr.3d 144] (*Kevin F.*)). “Although the [vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement,” the United States Supreme Court has “recognized . . . that the more important aspect of the vagueness doctrine ‘is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.’ ”

probation conditions, some of which were originally imposed in 2008 but were merely incorporated by reference in the 2009 order, the conditions imposed in 2008 were not appealable].)

(*Kolender v. Lawson* (1983) 461 U.S. 352, 357–358 [75 L.Ed.2d 903, 103 S.Ct. 1855] (*Kolender*).)

“A defendant may contend for the first time on appeal that a probation condition is unconstitutionally vague . . . on its face when the challenge presents a pure question of law that the appellate court can resolve without reference to the sentencing record. [Citations.]” (*Kevin F., supra*, 239 Cal.App.4th at p. 357; see *In re Sheena K.* (2007) 40 Cal.4th 875, 889 [55 Cal.Rptr.3d 716, 153 P.3d 282] (*Sheena K.*)). If the vagueness of a probation condition may be corrected “without reference to the particular sentencing record developed in the trial court” (*Sheena K., supra*, at p. 887), the condition is subject to de novo review on appeal as a matter of law (*Shaun R., supra*, 188 Cal.App.4th at p. 1143). When *Sheena K.* review is undertaken, it is important to bear in mind that not all cases of facial vagueness are cases of *unconstitutional* vagueness, involving language so obscure that it fails to give fair warning of potential violation. Context matters, even in a facial challenge. “In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that ‘abstract legal commands must be applied in a specific context,’ and that, although not admitting of ‘mathematical certainty,’ the language used must have ‘“reasonable specificity.”’” (*Sheena K., supra*, 40 Cal.4th at p. 890).⁵

Thus, the void for vagueness doctrine does not apply simply “‘because there may be difficulty in determining whether some marginal or hypothetical act is covered by [the challenged] language.’” (*People v. Morgan* (2007) 42 Cal.4th 593, 606 [67 Cal.Rptr.3d 753, 170 P.3d 129]; see also *Tapia, supra*, 129 Cal.App.4th at p. 1167 [“The fact that a statute contains ‘one or more ambiguities requiring interpretation does not make the statute unconstitutionally vague on its face’”]; *People v. Lewis* (1983) 148 Cal.App.3d 614, 618 [196 Cal.Rptr. 161] [“Vagueness challenges do not turn on the contemplation of marginal cases [citation] . . . [even where it is] easy to conjure them up . . .”].) The meaning of a challenged condition will often be plain enough

⁵ The traditional test in cases involving facial vagueness challenges to legislation is often phrased as whether the language or phrasing at issue is reasonably understandable to “ordinary people.” (See, e.g., *Kolender, supra*, 461 U.S. at p. 357 [“the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited”]; see also *People v. Tapia* (2005) 129 Cal.App.4th 1153, 1167 [29 Cal.Rptr.3d 158] (*Tapia*)). More specifically stated, however, vagueness analysis looks to whether the language in question is definite enough to “‘provide . . . a standard of conduct for those whose activities are proscribed.’” (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 567 [20 Cal.Rptr.2d 341, 853 P.2d 507], italics added.) Thus, in a juvenile probation case, the most accurate way to frame the test for vagueness is that we must ask whether the language claimed to be vague is reasonably understandable to *an ordinary juvenile of the age of the minor*. After all, probation conditions, unlike generally applicable legislation, are in effect “special ‘laws’ tailored only to” an individual probationer (*U.S. v. Loy* (3d Cir. 2001) 237 F.3d 251, 260 (*Loy*)), and here that person is a juvenile.

when its language is considered as a whole, together with related conditions, against the backdrop of governing law, or with reference to other aids to practical construction. (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 630 [78 Cal.Rptr.2d 66] (*Lopez*) [“a statute ‘will not be held void for vagueness “if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources”’ ”].)

B. *The Omission of an Express Scienter Requirement*

With one exception (her challenge to the School Attendance Requirement), Minor bases her appeal on a single argument: Because five of the challenged probation conditions in this case lack an express scienter requirement, she contends we must add one by modification. Relying primarily on *Kevin F.*, *supra*, 239 Cal.App.4th 351, and *People v. Freitas* (2009) 179 Cal.App.4th 747 [102 Cal.Rptr.3d 51] (*Freitas*), she argues that a knowledge requirement “should not be left to implication.” (*People v. Garcia* (1993) 19 Cal.App.4th 97, 102 [23 Cal.Rptr.2d 340]; see *Sheena K.*, *supra*, 40 Cal.4th at p. 890.) In her view, *Kevin F.* and *Freitas* correctly apply *Sheena K.*, *supra*, 40 Cal.4th at page 890, our Supreme Court’s most recent decision addressing “the need for a scienter clause in probation cases.” Without an express scienter requirement, she argues, she might innocently and inadvertently violate her probation. (See *Pirali*, *supra*, 217 Cal.App.4th at p. 1352; *People v. Kim* (2011) 193 Cal.App.4th 836, 843 [122 Cal.Rptr.3d 599] (*Kim*); *Victor L.*, *supra*, 182 Cal.App.4th at p. 912.) With respect to each of the five conditions she challenges for lack of an express scienter requirement, Minor claims there is no need to resort to the specific facts of her situation. Each condition challenged on this ground “is either constitutional or unconstitutional [on its face] in every juvenile case,” without reference to the individualized circumstances that drove its imposition.

By way of response, the Attorney General contends we should follow *People v. Gaines* (2015) 242 Cal.App.4th 1035 [195 Cal.Rptr.3d 842] (*Gaines*), review granted and opinion superseded February 17, 2016, S231723, and imply a scienter requirement.⁶ (See also *People v. Appleton* (2016) 245 Cal.App.4th 717, 728 [199 Cal.Rptr.3d 637]; *People v. Contreras* (2015) 237 Cal.App.4th 868, 887 [188 Cal.Rptr.3d 698]; *People v. Moore* (2012) 211 Cal.App.4th 1179, 1186 [150 Cal.Rptr.3d 437] (*Moore*).) Under this line of authority, we are told, so long as the proscribed conduct is described with sufficient clarity—which the Attorney General contends is the

⁶ Late last year, the Supreme Court granted review in another case, presenting the same issue, from the same appellate panel that decided *Gaines*. (See *People v. Hall* (2015) 236 Cal.App.4th 1124 [187 Cal.Rptr.3d 301], review granted and opinion superseded Sept. 9, 2015, S227193.)

case for each of the conditions challenged as lacking an express knowledge requirement—the “willfulness” standard in probation revocation proceedings provides adequate protection against unwitting violation. Reminding us that *Sheena K.* “recognized a limited class of claims [eligible to be] raised . . . for the first time on appeal,” the Attorney General argues that *Sheena K.* review for facial vagueness is subject to “the overriding principle” that “‘discretion to excuse forfeiture *should be exercised rarely* and only in cases presenting an important legal issue’ ” (quoting *Sheena K., supra*, 40 Cal.4th at p. 888, fn. 7, italics added). Here, the Attorney General contends, Minor’s claims of facial unconstitutionality raise no such issue, and in any event cannot be resolved without reference to the facts and circumstances surrounding the imposition of these conditions on Minor.

The Attorney General insists that *Gaines*, not *Kevin F.*, “provides the better rule.” “Until our Supreme Court rules differently, we will follow its lead on this point” (*Pirali, supra*, 217 Cal.App.4th at p. 1351), which may be found in *Sheena K.*, as we explained in *Kevin F.* In the meantime, we will concern ourselves here only with the narrower question of whether, under the cases calling for the addition of an explicit knowledge requirement, of which *Kevin F.* is but a recent example, such a modification is warranted by the particular phrasing of the conditions presented for review. Under *Sheena K.*, “an appellate claim—amounting to a ‘facial challenge’—that phrasing or language of a probation condition is unconstitutionally vague and overbroad because, for example, of the absence of a requirement of knowledge . . . , does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts,” which is “a task that is well suited to the role of an appellate court.” (*Sheena K., supra*, 40 Cal.4th at p. 885.)

In undertaking *Sheena K.* review here, it is important to note that, even where a challenged probation condition is phrased in language raising genuine due process concerns, the addition of an express knowledge requirement may not be adequate or appropriately fitted to the task of curing vagueness. “Though in some situations, a scienter requirement may mitigate” lack of fair warning due to vagueness, “such a requirement will not cure all defects for all purposes” (*Loy, supra*, 237 F.3d at p. 265.) That is why in *Kevin F.*, recognizing that facial vagueness is context sensitive, we declined to take a categorical approach to the express scienter issue in probation conditions cases, either always dispensing with the need for scienter language on grounds it is unnecessary, or always finding it to be required. (*Kevin F., supra*, 239 Cal.App.4th at p. 362, fn. 5.) Instead, we saw a need to evaluate each challenged probation condition as it comes to us, on a case-by-case basis. (*Ibid.*) We now turn to specific consideration of the probation conditions challenged in this case.

C. Condition-by-condition Analysis

1. The Alcohol, Drugs and Smoking Ban

The juvenile court ordered that “[t]he Minor is not to use, possess, or be under the influence of any alcoholic beverages, controlled substances, or tobacco, including electronic cigarettes.” We see no need to add an express scienter requirement here. For the most part, the Alcohol, Drugs and Smoking Ban simply implements applicable law.

With respect to alcohol, “any person under 21 years of age who purchases any alcoholic beverage . . . is guilty of a misdemeanor.” (Bus. & Prof. Code, § 25658; see also Cal. Const., art. XX, § 22 [“no person shall sell, furnish, give, or cause to be sold, furnished, or given away any alcoholic beverage to any person under the age of 21 years, and no person under the age of 21 years shall purchase any alcoholic beverage”].) Similarly, pursuant to recent statutory amendments, it generally is illegal to sell or distribute tobacco products, including electronic cigarettes, to persons under 21 years of age (raised from the previous age limit of 18 years of age). (Pen. Code, § 308, subd. (a)(1)(A)(i), (f); Bus. & Prof. Code, §§ 22950.5, subd. (d), 22950 et seq., commonly known as the Stop Tobacco Access to Kids Enforcement Act (STAKE Act) [regulating the manner in which tobacco products may be sold and distributed and prohibiting such sales and distribution to persons under 21 years of age]; Stats. 2016, 2nd Ex. Sess. 2015–2016, chs. 7 & 8, eff. June 9, 2016.)

■ The prohibition on possession and use of alcohol in the Alcohol, Drugs and Smoking Ban is readily understandable to the average juvenile, in our view. Among young people Minor’s age, we believe these age minimums are so well known that there is no need for any express scienter requirement. Under the “fundamental principle that, in the absence of specific language to the contrary, ignorance of a law is not a defense to a charge of its violation” (*Hale v. Morgan* (1978) 22 Cal.3d 388, 396 [149 Cal.Rptr. 375, 584 P.2d 512]; see *People v. Snyder* (1982) 32 Cal.3d 590, 592–593 [186 Cal.Rptr. 485, 652 P.2d 42]), Minor can be expected to abide by the law applicable to her. Indeed, one of the other conditions imposed on her—a condition that she does not challenge—requires her to “obey all laws.”

■ With respect to controlled substances, the California Uniform Controlled Substances Act, Health and Safety Code section 11000 et seq., broadly prohibits the transportation, sale and possession of controlled substances so as to protect the health and safety of all persons within this state, except as permitted by prescription, license or other statutory authorization. (See, e.g., Health & Saf. Code, §§ 11350, 11351, 11352.) “Case law has construed these

statutes as including implicit knowledge elements. ‘[A]lthough criminal statutes prohibiting the possession, transportation, or sale of a controlled substance do not expressly contain an element that the accused be aware of the character of the controlled substance at issue ([Health & Saf. Code.] §§ 11350–11352, 11357–11360, 11377–11379), such a requirement has been implied by the courts.’ [Citation.] ‘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.”’ [Citation.] ‘Although the possessor’s knowledge of the presence of the controlled substance and its nature as a restricted dangerous drug must be shown, no further showing of a subjective mental state is required.’ [Citation.]’ (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 593 [166 Cal.Rptr.3d 187] (*Rodriguez*) [“To the extent condition 8 reinforces defendant’s obligations under the California Uniform Controlled Substances Act, the same knowledge element which has been found to be implicit in those statutes is reasonably implicit in the condition. What is implicit is that possession of a controlled substance involves the mental elements of knowing of its presence and of its nature as a restricted substance.”]; accord, *People v. Nice* (2016) 247 Cal.App.4th 928, 945–946 [202 Cal.Rptr.3d 860].)

Rodriguez adopted the implied scienter analysis of *Kim, supra*, 193 Cal.App.4th at page 847. In *Kim*, the challenged probation condition, a lifetime ban on possession of weapons and ammunition, expressly referenced Penal Code former sections 12021 and 12316, subdivision (b), which together barred possession of firearms and ammunition by felons for life.⁷ Since the appellant in *Kim*, an adult probationer who had been convicted of a felony, was already subject to these statutes, the appellate court there viewed the counterpart ban imposed as a condition of his probation as merely “implementing” the statutory scheme. The court then analyzed cases applying these statutes, and concluded that “[i]mplicit in the crime of possession of a firearm is that a person is aware both that the item is in his or her possession and that it is a firearm. We believe the same is true of a probation condition prohibiting possession of a firearm, and, by logical extension, possession of ammunition.” (*Kim, supra*, at p. 846.) Because the “conduct proscribed by [Penal Code former] sections 12021 and 12316 is coextensive with” the challenged probation condition, the court held, the “probation condition need not be modified to add an explicit knowledge requirement.” (*Kim, supra*, at p. 847.)

That was not the situation we addressed in *Kevin F.* There, a juvenile probationer was found in section 602 proceedings to have committed robbery

⁷ Those prohibitions are now contained in Penal Code sections 29800, subdivision (a)(1) and 30305, subdivision (a)(1).

and was placed on probation. (*Kevin F., supra*, 239 Cal.App.4th at p. 356.) He was subject to a statutory ban on firearm possession until age 30. (Pen. Code, § 29820, subds. (a)–(c); Welf. & Inst. Code, § 707, subd. (b)(3).) But the ban on weapons possession in his probation conditions went far beyond this statutory prohibition and covered conduct that, for him, was otherwise lawful. It was an extraordinarily broad prohibition, covering a wide range of conduct that might be considered innocent (“‘You’re not to possess any toys that look like weapons’”) or that was difficult to know was wrongful (“‘You are not to possess anything that . . . someone else might consider to be a weapon’”). (*Kevin F., supra*, at p. 357.) Because of the sheer breadth of the ban, we modified it to require the addition of express scienter language.⁸ (*Kevin F., supra*, 239 Cal.App.4th at pp. 365–366.)

In this case, by contrast, the Alcohol, Drugs and Smoking Ban reinforces otherwise applicable statutory proscriptions. *Rodriguez* applied *Kim* to a prohibition on use and possession of controlled substances even though the probation condition at issue did not, in express terms, incorporate specific sections of the California Uniform Controlled Substances Act. We take the same approach here. When read against the backdrop of applicable law, the meaning of the prohibition on possession and use of “alcoholic beverages” and “controlled substances” is plain enough without an express scienter requirement. (See *Rodriguez, supra*, 222 Cal.App.4th at p. 593; *Kim, supra*, 193 Cal.App.4th at p. 847.) It may be, to be sure, that the antismoking clause of the Alcohol, Drugs and Smoking Ban—barring Minor from possessing or using “tobacco, including electronic cigarettes”—goes beyond otherwise applicable law. When the June 15 Dispositional Order issued, electronic cigarettes were not defined as regulated “tobacco products” in Penal Code section 308 and the STAKE Act, and Minor had turned 18 by then. But even assuming that, absent the Alcohol, Drugs and Smoking Ban, Minor was free to buy and smoke cigarettes and electronic cigarettes when the June 15 Dispositional Order issued, we are satisfied there is no due process problem here. The anti-smoking clause of the Alcohol, Drugs and Smoking Ban is phrased in terms that are specific and clear enough so that an express scienter requirement is not needed.⁹

⁸ To the extent it covered a wide range of undefined objects and things that it was lawful for the minor to own (see *Kevin F., supra*, 239 Cal.App.4th at p. 360, fn. 4), the challenged condition “impact[ed] the constitutional right to possess property” (*People v. Contreras, supra*, 237 Cal.App.4th at p. 888; see *Freitas, supra*, 179 Cal.App.4th at p. 751; Cal. Const., art. I, § 1).

⁹ In her zeal to argue the irreconcilability of cases adopting the implied scienter analysis of *Moore, supra*, 211 Cal.App.4th 1179, on the one hand, and cases in line with *Kevin F., supra*, 239 Cal.App.4th 351, on the other hand, the Attorney General does not distinguish sharply between two related but distinct points in the logic of *Moore*—first, that the more clearly a probation condition defines proscribed conduct, the less need there is for an express scienter requirement (*Moore, supra*, 211 Cal.App.4th at p. 1186 [“the weapons prohibition here is

Minor relies heavily on *Freitas*, *supra*, 179 Cal.App.4th 747, a case involving a probation condition prohibiting “‘possess[ion,] . . . custody or control’” of “‘firearms or ammunition.’” (*Id.* at p. 750, fn. omitted.) In that case, a panel of the Third District Court of Appeal required the addition of express scienter language to cure facially unconstitutional vagueness. Minor points to the observation in *Freitas* that “without the addition of a scienter requirement, [the probationer] could be found in violation of probation if he merely borrows a car and, unbeknownst to him, a vehicle owner’s lawfully obtained gun is in the trunk.” (*Id.* at p. 752.) We do not think an imagined scenario in which a probationer unknowingly comes into possession of some prohibited item warrants the addition of an express scienter requirement in all circumstances. The holding in *Freitas* is not that broad when read with its facts in mind. There, the language of the condition at issue included constructive possession wording (“‘possess[ion,] . . . custody or control’”). (*Id.* at p. 750, fn. omitted.) Evidently, the *Freitas* court saw a need to mitigate the potential that that particular language might have the effect of charging the probationer with the knowledge and responsibility of third parties in some circumstances. None of the probation conditions at issue in this appeal includes constructive possession language presenting any similar concern.

2. *The Drug Paraphernalia Ban*

The Drug Paraphernalia Ban provides that “[t]he Minor shall not possess any drug paraphernalia.” As we shall explain, this condition does not simply implement a statutory prohibition. And in light of the breadth of the Drug Paraphernalia Ban, we conclude that the addition of an express knowledge requirement is necessary.

Under Health and Safety Code section 11014.5, subdivision (a), “‘Drug paraphernalia’ means all equipment, products and materials of any kind which are designed for use or marketed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging,

sufficiently precise to inform Moore of what is required of him, and for a court to determine whether the condition has been violated”]), and second, that the standard of “willfulness” (*id.* at p. 1187) in probation violation proceedings makes it unnecessary to add an express scienter requirement (*id.* at p. 1186 [“Moore’s concern that without the express addition of a scienter requirement he could be found in violation of probation for unknowing possession appears unfounded. As the People point out, a trial court may not revoke probation unless the defendant willfully violated the terms and conditions of probation.”]). Although we part company with *Moore* on the latter point for the reasons explained at length in *Kevin F.*, *supra*, 239 Cal.App.4th at pages 357–362, we agree with the initial premise of its logic. It is unnecessary to add an express scienter requirement to a prohibition that is stated with reasonable clarity. The problem with the ban on weapons possession in *Kevin F.* was that it was inherently ambiguous. (*Ibid.*)

storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance" The statute provides a nonexclusive list of items that qualify as drug paraphernalia, and specifies factors a court or other authority may consider in determining whether an object is drug paraphernalia.¹⁰ (Health & Saf. Code, § 11014.5, subds. (a), (c).)

Other provisions of the Health and Safety Code prohibit possession of such items under certain circumstances, but those provisions are not coextensive with the prohibition on simple possession of all "drug paraphernalia" set forth in the Drug Paraphernalia Ban. First, Health and Safety Code section 11364.7, subdivision (a) criminalizes possession of "drug paraphernalia," but it also requires a further specific intent to "deliver, furnish, or transfer." It provides: "Except as authorized by law, any person who delivers, furnishes, or transfers, *possesses with intent to deliver, furnish, or transfer*, or manufactures with the intent to deliver, furnish, or transfer, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance, except as provided in subdivision (b), in violation of this division, is guilty of a misdemeanor." (Health & Saf. Code, § 11364.7, subd. (a), italics added.)

Second, Health and Safety Code section 11364, subdivision (a) prohibits possession of some, but not all, types of drug paraphernalia. That subdivision states that "[i]t is unlawful to possess an opium pipe or any device, contrivance, instrument, or paraphernalia used for unlawfully *injecting or smoking* (1) a controlled substance specified in subdivision (b), (c), or (e) or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, specified in subdivision (b) or (c) of Section 11055, or specified in paragraph (2) of subdivision (d) of Section 11055, or (2) a controlled substance that is a narcotic drug classified in Schedule III, IV, or V." (Italics added.) Not every drug or controlled substance is covered by Health and Safety Code section 11364. For example, marijuana is not one of the substances listed in Health and Safety Code section 11364, subdivision (a). (See Health & Saf. Code, § 11054, subd. (d)(13) [marijuana].) An appellate court has held that the possession of a device for smoking marijuana, without more, is not a crime in California. (*In re*

¹⁰ Health and Safety Code section 11364.5 (which generally requires any business that offers or displays "drug paraphernalia" to exclude persons under 18 years of age) sets forth a similar, but not identical, definition of drug paraphernalia that applies to the term "[a]s used in this section." (Health & Saf. Code, § 11364.5, subds. (d); see *id.*, subd. (e).)

Johnny O. (2003) 107 Cal.App.4th 888, 897 [132 Cal.Rptr.2d 471].) Moreover, Health and Safety Code section 11364, subdivision (a) does not cover paraphernalia used for introducing a drug into a human body by means other than injecting or smoking, such as snorting or inhaling. Because Health and Safety Code sections 11364 and 11364.7 do not prohibit simple possession of all drug paraphernalia, “[t]his is not a situation in which it is possible to infer that a probation condition has the same implicit mental element as the penal statutes it was written to enforce.” (*People v. Carreon* (2016) 248 Cal.App.4th 866, 882 [203 Cal.Rptr.3d 857] [distinguishing *Kim* and *Rodriguez*].)

Instead, the Drug Paraphernalia Ban is similar to the weapons prohibition at issue in *Kevin F.*, which provided in part that the probationer could not “possess anything that [he] could use as a weapon.” (*Kevin F., supra*, 239 Cal.App.4th at pp. 357, 360.) That condition was “broad enough to include any object that *could* injure someone, even an ordinary household object, regardless of [the probationer’s] intent in possessing it.” (*Id.* at p. 360.) In light of the wide array of items that could be considered weapons, we concluded addition of an express knowledge requirement (specifying in part that the minor could not knowingly possess anything that he intended to use as a weapon) was necessary to provide adequate notice of the prohibited conduct and to protect against unwitting violations. (*Id.* at pp. 360–361, 365–366.) We concluded “the probationer must engage in the proscribed conduct *knowingly* (i.e., with actual intent and understanding that he possesses something constituting a weapon).” (*Id.* at p. 365.)

■ The Drug Paraphernalia Ban here is similarly open-ended. Common household items that are needed for or associated with drug use arguably could constitute “drug paraphernalia,” and thus could fall within the Drug Paraphernalia Ban even if Minor possessed them for legitimate purposes and was ignorant of their use as drug paraphernalia. As noted, a broad prohibition on Minor’s possession of ordinary objects that it is lawful for her to own “impacts the constitutional right to possess property.” (*People v. Contreras, supra*, 237 Cal.App.4th at p. 888.) For these reasons, we conclude it is necessary to modify the Drug Paraphernalia Ban to prohibit only knowing conduct—Minor “must engage in the proscribed conduct *knowingly* (i.e., with actual intent and understanding that [she] possesses something constituting [drug paraphernalia]).” (*Kevin F., supra*, 239 Cal.App.4th at p. 365.) We will modify the Drug Paraphernalia Ban to state: “The Minor shall not possess any item that she knows is drug paraphernalia.” Under this revised condition, if Minor possesses a common item that has a legitimate purpose but she is unaware it is intended for use as drug paraphernalia by someone, she will not be in violation of the condition.

3. The Poppy Seed Products Ban

The Poppy Seed Products Ban bars Minor from “consum[ing] any poppy seed products or other substances known to adulterate or interfere with chemical testing.” We see no need for an express scienter requirement here.

We are satisfied that the meaning of this clause is sufficiently comprehensible for an average 18 year old bound by it to understand. Reading the Poppy Seed Products Ban in its proper context—together with the probation condition subjecting Minor to drug testing on demand (a condition she does not challenge), and keeping in mind the references to “adulterat[ing] or interfer[ing] with chemical testing”—it is clearly designed to *protect* Minor from violating her probation based on false positive drug test results. The wording could have been more precise, since the person to whom the effect of poppy seed products or other adulterating foods on drug testing must be “known” is not clear. But despite that ambiguity, we think the meaning of the prohibition is clear enough to avoid due process concerns. In conducting a review for facial vagueness, we do not require optimum precision and exactitude. “Condemned to the use of words, we can never expect mathematical certainty from our language.” (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 110 [33 L.Ed.2d 222, 92 S.Ct. 2294].)

Given its context and purpose (see *Lopez*, 66 Cal.App.4th at p. 630), we think the wording of the Poppy Seed Products Ban adequately conveys the message to an ordinary 18 year old who knows she is subject to chemical drug testing that, for her own protection, it is her responsibility to find out what kinds of foods might cause false positive drug test results and to avoid those foods.

4. The Data Deletion Tools Ban

In an apparent effort to strengthen the electronic search condition by ensuring preservation of all of Minor’s electronic communications, the juvenile court ordered that “Minor shall not possess or utilize any program or application, on any electronic data storage device, that automatically or through a remote command deletes data from that device.” We are constrained to conclude that this clause is unconstitutionally vague on its face, and that the addition of an express knowledge requirement will not cure the defect.

Because all computing devices are “electronic data storage devices” and virtually all software programs available to consumers for those devices have the capability to “automatically” delete data—which is the purpose of the “delete” key on any keyboard and the “delete” command in any software

application—the Data Deletion Tools Ban, plainly read, bans Minor from using or possessing any smartphone or computer. We doubt that is what the court intended, but it is the unavoidable meaning of the language used. Whether this infirmity is characterized as a problem of vagueness or of overbreadth, the Data Deletion Tools Ban, as phrased, fails to give fair warning of the scope of its prohibition. (See *Victor L.*, *supra*, 182 Cal.App.4th at p. 926 [striking probation condition barring all access to Internet-enabled computers on vagueness grounds, since the ban “could ensnare a minor in a claimed probation violation even if he were engaged in completely innocent and legitimate use of a computer for scholarly or job-related purposes”]; *In re Stevens* (2004) 119 Cal.App.4th 1228, 1239 [15 Cal.Rptr.3d 168] [“the broad prohibition on use of the computer and Internet bore no relation to Stevens’s conviction for child molestation and imposed a greater restriction of his rights than was reasonably necessary to accomplish the state’s legitimate goal”].)

Perhaps the Data Deletion Tools Ban was designed to ban Minor from using apps, such as Snapchat, which allow electronic communications to be sent, received, and automatically deleted after they are read, thus effectively destroying all evidence that any communications occurred. Perhaps it was aimed at remote “erase” capability, which is available on many modern, cloud-enabled handheld devices such as iPhones to delete data from lost or stolen phones. Or perhaps the court had some other specific tool in mind. Rather than modify this condition on appeal in an effort to save it based on surmise, we think the better course is to vacate it and invite modification on remand by using examples designed to narrow it to its intended purpose. (See *Lopez*, *supra*, 66 Cal.App.4th at p. 630 [“‘A contextual application of otherwise unqualified legal language may supply the clue to a law’s meaning, giving facially standardless language a constitutionally sufficient concreteness.’ ”].)

5. *The Electronic Monitoring Condition*

The Electronic Monitoring Condition requires Minor to “obey all rules and regulations of the Electronic Monitoring Program” and grants to Minor’s probation officer discretion to extend the duration of electronic monitoring and to detain Minor temporarily at Girls Camp for “violating the . . . Electronic Monitoring Agreement.” Nowhere are the referenced “rules and regulations” set forth or summarized. This condition, too, is unconstitutionally vague on its face, and the addition of an express knowledge requirement will not cure the defect. Nothing on the face of the June 15 Dispositional Order, in the transcript of the hearing leading to its imposition, or anywhere else in the record, indicates that Minor was apprised of the “rules and regulations” of the Electronic Monitoring Program, or that steps were taken to make sure she understands those rules. There are references to a contract

(the “Electronic Monitoring Agreement”), but these references are without content and provide no guidance about where to find whatever standards of conduct that instrument may impose.

■ The Attorney General asks that we presume the trial court fulfilled its duty to ensure Minor was aware of her obligations of compliance. But this appeal raises claims of facial vagueness, our review is *de novo*, and there is nothing in the challenged probation condition or anywhere else in the June 15 Dispositional Order to justify indulging such a presumption. Here, at least on the face of the challenged order, one can only guess at what the “rules and regulations” of the Electronic Monitoring Program may be. The vagueness problem is exacerbated by the broad delegation of authority to Minor’s probation officer. “A [probation] condition with no core meaning . . . cannot be cured by allowing the probation officer an unfettered power of interpretation, as this would create one of the very problems against which the vagueness doctrine is meant to protect, i.e., the delegation of ‘basic policy matters to policemen . . . for resolution on an ad hoc and subjective basis.’” (*Loy, supra*, 237 F.3d at p. 266.)¹¹

Because the Electronic Monitoring Condition, on its face, is standardless, without content and potentially exposes Minor to arbitrary deprivations of her liberty, we find it to be unconstitutionally vague. We will modify it to specify that Minor shall “obey all rules and regulations of the Electronic Monitoring Program, as posted on the probation department’s website, as approved by the court, and as explained to her by her probation officer.” (See *Rodriguez, supra*, 222 Cal.App.4th at p. 586 [“probation conditions ‘need not be spelled out in great detail in court as long as the defendant knows what they are; to require recital in court is unnecessary in view of the fact the probation conditions are spelled out in detail on the probation order,’ ” or incorporated

¹¹ The Attorney General argues that Minor waived any right to appeal the Electronic Monitoring Condition because it was originally imposed at a hearing on September 22, 2014, and Minor failed to supply a transcript of that hearing in the record. We are not persuaded. Minor appeals from the June 15 Dispositional Order, mounts a facial challenge to the language of probation conditions imposed in that order, and the record she supplied to us—which includes the June 15 Dispositional Order itself and enough of the remainder of the record to show the procedural context surrounding that order—is sufficient to satisfy her burden of furnishing an adequate record supporting her appeal, as she framed it. To the extent anything in the September 22, 2014 hearing transcript might have undercut Minor’s argument that her claims of vagueness are susceptible of resolution facially—the Attorney General posits, for example, that there might be something in that transcript showing that the court explained the terms of the Electronic Monitoring Condition then—that transcript could have been supplied by the Attorney General by counter-designation or request to augment, to show that Minor’s vagueness challenges can only be resolved by reference to “the particular sentencing record developed in the trial court” (*Sheena K., supra*, 40 Cal.4th at p. 887.) The Attorney General made no such counter-designation or request for augmentation.

therein by reference, “ ‘and the probationer has a probation officer who can explain to him the contents of the order’ ”].)

6. *The School Attendance Requirement*

The School Attendance Requirement requires Minor to “attend school regularly without tardiness or unexcused absence . . . and to . . . behave at all times while in school.” Minor contends the word “regularly” renders this condition so ambiguous and susceptible of multiple meanings that it cannot be understood by an average person. She asks that we modify it to make it more precise, replacing “regularly” with language requiring that she “attend school every day that school is in session without tardiness or unexcused absence.” We decline to do so.

■ This condition does not implicate any “important issue of constitutional law or a substantial right.” (*Sheena K., supra*, 40 Cal.4th at p. 887, fn. 7.) Absent a chilling effect on constitutionally protected conduct, a broadly stated prohibition phrased in inexact terms may in some instances be perfectly appropriate to use, by design, with the aim of ensuring that a probationer errs on the side of compliance. We cannot say that that approach is improper here. The manifest purpose of the School Attendance Requirement is to prohibit truancy. Read with that purpose in mind, we think its phrasing is clear enough for the target audience, an average juvenile of Minor’s age, to understand.

III. CONCLUSION AND DISPOSITION

The conditions of probation imposed on Minor in the June 15 Dispositional Order are modified as follows:

(1) The condition that Minor “shall not possess any drug paraphernalia” is modified to state that Minor “shall not possess any item that she knows is drug paraphernalia.”

(2) The condition that “Minor shall not possess or utilize any program or application, on any electronic data storage device, that automatically or through a remote command deletes data from that device” is vacated, subject to reinstatement in narrower form should the juvenile court wish to reinstate it after further consideration.

(3) The condition that Minor shall “obey all rules and regulations of the Electronic Monitoring Program” is modified to provide that Minor shall “obey all rules and regulations of the Electronic Monitoring Program, as

posted on the probation department's website, as approved by the court, and as explained to her by her probation officer."

Except as so modified, the June 15 Dispositional Order is affirmed.

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

Respondent's petition for review by the Supreme Court was granted October 19, 2016, S237208. On March 22, 2017, cause transferred to Court of Appeal, First Appellate District, Division Four, with directions.

[No. D069893. Fourth Dist., Div. One. Aug. 11, 2016.]

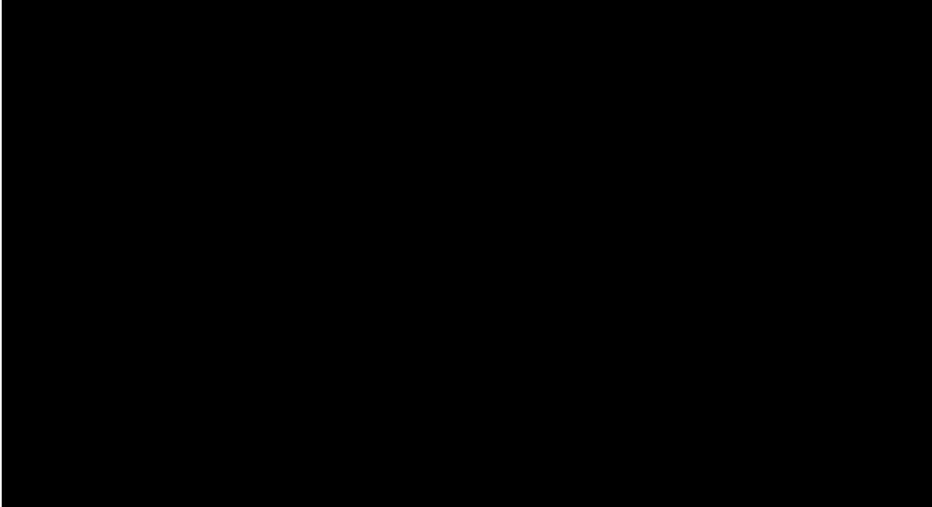
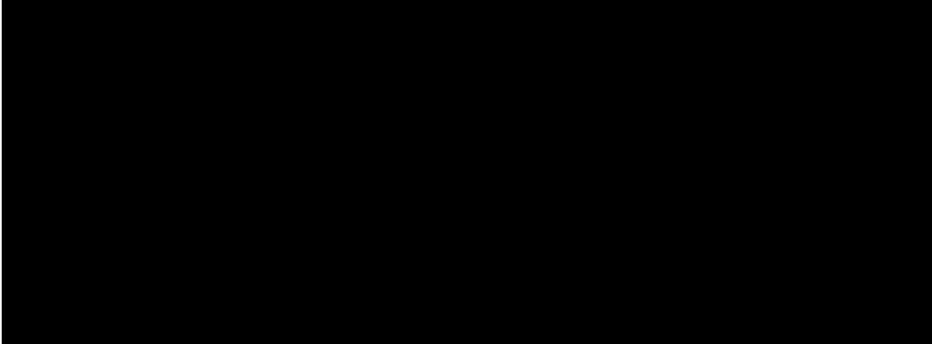
THE PEOPLE, Plaintiff and Appellant, v.
KYLE WARREN VANVLECK, Defendant and Respondent.

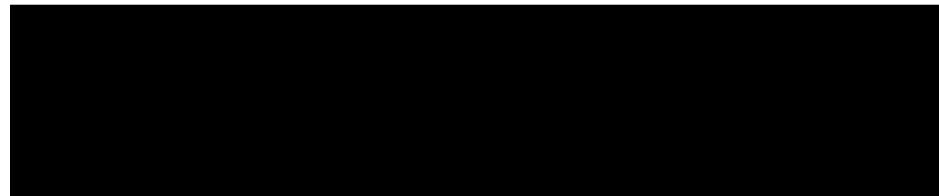
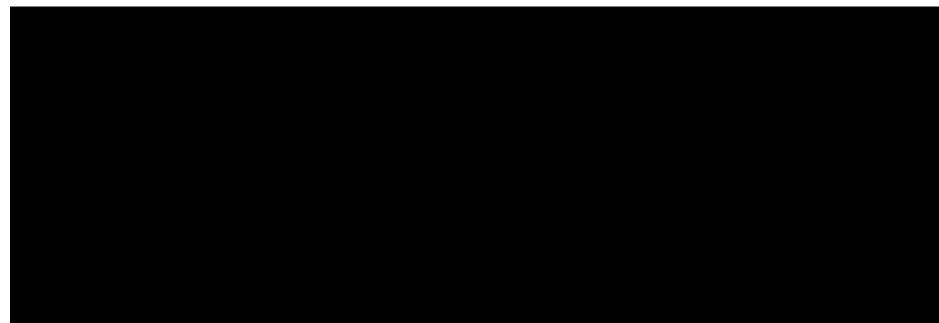
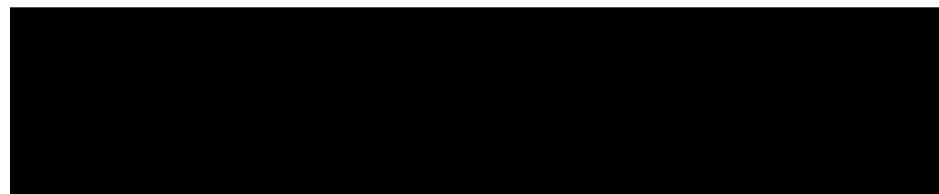
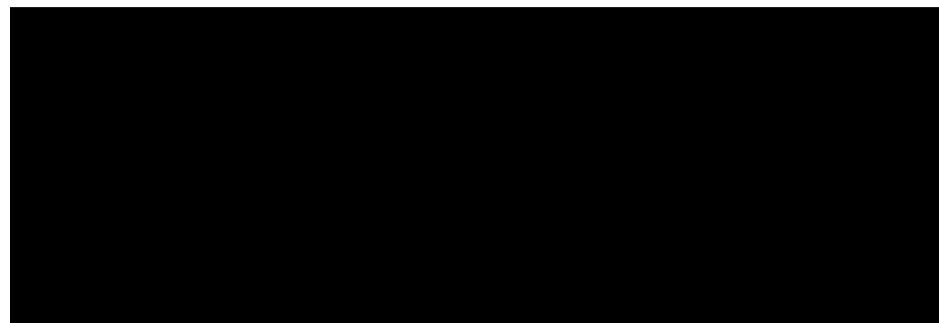
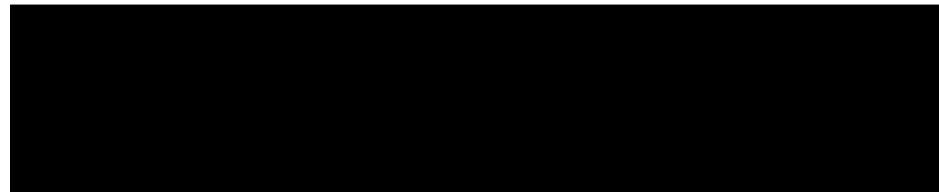
[No. D069894. Fourth Dist., Div. One. Aug. 11, 2016.]

THE PEOPLE Plaintiff and Appellant, v.
JEREMY KLUESNER, Defendant and Respondent.

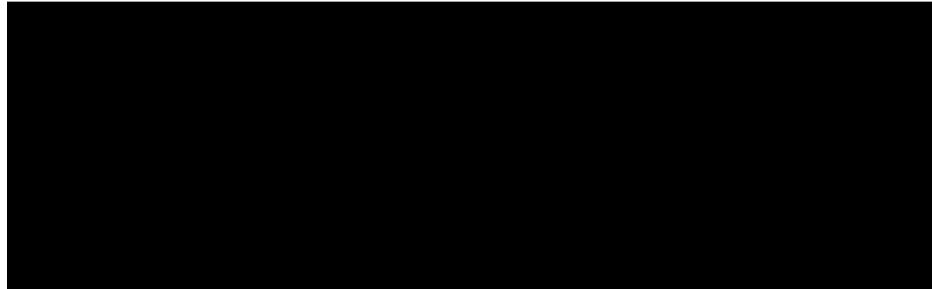
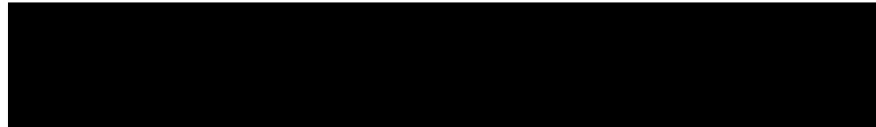
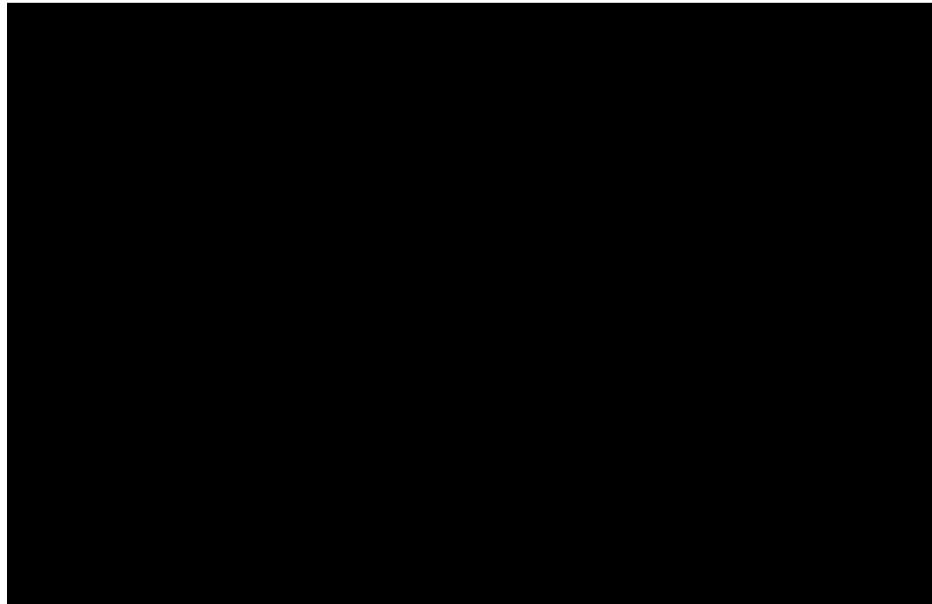
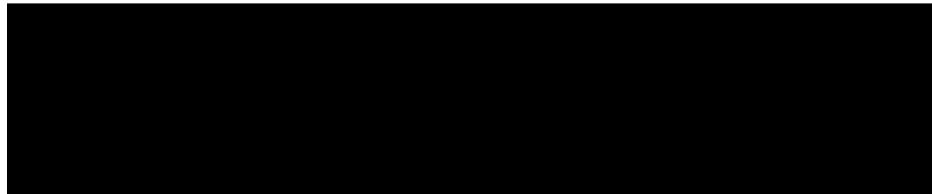
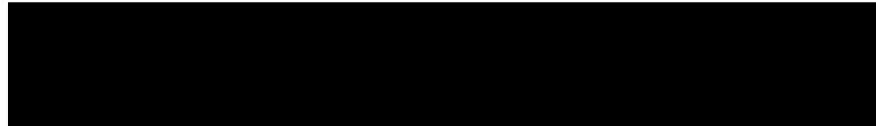
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) November 16, 2016, S237219.

[REDACTED]









COUNSEL

Jan I. Goldsmith, City Attorney, John C. Hemmerling, Assistant City Attorney, and Michael L. Ficken, Deputy City Attorney, for Plaintiff and Appellant.

Bonnie M. Dumanis, District Attorney, James E. Atkins and Harrison C. Kennedy, Deputy District Attorneys, for San Diego County District Attorney as Amicus Curiae on behalf of Plaintiff and Appellant.

Law Offices of C. Bradley Patton and C. Bradley Patton for Defendant and Respondent Kyle Warren VanVleck.

Leslie Legal Group and Sean F. Leslie for Defendant and Respondent Jeremy Kluesner.

OPINION

McCONNELL, P. J.—These consolidated appeals raise the issue of whether Vehicle Code section 23640 (section 23640) prohibits military diversion pursuant to Penal Code section 1001.80 (military diversion statute) for defendants charged with driving under the influence offenses.¹ We conclude military diversion is not available for defendants charged with driving under the influence offenses in violation of sections 23152 and 23153.

FACTUAL AND PROCEDURAL BACKGROUND

The People charged Kyle Warren VanVleck with misdemeanor violations of driving under the influence of alcohol and driving while having a measurable blood-alcohol content of 0.08 percent or more (§ 23152, subds. (a), (b)). He moved to be placed in a military diversion program pursuant to the military diversion statute, which provides for pretrial diversion where the defendant (1) is charged with a misdemeanor; (2) “was, or currently is, a member of the United States military”; and (3) “may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service.” (Pen. Code, § 1001.80, subd. (a)(1)–(2).) VanVleck claimed he was on active duty

¹ Further undesignated statutory references are to the Vehicle Code.

in the United States Marine Corps and suffered from an alcohol use disorder of moderate severity as a result of his military service.

The People opposed diversion, arguing section 23640 prohibits diversion in all driving under the influence cases. The superior court granted VanVleck's motion and suspended proceedings for the diversion term of two years.

The People charged Jeremy Kluesner with three misdemeanors: driving under the influence of alcohol (§ 23152, subd. (a)), driving while having a measurable blood-alcohol content of 0.08 percent or more (§ 23152, subd. (b)), and driving without a valid license (§ 12500, subd. (a)). Kluesner claimed he was a veteran of the United States Army and suffered from posttraumatic stress disorder, traumatic brain injury, and alcohol abuse as a result of his military service. He moved to be placed in a diversion program pursuant to the military diversion statute. Over the People's opposition, the superior court granted Kluesner's motion and suspended proceedings for the diversion term of two years.

The People appealed both decisions to the appellate division of the superior court. Pursuant to rule 8.1005(a)(1) of the California Rules of Court, the appellate division of the superior court certified the cases for transfer to this court "to secure uniformity of decision [and] settle an important question of law." We ordered the cases transferred to this court for hearing and decision and subsequently consolidated them.

We granted the San Diego County District Attorney's applications to file amicus curiae briefs in both cases.

DISCUSSION

I. *Requests for Judicial Notice*

VanVleck and Kluesner requested we take judicial notice of two items from the legislative history of Senate Bill No. 1227 (2013–2014 Reg. Sess.), the bill that added the military diversion statute to the Penal Code. Specifically, they request we take judicial notice of (1) a Senate Floor analysis, dated August 21, 2014, and (2) a bill analysis from the Assembly Committee on Appropriations for a hearing on August 6, 2014. We grant the unopposed requests for judicial notice. (*People v. Cruz* (1996) 13 Cal.4th 764, 780, fn. 9 [55 Cal.Rptr.2d 117, 919 P.2d 731]; *People v. Lamb* (1999) 76 Cal.App.4th 664, 680 [90 Cal.Rptr.2d 565] ["Legislative committee reports and analyses generally have been found appropriate items of consideration in determining legislative intent."].)

■ VanVleck also requests we take judicial notice of a superior court progress report for the military diversion program in San Diego County. VanVleck argues judicial notice is mandatory pursuant to Evidence Code section 451, subdivision (f), which provides the court shall take judicial notice of “[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.” The facts and propositions within the superior court progress report do not satisfy the requirements of Evidence Code section 451, subdivision (f). Further, “[w]hile courts may notice official acts and public records, ‘we do not take judicial notice of the truth of all matters stated therein.’” (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 [31 Cal.Rptr.2d 358, 875 P.2d 73] [declining to take judicial notice of a report of the United States Surgeon General and report to the former State Department of Health Services regarding tobacco use and prevention]; see *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 193–194 [147 Cal.Rptr.3d 41] [declining to take judicial notice of the contents of an audit report prepared by the Office of the Inspector General of the United States Department of Treasury].) Accordingly, we deny VanVleck’s request for judicial notice of the superior court’s progress report on the military diversion program in San Diego County.

II. *Section 23640*

“In 1981, . . . the Legislature made extensive statutory changes and additions to the Vehicle Code in response to growing public concern about intoxicated drivers. [Citation.] The legislation was designed to make it more difficult for those committing such offenses to avoid conviction and to increase the penalties consequent upon such a conviction.” (*People v. Duncan* (1990) 216 Cal.App.3d 1621, 1628 [265 Cal.Rptr. 612] (*Duncan*).) Section 23640 (formerly § 23202), enacted at that time, provided: “*In any case* in which a person is charged with a violation of Section 23152 or 23153, prior to acquittal or conviction, the court shall neither suspend nor stay the proceedings for the purpose of allowing the accused person to attend or participate, nor shall the court consider dismissal of or entertain a motion to dismiss the proceedings because the accused person attends or participates during that suspension, in any one or more education, training, or treatment programs, including, but not limited to, a driver improvement program, a treatment program for persons who are habitual users of alcohol or other alcoholism program, a program designed to offer alcohol services to problem drinkers, an alcohol or drug education program, or a treatment program for persons who are habitual users of drugs or other drug-related program.” (§ 23640, subd. (a), italics added.)

■ Section 23600 (formerly § 23206) imposes a similar postconviction restraint and “provides that no person convicted of a [section 23152 or

23153] offense may be absolved from spending the minimum time in confinement.” (*Duncan, supra*, 216 Cal.App.3d at p. 1628; see § 23600, subd. (c).)² “The unambiguous intent of [sections 23640 and 23600] is to prohibit pre- or postconviction stays or suspensions of proceedings to allow a defendant charged with driving under the influence to be diverted into a treatment program and avoid spending the statutorily mandated minimum time in confinement or paying the statutorily imposed minimum fine upon conviction.” (*People v. Darnell* (1990) 224 Cal.App.3d 806, 810 [274 Cal.Rptr. 110].)

III. *Military Diversion Statute*

In 2014, the Legislature proposed Senate Bill No. 1227 (2013–2014 Reg. Sess.) to add the military diversion statute to the Penal Code. The purpose of the original version of the bill was to “create a diversion program for veterans who commit misdemeanors or jail felonies and who are suffering from service-related trauma.” (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1227 (2013–2014 Reg. Sess.) as introduced Feb. 20, 2014, p. 1, italics omitted.) According to the bill’s author, many of California’s two million military veterans suffer from service related trauma and “some veterans find themselves entangled in the criminal justice system.” (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1227 (2013–2014 Reg. Session) as introduced Feb. 20, 2014, p. 4.) The author noted the well-established benefits of diversion programs, including reducing recidivism and incarceration costs. (*Ibid.*)

The bill set forth that existing law provides for “deferred entry of judgment for specified drug offenses” (see Pen. Code, § 1000 et seq.), “permits a court to create a ‘Back on Track’ deferred entry of judgment reentry program for first time non-violent drug offenders” (see Pen. Code, § 1000.8 et seq.), “provides for diversion of non-DUI misdemeanor offenses” (see Pen. Code, § 1001.50 et seq.), and “provides for diversion of misdemeanors when the defendant is a person with cognitive disabilities” (see Pen. Code, § 1001.20 et seq.). (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1227 (2013–2014 Reg. Sess.) as introduced Feb. 20, 2014, pp. 1–2.) Senate Bill No. 1227, in turn, authorized the court to place an eligible current or former member of the military in a diversion program and to postpone prosecution, temporarily or permanently, of a misdemeanor or jail felony. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1227 (2013–2014 Reg. Sess.) as

² All further references to former sections 23202 and 23206 are to the renumbered sections 23640 and 23600, respectively. (See Legis. Counsel’s Dig., Sen. Bill No. 1186, 6 Stats. 1998 (1997–1998 Reg. Sess.) Summary Dig., p. 43 [Effective July 1, 1999, Sen. Bill No. 1186 (1997–1998 Reg. Sess.) “reorganize[d] specified provisions relating to . . . driving while under the influence offenses without making any substantive changes to those provisions.”].)

introduced Feb. 20, 2014, p. 2.) If the court found the defendant was not performing satisfactorily in the program or not benefiting from the treatment and services provided under the program, it could end diversion and resume criminal proceedings. (*Ibid.*)

The California District Attorneys Association opposed the bill unless it was amended to exclude jail felonies from eligibility for the diversion program. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1227 (2013–2014 Reg. Sess.) as introduced Feb. 20, 2014.) In response, the bill was amended to exclude jail felonies and apply to misdemeanors only. (Assem. Com. on Appropriations, Rep. on Sen. Bill No. 1227 (2013–2014 Reg. Sess.) as amended Aug. 4, 2014.)

■ The Governor approved the amended bill in September 2014, and the military diversion statute became effective January 1, 2015. (Stats. 2014, ch. 658, § 1.) As enacted, the military diversion statute “appl[ies] whenever a case is before a court on an accusatory pleading alleging the commission of a misdemeanor offense,” and the defendant is or was a member of the United States military suffering from service-related trauma, substance abuse, or mental health problems. (Pen. Code, § 1001.80, subd. (a)(1)–(2).)

IV. *Conflict Between the Military Diversion Statute and Vehicle Code*

A. *General Legal Principles*

■ “Statutory construction is a question of law we decide de novo. [Citation.] Our primary objective in interpreting a statute is to determine and give effect to the underlying legislative intent. [Citation.] Intent is determined foremost by the plain meaning of the statutory language. If the language is clear and unambiguous, there is no need for judicial construction. When the language is reasonably susceptible of more than one meaning, it is proper to examine a variety of extrinsic aids in an effort to discern the intended meaning. We may consider, for example, the statutory scheme, the apparent purposes underlying the statute and the presence (or absence) of instructive legislative history.” (*City of Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004) 123 Cal.App.4th 714, 722 [20 Cal.Rptr.3d 322].)

■ “A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. [Citations.] This rule applies although one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject.” [Citation.] Thus, when “two codes are to be construed, they “must be regarded as blending into each other and forming a single statute.” [Citation.] Accordingly, they “must be read

together and so construed as to give effect, when possible, to all the provisions thereof.”””” (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955 [184 Cal.Rptr.3d 60, 342 P.3d 1217].)

B. Analysis

This case requires us to resolve an apparent conflict between the military diversion statute and section 23640. The People argue section 23640 prohibits diversion for *all* driving under the influence offenses and the military diversion statute does not create an exception to that rule. VanVleck and Kluesner argue the military diversion statute supersedes section 23640’s prohibition on diversion. The parties each rely on the plain meaning of the military diversion statute, legislative history, and rules of statutory interpretation, but reach different results. We reconcile the conflict and conclude the military diversion statute does not create an exception to section 23640.

1. Plain Language and Legislative History

Read on its own, the military diversion statute applies “*whenever* a case is before a court on an accusatory pleading alleging the commission of a misdemeanor offense.” (Pen. Code, § 1001.80, subd. (a), italics added.) However, that statute conflicts with the plain language of Vehicle Code section 23640, subdivision (a), which prohibits diversion “[i]n any case in which a person is charged with a violation of Section 23152 or 23153,” pertaining to driving under the influence offenses. (Italics added.)

VanVleck and Kluesner argue the legislative history of the military diversion statute supports their position that it applies to all misdemeanors because opponents of Senate Bill No. 1227 (2013–2014 Reg. Sess.) raised an objection to the inclusion of jail felonies, but not to any misdemeanor covered by the statute. Further, in response to the objection, the Legislature amended Senate Bill No. 1227 to exclude jail felonies and “did not place any restrictions on which misdemeanor charges qualify for diversion.” While the Legislature did not specifically include or exclude driving under the influence misdemeanors from military diversion, we presume the Legislature was aware of preexisting legal authority and decisional interpretations, and enacted the military diversion statute with that in mind. (*People v. Hernandez* (1988) 46 Cal.3d 194, 201 [249 Cal.Rptr. 850, 757 P.2d 1013].)

At the time the Legislature enacted the military diversion statute, the court had previously considered a similar conflict between section 23640 and Penal Code section 1001.21, providing for diversion for defendants with cognitive developmental disabilities. (*People v. Weatherill* (1989) 215 Cal.App.3d 1569 [264 Cal.Rptr. 298] (*Weatherill*).) Like the statute at issue in this case, the

diversion statute for defendants with cognitive developmental disabilities stated it applied to *any* eligible defendant charged with a misdemeanor offense. (Pen. Code, § 1001.21, subd. (b).) In *Weatherill*, the court looked at the plain language of section 23640 and found its “apparent meaning is that *all* driving-under-the-influence defendants, without exception, shall have their guilt or innocence determined without delay and without diversion and those found guilty shall be timely sentenced.” (*Weatherill, supra*, at p. 1573.) Based on the defendant’s argument that the Legislature intended to allow diversion for persons with cognitive developmental disabilities, the court engaged in a detailed discussion of section 23640’s legislative history. (*Weatherill*, at pp. 1574–1577.)

The *Weatherill* court noted the public strongly supported section 23640 and the “‘[c]elerity and certainty of punishment’” it provided. (*Weatherill, supra*, 215 Cal.App.3d at p. 1575.) At the time the Legislature proposed section 23640, pretrial diversion programs had proliferated. (*Weatherill, supra*, at p. 1576.) “It was to bar such diverse and voluminous diversion programs that section [23640] was included in [Assembly Bill No.] 541.” (*Ibid.*) Accordingly, in enacting section 23640, the Legislature “did not overlook a major loophole to certainty of punishment, viz., pretrial diversion.” (*Weatherill, supra*, at p. 1575.) The *Weatherill* court concluded the legislative history of section 23640 supported the statute’s plain meaning that diversion did not apply, without exception, to defendants charged with driving under the influence offenses. (*Weatherill, supra*, at p. 1577.)

In this case, the plain language of military diversion statute does not state whether it creates an exception to section 23640 and authorizes diversion for defendants charged with driving under the influence offenses. Further, the legislative history of that statute does not mention or resolve the conflict with section 23640’s ban on diversion for driving under the influence offenses. However, we presume the Legislature was aware of the *Weatherill* decision and its interpretation of section 23640 when it enacted the military diversion statute. (*People v. Hernandez, supra*, 46 Cal.3d at p. 201.) Had the Legislature intended to depart from the conclusion in *Weatherill* and create an exception to section 23640, it could have easily done so by stating the military diversion statute authorizes pretrial diversion for defendants charged with violations of sections 23152 and 23153.

2. Application of Rules of Statutory Construction

While the parties generally agree on the rules of statutory construction, they disagree regarding their application. VanVleck and Kluesner argue the military diversion statute eliminated any bar on eligibility for diversion for current and former military members charged with driving under the influence offenses because that statute was enacted after section 23640. They also

[REDACTED]

argue the military diversion statute prevails over section 23640 because it is more specific in that it applies only to current and former military members whereas section 23640 applies generally.

The People, on the other hand, contend section 23640 bars diversion because its subject matter of driving under the influence diversion is more specific than general misdemeanor diversion under the military diversion statute. Further, the People argue, the rule that specific statutes control over general ones takes precedence over the rule that later-enacted statutes control over older ones. We agree with the People.

■ “If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones [citation].” [Citation.] But when these two rules are in conflict, the rule that specific provisions take precedence over more general ones trumps the rule that later-enacted statutes have precedence.” (*State Dept. of Public Health v. Superior Court, supra*, 60 Cal.4th at p. 960; see *Miller v. Superior Court* (1999) 21 Cal.4th 883, 895 [89 Cal.Rptr.2d 834, 986 P.2d 170].)

■ As the court explained in *Weatherill*, “[t]he referent of ‘general’ and ‘specific’ is subject matter.” (*Weatherill, supra*, 215 Cal.App.3d at p. 1578.) While VanVleck and Kluesner urge us to look at the classes of people covered by the two statutes at issue to find the military diversion statute is more specific, we must look to the subject matter of the statutes. Like the cognitive developmental disability diversion statute at issue in *Weatherill*, the subject matter of the military diversion statute in this case is misdemeanor diversion. (*Ibid.*) “By contrast, the subject matter of section [23640] is driving-under-the-influence diversion. It applies to a single type of conduct and comprehends only two offenses, sections 23152 and 23153. Section [23640] is a specific statute and controls, to the extent of their inconsistency, the general statute, Penal Code section [1001.80].” (*Ibid.*)

Although the military diversion statute was enacted 23 years after section 23640, the rule that the more specific statute controls over a general one prevails over the rule that the later-enacted statute controls. Thus, pursuant to section 23640, current and former military members charged with driving under the influence offenses in violation of section 23152 and 23153 are ineligible for diversion.³

³ While we believe that the statutory analysis compels this result, if the Legislature intended for the military diversion statute to apply to driving under the influence offenses, it should make that intention clear by amending the statute to expressly allow for diversion in those cases. (See *Williams v. Los Angeles Metro. Transit Auth.* (1968) 68 Cal.2d 599, 611 [68 Cal.Rptr.

3. Other Misdemeanor Diversion Statutes

In its amicus curiae brief, the San Diego County District Attorney notes other defendants contending the military diversion statute applies to driving under the influences offenses have argued if the Legislature intended to deny them diversion, it would have specifically denied that right within the military diversion statute, just as it did in Penal Code sections 1001.2, subdivision (a), and 1001.51, subdivision (b), pertaining to misdemeanor diversion. In order to address this argument, we must look at the history of Penal Code sections 1001.2 and 1001.51.

Penal Code sections 1001.2 and 1001.51 were enacted to negate an earlier opinion from the Attorney General's Office that concluded the Legislature had preempted the field of diversion, leaving no authority to local jurisdictions to create diversion programs. (*Davis v. Municipal Court* (1988) 46 Cal.3d 64, 74–75 [249 Cal.Rptr. 300, 757 P.2d 11] (*Davis*).) The Legislature wanted to make clear it did not intend to preempt the pretrial diversion field (Pen. Code, § 1001) and provided a “‘model’ misdemeanor diversion program with legislatively prescribed eligibility criteria ([Pen. Code,] § 1001.51, subds. (a) and (c))” (*Davis, supra*, 46 Cal.3d at p. 75). In enacting these statutes, the Legislature also specifically confirmed misdemeanor diversion does not apply to defendants charged with driving under the influence offenses. (Pen. Code, §§ 1001.2, subd. (a), 1001.51, subd. (b).) The purpose of doing so was “to avoid the risk of implied repeal” of section 23640. (*Weatherill, supra*, 215 Cal.App.3d at pp. 1579–1580.)

As we previously explained, when the Legislature created the military diversion statute, it was aware of the *Weatherill* decision. Like the military diversion statute, the diversion statute for defendants with cognitive developmental disabilities at issue in *Weatherill* did not specifically prohibit diversion for driving under the influence offenses. (Pen. Code, § 1001.21.) Regardless of the specific exemptions for driving under the influence offenses in Penal Code sections 1001.2 and 1001.51 and the failure of the Legislature to include similar language in the cognitive developmental disability diversion statute, the *Weatherill* court concluded section 23640 bars diversion for *all* driving under the influence offenses. (*Weatherill, supra*, 215 Cal.App.3d at pp. 1579–1580.)

■ Consistent with *Weatherill*, we conclude the Legislature’s specific exclusion of driving under the influence offenses in Penal Code sections 1001.2 and 1001.51, but not in the military diversion statute, does not support a conclusion the Legislature intended for the military diversion statute to

297, 440 P.2d 497] [“If the Legislature in its wisdom believes the law should be otherwise, it may make the change by express statutory amendment.”].)

supersede section 23640's bar on diversion. Given the *Weatherill* decision, the Legislature could have specifically permitted military diversion for driving under the influence offenses had it intended to do so. Given that it did not, section 23640 continues to bar diversion for driving under the influence charges.

DISPOSITION

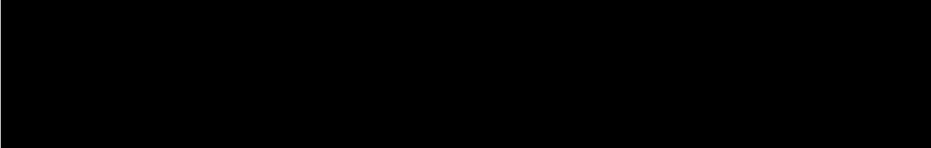
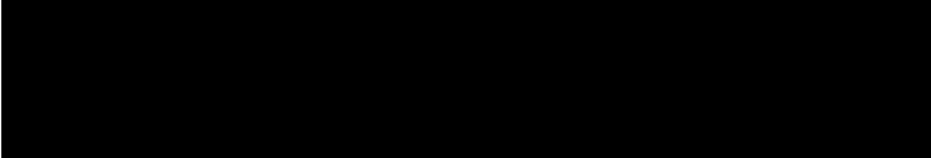
The orders are reversed.

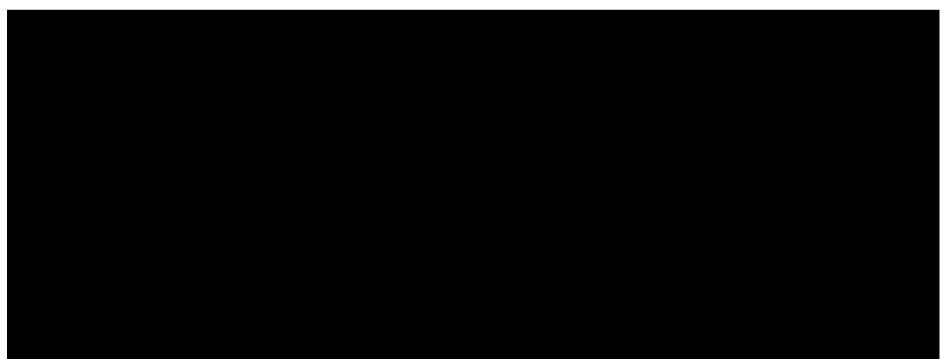
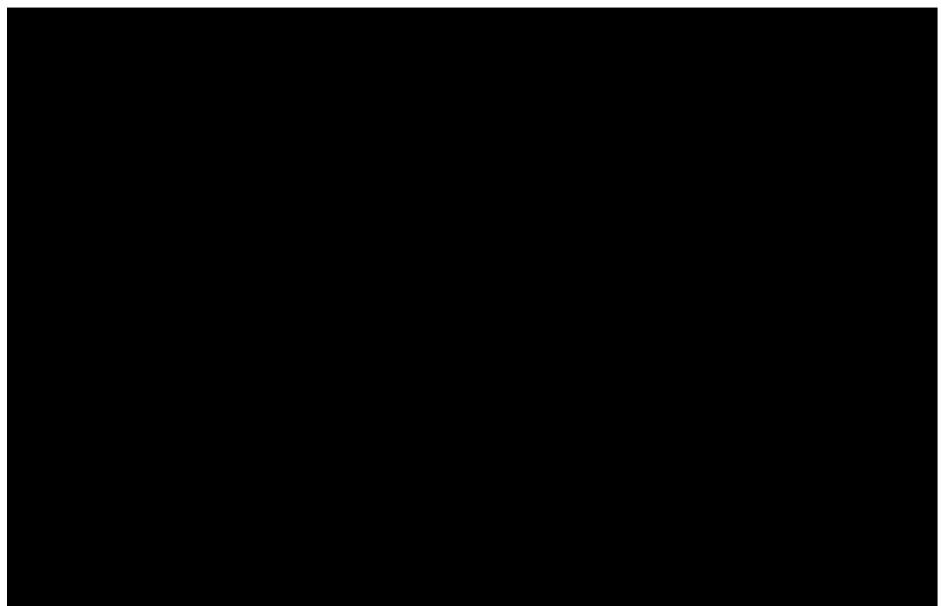
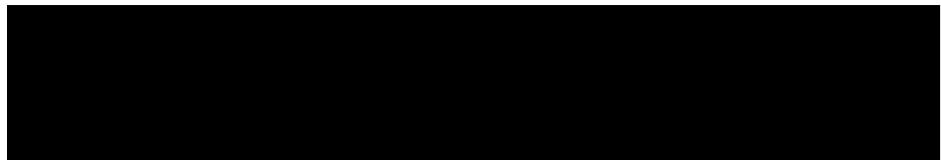
Huffman, J., and Haller, J., concurred.

A petition for a rehearing was denied September 6, 2016, and the petition of all respondents for review by the Supreme Court was granted November 16, 2016, S237219.

[No. F071257. Fifth Dist. Aug. 11, 2016.]

STANISLAUS COUNTY DEPUTY SHERIFFS' ASSOCIATION, Petitioner
and Appellant, v.
COUNTY OF STANISLAUS et al., Respondents.





COUNSEL

Goyette & Associates and Richard P. Fisher for Petitioner and Appellant.

Jones & Mayer, Martin J. Mayer and James R. Touchstone for Respondents.

OPINION

KANE, J.—The Stanislaus County Deputy Sheriffs' Association (appellant), on behalf of certain custodial deputies designated as a "peace officer" under Penal Code¹ section 830.1, subdivision (c) (custodial deputies), filed this action in the trial court seeking, among other relief, a judicial declaration that such custodial deputies may lawfully carry concealed firearms while off duty without the necessity of obtaining a permit to carry a concealed weapon. The current practice of Stanislaus County, Stanislaus County Sheriff's Department, the chief executive officer of Stanislaus County and the Stanislaus County Sheriff (collectively respondents) is to recognize that a custodial deputy may carry a concealed firearm while off duty only if that deputy has first obtained a license or a permit to carry a concealed weapon.² Appellant maintains that respondents' practice does not comport with section 25450, which categorically exempts all peace officers listed in section 830.1 from the prohibition against carrying a concealed weapon. As we explain below, appellant is correct.³ Accordingly, we reverse the contrary conclusion and judgment of the trial court and remand the matter back to the trial court with instructions to enter declaratory relief in appellant's favor consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

After attempting to resolve the instant dispute through administrative channels, appellant's petition for writ of mandate and complaint for declaratory relief, etc. (the petition), was filed in the trial court on August 15, 2013.

¹ Unless otherwise indicated, further statutory references are to the Penal Code.

² In this opinion, we refer to a permit or license (to carry concealed weapons) interchangeably. We also use the terms "weapons" and "firearms" interchangeably, with the understanding that the only type of weapons at issue herein are firearms "capable of being concealed upon the person" as described in section 25400, subdivision (a)(1)–(3).

³ Of course, our discussion assumes that the custodial deputies are in good standing with the Stanislaus County Sheriff's Department and have complied with all legal requirements of peace officers (see §§ 830, 832). We also note at the outset that the law's granting of an exemption is not the equivalent of conferring a vested right. Other legal considerations may bear upon an officer's concealed firearm authority. Thus, for example, a sheriff or police department may impose restrictions on a particular officer's privilege to carry a concealed weapon off duty when necessary for public safety. (See *Gordon v. Horsley* (2001) 86 Cal.App.4th 336, 345–346 [102 Cal.Rptr.2d 910].)

The petition was made on behalf of two classifications of sheriff deputies—namely, “Stanislaus County Deputy Sheriff-Custodial and Sergeant-Custodial.” It is undisputed that both classifications, which are referred to together herein as custodial deputies, are peace officers under section 830.1, subdivision (c). According to the allegations in the petition, all peace officers listed in section 830.1 are exempt by statute from the law criminalizing the carrying of concealed weapons and may carry concealed weapons while off duty without the need to obtain a permit to carry concealed weapons. Notwithstanding the exemption, respondents’ practice has been to issue to each custodial deputy a restrictive identification card, which states that the deputy may only carry a concealed weapon while off duty if that deputy is in possession of a valid permit to carry a concealed weapon. Appellant alleges that this practice places an undue burden on custodial deputies (in terms of fees, applications, renewals, etc.), and is contrary to applicable law, since the Legislature intended them to be exempt from such requirements.

Appellant’s petition sought a judicial declaration that such custodial deputies are exempt from the law prohibiting concealed firearms and may, while off duty, carry such a firearm on their person or in their vehicle without the necessity of first obtaining a permit to carry a concealed weapon. Additionally, appellant’s petition sought a writ of mandate and/or an injunction requiring respondents to provide the custodial deputies with accurate identification cards reflecting and/or certifying that they may carry a concealed firearm while off duty without the necessity of obtaining a license or permit to carry a concealed weapon.⁴ As the above described pleadings make clear, the gist of this dispute concerns the applicability and impact of the exemption under section 25450 when the custodial deputies are *off duty*.

On August 19, 2014, respondents filed opposition in the trial court to the petition, arguing that, pursuant to section 830.1, subdivision (c), custodial deputies are peace officers with only limited authority and, as such, cease to have peace officer status or authority outside of their particular custodial assignments. According to respondents, this means that custodial deputies, when off duty, are not exempt from the law that prohibits carrying concealed weapons. As a result, custodial deputies who wish to carry a concealed firearm while off duty must first obtain a “CCW” (carry a concealed weapon) permit. In support of their position, respondents especially rely upon a 2002 Attorney General opinion (i.e., 85 Ops.Cal.Atty.Gen. 130 (2002)).

Appellant filed a reply in the trial court on August 29, 2014. Appellant argued therein that the exemption in question, section 25450, does not make the distinctions raised by respondents, but is worded so as to be fully

⁴ In other words, to the extent that respondents are going to put such information on the identification cards or badges, it should be legally accurate information.

applicable to all peace officers listed in section 830.1, which was also how the Legislature understood the issue based on certain statements in the legislative history. Appellant's reply further stressed why the issue is important to the custodial deputies: "Just like many Peace Officers in California, . . . Custodial Deputies . . . work in close proximity with convicted felons, many with long and violent histories. Custodial Deputies put their lives on the line everyday going to work with these dangerous individuals, and that danger continues as they lead their lives away from their jobs. [Appellant's] members only ask to be treated like other Peace Officers in California listed under section 830.1 who have been wisely granted the privilege by the Legislature to carry concealed weapons to protect themselves and their families from harm."

In connection with the hearing of the petition in the trial court, the parties stipulated in writing to a number of facts. The stipulated facts included the following:

"8. In Stanislaus County, the Deputy Sheriff Custodial position escorts, receives, registers, controls, supervises and cares for inmates and may be assigned to either the County Jail, Public Safety Center or Honor Farm.

"9. In Stanislaus County, the Sergeant Custodial position supervises the work of personnel and inmates assigned to the Public Safety Center, County Jail, Honor Farm, Support Services and administers the work furlough, alternative work and home detention programs.

"10. In Stanislaus County, both the Deputy Sheriff Custodial Position and the Sergeant Custodial position (collectively 'Custodial Deputies') are sworn under and derive powers from . . . section 830.1[, subdivision](c).

"11. In Stanislaus County, Custodial Deputies have an endorsement on the back of their County identification cards that states: 'The bearer whose picture is affixed on the reverse of this card is a Peace Officer regularly paid as such and sworn under Section 830.1[, subdivision](c) . . . The bearer has completed training as required by statute and is authorized to carry a weapon while engaged in the performance relating to his or her Custodial assignments, or when performing law-enforcement duties decided by the Stanislaus County Sheriff during a local or state emergency. The bearer is also authorized to carry a concealed weapon while off-duty when in the possession of a valid CCW permit.'

"12. In Stanislaus County, Custodial Deputies are limited peace officers whose duties are limited to maintaining the operations of County custodial facilities, including the custody, care, supervision, security, movement, and transportation of inmates.

[REDACTED]

“13. In Stanislaus County, Custodial Deputies do not perform their custodial duties while off-duty.

“14. The Sheriff of Stanislaus County has discretion to issue a license to carry a concealed firearm to residents within Stanislaus County.

“15. In Stanislaus County, a concealed weapons license issued to a Custodial Deputy is valid for a period not to exceed four years. Said license can be renewed at the conclusion of that period. Except that licenses issued to Custodial Deputies shall be invalid upon the individual’s conclusion of service as a Custodial Deputy.

“16. The cost associated with an application for a concealed weapons license in Stanislaus County is \$113.00, which consists of a \$20 County processing fee and a \$93.00 California Department of Justice processing fee.

“17. The cost associated with an application for a renewal of a concealed weapons license in Stanislaus County is \$57.00, which consists of a \$5.00 County processing fee and a \$52.00 California Department of Justice processing fee.”

On September 9, 2014, the parties appeared at the hearing and presented oral argument, highlighting the issues and advocating for their respective legal positions. At the close of oral argument, the trial court took the matter under submission.

On November 6, 2014, the trial court issued its tentative decision, siding with respondents’ position and ordering that the petition should be denied in its entirety. The tentative decision became final and on January 9, 2015, the trial court entered judgment in favor of respondents. This appeal by appellant followed.

DISCUSSION

I. *Standard of Review*

The issues presented in this appeal involve the interpretation and application of statutory provisions where there are no material factual disputes. Our review of such legal issues is *de novo*. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799 [35 Cal.Rptr.2d 418, 883 P.2d 960]; *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432 [101 Cal.Rptr.2d 200, 11 P.3d 956].)

II. *The Statutory Framework for the Issues*

The question before us involves the interplay of several related sections of the Penal Code. Section 25400⁵ prohibits the carrying of concealed firearms (see § 25400, subd. (a)), albeit a procedure is provided in the statutory scheme whereby individuals may apply for a license to carry concealed weapons (see § 26150 et seq. [licensing procedure implemented by sheriff of each county]). Section 25450 sets forth what is generally known as the peace officer exemption to the law against carrying concealed firearms. It declares, in relevant part, as follows: “Section 25400 does not apply to, or affect, any of the following: [¶] (a) *Any peace officer, listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33, whether active or honorably retired.* [¶] (b) Any other duly appointed peace officer.” (§ 25450, subds. (a), (b), italics added.)

■ Section 830.1, subdivision (c), expressly provides that custodial deputies of the type considered in the present appeal *are* peace officers, and it goes on to describe the scope and limitations of the deputies’ authority as peace officers. Section 830.1 is part of chapter 4.5 of title 3 of part 2 of the Penal Code (§ 830 et seq.; hereafter chapter 4.5), which chapter identifies those persons who are peace officers and defines the nature and scope of their authority, powers and duties. (*County of Santa Clara v. Deputy Sheriffs’ Assn.* (1992) 3 Cal.4th 873, 879 [13 Cal.Rptr.2d 53, 838 P.2d 781].)⁶ As summarized by one Court of Appeal: “Chapter 4.5 specifies dozens of government employees as peace officers, sometimes simply by job title, but more often by reference both to a position and its primary duties. In general, chapter 4.5 names some classifications of employees as peace officers whose powers are either specified or limited, provides that other employees are not peace officers but may exercise some peace officer functions under certain circumstances, denies peace officer status to some classifications, and denies or restricts the right of some peace officers to carry firearms. [Citation.] The plain import of this statutory system is that the Legislature intended to grant peace officer status, and the powers and authority conferred with that status in particular instances, subject to carefully prescribed limitations and conditions.” (*Service Employees Internat. Union v. City of Redwood City* (1995) 32 Cal.App.4th 53, 60 [38 Cal.Rptr.2d 86], fns. omitted (*Service Employees*)).

The Attorney General has issued a number of opinions over the years on legal questions relating to peace officers. While not binding on us, such

⁵ Section 25400, subdivision (a), prohibits carrying a concealed “pistol, revolver, or other firearm capable of being concealed upon the person,” and includes carrying such weapon concealed on the person or in a vehicle in which the person is an occupant.

⁶ Section 830 states: “Any person who comes within the provisions of this chapter and who otherwise meets all standards imposed by law on a peace officer”

opinions are entitled to considerable weight. (*Orange County Employees Assn., Inc. v. County of Orange* (1993) 14 Cal.App.4th 575, 578 [17 Cal.Rptr.2d 695] (*Orange County*).) In the past, the Attorney General has concluded that the peace officer exemption provided in former section 12027 (now § 25450) was applicable to specified peace officers whether they were on or off duty and, therefore, such officers were not required to obtain a permit to carry a concealed weapon while off duty. (See, e.g., 63 Ops.Cal.Atty.Gen. 385 (1980) [correctional officers under § 830.5 exempt whether on or off duty]; 72 Ops.Cal.Atty.Gen. 167 (1989) [deputy probation officers exempt off duty; no license required]; 78 Ops.Cal.Atty.Gen. 209 (1995) [investigators of board of prison terms exempt off duty; no license required].)

In 2002, the Attorney General, relying on limiting language in section 830.1, subdivision (c), held that custodial deputies described therein did not have peace officer status when they were away from the county detention facilities appearing at community service events, participating in the sheriff's honor guard, or conducting recruitment background checks or internal affairs investigations. During those occasions, since the deputies purportedly lacked peace officer status, the Attorney General held the custodial deputies "would be subject to certain statutory prohibitions such as those against carrying a concealed weapon." (85 Ops.Cal.Atty.Gen., *supra*, at p. 131.) In the present case, the trial court understood this 2002 Attorney General opinion to mean that the peace officer exemption (§ 25450) did not apply to custodial deputies while they were off duty. Adhering to that Attorney General opinion, the trial court denied all relief to appellant.

In the instant appeal, appellant's position is essentially that section 25450 creates a categorical exemption for "[a]ny peace officer . . . listed in [s]ection 830.1," and since custodial deputies are peace officers listed in section 830.1, subdivision (c), they *are* exempt and need not obtain a license to carry a concealed firearm when off duty. In other words, for purposes of the exemption, a custodial deputy's status as a "peace officer, listed in Section 830.1" (§ 25450, subd. (a)) does not end when he or she is off duty and, therefore, the exemption applies at such times. Appellant maintains the legislative history was clear on this point, and the Legislature's intent governs the issue. Moreover, appellant points out that nothing in section 830.1, subdivision (c), indicates otherwise.

Respondents, relying on 85 Ops.Cal.Atty.Gen., *supra*, at page 130, argue that custodial deputies cease to have the status of peace officers as soon as they are off duty, which would mean they are not exempt under section 25450 at such times and must obtain a permit to carry a concealed weapon.

On balance, we believe that appellant's position is the correct one.

III. *The Exemption Is Applicable to Off-duty Custodial Deputies*

The core issue before us is whether the peace officer exemption in section 25450, which by its terms applies to custodial deputies described in section 830.1, subdivision (c), ceases to apply to such deputies when they are off duty. Of course, the nature and scope of the exemption is a question of statutory interpretation.

A. *Rules of Statutory Construction*

■ The principles that govern the process of statutory construction are well settled. “We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning.” (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340 [14 Cal.Rptr.3d 857, 92 P.3d 350].) We keep in mind that the words of the statute are to be construed in the context of the statutory framework of which the statute is a part, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (*Haas v. Meisner* (2002) 103 Cal.App.4th 580, 586 [126 Cal.Rptr.2d 843]; *Phelps v. Stostad* (1997) 16 Cal.4th 23, 32 [65 Cal.Rptr.2d 360, 939 P.2d 760].) “When the language of a statute is clear, we need go no further.” (*Nolan v. City of Anaheim, supra*, at p. 340.) That is, “[i]f the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute’s plain meaning governs.” (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190 [48 Cal.Rptr.3d 108, 141 P.3d 225].)

“Where the statutory language is not clear and allows more than one meaning, the courts nevertheless have a duty to accept the meaning that the Legislature intends if its intention is ascertainable.” (*Service Employees, supra*, 32 Cal.App.4th at p. 58.) To clarify ambiguities and to discern legislative intent, it is appropriate to refer to extrinsic aids such as the legislative history and context. (*Id.* at p. 59.) In this regard, committee reports are often useful in determining the Legislature’s intent. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 646 [59 Cal.Rptr.2d 671, 927 P.2d 1175] (*California Teachers Assn.*)). Prior judicial or administrative construction of the statute may also assist in discerning the Legislature’s intent. (*Orange County, supra*, 14 Cal.App.4th at p. 582 [Atty. Gen. opns.].)

B. *Section 25450*

Our starting point in discerning the Legislature’s intent as to the scope of the exemption at issue is the language of the exemption statute itself. Section

25450 states: “As provided in this article, Section 25400 does not apply to, or affect, any of the following: [¶] (a) *Any peace officer, listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33, whether active or honorably retired.* [¶] (b) Any other duly appointed peace officer. [¶] (c) Any honorably retired peace officer listed in subdivision (c) of Section 830.5. [¶] (d) Any other honorably retired peace officer who during the course and scope of his or her appointment as a peace officer was authorized to, and did, carry a firearm. [¶] (e) Any full-time paid peace officer of another state or the federal government who is carrying out official duties while in California. [¶] (f) Any person summoned by any of these officers to assist in making arrests or preserving the peace while the person is actually engaged in assisting that officer.” (Italics added.)

By its terms, section 25450 exempts the persons described therein from section 25400—the law that would otherwise prohibit the carrying of concealed firearms. A conspicuous feature of section 25450 is that some of the exempt persons described therein are simply identified as a category or class of peace officers, such as in subdivisions (a) and (b), while other persons referred to in the statute are required to be acting in the scope of a specific duty or activity in order for the exemption to apply, such as in subdivisions (e) and (f). This reflects that when the Legislature wants to limit the exemption to occasions in which a peace officer or other person is acting in the course of particular duties or authority, the Legislature does so *explicitly*—as it has done in the exemption statute itself, or (as noted below) in the applicable section of chapter 4.5. Since subdivision (a) of section 25450 grants the exemption to “[a]ny peace officer, listed in Section 830.1” (italics added), and does not tie the exemption to the officer’s performance of any particular law enforcement duties or responsibilities, it seems reasonable to assume from the language and structure of the statute that the Legislature intended the exemption to apply whether such peace officers were on or off duty.

Consistent with our analysis is the fact that subdivision (a) of section 25450 exempts any peace officer listed in section 830.1, etc., “whether active or honorably retired” (italics added). Obviously, persons who are honorably retired peace officers are not engaged in the scope of a present, on-duty assignment as a peace officer; nevertheless, the exemption applies to them as individuals. It would seem that, at least for purposes of this subdivision of the exemption, the Legislature was interested in benefitting *the persons* who serve as section 830.1 peace officers, or who are honorably retired from such service, without imposing further conditions (i.e., situational variables) on the exemption such as on duty, off duty or scope of authority. Of course, we will have to consider section 830.1 as well, and we do so below. However, at this point, we simply observe that there is no indication in the wording of section 25450, subdivision (a) itself—which plainly confers the exemption on broad categories of listed peace officers and retired officers—that the exemption

was meant to turn on and off like a light switch depending on the individual's particular activities, location or circumstances in a given moment.⁷

C. Prior Attorney General Opinions and the Orange County Case

We note that past Attorney General opinions have, to a significant extent, agreed with what we have said thus far concerning the peace officer exemption statute. For example, in 1980, the Attorney General held that "Department of Corrections peace officers, as defined in . . . section 830.5, are exempt from the prohibition against carrying a concealed firearm . . . by virtue of [former] section 12027 [now section 25450] whether such officers are on duty or off duty." (63 Ops.Cal.Atty.Gen., *supra*, at p. 386.) In considering the wording of the exemption statute, the Attorney General's opinion noted that "[i]f the Legislature had intended the exemption in [former] section 12027 [now section 25450] to apply to peace officers only when they were acting with peace officer authority it could have so stated" (*id.* at p. 388, fn. omitted), adding that "when the Legislature has determined to limit the exemption of [former] section 12027 [now section 25450] to a person while such person is acting in the course of a certain duty, it has done so" (*ibid.*). Thus, the Attorney General concluded in that opinion that the Legislature did not intend to limit the exemption to peace officers "while they are acting within the scope of peace officer authority." (*Id.* at p. 390; accord, 72 Ops.Cal.Atty.Gen., *supra*, at p. 172; 78 Ops.Cal.Atty.Gen., *supra*, at p. 217.)⁸

In an apparent response to the opinion in 63 Ops.Cal.Atty.Gen., *supra*, at page 385, the Legislature added language to section 830.5 to address the carrying of firearms by state correctional officers, and it has continued to amend that section over the years, including the addition of provisions referencing both on-duty and off-duty carrying of firearms by certain officers.⁹ (*Orange County, supra*, 14 Cal.App.4th at pp. 578–582 [summarizing

⁷ At this point in our analysis, we are considering the language and structure of the exemption statute itself. Later in our discussion, we will consider whether any limiting language in section 830.1, subdivision (c), may potentially qualify or limit what is otherwise indicated by section 25450, subdivision (a).

⁸ In 78 Ops.Cal.Atty.Gen., *supra*, at page 217, the Attorney General observed: "As long as the person has the status of being a duly appointed peace officer, the statutory exemption for possessing a firearm applies regardless of when or where the person may exercise peace officer powers."

⁹ As currently worded, section 830.5 regulates carrying firearms on duty and, for some categories of peace officer, it addresses off duty as well. (See § 830.5, subds. (c) & (d).) It also states in the initial paragraph: "Except as specified in this section, these peace officers may carry firearms only if authorized and under those terms and conditions specified by their employing agency . . ." (§ 830.5.) The latter language, which is also contained in numerous other sections of chapter 4.5, has been held to allow employer regulation of carrying firearms only when the peace officers are on duty. (*Orange County, supra*, 14 Cal.App.4th at pp. 581–583 [construing §§ 830.33, 830.35 & 830.36].) We note that at least one section of

Atty. Gen. opns. interpreting peace officer exemption and legislative response in the form of § 830.5 amendments.) According to the appellate court's analysis in *Orange County*, this history indicates that when the Legislature wants to restrict the effect of the peace officer exemption for a particular classification of peace officers, it does so by expressly addressing the matter of carrying of firearms within the applicable provision of chapter 4.5. (*Orange County, supra*, at p. 582.) The Court of Appeal forcefully stated: "[I]n various amendments to . . . section 830.5 over the past decade [citation] the Legislature has specifically authorized on- and off-duty regulation of concealable firearms of state correctional officers. Had it intended county officers to be subject to similar controls, it surely would have said so." (*Ibid.*)

Orange County ultimately involved the interpretation of language in sections 830.33, 830.35 and 830.36, stating that the identified peace officers in those sections may carry firearms "only if authorized and under terms and conditions specified by their employing agency." (*Orange County, supra*, 14 Cal.App.4th at pp. 581–582.) In light of an Attorney General interpretation that such wording referred only to *on-duty* carrying of firearms, of which interpretation the Legislature was presumably aware at the time the subject provisions were enacted, the Court of Appeal held that the language allowing the employing agency to regulate carrying of firearms applied only to *on-duty* carrying of firearms, not to off-duty carrying. It concluded: "We must assume the Legislature knew what it was doing when it employed the language of the statutes at issue in this case. If the county wishes to restrict the carrying of concealed weapons by the affected officers, it will have to apply to the Legislature." (*Id.* at pp. 582–583, fn. omitted.) Because the county in that case had improperly applied the language in question to restrict the peace officers from carrying concealed firearms while *off duty*, which practice the trial court had upheld, the Court of Appeal reversed with directions to enter declaratory relief for the plaintiff, Orange County Employees Association. (*Id.* at pp. 577, 583.)

Although the *Orange County* case involved different provisions of chapter 4.5 (our case involves § 830.1), the basic approach it employed reinforces our observation that when the Legislature wishes to restrict or qualify the scope of the peace officer exemption with respect to a particular classification of peace officer, the Legislature does so—either in the exemption statute itself, or by explicitly addressing the matter of carrying firearms within the applicable provision of chapter 4.5.

chapter 4.5 explicitly restricts off-duty carrying of firearms by certain peace officers (see § 830.31, subd. (c)(3)), and other sections prohibit carrying any firearms (see, e.g., § 830.3, subds. (h), (k), (l), (m), (o) & (q)).

D. *Section 830.1*

This leads to the questions: Does section 830.1, subdivision (c), explicitly restrict or qualify the peace officer exemption granted to the custodial deputies under section 25450, subdivision (a)? Does it expressly address the carrying of firearms, whether on or off duty? Plainly, it does neither.

Section 830.1, subdivision (c), provides that any deputy sheriff of one of the counties listed therein (including Stanislaus County) “who is employed to perform duties exclusively or initially relating to custodial assignments with responsibilities for maintaining the operations of county custodial facilities, including the custody, care, supervision, security, movement, and transportation of inmates, *is a peace officer* whose authority extends to any place in the state only while engaged in the performance of the duties of his or her respective employment and for the purpose of carrying out the primary function of employment relating to his or her custodial assignments, or when performing other law enforcement duties directed by his or her employing agency during a local state of emergency.” (Italics added.)¹⁰

■ Section 830.1, subdivision (c), is similar to most of the other provisions of chapter 4.5 in that it (1) identifies certain persons (i.e., custodial deputies of the listed counties) as peace officers and (2) defines, limits and delineates the nature of the authority such persons have as peace officers. However, unlike a number of other provisions in chapter 4.5 (e.g., §§ 830.5, 830.31, 830.33), nothing in section 830.1, subdivision (c), purports to address, much less limit, the carrying of firearms by the peace officers described therein, whether on or off duty. Because section 25450, subdivision (a), unequivocally grants an exemption from the law prohibiting the carrying of concealed weapons to “[a]ny peace officer, listed in Section 830.1,” and since nothing in section 830.1, subdivision (c), purports to restrict or qualify what has been granted in that exemption, it follows that the exemption is fully applicable to custodial deputies.

Indeed, this appears to have been the result actually contemplated by the Legislature, as evidenced by certain legislative committee reports. Custodial deputies of certain counties were initially declared to be peace officers during the 1996 legislative session, when subdivision (c) of section 830.1 was enacted. (Stats. 1996, ch. 950, § 1, p. 5347.) Four years later, custodial

¹⁰ We note that custodial deputies should not be confused with other types of custodial positions that are not peace officers. Local law enforcement agencies may employ custodial officers under sections 831 and 831.5 to assist in the work of maintaining custody of prisoners and to perform other tasks in local detention facilities. By statute, such custodial officers are *not* peace officers, although they may have some functions that are similar to peace officers. (§§ 831, subd. (a), 831.5, subd. (a).)

[REDACTED]

[REDACTED]

deputies employed by San Diego County were added to the peace officers identified in section 830.1, subdivision (c). (Stats. 2000, ch. 61, § 1, p. 1136.) When Senate Bill No. 1762 (1999–2000 Reg. Sess.) was being considered, the Senate Committee on Public Safety provided its analysis of the legislation, noting that “[e]xisting law provides that any peace officer listed in . . . sections 830.1, 830.2, and other duly appointed peace officers are allowed to carry firearms concealed in public while off-duty.” (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1762 (1999–2000 Reg. Sess.) as amended May 2, 2000, p. 9.) The Senate Committee on Public Safety then made the following comment on the effect of the bill on San Diego County custodial deputies: “The sponsors of this bill are . . . now apparently comfortable with the effect of this bill as currently amended which would allow all of the new [section] 830.1[] correctional peace officers to carry firearms off duty without the sheriff needing to issue a separate permit to carry a concealed weapon in public to those officers.” (*Id.* at p. 11.) As correctly asserted by appellant, this is a clear indication of the Legislature’s understanding and intent with respect to custodial deputies listed as peace officers under section 830.1, subdivision (c); namely, that such deputies may carry concealed weapons while off duty without the necessity of obtaining a separate permit or license.

Seven years after San Diego County was added to section 830.1, subdivision (c), Glenn, Lassen and Stanislaus Counties were added as well. (Stats. 2007, ch. 84, § 1, p. 369.) In connection with Assembly Bill No. 151 (2007–2008 Reg. Sess.), the Senate Committee on Public Safety again commented on the effect of the counties’ custodial deputies being included as peace officers under the proposed law, stating as follows: “Being a peace officer . . . confers a special status under several Penal Code provisions, e.g. . . . any peace officer listed in . . . Sections 830.1, 830.2, is allowed to carry firearms concealed in public while off-duty, even if that person’s employing agency does not allow the officer to carry a firearm while on-duty. (*Orange County*[, *supra*], 14 Cal.App.4th [at p.]582.) Additionally, an honorably retired peace officer may carry a concealed and/or a loaded weapon in a public place or vehicle after retirement.” (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 151 (2007–2008 Reg. Sess.) as introduced Jan. 17, 2007, p. 6.) We note that similar statements are contained in committee reports when, in other legislative sessions, other counties were added to section 830.1, subdivision (c), by similar amendment. (See, e.g., Sen. Com. on Public Safety, Analysis of Assem. Bill No. 272 (2005–2006 Reg. Sess.) as amended Sept. 6, 2005, enacted by Stats. 2006, ch. 127, § 1, p. 127 [adding Inyo, Kings & Tulare Counties to § 830.1, subd. (c)].)

Legislative history such as committee reports may be resorted to as an extrinsic aid to discerning legislative intent. (*California Teachers Assn.*, *supra*, 14 Cal.4th at p. 646.) Here, the committee reports recited above strongly suggest that, in declaring custodial deputies to be peace officers under section

831, subdivision (c), the Legislature understood and intended one of the effects thereof would be that such custodial deputies would be allowed to carry a concealed weapon while off duty without the necessity of obtaining a separate permit from the sheriff. If there was any doubt on this issue, we believe the legislative history decisively resolves it in favor of the interpretation urged by appellant.

E. *The 2002 Attorney General Opinion*

As we noted above, in 2002, the Attorney General, relying on the language of section 830.1, subdivision (c), held that custodial deputies described therein did not have peace officer status or authority when they were away from the county detention facilities appearing at community service events, participating in the sheriff's honor guard, or conducting recruitment background checks or internal affairs investigations. During those occasions, since the deputies purportedly lacked peace officer status, the Attorney General held the custodial deputies "would be subject to certain statutory prohibitions such as those against carrying a concealed weapon." (85 Ops.Cal.Atty.Gen., *supra*, at p. 131.) The trial court relied on this 2002 Attorney General opinion to conclude that the peace officer exemption (§ 25450) did not apply to custodial deputies while they were off duty. On that basis, the trial court denied all relief.

To the extent that the 2002 Attorney General opinion held that the peace officer exemption does not apply to custodial deputies under section 830.1, subdivision (c), while they are off duty, we decline to follow it. (85 Ops.Cal.Atty.Gen., *supra*, at pp. 131, 133.) Respondents argue, based on said Attorney General opinion, that the limiting language of section 830.1, subdivision (c), relating to custodial deputies' *scope of authority* as peace officers would cause them to lose their peace officer *status* at the moment they were off duty. We disagree. Section 830.1, subdivision (c), declares without any qualification that a custodial deputy *is a peace officer*, and then goes on to delineate a custodial deputy's scope or extent of authority. Nothing in that section's description (including limitations) of custodial deputies' scope of authority *as peace officers* indicates an entire loss of their *status* as peace officers while they are off duty.

Moreover, as we have explained at length herein, the pattern used by the Legislature in this statutory scheme is that when it wants to limit the application of the peace officer exemption with respect to a particular classification of peace officer, it does so explicitly. That was not done in section 830.1, subdivision (c), and we find no warrant to find such a limitation by implication.

IV. Dispositional Matters

In its petition in the trial court, appellant sought a judicial declaration that section 830.1, subdivision (c), custodial deputies are exempt (under § 25450, subd. (a)) from the law prohibiting the carrying of concealed firearms, and need not obtain a permit from the sheriff to carry a concealed firearm while off duty. For the reasons discussed in this opinion, appellant is clearly entitled to such declaratory relief. We therefore reverse the judgment of the trial court and remand the case to the trial court with directions to enter a new judgment granting declaratory relief to appellant, consistent with this opinion. On remand, the trial court shall also consider and decide whether there are adequate and proper grounds to grant the other forms of relief sought by appellant in the petition under the related causes of action for writ of mandate and/or injunctive relief.¹¹ The trial court's decision on those related causes of action shall likewise be set forth in the new judgment to be entered by it.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion, including the entry of declaratory relief in appellant's favor. Costs on appeal are awarded to appellant.

Hill, P. J., and Gomes, J., concurred.

¹¹ Of course, the trial court may require further briefing and proceedings on such causes of action before determining whether or not such further relief is warranted or proper under the circumstances.

[No. A145642. First Dist., Div. One. Aug. 11, 2016.]

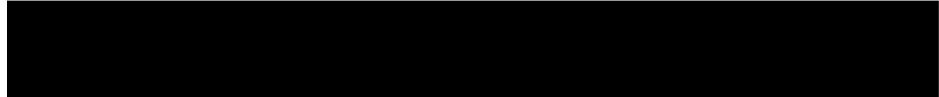
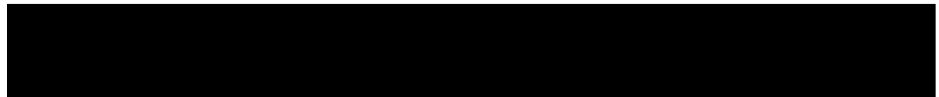
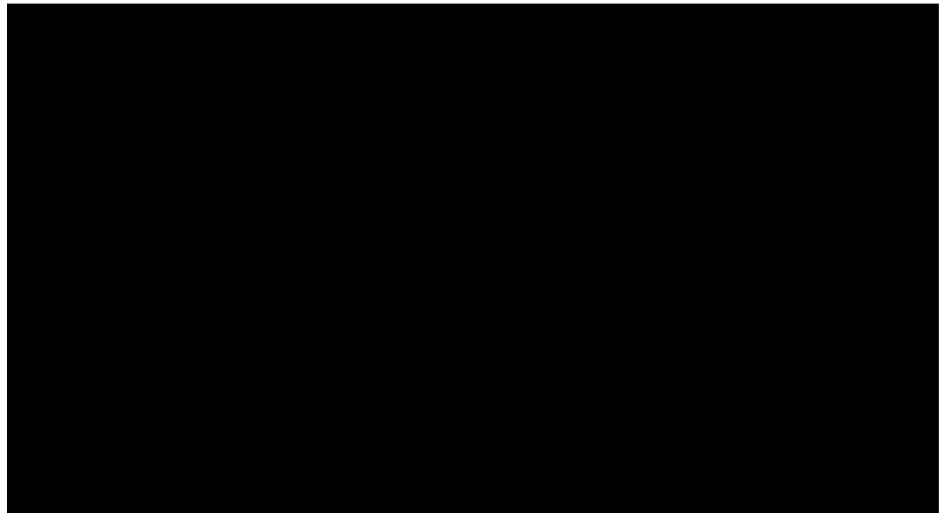
KEVIN A. COLES, Plaintiff and Respondent, v.
BARNEY G. GLASER et al., Defendants and Appellants.

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COUNSEL

Farmer Brownstein Jaeger and William S. Farmer for Defendant and Appellant Barney G. Glaser.

Bartko, Zankel, Bunzel & Miller and Marco Quazzo for Defendant and Appellant Fred W. Taylor.

Kevin A. Coles, in pro. per., for Plaintiff and Respondent.

OPINION

HUMES, P. J.—Plaintiff Kevin A. Coles filed this action against defendants Barney G. Glaser and Fred Taylor for allegedly breaching a settlement agreement the parties had entered in a prior lawsuit. Coles brought the prior suit to recover an overdue loan that he had extended to a real estate investment company, Cascade Acceptance Corporation (Cascade), and that was guaranteed by Glaser and Taylor. That case was settled when Cascade ostensibly paid off the loan, and Coles, in return, executed a release. But shortly after the settlement, Cascade filed for bankruptcy, and Coles was forced to surrender most of the settlement proceeds to the bankruptcy trustee as a preferential payment. The trial court in this case found that Glaser and Taylor had breached the settlement agreement, and it entered judgment in favor of Coles. We affirm, holding that a debt of a contractual co-obligor is not extinguished by another co-obligor's pre-bankruptcy payment to a creditor that is later determined to be a bankruptcy preference.

I.

FACTUAL AND PROCEDURAL BACKGROUND

In 2005, Coles lent money to Cascade, and defendants guaranteed the loan's repayment. In early 2009, Glaser—Cascade's president and chairman

of the board—*informed* Coles that Cascade could not repay him in the foreseeable future. Coles then sued Cascade, Glaser, and Taylor—Cascade’s vice-president—seeking to recover the amount of the loan and other damages. Shortly after the suit was filed, Cascade wired \$308,783.85 to Coles’s bank account to pay off the loan, and the parties quickly entered into a settlement agreement. The agreement required Cascade, Glaser, and Taylor to pay off the loan, acknowledged that Cascade had transferred the full amount of the outstanding obligation to Coles, and included a release of claims by Coles.¹ The agreement was signed by Glaser on behalf of Cascade, and by Glaser and Taylor individually. The case was soon dismissed.

A week after the case was dismissed, Cascade filed for bankruptcy. Months later, the bankruptcy trustee demanded that Coles surrender the settlement proceeds he had received from Cascade as a voidable preferential payment under 11 United States Code section 547(b)(4)(B). Eventually, Coles and the trustee negotiated a compromise under which Coles surrendered \$200,000 in cash and a promissory note to Coles issued by a Cascade affiliate.² We shall follow the usage of the trial court and parties by referring to Coles’s surrender of these assets as the bankruptcy “clawback.”

Coles filed a claim in the bankruptcy proceeding and received some distributions as a creditor. But he was left with a significant shortfall, which he sought to recover by bringing this lawsuit against Glaser and Taylor. The operative complaint asserted a cause of action for breach of contract based on the allegation that Glaser and Taylor violated the settlement agreement because Coles was not paid the full sum he was due.³

After a one-day bench trial on the breach of contract claim, the trial court ruled in Coles’s favor. It found that Glaser and Taylor were jointly responsible with Cascade for payment of the full sum owed under the settlement agreement and that both were liable for the shortfall because Cascade’s pre-bankruptcy payment was a legal nullity to the extent it was clawed back.

¹ Coles agreed “to release and does hereby release any claims of any kind against DEFENDANTS, . . . which either were or could have been asserted in the Action.” The release discharged defendants and Cascade from any liability “arising from the Claim, except for obligations arising under this Compromise Settlement and Release Agreement.”

² The trial court found that the note had a “purported” value of \$78,923.58 but an actual value of \$50,000.

³ Two other causes were also asserted, but they are not relevant to the issues on appeal. The first one was based on fraud, and it was dismissed with prejudice at trial. The second was based on common count, and the trial court found that it was moot in light of the court’s finding that the settlement agreement was breached. In addition, Coles did not pursue his allegation that defendants breached the covenant of good faith and fair dealing.

The court ruled that because “Cascade’s payment was clawed back, Defendants [could not] rely on Cascade’s satisfaction of Defendants’ contractual obligation.” It explained that, “[a]s [a] matter of law, the payment that had been promised and purportedly delivered in connection with the settlement agreement does not exist. The ‘clawback’ effected a *nunc pro tunc* reversal of the payment that had been made. As a result of that reversal, Cascade and [defendants] did not perform that which [the] settlement agreement required, payment of the settlement funds. Further, [Coles’s] release of his claims . . . was based on the payment that was subsequently clawed back by the bankruptcy trustee. The release was granted only in exchange for the payment that now has been revoked. [Coles] effectively by operation of law never received the payment and thus, the release is invalid or ineffective. The parties [were] put back in the position [they] were in at the time the payment was purportedly made, prior to the purported release.” Based on its findings, the court entered a \$207,515.82 judgment in favor of Coles.⁴

II.

DISCUSSION

Glaser and Taylor argue that the trial court erred in ruling that they breached the settlement agreement because Cascade paid the full amount due under the agreement and Coles released them from further liability. They argue that it is inconsequential that part of Cascade’s payment was deemed a preference and clawed back for the benefit of the bankruptcy estate. As we shall explain, they are mistaken.

We review the decision of the trial court de novo where, as here, the facts are not in dispute and the appeal raises only questions of law. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800–801 [35 Cal.Rptr.2d 418, 883 P.2d 960]; see, e.g., *Taylor v. Nu Digital Marketing, Inc.* (2016) 245 Cal.App.4th 283, 288 [199 Cal.Rptr.3d 488] [issues of contract interpretation reviewed de novo absent admission of extrinsic evidence]; *In re Chang* (9th Cir. 1998) 163 F.3d 1138, 1140 [applying de novo review in interpreting and applying a provision of the bankruptcy code].)

⁴ In calculating the amount of the judgment, the trial court accounted for two bankruptcy distributions that Coles had apparently received: one in the amount of \$28,538, and another in the amount of \$15,946.19. We need not resolve any disputes about the amount of the judgment because on appeal Glaser and Taylor challenge only their liability for the judgment, not its amount.

■ We begin our review by discussing voidable preferences in bankruptcy. Under 11 United States Code section 547(b), a bankruptcy trustee may seek to recover for the benefit of the bankruptcy estate payments a debtor made to a creditor before filing the bankruptcy petition. The “section gives the trustee the right to undo, in certain circumstances, transfers that were made during the 90 days prior to the bankruptcy filing. It is a broad grant of authority, allowing avoidance of transfers of interests of the debtor in property if five conditions are satisfied and unless an exception applies.” (*In re Churchill Nut Co.* (Bankr. N.D.Cal. 2000) 251 B.R. 143, 149.) The statute serves two basic policies: it discourages a pre-bankruptcy race to the courthouse by creditors, and it facilitates equality in estate distribution among creditors. (*Union Bank v. Wolas* (1991) 502 U.S. 151, 154–155 [116 L.Ed.2d 514, 112 S.Ct. 527].) Recovering a payment as a preference “requires a finding that the debtor was insolvent when the payment was made and essentially treats the estate as if it were already created during the preference period. Since an insolvent debtor has no equity in that estate, the pre-petition payment was in fact made by the other creditors of the estate, not by the debtor.” (*In re Hackney* (Bankr. N.D.Cal. 1988) 93 B.R. 213, 218.) In this case, we are, of course, bound by the bankruptcy determination that the loan repayment to Coles was a preference, and the parties do not argue to the contrary. (See *Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1163 [121 Cal.Rptr.2d 773] [“California gives full faith and credit to a final order or judgment of a federal court,” including in bankruptcy matters].)

■ Coles’s breach of contract claim was brought against Glaser and Taylor not on the basis of their status as guarantors under the original note, but instead on the basis of their status as co-obligors under the settlement agreement. Much of the relevant authority in this area has developed in bankruptcy courts and discusses the liability of guarantors, rather than co-obligors, for pre-bankruptcy payments to creditors made by a bankrupt debtor that are later clawed back into the bankruptcy estate as a preference. This authority uniformly holds that guarantors remain liable to creditors for the debt reflected in these clawed-back payments. “[C]ourts have uniformly held that a payment of a debt that is later set aside as an avoidable preference does not discharge a guarantor of [its] obligation to repay that debt.” (*Wallace Hardware Co., Inc. v. Abrams* (6th Cir. 2000) 223 F.3d 382, 408; see also *In re SNTL Corp.* (Bankr. 9th Cir. 2007) 380 B.R. 204, 213 [“the return of a preferential payment by a creditor generally revives the liability of a guarantor”]; *In re Robinson Bros. Drilling, Inc.* (10th Cir. 1993) 6 F.3d 701, 704 [courts “have recognized, without regard to any special guaranty language, that guarantors must make good on their guarantees following avoidance of payments previously made by their principal debtors”]; *In re Herman Cantor*

Corp. (Bankr. E.D.Va. 1981) 15 B.R. 747, 750 [“Although a surety usually is discharged by payment of the debt, [the surety] continues to be liable if the payment constitutes a preference under bankruptcy law”]; accord, Rest.3d Suretyship & Guaranty § 70.)

California authority is in agreement. In *Conner v. Conner* (1999) 76 Cal.App.4th 646 [90 Cal.Rptr.2d 687] (*Conner*), one brother, FM, guaranteed the payment of a company’s obligation under a promissory note to another brother, Billie. (*Id.* at p. 648.) The company filed for bankruptcy, and Billie was forced to surrender as preferences some of the payments he had received from the company. (*Ibid.*) During the bankruptcy proceedings, Billie opposed a reorganization plan and declined to accept a settlement of his claim. (*Id.* at p. 649.)

FM sued in state court for declaratory relief. (*Conner, supra*, 76 Cal.App.4th at p. 649.) He argued that the guarantor could not be enforced because Billie had declined to settle his bankruptcy claim and thereby adversely affected FM’s interest. (*Ibid.*) The Court of Appeal affirmed the trial court’s determination that FM remained liable as a guarantor of the note, observing that “[b]y rejecting the settlement offer, Billie left the personal guarantee just as it was bargained for . . . years earlier.” (*Id.* at p. 650.) The court held that to find the guarantee unenforceable would effectively “judicially erase FM’s signature from the personal guarantee [and] would be a windfall to [FM] and unfair to Billie. The trial court’s ruling protects the reasonable expectations of the parties when they entered into the [agreements that included the guarantee].” (*Id.* at p. 652.)

■ Glaser and Taylor argue that *Conner, supra*, 76 Cal.App.4th 646 does not control here because Coles’s breach of contract claim is based not on their status as guarantors but instead on their status as cosignatories of the settlement agreement. They argue that their liability was extinguished when Cascade satisfied the joint obligation to pay the settlement amount. In doing so, they essentially argue that a guarantor’s liability under a contractual guarantee for a payment later deemed to be a preference is different from a co-obligor’s liability under a settlement agreement for such a payment. The trial court rejected this argument, finding no “significance in the distinction. The obligations of someone directly making a promise to pay are at least as strong as those of someone making a guarantee.” We are in complete agreement with the court. (See *Wagner v. Giles* (Ky.Ct.App. 2006) 209 S.W.3d 489, 492 [“The fact that [the defendant] was a co-maker rather than a guarantor of the notes does not dictate a different result”].)

■ A party's obligation, whether under a guarantee or a settlement agreement, is contractual. The elements of a cause of action for breach of contract are: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614 [126 Cal.Rptr.3d 174].) Here, the parties agree that the settlement agreement is a contract, that Coles performed his obligation under it by issuing the release, and that Coles suffered damages by not receiving the shortfall as a result of the clawback.

The only disputed element is whether Glaser and Taylor breached the agreement, and we agree with the trial court that they did. The agreement specifically defined the defendants in the previous lawsuit to include Glaser, Taylor, and Cascade, and it was signed, as we mentioned above, by all three. In exchange for Coles's release, the settlement required that those defendants "pay directly to [Coles] the sum of . . . [\$308,783.85], which sum was received by [Coles] from DEFENDANTS through inter-bank wire transfer." But this term was violated in at least two ways as a result of the clawback: the full amount of the obligation was not paid, and none of the three defendants paid the amount reflected in the clawback.

■ The full amount owed under the settlement agreement was not paid even if none of the parties was aware of that fact at the time the settlement agreement was entered. We agree with the trial court that Coles "effectively by operation of law never received . . . payment" to the extent of the clawback. "A preferential payment is deemed by law to be no payment at all." (*In re Herman Cantor Corp., supra*, 15 B.R. at p. 750.) ■ "Under the [Bankruptcy Code], a payment which is set aside as a preference is null and void, as if no payment had been made, and the parties are returned to the status quo ante." (*Wagner v. Giles, supra*, 209 S.W.3d at p. 491, italics omitted.)

Not only was the full amount not paid, but also the portion reflected in the clawback was not paid by any of the three defendants, including Cascade, as required by the agreement. True enough, Cascade ostensibly paid the full settlement sum at the time of the settlement. But, as a matter of law, the portion of the payment eventually clawed back was actually paid by Cascade's creditors, not by Cascade, once it was determined to be a preference, and those creditors had every right to have it surrendered to the bankruptcy estate for proper distribution. (See *In re Hackney, supra*, 93 B.R. at p. 218.) In short, Glaser and Taylor's insistence that "Cascade made the entire payment" is simply wrong as a matter of law.

“‘The purpose of the law of contracts is to protect the reasonable expectations of the parties.’” (*Citizens for Goleta Valley v. HT Santa Barbara* (2004) 117 Cal.App.4th 1073, 1076 [12 Cal.Rptr.3d 249]; see Civ. Code, § 1636.) No one suggests that the parties intended for Coles to provide a release regardless of whether he got paid. The most that defendants intimate is that Coles may have known that Cascade was insolvent and near bankruptcy at the time the settlement agreement was reached. In our view, any such knowledge has no bearing on whether defendants breached their contractual obligations.⁵ (See, e.g., *Wallace Hardware Co., Inc. v. Abrams, supra*, 223 F.3d at p. 409 [whether settlement is “binding [on guarantor] in spite of [debtor’s] subsequent bankruptcy . . . turns purely on contract and bankruptcy principles, and not on the relative blameworthiness of the parties”].)

Having concluded that Glaser and Taylor breached the settlement agreement, we need not address their arguments based on the release, including their contention that Coles’s breach of contract claim here is covered by the release as a claim “arising out of or connected with the [original] Claims” in the previous lawsuit. Having failed to keep their end of the bargain, Glaser and Taylor are in no position to argue that the release, which Coles gave to keep his end of the bargain, bars Coles from recovering the damages he incurred as a result of their breach.

■ But on one related matter we disagree slightly with the trial court. It determined that the release “is invalid or ineffective” as a result of Glaser and Taylor’s breach. Although defendants cannot rely on the release to prevent Coles from asserting that the settlement agreement itself was breached, the release is not otherwise invalid. A party to a contract has two different remedies when injured by a breach of contract: the party may disaffirm the contract, treating it as rescinded, and recover damages resulting from the rescission, or, alternatively, may affirm the contract, treating it as repudiated, and recover damages. (*Wong v. Stoler* (2015) 237 Cal.App.4th 1375, 1384 [188 Cal.Rptr.3d 674].) Here, Coles did not treat the contract as rescinded but instead affirmed it by seeking and obtaining the amount of the shortfall the clawback caused. The release, therefore, remains a part of the unrescinded agreement and prevents Coles from pursuing any future claims that may be barred by it.

⁵ We need not address Glaser’s claim that certain exhibits related to Coles’s knowledge of the bankruptcy were improperly admitted. This claim is conditioned on our reversing the trial court’s judgment, which we decline to do, and is forfeited in any event because it is unsupported by “reasoned argument and citation to authority.” (*Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1066 [193 Cal.Rptr.3d 403].)

III.

DISPOSITION

The judgment is affirmed. Coles is awarded his costs on appeal.

Margulies, J., and Dondero, J., concurred.

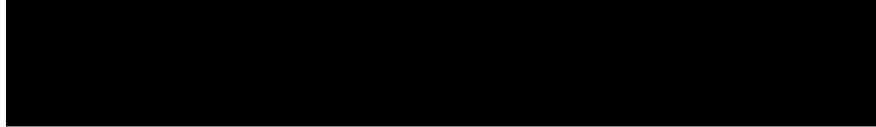
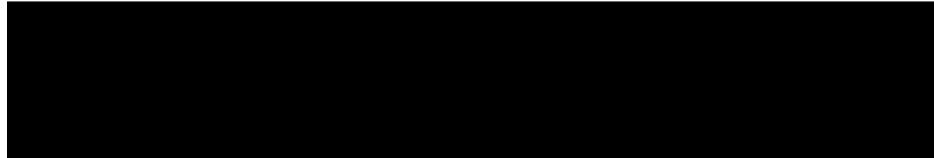
[No. B268231. Second Dist., Div. Eight. Aug. 11, 2016.]

TRUCK INSURANCE EXCHANGE, Petitioner, v.
WORKERS' COMPENSATION APPEALS BOARD and NG FUNG
KWOK, Respondents.

[REDACTED]

[REDACTED]

[REDACTED]



COUNSEL

Horvitz & Levy, David M. Axelrad, Bradley S. Pauley, Julie L. Woods; Williams-Abrego Los Angeles, Kevin D. Miller, Vanessa Y. Cavanna, Dana L. Sandoval and David S. Ettinger for Petitioner.

Anne Schmitz and Allison J. Fairchild for Respondent Workers' Compensation Appeals Board.

Law Offices of Williams O. Owuor, Williams O. Owuor, Steven C. Louie and Charles R. Rondeau for Respondent Ng Fung Kwok.

OPINION

GRIMES, J.—Petitioner Truck Insurance Exchange of Farmers Insurance Group (Farmers) contends the defense of laches bars the workers' compensation claim of the employee. The employer received notification of the injury

the day after it happened but a workers' compensation claim was not submitted to Farmers until more than seven years later. However, notice to or knowledge of a workplace injury on the part of the employer is deemed to be notice to or knowledge of the insurer.¹ Since Farmers is deemed to have known of the injury the day after it occurred, Farmers cannot show delay in receiving notice of the claim, which is an essential element of laches (*Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1157 [63 Cal.Rptr. 3d 713]). We hold laches does not apply. We therefore affirm the order excluding laches as an affirmative defense and remand the case to the Workers' Compensation Appeals Board (appeals board) for further proceedings.

FACTUAL BACKGROUND

A. *The Employee and the Accident*

It is undisputed that the employee, Ng Fung Kwok (Kwok), was employed as a restaurant manager and waiter by Nu Square Corporation, doing business as Har Lam Kee Restaurant (restaurant). The owner of the restaurant was King Tak Cheung (Mr. Cheung). Mr. Cheung is the older brother of Kwok's wife, Yuk Lin Cheung (Ms. Cheung).

On the morning of January 10, 2005, rain was coming into the restaurant dining area. Kwok went out to the backyard area with a ladder to inspect the leak. A few minutes later, Kwok was found lying on the ground unconscious with the ladder next to him.

Kwok sustained a brain hemorrhage and was and continues to be paralyzed from the shoulders down. Since the accident, Kwok receives 24-hour medical care.

B. *Notification*

Ms. Cheung notified Mr. Cheung of Kwok's accident by way of a phone call the day after it occurred. Mr. Cheung was then in Hong Kong for treatment of an illness. While Farmers contended that Mr. Cheung did not know of the injury, the workers' compensation administrative law judge (WCJ) rejected as not believable that Mr. Cheung never received information about his brother-in-law's injury. The WCJ found Ms. Cheung's testimony "far more believable" that she called Mr. Cheung in Hong Kong and told him

¹ "Every such contract or policy shall contain a clause to the effect that, as between the employee and the insurer, notice to or knowledge of the occurrence of the injury on the part of the employer will be deemed notice or knowledge, as the case may be, on the part of the insurer." (Ins. Code, § 11652.)

what had happened. The appeals board expressly supported the WCJ's credibility determination. Mr. Cheung did not testify nor was he ever deposed. No evidence was presented that contradicted Ms. Cheung's testimony on this issue.

Within one working day of receiving notice or knowledge of injury, the employer is required to provide to the employee a claim form and a notice of potential eligibility for workers' compensation benefits. (Lab. Code, § 5401, subd. (a).)² The WCJ concluded that in this case this "was apparently never done." If an employer breaches this statutory duty, the limitations period is tolled for the period of time that the employee remains unaware of his rights. (*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (1985) 39 Cal.3d 57, 60 [216 Cal.Rptr. 115, 702 P.2d 197].)

C. *Kwok's Workers' Compensation Claim*

Ms. Cheung, Kwok's wife, filed a workers' compensation claim for Kwok in July 2012, more than seven years after the accident. This came about because Ms. Cheung heard a radio program about workers' compensation cases and began inquiring with attorneys. Although she had procured workers' compensation insurance for the restaurant after the accident, she did not understand what workers' compensation meant. She understood that without liability and workers' compensation insurance, the business could not operate. She bought the insurance based on what the insurance agent told her was necessary.

Given Ms. Cheung's lack of familiarity with the workers' compensation system, this was exactly the kind of case where notice of workers' compensation rights under section 5401 was particularly important.

D. *Coverage*

It was stipulated that the restaurant was insured for workers' compensation by Farmers.

E. *Testimony About Laches*

Farmers called Elizabeth Wojcik (Wojcik) as a witness to support its laches defense.

Wojcik began handling Kwok's claim in March 2013. Kwok's claim first came to the attention of Farmers in July 2012. Farmers tried to verify

² Statutory references are to the Labor Code, unless otherwise noted.

coverage but it was difficult to verify the dates of coverage because it was a number of years since the date of injury. Coverage was ultimately confirmed through the Workers' Compensation Insurance Rating Bureau (WCIRB).³

Wojcik investigated the claim to determine the owner of the business and the owner of the building. However, only limited information was obtained through the business owner, Mr. Cheung, and the owner of the building, Sharon Feng.

Wojcik found indications that the owners of the restaurant might be Kwok, an older brother, or Ms. Cheung. She attempted to investigate by interviewing people working in the restaurant but no one remembered anything. Wojcik subpoenaed records from the Secretary of State, the State Department of Health Care Services, and the Department of Alcoholic Beverages Control, which included a statement that the restaurant was transferred to Ms. Cheung from the prior owner. Wojcik could not come to a conclusion about whether Kwok owned the restaurant.

The cause of the fall was unknown because no one actually witnessed the fall. The roof was flat so it would have been difficult to fall off the actual roof. Wojcik was unable to determine if there was a defect in the ladder because it could not be located. Wojcik testified that Farmers was unable to determine if the fall was intentional, if there was horseplay involved, if there was criminal activity, or if there was intoxication. There was one witness mentioned in the police report but he could not be located.

Wojcik confirmed that a copy of the application and a DWC-1 employee's claim form was served on Farmers on July 27, 2012. Wojcik also confirmed that she signed a notice regarding denial of workers' compensation benefits on behalf of Farmers dated March 21, 2013. Wojcik acknowledged that Kwok's claim was not denied within the 90-day period mandated in section 5402.⁴ Accordingly, Wojcik agreed that section 5402 triggered the rebuttable presumption that the claim was compensable. However, Farmers did not treat Kwok's claim as compensable.

³ The WCIRB is the bureau to which employers must provide information pertaining to workers' compensation, including employer information, insurer information, employee information and payroll, and workers' compensation claims filed for previous calendar year. (Cal. Code Regs., tit. 8, § 10203.)

⁴ "If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period." (§ 5402, subd. (b).)

RULINGS OF THE WCJ AND THE APPEALS BOARD

The WCJ concluded that Kwok sustained injury arising out of and occurring in the course of employment. The WCJ also concluded that the statute of limitations did not bar Kwok's claim. The medical record was ordered developed.

On the issue of injury arising out of and occurring in the course of employment, the WCJ noted the parties' stipulation that Kwok was employed by the restaurant as a manager. The WCJ noted the unrebutted testimony of a witness that there was a leak in the roof due to rain and that Kwok went outside carrying a ladder. Several minutes later, Kwok was found lying on the ground outside the restaurant, next to the ladder.

On Farmers' assertion of the statute of limitations, the WCJ found that the employer, Mr. Cheung, was given notice of Kwok's injury the day after the accident but Kwok was not advised of his right to file a workers' compensation claim. Accordingly, the statute of limitations had not expired.

At this point, the WCJ did not address the issue of laches.

Farmers petitioned for reconsideration. One of the grounds upon which reconsideration was sought was the doctrine of laches, which was raised as an issue in the pretrial conference statement but was not addressed by the WCJ. Farmers' contention with respect to laches was that the "carrier was greatly prejudiced by the lengthy delay in filing an Application for Adjudication." The petition for reconsideration also contended that the statute of limitations barred the action, that employment had not been shown, and that the injury did not arise and was not sustained in the course and scope of employment.

The WCJ recommended the petition be denied. Noting that the employer was Mr. Cheung, and not the insurance company, the WCJ found that the undisputed and credible testimony at trial was that Mr. Cheung was notified of the injury the day after the accident. The employer failed to provide Kwok a claim form or to process the injury claim.

On the issue of laches, the WCJ concluded in the report on the petition for reconsideration as follows: "The same facts form the basis of [Farmers'] arguments that this claim should be barred on the grounds of laches, or expiration of the statute of limitations. As set forth above, the undersigned found the testimony of [Ms.] Cheung that she reported the injury to the boss, [Mr.] Cheung, to be credible and as a result, believes that the employer had notice of this accident the day after it occurred. As a result the issue of laches or the statute of limitations are not applicable."

It is clear that the WCJ expressly found that laches did not apply to preclude Kwok's claim.

The appeals board adopted and incorporated the WCJ's report and denied reconsideration. Other than noting that it gave great weight to the WCJ's credibility determination and that there was no evidence to contradict that determination, the appeals board did not issue an opinion of its own.

THE PETITION FOR A WRIT OF REVIEW

Farmers filed a petition for a writ of review in this court on November 16, 2015. Abandoning all other issues, the petition's sole contention was that laches applied to preclude Farmers' liability. The basis of Farmers' laches defense in the petition for writ of review was that Ms. Cheung, like the working population, had to have a "general knowledge . . . concerning the availability of workers' compensation benefits," and that she had "specific knowledge of Kwok's workers' compensation rights" because "she purchased workers' compensation insurance for the restaurant." Ms. Cheung was "on notice (or at least on inquiry notice) of Kwok's rights" and the delay in filing a claim was unreasonable.

The petition did not seek review of the finding that notice had been provided to the employer, Mr. Cheung, the day after the injury by telephone. The petition also did not seek review of the finding that Kwok's injuries had been sustained in the course and scope of employment.

Kwok filed an answer and Farmers submitted a reply.

ISSUANCE OF THE WRIT AND ADDITIONAL BRIEFING

We issued a writ of review on February 5, 2016. As noted, the petition for a writ of review was limited to the laches defense. Given that the appeals board had adopted the WCJ's rulings, including the ruling rejecting the laches defense, on the authority of *Rymer v. Hager* (1989) 211 Cal.App.3d 1171, 1180 [260 Cal.Rptr. 76] we deemed the order rejecting the affirmative defense of laches to be a reviewable order.

Simultaneously with the issuance of the writ, we requested briefing on whether the defense of laches should be remanded to arbitration pursuant to section 5275, subdivision (a), as a question of insurance coverage. As evident in the request, this court assumed laches was raised as a coverage defense to the employer's insurance claim rather than as a defense to Kwok's injury claim.

Each of the parties unequivocally responded that arbitration was no longer appropriate. Both the appeals board and Kwok asserted that there was no coverage dispute raised in the underlying proceedings by Farmers. In addition, the appeals board and Kwok advised that Farmers had stipulated that it provided workers' compensation coverage to the restaurant on January 10, 2005, when Kwok had sustained the injury and that Kwok was an employee of the restaurant at the time of his injury.

On March 15, 2016, this court directed Farmers to explain the impact of the stipulation regarding coverage, if any, on its defense of laches. The appeals board and Kwok were provided an opportunity to reply to Farmers' response.

Farmers' position is that the stipulation is irrelevant to the defense of laches because laches has nothing to do with the merits of the cause against which it is asserted. Questions of coverage and employment status related to the merits of Kwok's claim while Farmers' defense of laches relates to the prejudice caused by the unreasonable delay in bringing the claim.

The appeals board noted Farmers' concession of its stipulations regarding insurance coverage and employment status. Because timely notice was provided to the employer, Mr. Cheung, who failed to give notice of workers' compensation rights, the appeals board asserted that laches could not apply. The breach of the employer's duty outweighed the delay because it was the breach that caused the delay.

Kwok underscored Farmers' failure to challenge the WCJ's findings of employment status, timely notice of the injury to the employer, and the employer's failure to provide statutory notice of workers' compensation rights.

DISCUSSION

■ The appeals board has broad equitable powers with respect to matters within its jurisdiction. (*Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [28 Cal.Rptr.2d 30].) Thus, equitable doctrines such as laches are applicable in workers' compensation litigation. (*State Farm General Ins. Co. v. Workers' Comp. Appeals Bd.* (2013) 218 Cal.App.4th 258, 268 [159 Cal.Rptr.3d 779]; 2 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed. 2016) § 24.03[1], p. 24-14 (rel. 81-3/2015).) Given these principles, the first inquiry is what standard of review applies to the appeals board's ruling that laches does not apply to bar the claim in this case.

■ “Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances, and in the absence of manifest injustice or a lack of substantial support in the evidence its determination will be sustained.” (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624 [166 Cal.Rptr. 826, 614 P.2d 258].) When coupled with the fact that we are empowered to determine if the appeals board’s decision or award is supported by substantial evidence (§ 5952, subd. (d)), it appears that we must decide whether the appeals board’s decision regarding laches is supported by substantial evidence.

Ms. Cheung’s testimony that she called Mr. Cheung the day after the accident and informed him of the accident and of Kwok’s injuries is the only evidence on the question of notification. The WCJ and the appeals board found her testimony to be credible, and it is uncontradicted by any evidence.

“Except as provided by sections 5402 and 5403,^[5] no claim to recover compensation under this division shall be maintained unless within thirty days after the occurrence of the injury which is claimed to have caused the disability or death, there is served upon the employer notice in writing, signed by the person injured or someone in his behalf” (§ 5400.) “Knowledge of an injury, obtained from any source, on the part of an employer, his or her managing agent, superintendent, foreman, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts, is equivalent to service under Section 5400.” (§ 5402, subd. (a).) *Notice to or knowledge of the employer is deemed to be notice to or knowledge of the insurer.* (Ins. Code, § 11652.)

■ Under the foregoing statutes, Farmers was on notice about the accident and the claim of injury, or had knowledge thereof, as of January 11, 2005, the day after Kwok’s accident. Not only is this substantial evidence, the statutes do not allow for any other conclusion. The frustrations reflected in Wojcik’s testimony are, of course, understandable and not surprising.⁶ Yet the fact is that under the law Farmers is deemed to have known of the claim of injury as of January 11, 2005, which means that there was no delay at all. Without at least some delay, the doctrine of laches simply has no application.

⁵ “The failure to give notice under section 5400, or any defect or inaccuracy in a notice is not a bar to recovery under this division if it is found as a fact in the proceedings for the collection of the claim that the employer was not in fact misled or prejudiced by such failure.” (§ 5403.)

⁶ These difficulties, which comprise the prejudice Farmers claims it has suffered, were directly caused by the failure to comply with subdivision (a) of section 5401. If Kwok had been furnished with the claim form and notified of his potential eligibility for workers’ compensation within one day of receiving notice of the injury, Farmers would not have encountered the troubles Wojcik described.

This was the basis of the WCJ's ruling in the report after the petition for reconsideration. Farmers is therefore in error when it contends that the doctrine of laches was misapplied because prejudice was not taken into account. The WCJ did not analyze the issue of prejudice because laches could not be applicable, given that there was no delay.

Farmers is correct when it contends that laches does not implicate the merits of the claim against which it is asserted. But it is not because of the merits of the claim that laches cannot be applied to this case. It is the absence of delay that precludes laches.

In Farmers' most recent filing, Farmers asserts that Mr. Cheung had no interest in limiting his brother-in-law's time to obtain workers' compensation benefits, thus extending the time to file indefinitely. According to Farmers, laches should be applied to prevent this type of open-ended time limitation. Even though there is no evidence that there was collusion among the family members, that is exactly what Farmers is contending. However, the basis for the laches defense in Farmers' petition for reconsideration was that the "carrier was greatly prejudiced by the lengthy delay in filing an Application for Adjudication." No claim was raised with respect to collusion between the employer and employee to leave the workers' compensation claim open. The argument therefore is deemed waived pursuant to section 5904.⁷

The appeals board's decision precluding the defense of laches is affirmed.

DISPOSITION

The decision of the appeals board, entered on October 2, 2015, denying Farmers' petition for reconsideration is affirmed.

Rubin, Acting P. J., and Flier, J., concurred.

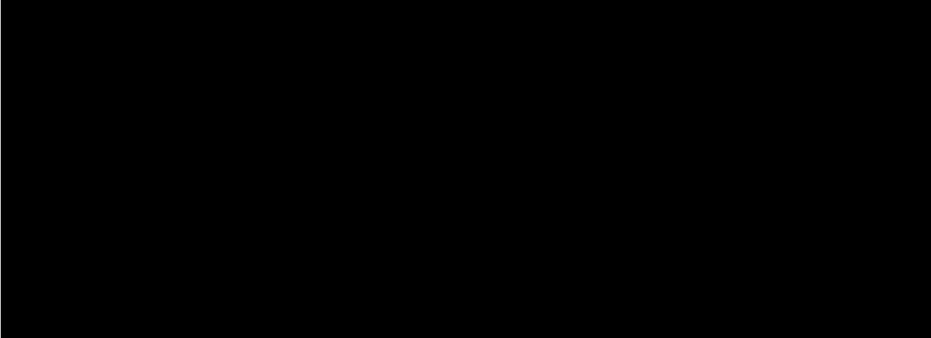
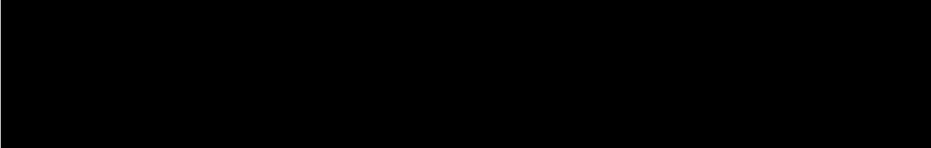
Petitioner's petition for review by the Supreme Court was denied November 16, 2016, S237343.

⁷ "The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration." (§ 5904.)

[No. B264040. Second Dist., Div. Five. July 14, 2016.]

JONATHAN C. ELLIS, Respondent, v.
CRYSTAL L. LYONS, Appellant.







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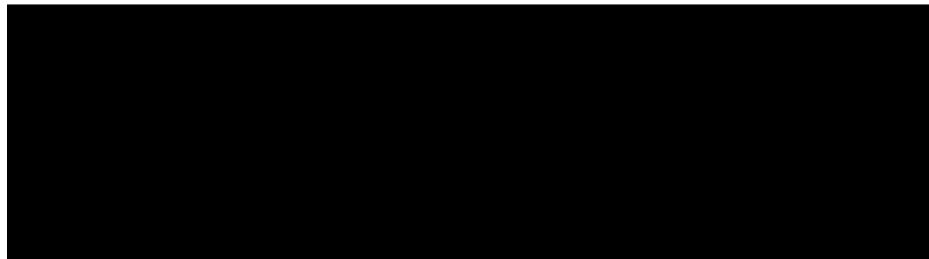
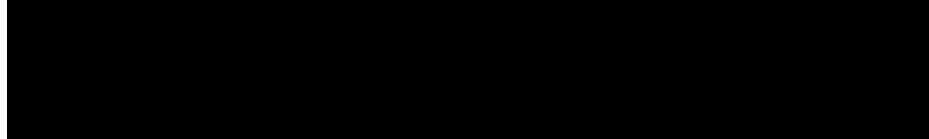
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COUNSEL

Crystal L. Lyons, in pro. per., for Appellant.

Kari Hong as Amicus Curiae on behalf of Appellant.

Estelle & Kennedy and Michael Kennedy for Respondent.

OPINION

BAKER, J.—Appellant Crystal L. Lyons (Mother) appeals the denial of her request for sole legal and physical custody of her minor daughter (Minor) and to reinstate child support from respondent Jonathan C. Ellis (Father). Father engaged in a physical altercation with his brother-in-law in a room where Minor was present. When informed of the altercation, Mother sought and obtained a temporary protective order in Massachusetts, her state of residence, that barred Father from contacting Minor. The Massachusetts court continued that order in force until the Los Angeles Superior Court—where the family law proceedings had originated—heard Mother’s request to change the existing joint custody order. We consider whether the family law court abused its discretion when it denied Mother’s request for sole custody of Minor, and in answering that question, we address what effect California law required the family law court to give to the Massachusetts court’s findings.

I. BACKGROUND

Minor was born to Mother and Father in February 2001. Mother and Father’s relationship ended that same year, and in 2002, Father filed a

[REDACTED]

paternity action. Pursuant to a November 2009 stipulated judgment, the parents share joint legal and physical custody of Minor, and she lives most of the year in Massachusetts with Mother, who has since remarried. Father lives in Southern California at his parents' home, and he has custody of Minor for five weeks every summer, on spring breaks, and on alternating winter breaks.

A. *Father Gets in a Physical Altercation in Minor's Presence*

In April 2014, Minor was in Southern California for her weeklong spring break visit with Father. Generally, Father and Minor would go shopping, play games, play softball and tennis, and go to the bookstore during her visits. While at Father's house, Minor would sleep on the sofa in his bedroom and Father would sleep downstairs.

On April 21, 2014, the day after her arrival, Minor witnessed an argument between Father and his adult brother-in-law Andy. Andy began to touch the cables behind Father's TV console, and Father asked him not to do so. Andy responded, "I can do what I want. What are you going to do about it?" Andy's 12-year-old son Stevie then began to mishandle Father's video game controller, and Father became upset and repeatedly told him to stop. Father told Stevie to go into the other room until he "learn[ed] to listen to instructions." Andy became angry and told Father not to correct Stevie, adding that Father was acting like an "asshole."

What transpired next was the subject of some disagreement between the parties, but the core facts are undisputed. Father and Andy engaged in a physical confrontation while Minor was still seated on a couch roughly three feet away. Father pushed Andy and Father used his fist to strike Andy in his face two or three times. During the altercation, which lasted only seconds, Andy's wife (Father's sister) jumped on Father's back in an attempt to separate both men. They did separate, and neither sustained significant injuries. Minor was not hit in any way during the altercation.

When the altercation between Father and Andy ended, Father noticed Minor had left the room. Father saw an upstairs bathroom door was closed, and he found Minor inside on the phone. Believing Minor had called Mother, Father asked for the phone and instead heard a 911 operator on the other end asking for their address. Father told the 911 operator there was no need to send help because it was just a family squabble and no one had been hurt; as a result, the police did not respond to the home. After hanging up with the 911 operator, Father returned Minor's cell phone to her; she contended he did so only on condition that she promise not to call 911 again, but he said he willingly returned the phone without conditions.

In the aftermath of the incident, Father and Minor discussed it, and Minor's grandmother (Father's mother) joined the conversation at some point. All parties agree that at some point during that discussion, Father threatened to slap Minor. The parties disagree, however, about the timing of when the comment was made and what prompted it.

According to Father, Minor began yelling, telling him that he was overweight, suffering from OCD (obsessive-compulsive disorder), unemployed, antisocial, and not her "real father," which caused him to lose his temper and tell her to stop speaking disrespectfully or he would slap her. Minor admitted telling Father he was overweight, suffering from OCD, and words to the effect that he was antisocial, but she said that was not what prompted his statement that he would slap her. Rather, according to Minor, Father said "[w]ell, do you want me to slap you" earlier in the conversation when she told him that he should not have hit Andy. It is undisputed that Father apologized to Minor for the threat to slap her shortly after he said it. And Father did not hit Minor that day, nor was there any evidence before the family law court that he had hit her at any other time.

The next two days were largely uneventful—Father and Minor went out to play tennis and softball, and they also watched television together. Mother called Minor the day after the altercation, but Minor did not tell her what had transpired between Father and Andy; according to Mother, Minor did say "something was wrong" and that she would talk to Mother about it later when she could. The next day, Minor called Mother and told her about the confrontation between Father and Andy, explaining she was "really scared." Mother was concerned for Minor's safety and told Minor she would help Minor "get out of there," i.e., the home where Father was living.¹

B. *The Massachusetts Protective Order*

Having learned of the altercation between Father and Andy, Mother contacted her attorney in Los Angeles, who on April 23, 2014, attempted to obtain an ex parte restraining order against Father in Los Angeles Superior

¹ During the evidentiary hearing held by the family law court, Minor admitted it was not just the altercation between Andy and Father that made her want to leave. Rather, she agreed she also wanted to go back home to Mother because she did not want to be visiting Father to begin with. Father and Minor's grandmother also testified that during her visit, Minor said Mother had hired a lawyer and had started paperwork to shorten the time she had to spend visiting Father because Minor wanted to go to summer camp and spend time with friends. According to Minor's grandmother, Minor said her Mother had told her she could change the visitation schedule once she reached 13 years of age (which she then was).

Court. Mother's attorney sought the order not in the Pomona courthouse where the case had been litigated, but instead in another courthouse in downtown Los Angeles. The commissioner who heard the application for the ex parte order declined to issue an order without notice to Father and without Mother being present. The commissioner instead suggested Mother could notice the matter to be heard in the Pomona courthouse two days later, on April 25, 2014. Mother did not proceed as the court commissioner proposed; as she would later claim, she feared for Minor's safety if she gave notice to Father of her intention to seek a restraining order.

Instead, on April 25, 2014, Mother applied for a domestic violence abuse prevention order from the Newton District Court in Massachusetts. After entering a temporary emergency order, the Massachusetts court held a hearing on May 6, 2014, at which Mother and Minor were present. Father was not present for the hearing, but an attorney appeared on his behalf. The Massachusetts judge received in evidence an affidavit submitted by Mother that summarized Minor's account of the April 21 altercation, and the court asked several questions of Minor directly. Minor told the court: "From the day that the incident happened, I was always fearful of . . . [Father]. [H]e's a very intimidating person and I would be asked to go to Kung [Fu] lessons where we would practice moves. And even then, I wouldn't be able to . . . budge him or . . . move him. [¶] And so based on that, I was also very fearful then. And also if he would threaten to—he would . . . spank me or slap me, I'd also be fearful of that. And from the day that the incident happened, that just confirmed my fears to where I was afraid to be inside the same room with him."

At the conclusion of Minor's testimony, the Massachusetts court issued a restraining order against Father, expressly finding that Minor was credible and in fear of him. The order entered by the court prevented Father from contacting Minor, coming within 100 yards of her, or visiting her school or place of residence. Mother asked the Massachusetts court to keep that order in force for another six months to give her time to pursue modification of the existing custody order in Los Angeles Superior Court. The Massachusetts court stated it would maintain its order in force for three months, until August 6, 2014, explaining that the "[family law] Court in California can—can look at this and make their own determination if they feel they need to have a hearing on it or if one of you is going to go into [family law] Court before that August 6th date."

The parties (this time including both Father and his attorney) appeared in court in Massachusetts on August 6, the date the temporary order was set to expire. Mother asked the Massachusetts court to extend the order until October 6, 2014, by which time she represented the family law court in this

state would hear her request for a change in custody. Although the matter was again heard in the Newton District Court, a different judge presided over the proceedings than the judge who heard the matter three months before.

The Massachusetts judge hearing Mother's request for an extension of the order noted the previously assigned judge had issued the order based on a finding that Minor was in "reasonable fear of imminent serious personal injury." The Massachusetts court had before it a transcript of Minor's statements during the prior hearing and the court asked Minor whether she reaffirmed those statements and maintained she continued to be in fear of Father, which she did. Mother told the court that she had seen Minor wake up from nightmares, and that in Mother's opinion, Minor's "fear is real and substantiated." Father, through counsel, argued Mother was engaging in improper forum shopping by pursuing an order in Massachusetts rather than the California court that had jurisdiction over custody matters relating to Minor. Father also addressed the court directly, stating he had never hit Minor at any time and that he made the statement about slapping her only when she had been yelling at him and making disrespectful comments.

The Massachusetts court granted Mother's request to extend the protective order that had been entered against Father. The court rejected the argument that Mother was engaged in improper forum shopping, stating its job pursuant to the applicable Massachusetts statute was to protect the child and that the case was "no different than any other case in Massachusetts where there's a Probate Court order and the Court finds a reasonable fear of imminent serious personal injury and orders there [to be] no contact or a custody change and [the] Probate Court had ordered otherwise before that." And on the basis of the evidence before it, the Massachusetts court found Minor credible and concluded there was a substantial basis on which to conclude she had a reasonable fear of imminent serious personal injury because Father, whom the court described as a "sizeable" man, had "lock[ed] her [in his bedroom], tak[en] away her cell phone, [and] threaten[ed] to slap or spank her." In making its findings, the Massachusetts court stated it relied on its observations of Minor's expressions and appearance during the hearing, noting at one point for the record that Minor was shaking and crying.

C. *Mother's Request in California for Modification of the Existing Custody Arrangement*

Back in California, Mother had filed a request for modification of the child custody and support orders in the superior court case in which those orders had been made in 2009. Instead of joint custody with set periods of visitation

[REDACTED]

with Father, Mother sought sole legal and physical custody of Minor, with only supervised visitation between Father and Minor to occur in Massachusetts.

Mother submitted her own declaration in support of her request for sole custody. Among other things, Mother's declaration recounted what she apparently heard from Minor about the altercation between Father and Andy. It also asked the court to reinstate Father's obligation to pay child support, which had been suspended by the court since 2009. Mother's request for a custody modification order made reference to the protective order the Massachusetts court had issued, and in a memorandum of points and authorities accompanying her modification request, Mother argued the family law court must follow Family Code section 3044,² which establishes a rebuttable presumption that an award of joint custody to a person who has "perpetrated domestic violence" is detrimental to the child's best interest.

Father opposed Mother's request for an order giving her sole custody of Minor and reinstating his child support obligation. He submitted his own counter-declaration, as well as a declaration from his mother (Minor's grandmother). He contended there were no changed circumstances warranting a different custody order, and he argued the Massachusetts proceedings were "tantamount to forum shopping" because "[Minor] was not harmed in any way during the incident nor was she or other family members injured." Father additionally argued there was no basis for the court to reinstate his obligation to pay child support because Mother had not satisfied her burden to allow the court to impute income to him, as he remained unemployed.

The family law court held a hearing on Mother's request to modify the existing custody order over the course of three days in early October 2014. The family law court reviewed the transcripts of both hearings that had been conducted in Massachusetts, and it took testimony from Minor, Mother, Father, and Minor's grandmother. We summarize the relevant aspects of the hearing and highlight certain of the extensive findings made by the family law court during and after the presentation of evidence.

During the first day of the evidentiary hearing, which took place on a Friday, the family law court discussed with the parties what had transpired in the Massachusetts court proceedings. The family law court expressed its belief that "the Massachusetts order was improperly issued" but said it was "not passing judgment on that." The court asked whether the Massachusetts protective order against Father remained in effect, and the parties advised that

² Statutory references that follow are to the Family Code.

it was scheduled to expire the following Monday. The court then asked Mother whether she was seeking to extend the order beyond that day (Friday). Mother said she was not, and the parties accordingly stipulated that “the Massachusetts protective order is null and void effective today.”

The family law court took testimony from Minor (giving counsel for both parties an opportunity to ask questions) and Minor’s grandmother also began her testimony before the court recessed at the end of the day. When the court halted the presentation of evidence, it made interim findings to justify its stated intent to allow Father to visit with Minor over the weekend. Specifically, the court found as follows: “[T]he court does not see that there has been domestic violence perpetrated against the minor child. . . . [¶] The Court believes that the minor child has an agenda. Her agenda is to avoid spending the court-ordered time that the parties previously stipulated to and, in particular, the five weeks during this past summer. Through her indication that she was intimidated or fearful after seeing petitioner have an altercation with his brother-in-law and sister, she was able to work with her mother to get a restraining order from Massachusetts that effectively took father’s five weeks of summer [visitation] away. [¶] The child has acknowledged that it was the child’s intent that she limit summer vacation time with father, apparently so she could spend time with her mother’s family on vacation in Massachusetts. That motivation is not a justification for a domestic violence or related sort of order, which is what happened in Massachusetts.”

The family law court also remarked it had “no control over what a Massachusetts court does,” but explained it could “reach a different conclusion than the Massachusetts bench officers, and that may be because those bench officers don’t have the two volume history of this case. They were not able to speak with the grandmother. They were not able to understand the concept that the child was not locked in the bedroom, as Mother’s affidavits repeatedly infer that this child is held a prisoner in a locked bedroom in Father’s home. The lock is on the outside of the door, not the inside of the door. I don’t know if that was ever made clear to those bench officers.”

When the parties appeared for the continuation of the evidentiary hearing the following Monday, the family law court heard the remainder of the testimony from Minor’s grandmother, testimony from Mother, and the beginning of Father’s testimony. The family law court also indicated it had reviewed the transcripts of the proceedings in the Massachusetts court and noted it was perplexed both because there was no discussion during those proceedings of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA; Fam. Code, § 3400 et seq.) and because the Massachusetts court did not think to confer with the courts in this state before issuing a protective

order.³ The family law court also expressed doubts about the thoroughness of the Massachusetts proceedings, stating at one point that the Massachusetts court “made a finding that [Minor’s] fearful because she said, ‘I’m fearful,’ and then she cried.”

The parties concluded the presentation of evidence on the third and final day of the evidentiary hearing, and the family law court gave both sides the opportunity to argue (with rebuttal argument for Mother) before making its ruling. During her argument, Mother’s attorney advised the family law court that section 3031 obligated it to determine whether a protective order had been issued before resolving the custody dispute, and she emphasized the Massachusetts court had issued such an order. She also highlighted the impact section 3044 should have on the court’s determination: “Family Code 3044 sets forth a rebuttable presumption that it is not in the best interests of a child to award joint custody to a party who has perpetrated domestic violence. Family Code 3044 sub (d)(2) further specifies that a finding of domestic violence by any court is sufficient for the purposes of this statute, whether or not the court has heard the custody proceedings.” In his argument, father did not address whether section 3044 was applicable.

After hearing from counsel, the court made extensive factual findings and denied Mother’s request to modify the existing joint custody order. Among other things, the court found the altercation between Father and Andy ended after less than one minute and there was no evidence of any injury. Although Minor witnessed the incident, which the family law court characterized as “unfortunate,” it found she was not hurt and was not in any danger. At the time Minor began her spring break, according to the court, she had an agenda encouraged by Mother to take steps to eliminate or shorten the upcoming summer visitation. After the incident, Minor felt comfortable enough with Father to confront him about it. The court found that Minor did not fear for her safety at any time while visiting Father, and the court disbelieved Minor’s claim she was locked in Father’s bedroom.

The family law court stated it found testimony by Father and Minor’s grandmother credible, but the testimony by Minor and Mother “sometimes credible and sometimes not credible.” In particular, the court “observed [Minor’s] demeanor . . . while testifying in this court . . . and believes [Minor’s] sometimes emotional state of crying was not caused by a genuine fear of the petitioner, but, instead, was perhaps caused by the anticipation that she would not have the right to decide when and under what conditions she would visit with her father.” The court opined: “[Minor] understands that her

³ The family law court asked counsel for the parties if they knew whether Massachusetts had adopted the UCCJEA, but neither attorney was certain. In fact, Massachusetts has not adopted the UCCJEA, being the only state not to have done so to date.

Father would not physically harm her and would not allow anyone else to do so either. The court believes that the minor child's statement that she's afraid of her father is her way of achieving a modification or elimination of his custodial rights and visitation rights." For these and other reasons, the family law court concluded Minor's best interests would not be served by restricting Father's custodial rights.

The court in its findings and oral ruling made no reference to section 3044, the rebuttable presumption it establishes, or the factors the statute directs courts to consider to determine whether the presumption has been rebutted. In addition, and critically for purposes of this appeal, the family law court relied on section 3040, among other points, in concluding Minor's best interests warranted denial of Mother's request for sole custody: "The court notes that under Family Code section 3040, the petitioner-father is clearly the parent more likely to allow the child frequent and continuing contact with the other parent and that mother is not the parent likely to allow frequent and continuing contact. The court finds that mother's conduct, on the contrary, has been aimed at deterring father's frequent and continuing contact with the child."

The family law court memorialized its findings and ruling in a written order issued after the hearing, which continued the provisions of the stipulated judgment mandating joint custody in full force and effect. Consistent with the court's statement from the bench, the written order includes the court's findings pursuant to section 3040 in connection with its determination of custody and visitation issues. The written order, again consistent with the court's oral ruling, also denies Mother's request to require Father to again pay child support, finding she had not established a basis to impute earnings to Father.

II. DISCUSSION

■ The outcome of this appeal turns almost entirely on the dictates of section 3044. The statute establishes a rebuttable presumption that joint or sole custody for a parent who has perpetrated domestic violence is not in a child's best interests. This presumption, which shifts the usual burden of persuasion, need only be rebutted by a preponderance of the evidence. But what a court may not do under the statute—and what the family law court did here—is rely "in whole or in part" on section 3040's preference for frequent and continuing contact with the noncustodial parent. (§ 3044, subd. (b)(1).) We are therefore compelled to reverse the order denying Mother's request for modification of the custody arrangement and to remand to allow the family law court to determine the issue under the proper legal framework. In addition, and although our disposition makes it unnecessary to engage in any

extended analysis, we believe it is nevertheless appropriate under the circumstances to reject Mother's contentions that the family law court exhibited gender bias and became embroiled in the proceedings. Last, we hold the family court's determination that Mother failed to carry her burden to reinstate child support payments was not an abuse of its discretion.

A. *The Family Law Court's Custody Ruling*

We review a trial court's ruling on a request to modify a custody order for abuse of discretion. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 [51 Cal.Rptr.2d 444, 913 P.2d 473]; *Foster v. Foster* (1937) 8 Cal.2d 719, 730 [68 P.2d 719] ["An application for a modification of an award of custody is addressed to the sound legal discretion of the trial court, and its discretion will not be disturbed on appeal unless the record presents a clear case of an abuse of that discretion".] A family law court abuses its discretion if it applies improper criteria or makes incorrect legal assumptions. (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1497 [179 Cal.Rptr.3d 569]; see also *Farmers Insurance Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 106 [159 Cal.Rptr.3d 580] ["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"].)

1. *The family law court's express reliance on Section 3040 requires reversal of its custody ruling*

■ Generally, a court makes custody orders concerning minor children pursuant to the best interests of the child standard. (§§ 3011, 3040; *In re Marriage of Brown and Yana* (2006) 37 Cal.4th 947, 955 [38 Cal.Rptr.3d 610, 127 P.3d 28].) In fashioning a custody order, however, a court "is encouraged to make a reasonable effort to ascertain whether or not any emergency protective order, protective order, or other restraining order is in effect that concerns the parties or the minor." (§ 3031, subd. (a).) Where such an order has been made, or where there are other findings that domestic violence involving the parties has occurred, special considerations come into play under the Family Code. (See, e.g., §§ 3011, subds. (a)-(b), 3020, subds. (a), (c), 3044.)

Mother consistently maintained in the family law court, as she does on appeal, that the Massachusetts court's entry of the protective order against Father meant section 3044 must govern the family law court's determination of her request to modify the existing custody order for Minor. When we examine the relevant provisions of section 3044, we conclude she is correct.

“Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child’s siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to section 3011. This presumption may only be rebutted by a preponderance of the evidence.” (§ 3044, subd. (a); see *Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1054 [96 Cal.Rptr.3d 298] [“[A] domestic violence finding [under section 3044] in a family law case changes the burden of persuasion as to the best interest test . . .”].) Subdivision (c) of section 3044 states a person has “perpetrated domestic violence” within the meaning of subdivision (a) when, among other things, he or she is found to have “placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another.”

Section 3044, subdivision (a)’s reference to a finding by “the court” that a person had perpetrated domestic violence was not satisfied by the findings of the family law court in *this* case; the family law court did not believe Father had placed Minor in reasonable apprehension of imminent serious bodily injury. But that is not the end of the matter under section 3044—indeed, far from it.

■ Section 3044, subdivision (d)(2), which is the provision Mother’s attorney cited during her argument to the family law court, states that “[t]he requirement of a finding by the court *shall also be satisfied* if any court, whether that court hears or has heard the child custody proceedings or not, has made a finding pursuant to subdivision (a) based on conduct occurring within the previous five years.” (Italics added.) Thus, the rebuttable presumption described in section 3044, subdivision (a) necessarily applies if there has been a finding (1) by any court (§ 3044, subd. (d)(2)); (2) that a person “perpetrated domestic violence . . . against the child,” meaning “placed [the child] in reasonable apprehension of imminent serious bodily injury” (§ 3044, subds. (a), (c)); and (3) that finding was based on conduct occurring within five years of the custody determination being made (§ 3044, subd. (d)(2)).

Putting these statutory provisions together in the context of our facts here, the rebuttable presumption against joint custody for Father (or, more precisely, that joint custody is not in the best interests of Minor) arises because all the statutory requirements are satisfied. The Massachusetts court, which surely qualifies as “any court,” expressly found that Father had placed Minor in reasonable apprehension of imminent serious bodily injury.⁴ In addition, that finding was based on Father’s altercation and related events on April 21,

⁴ The Massachusetts court used the term “fear” for “apprehension” and “personal injury” for “bodily injury,” but these distinctions are immaterial.

2014, which was well within the five-year time frame preceding the family law court's ruling on Mother's request to modify custody.

We see no indication in the record that the family law court applied the rebuttable presumption called for by section 3044. Nor is there any indication the family law court expressly considered the statutory factors section 3044 directs a court to consider in determining whether the presumption called for in section 3044, subdivision (a) has been rebutted by a preponderance of the evidence. (§ 3044, subds. (b)(1)–(7).) Other courts have concluded the absence of such indications in the record is alone sufficient to warrant reversal. (*In re Marriage of Fajota*, *supra*, 230 Cal.App.4th at pp. 1498–1500; *Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 737 [177 Cal.Rptr.3d 178] [reversing where “[n]othing in the order even hints the court applied the presumption of section 3044, or required Father to show by a preponderance of the evidence that it would not be detrimental to grant him custody of the children”].) Here, and owing to the extensive findings made by the family law court, our inclination might have been to parse those findings to determine whether the family law court implicitly considered all of the applicable statutory factors and found the presumption rebutted. But there is no profit in such a task because it is clear there was error here—the family law court expressly relied on a consideration section 3044 forbids.

■ Section 3044, subdivision (b) states in relevant part: “In determining whether the presumption set forth in subdivision (a) has been overcome, the court shall consider all of the following factors: [¶] (1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In determining the best interest of the child, *the preference for frequent and continuing contact with . . . the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part.*” (Italics added.) The paragraph of section 3040 to which this provision refers reads as follows: “Custody should be granted in the following order of preference according to the best interest of the child as provided in Sections 3011 and 3020: [¶] (1) To both parents jointly pursuant to Chapter 4 (commencing with Section 3080) or to either parent. In making an order granting custody to either parent, *the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent, consistent with Sections 3011 and 3020*, and shall not prefer a parent as custodian because of that parent's sex. The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.” (§ 3040, subd. (a), italics added.) Because the family law court expressly considered this paragraph in section 3040 when deciding Mother's request for sole custody (*ante*, at p. 414), and because section 3044 prohibits such

consideration “in whole or in part,” the conclusion is inescapable: the family law court’s ruling is predicated on an erroneous understanding of applicable law.

■ Father’s sole argument to the contrary is unavailing.⁵ He contends section 3044 has no application here “because the alleged abuse did not occur between [Father] and [Mother], Father and [Minor] or between Father and [Minor’s] siblings in the previous five years.” Because there is no dispute that the April 21, 2014, altercation between Father and Andy occurred well within five years of the family law court’s ruling, we take Father’s point to be that there was no finding Father ever hit Minor or that she was injured during the altercation. What Father fails to recognize, however, is that section 3044 defines abuse (“domestic violence” in statutory parlance) to include a situation in which a person places another “in reasonable apprehension of imminent serious bodily injury.” (§ 3044, subd. (c).) The Massachusetts court found Father had done just that, and that finding was sufficient to trigger section 3044’s presumption—which the family law court did not apply and could not properly have found rebutted.

■ Because the family law court’s decision to deny Mother’s request for an order modifying the custody arrangement is infected by legal error, we hold the decision must be reversed as an abuse of the court’s discretion. (*In re Marriage of Fajota*, *supra*, 230 Cal.App.4th at p. 1489; *Christina L. v. Chauncey B.*, *supra*, 229 Cal.App.4th at p. 737.) On remand, the family law court should apply section 3044’s rebuttable presumption and expressly address whether Father has rebutted that presumption by a preponderance of the evidence. (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 28–29 [123 Cal.Rptr.3d 120].) Because we reverse only on the ground that the decision was the product of legal error, and because the parties were fully apprised of the section 3044 issue throughout the proceedings (by virtue of Mother’s pre-hearing memorandum of points and authorities), the family law court need not preside over a representation of evidence. Rather, after giving the parties an opportunity for further argument, the family law court may decide the matter on the basis of the evidence already presented, exercising its discretion under the correct legal framework and without any consideration of section

⁵ Father does not defend the family law court’s order on the ground that the Massachusetts order was rendered without jurisdiction, and for good reason. (From father’s respondent’s brief: “It is uncontested that the Massachusetts court order was binding.”) In at least one instance, the family law court conceded “Massachusetts . . . might technically have the right to make emergency temporary orders” Other comments made by the family law court, in which it states its view that the Massachusetts order was improperly issued, appear to be predicated on its mistaken belief that Massachusetts had adopted the UCCJEA. (See generally *In re Gino C.* (2014) 224 Cal.App.4th 959, 967 [169 Cal.Rptr.3d 193] [explaining differences between UCCJEA and the Uniform Child Custody Jurisdiction Act]; *Orchard v. Orchard* (1997) 43 Mass.App.Ct. 775 [686 N.E.2d 1066].)

3040, subdivision (a). In doing so, section 3044 places no limitation on the evidence the family law court may consider concerning Minor's best interests, including evidence not considered by the Massachusetts court.⁶ (*Keith R. v. Superior Court, supra*, 174 Cal.App.4th at p. 1054 ["[A] domestic violence finding in a family law case changes the burden of persuasion as to the best interest test, but it does not limit the evidence cognizable by the court, and it does not eliminate the best interest requirement"]; see also *F.T. v. L.J., supra*, 194 Cal.App.4th at p. 28 [presumption rebuttable even where party has conviction for domestic violence].)

2. *We reject mother's gender bias and embroilment contentions**

.....

B. *The Denial of Mother's Request to Reinstate Child Support Payments Was Not an Abuse of Discretion**

.....

DISPOSITION

The order of the superior court denying without prejudice Mother's request to reinstate child support payments is affirmed. In all other respects concerning custody and visitation, the superior court's order is reversed and the matter remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

Kriegler, J., concurred.

TURNER, P. J., Concurring.—I concur in the judgment including the analysis concerning the meritless attack on the integrity of the family law court. I write separately to explain why I believe the limited reversal and remand is warranted. It is presumed a trial court knows the law and has applied it. (Evid. Code § 664; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 549–550 [59 Cal.Rptr.3d 876].) But here, the family law court's findings made no reference to Family Code section 3044 which, as my colleagues correctly note, is the controlling issue. Thus, in my view, the presumption the

⁶ We reject the argument by Mother and amicus curiae that the Massachusetts order must be given collateral estoppel effect. That contention is inconsistent with section 3044, which defines precisely what effect the Massachusetts order has in a California court.

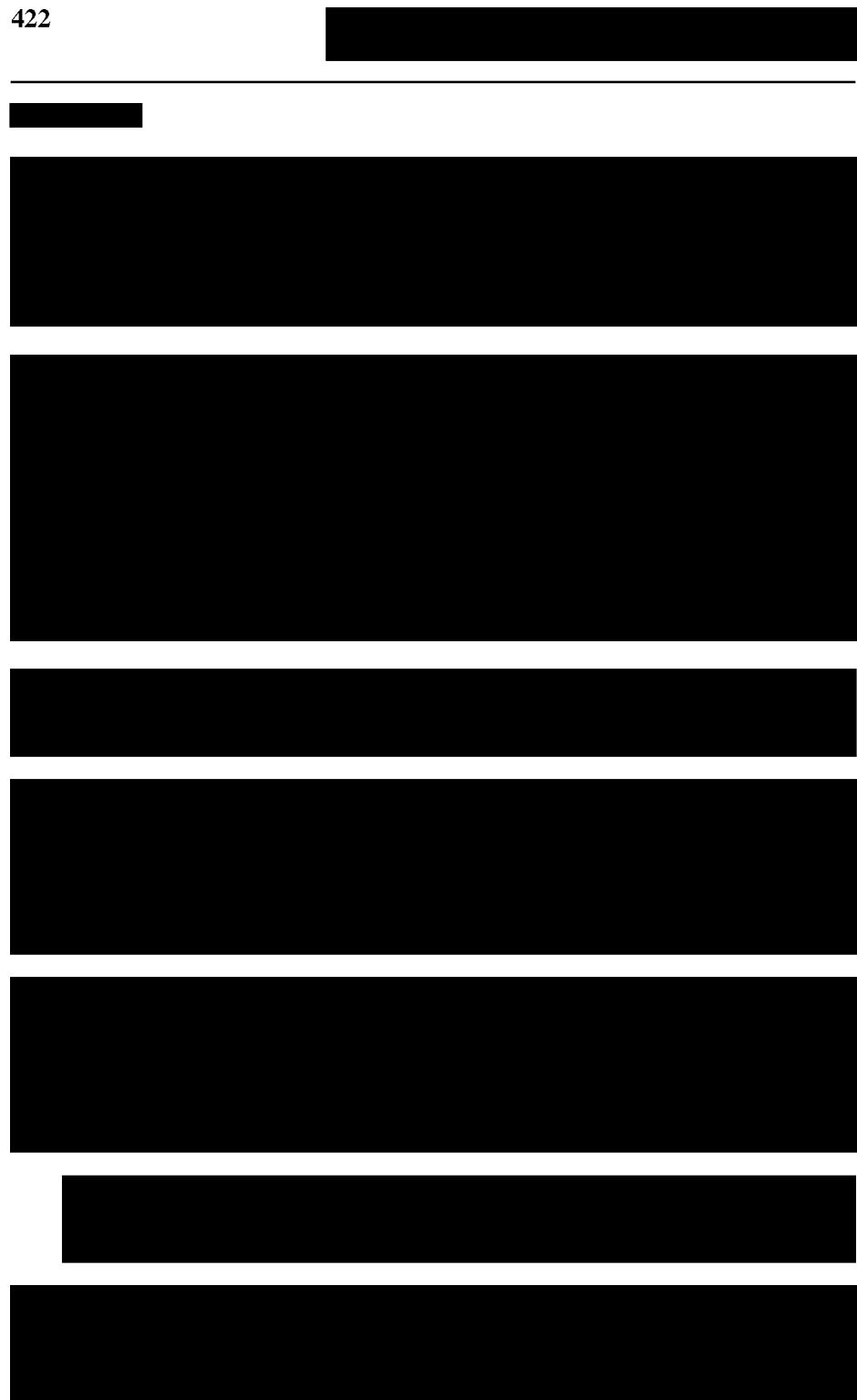
*See footnote, *ante*, page 404.

trial court applied the law is overcome by the absence of any findings directed at the crucial issue before the family law court. But how to resolve the dispute's merits is a matter to be left in the good hands of the family law court.

A petition for a rehearing was denied September 2, 2016, and on August 11, 2016, the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied November 9, 2016, S237327.

[No. D069255. Fourth Dist., Div. One. Aug. 12, 2016.]

SCOTT WALTERS, as Administrator, etc., Plaintiff and Appellant, v.
VALERIE A. BOOSINGER, Defendant and Respondent.



COUNSEL

Craig A. Sherman for Plaintiff and Appellant.

Rosenberg, Shpall, & Zeigen, Tomas A. Shpall and Amy C. Lea for Defendant and Respondent.

OPINION

AARON, J.—

I.

INTRODUCTION

The case involves a dispute over the ownership of certain real property (the Property) between appellant Scott Walters (Scott), as the administrator of the estate of his father, Randy Walters (Randy), and Randy's former girlfriend, respondent Valerie A. Boosinger. A 2003 deed named Randy and Boosinger as owners in joint tenancy of the Property. Upon Randy's death in 2013,

Boosinger claimed sole ownership of the Property as the surviving joint tenant.¹ Scott brought a quiet title claim premised on the theory that the grant deed was void *ab initio*. We reject Scott's claim on appeal that such a claim may be brought "at any time." We conclude that the claim is subject to a statute of limitation and that Scott has failed to demonstrate that the trial court erred in concluding that his quiet title cause of action is time-barred.

Scott also contends that he properly stated a claim for quiet title premised on the alternative theory that Randy and Boosinger severed their joint tenancy in the Property prior to Randy's death. We conclude that Scott failed to sufficiently allege facts demonstrating such severance and that he has not demonstrated that he could amend his complaint to properly allege a severance of the joint tenancy. Accordingly, we conclude that Scott has not properly stated a quiet title claim pursuant to this alternative theory.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Proceedings related to Randy's original complaint*²

Randy filed the original complaint in this action against Boosinger in April 2013. In his complaint, Randy brought a single cause of action for partition. Randy alleged that he owned a 66.7 percent interest in the Property and that Boosinger owned a 33.3 percent interest. Randy requested that the court require Boosinger to purchase Randy's interest in the Property or conduct a forced sale of the Property in order to liquidate Randy's interest.

After Boosinger filed her initial answer to the complaint, Randy died. The trial court thereafter granted Scott's motion to be substituted into the case as the named plaintiff.

Boosinger filed an amended answer and a cross-complaint. In her cross-complaint, Boosinger alleged that the parties owned the Property as joint tenants pursuant to a February 2003 deed, and that upon Randy's death, the Property passed to Boosinger through her right of survivorship. Boosinger also filed a motion for judgment on the pleadings. In a supporting brief,

¹ "[T]he distinguishing characteristic of a joint tenancy is that each tenant has a *right of survivorship*, by which, upon the death of the other tenant, the survivor will automatically succeed to the entire property." (*Dang v. Smith* (2010) 190 Cal.App.4th 646, 660 [118 Cal.Rptr.3d 490].)

² We provide additional factual and procedural history of the proceedings related to the original complaint in discussing Scott's contention that Randy and Boosinger severed the joint tenancy, in III.B.2., *ante*.

Boosinger argued that because Randy and Boosinger owned the Property as joint tenants, the Property automatically transferred to Boosinger pursuant to her right of survivorship upon Randy's death. Accordingly, Boosinger contended that Scott had no ownership interest in the Property upon which to bring a partition claim. Boosinger also requested that the court take judicial notice of the 2003 grant deed reflecting Randy and Boosinger's ownership of the Property as joint tenants.

The trial court granted Boosinger's request for judicial notice and her motion for judgment on the pleadings, with leave to amend. In its order, the court stated that “[t]o the extent [Scott] asserts that there was no joint tenancy and/or the joint tenancy was severed, no such facts are alleged in the complaint.” The court granted Scott leave to amend the complaint in order “to allege facts supporting a right to relief with respect to the . . . [Property].”

B. *Scott's first amended complaint*

Scott filed a first amended complaint in which he brought claims for quiet title and partition. In his quiet title cause of action, Scott alleged that Randy and Boosinger purchased the Property as tenants in common in 1997, with Randy obtaining a 66.7 percent interest in the Property based upon his larger down payment and an agreement with Boosinger.

Scott acknowledged the existence of a 2003 grant deed for the Property that was recorded as a result of Randy and Boosinger's decision to refinance a loan on the Property. The 2003 deed, which Scott attached to his first amended complaint, grants ownership of the Property from “[Randy], an Unmarried Man as to an undivided 2/3 interest, and [Boosinger], a Single Woman as to an Undivided 1/3 interest as tenants in common,” to “[Randy], an Unmarried Man and [Boosinger], a Single Woman *as Joint Tenants*.¹” (Italics added.)

Despite the language in the 2003 deed, Scott alleged that Randy and Boosinger never owned the Property as joint tenants. In support of this allegation, Scott alleged that Randy never intended to create a joint tenancy with Boosinger. In addition, Scott alleged that Boosinger's friend, Susan O'Connor, who served as the broker's representative in connection with the 2003 refinancing, “breached her duty to Randy . . . because [she] knew, or should have known, that Randy . . . was chemically dependent and an alcoholic during the 2003 refinancing process.” Scott alleged that O'Connor failed to ensure that Randy understood the nature of the documents that he signed in connection with the refinance. Scott contended that Randy had not intended to create the joint tenancy and that the “purported conveyance of ownership and transfer into a joint tenancy [was] void.”

Alternatively, as discussed in greater detail in part III.B, *post*, Scott alleged that, if the joint tenancy had been created, Randy unilaterally severed the joint tenancy by way of the filing of the original complaint in this action, or that Randy and Boosinger jointly severed the joint tenancy through the combined operation of Randy's filing of the initial complaint and Boosinger's filing of an answer.

Scott further alleged that, upon Randy's death, Randy's two-thirds interest in the Property had passed to Randy's estate to be probated by Scott as the administrator of Randy's estate.

In his partition cause of action, Scott requested that Boosinger either purchase Scott's two-third's interest in the Property or that a forced sale of the Property be held such that Scott's interest would be liquidated.

C. *Boosinger's demurrer to the first amended complaint*

■ Boosinger demurred to both claims in the first amended complaint. In a supporting brief, with respect to Scott's claim for quiet title, Boosinger argued that any claim that the joint tenancy was void was barred by the statute of limitations. In support of this contention, Boosinger argued that Scott's claim was premised on "[Randy's] mistake or fraud in getting him to sign a grant deed conveying the Property to himself and Boosinger as Joint Tenants," and thus, the three-year statute of limitations contained in section 338, subdivision (d) applied to Scott's claim. (See Code Civ. Proc., § 338, subd. (d) [providing a three-year statute of limitation for "[a]n action for relief on the ground of fraud or mistake"].) Boosinger contended that Scott's cause of action had accrued no later than April 2007 when judicially noticeable documents demonstrated that Randy had actual notice "that Boosinger claimed half of the Property as joint owner, a fact which [Randy] disputed."³ (See *ibid.* ["The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake"].) Boosinger claimed that the statute barred Scott's quiet title claim premised on the theory that the 2003 deed was void because the claim had not been brought prior to April 2010.

Boosinger also argued that Scott had not adequately stated a quiet title claim premised on the theory that the joint tenancy had been severed by virtue of the parties' filing of the pleadings in the action. Finally, Boosinger maintained that Scott could not properly state a cause of action for partition because he had no interest in the Property.

³ Boosinger requested that the trial court take judicial notice of the documents, which had been filed in connection with Boosinger's request for a temporary restraining order against Randy.

D. *Scott's opposition*

Scott filed an opposition brief in which he argued, among other contentions, that the 2003 grant deed was void *ab initio* and that “[a] three[-]year statute of limitations does not apply.” Scott argued, in the alternative, that the parties had jointly severed any joint tenancy through the filing of their pleadings in this case.

E. *The trial court's ruling on the demurrer*

After further briefing and a hearing, the trial court sustained Boosinger’s demurrer to Scott’s quiet title cause of action on the ground that the claim is barred by the three-year statute of limitations in Code of Civil Procedure section 338. The court reasoned in part: “In this case, the theory of relief sought by [Scott], despite his protestations, is fraud. Therefore, the three[-]year statute of limitations set forth in [Code of Civil Procedure section] 338 [applies]. [Citation.] [Scott] alleges his father was defrauded into signing a grant deed naming the owners as joint tenants instead of tenants in common. [Citation.] However, [Randy] became aware [Boosinger] was claiming a joint interest in the [P]roperty as of 2007. Based upon [Boosinger’s] request for a domestic violence TRO and [Randy’s] response, it is clear [Randy] was aware [Boosinger] was claiming an equal and joint interest in the [P]roperty. [Citation.] Since [Randy] was aware in 2003^[4] of [Boosinger’s] adverse claim arising from alleged fraud, the three[-]year statute of limitations applies. Further, since [Scott] failed to file his complaint within the three-year period, the statute of limitations bars his claim.”

The trial court also sustained Boosinger’s demurrer to Scott’s cause of action for partition on the ground that Scott had no interest in the Property after the death of Randy. In its order, the trial court granted all of the parties’ requests for judicial notice.

Thereafter, the court entered a written order sustaining the demurrer to the first amended complaint without leave to amend and dismissing the complaint.

F. *The appeal*

Scott timely appeals from the order of dismissal.⁵

⁴ The court’s order states 2003, the year the grant deed naming Randy and Boosinger as joint tenants was executed. It is unclear whether the court intended to refer to 2003, or rather to 2007, the year of the proceedings related to the temporary restraining order.

⁵ Ordinarily, an “order dismissing a complaint with prejudice constitutes an appealable judgment.” (See *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118

III.

DISCUSSION

A. *The trial court did not err in concluding that Scott's quiet title claim is time-barred insofar as the claim is premised on the theory that the 2003 grant deed is void ab initio*

Scott claims that the trial court erred in determining that his quiet title claim is time-barred. In support of this claim, Scott contends that a quiet title claim based on the theory that a deed is void *ab initio* is not subject to *any* statute of limitation and that “an action thereon can be brought at *any* time.” (Italics added.)

Scott’s claim raises a question of law that we review de novo. (See *McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, 1164 [71 Cal.Rptr.3d 109] [“The determination of the statute of limitations applicable to a cause of action is a question of law we review independently”].)

■ In *Salazar v. Thomas* (2015) 236 Cal.App.4th 467, 476–477 [186 Cal.Rptr.3d 689], the court outlined the following general principles of law that govern the determination of the statute of limitations for a quiet title action: “The Legislature has not established a specific statute of limitations for actions to quiet title. [Citation.] Therefore, courts refer to the underlying theory of relief to determine the applicable period of limitations. [Citations.] An inquiry into the underlying theory requires the court to identify the nature (i.e., the ‘gravamen’) of the cause of action. [Citation.] [¶] Generally, the most likely time limits for a quiet title action are the five-year limitations period for adverse possession,^[6] the four-year limitations period for the cancellation of an instrument, or the three-year limitations period for claims based on fraud and mistake.” (Fns. omitted.)

■ Courts have also concluded that an action to cancel a deed on the ground that the deed is void is subject to a statute of limitations. In *Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319 [109 Cal.Rptr.2d

Cal.App.4th 861, 867, fn. 3 [13 Cal.Rptr.3d 420].) While this appeal was pending, in response to this court’s inquiries as to the appealability of the judgment in light of the still pending cross-complaint, Boosinger dismissed her cross-complaint without prejudice and the parties informed us that the dismissal was not accompanied by any agreement between the parties regarding future litigation. We thereafter sent a letter to counsel indicating that Boosinger’s dismissal and the accompanying representations created sufficiently finality to render the judgment appealable. (See *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1105 [162 Cal.Rptr.3d 516, 309 P.3d 838].)

⁶ It is undisputed that this case does not involve adverse possession.

650] (*Robertson*), the court considered the validity of a decision, *Hironymous v. Hiatt* (1921) 52 Cal.App. 727, 736 [199 P. 850] (*Hiatt*), in which the court stated that “‘an action to cancel a wholly void instrument can be brought at any time.’” (*Robertson, supra*, at p. 1324, citing *Hiatt, supra*, at p. 736.) The *Robertson* court concluded that “[t]he *Hiatt* court’s view of things is especially inappropriate when applied, as here, to actions involving the title to or possession of real property.” (*Robertson*, at p. 1327.)

In *Robertson*, the plaintiff filed a first amended complaint in 2000 requesting that the court declare void, pursuant to Civil Code section 3412,⁷ a 1949 quitclaim deed executed by his mother, on the ground that she was mentally incompetent at the time she executed the deed. (*Robertson, supra*, 90 Cal.App.4th at p. 1321.)⁸ The defendant demurred to the claim on the ground that the statute of limitations barred the plaintiff’s claim. (*Ibid.*) The trial court overruled the defendant’s demurrer, ruling that an action to “cancel ‘a wholly void instrument can be brought at any time,’ i.e., is not subject to any statute of limitations.” (*Ibid.*) The *Robertson* court granted the defendant’s petition for writ of mandate and directed the trial court to vacate its order overruling the demurrer and to enter an order sustaining the demurrer. (*Id.* at p. 1329.)

The *Robertson* court concluded that the *Hiatt* court was “flatly wrong” (*Robertson, supra*, 90 Cal.App.4th at p. 1326) in concluding that there was no applicable statute of limitations to an action to cancel an instrument as being “wholly void.” (*Robertson, supra*, at p. 1324.) The *Robertson* court reasoned: “In *Moss v. Moss* (1942) 20 Cal.2d 640 [128 P.2d 526] (*Moss*), the plaintiff sued for a declaratory judgment that a decade-old property settlement agreement between him and his former wife, along with a later modification of it, were void as against public policy (because conditioned upon an agreement to secure a divorce). The trial court denied relief, principally upon the ground that the plaintiff was in pari delicto and the Supreme Court found no abuse of discretion in that ruling. But the plaintiff also argued on appeal that ‘the complaint also alleges facts stating a cause of action for cancellation of the agreement.’ (*Id.* at p. 644.) As to this claim, however, our Supreme Court held that the four-year limitations period of section 343 of the Code of Civil

⁷ Unless otherwise specified, all subsequent statutory references are to the Civil Code.

Section 3412 provides, “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.”

⁸ The *Robertson* court noted that it was not clear from the record when plaintiff had filed the original complaint. (*Robertson, supra*, 90 Cal.App.4th at p. 1321.)

Procedure applied.^[9] Citing a broad range of cases, including actions to set aside a deed made under undue influence, a proceeding to set aside a satisfaction of judgment, and actions to set aside void bonds, the court concluded: ‘Although plaintiff contends that laches and lapse of time cannot be defenses in an action to cancel an instrument void because contrary to public policy . . . equitable factors . . . may not be used as a means of avoiding the express mandate of the statute of limitations. We must hold, therefore, that if plaintiff had a cause of action for cancellation, it is now barred by section 343 . . .’ (20 Cal.2d at p. 645.)” (*Robertson*, at p. 1326, fn. omitted.)

■ The *Robertson* court noted that numerous courts had reached similar results: “Three years after *Moss* was decided, Division One of this district relied on it in an action expressly brought under Civil Code section 3412, ruling: ‘Ordinarily a suit to set aside and cancel a void instrument is governed by section 343 of the Code of Civil Procedure.’ (*Zakaessian v. Zakaessian* (1945) 70 Cal.App.2d 721, 725 [161 P.2d 677] (*Zakaessian*); see also, to the same effect, *Trubody v. Trubody* (1902) 137 Cal. 172, 173 [69 P. 968]; *Wade v. Busby* (1944) 66 Cal.App.2d 700, 702 [152 P.2d 754]; *Estate of Pieper* (1964) 224 Cal.App.2d 670, 688–689 [37 Cal.Rptr. 46]; cf. *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 212–213 [1 Cal.Rptr. 12, 347 P.2d 12].) The only exception to this rule, the *Zakaessian* court indicated, would be as and when fraud or mistake were involved, in which case the three-year period of [Code of Civil Procedure] section 338, [former] subdivision (4) would apply. (*Zakaessian, supra*, 70 Cal.App.2d at p. 725.)^[10] In short, if there were ever any merit to the position that there is no limitations period for actions brought under Civil Code section 3412 to declare an instrument void, post-*Moss* and *Zakaessian* there certainly is none.” (*Robertson, supra*, 90 Cal.App.4th at pp. 1326–1327; accord, *Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 879 [127 Cal.Rptr.2d 113] [citing *Zakaessian*, among other cases, and stating, “Nor does the fact that the contracts are claimed void avoid the statute of limitations. Actions to void contracts are nonetheless subject to the statute of limitations”].)

Scott does not cite *Robertson*, nor any of the case law that it addresses, in his brief. Scott does cite *Costa Serena Owners Coalition v. Costa Serena Architectural Com.* (2009) 175 Cal.App.4th 1175 [97 Cal.Rptr.3d 170] (*Costa Serena*) and *Erickson v. Bohne* (1955) 130 Cal.App.2d 553 [279 P.2d 619] (*Erickson*), in support of his contention that a quiet title claim based on the

⁹ Code of Civil Procedure section 343 provides, “An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.”

¹⁰ Code of Civil Procedure section 338, former subdivision (4) is now Code of Civil Procedure section 338, subdivision (d).

theory that a deed is void *ab initio* is not subject to *any* statute of limitation. For the reasons discussed below, we conclude that the portions of *Costa Serena* and *Erickson* on which Scott relies constitute dicta that should not be followed.

In *Costa Serena*, this court considered whether a party's challenge to certain amendments to the declarations of restrictions governing a real estate development were timely. (*Costa Serena, supra*, 175 Cal.App.4th at pp. 1191–1197.) In discussing the distinction between instruments that were void *ab initio* and those that were merely *voidable*, we quoted the following passage from *Erickson, supra*, 130 Cal.App.2d at p. 556: “‘[T]he courts distinguish between those cases in which a purported instrument never had any legal inception or existence—due to the fact that one party was induced to execute an agreement totally different from that which he apparently made, or where, due to the fraud, there was no execution at all—and those cases in which the agreement was induced by fraudulent misrepresentations or concealments which in no degree make the instrument anything other than it purports to be. *In the first case it is clear that the purported agreement is void ab initio and an action to avoid it may be brought at any time*, or it may be treated as nonexistent; while in the second case the agreement is voidable and may be rescinded at the election of the party defrauded’” (*Costa Serena, supra*, at p. 1193, italics added, quoting *Erickson, supra*, at p. 556.) However, it is clear that the italicized portion of the quotation in *Costa Serena* was dicta because the *Costa Serena* court held that the amendments at issue in that case were merely *voidable*, and that the party's claim was untimely. (*Costa Serena*, at pp. 1194–1197.)

Erickson, in turn, did not involve a statute of limitations question. Rather, in *Erickson*, the court considered whether a plaintiff had stated a cause of action against a third party purchaser of certain real property (Pierce) on the ground that a deed through which Pierce obtained ownership of the property was void *ab initio* because the plaintiff had not known that she was signing a deed to the property.¹¹ (*Erickson, supra*, 130 Cal.App.2d at pp. 554–556.) The *Erickson* court cited a legal encyclopedia for the proposition quoted in *Costa Serena* above, namely, that an action to cancel a legal instrument premised on a claim that “‘one party was induced to execute an agreement totally different from that which he apparently made’” (*id.* at p. 556) is a claim that the instrument is void *ab initio*, and may be brought at any time. (*Ibid.*)

¹¹ Whether the plaintiff had properly stated a cause of action against Pierce was in turn relevant to the ultimate question raised on an appeal, i.e., whether the trial court had erred in denying certain other defendants' motion for change of place of the trial. (*Erickson, supra*, 130 Cal.App.2d at p. 555.)

It appears that the source of the dicta in *Costa Serena and Erickson* is the California Supreme Court's decision in *Loftis v. Marshall* (1901) 134 Cal. 394 [66 P. 571] (*Loftis*).¹² In *Loftis*, the plaintiff brought a quiet title action against defendants claiming title to real property through a deed that the plaintiff claimed had been obtained through the "fraudulent procurement" of the plaintiff's wife, Mary Loftis, and her son, George Marshall. (*Id.* at p. 395.) The plaintiff alleged that, at the time he signed the deed in question, he was "in a drunken condition, and wholly incapacitated from attending to business, and was induced to sign the deed by representations made to him by them that it was a letter to one Horrigan, and by the belief to that effect thus engendered." (*Ibid.*) The "principal question" on appeal was whether the plaintiff's action was barred by a judgment in a former action. (*Id.* at p. 396.) However, the *Loftis* court also considered whether the trial court erred in overruling the defendants' demurrer on the ground that the action was untimely. In addressing this issue, the *Loftis* court stated the following: "It is alleged that the plaintiff, 'in pursuance of the . . . conspiracy and the . . . fraudulent and deceitful acts of . . . Mary Loftis and George D. Marshall, was kept in ignorance of the . . . grant (or deed) until the . . . day of October, 1894.' This, we think, was a sufficient allegation of the discovery of the fraud within three years before the commencement of the action.^[13] . . . Nor do we think the allegation was material. *On the theory of the appellants—which we have assumed to be correct—the deed was void, and the plaintiff, except as against an adverse possession of five years, could maintain his action at any time.*" (*Id.* at p. 398, italics added.)

The *Loftis* court did not cite any authority for the italicized statement, and did not consider the four-year catchall limitation provision Code of Civil Procedure, section 343, discussed above.¹⁴ (See fn. 9, *ante*.) In addition, no California published case has ever cited this *Loftis* for this proposition.¹⁵ Further, as noted above, in 1942, the California Supreme Court held in *Moss* that a party's claim that an instrument was void as being contrary to public policy was subject to the four-year statute of limitations in Code of Civil Procedure section 343. (*Moss, supra*, 20 Cal.2d at p. 645.) A claim that an

¹² *Loftis* is cited in the portion of the legal encyclopedia quoted in *Erickson*. (See 12 Cal.Jur. (1923) Fraud and Deceit, § 10, p. 722, fn. 6.)

¹³ The *Loftis* court did not state the basis for the three-year limitation period. However, it appears that the court was likely referring to Code of Civil Procedure former section 338. (See *Marks v. Evans* (1900) 62 P. 76, 78 [stating that Code Civ. Proc., former § 338 "provid[ed] that an action for relief on the ground of fraud must be commenced within three years after the discovery of the facts constituting such fraud"].)

¹⁴ Code of Civil Procedure section 343 was initially enacted in 1872.

¹⁵ In fact, despite the fact that *Loftis* was decided more than a century ago, it appears that only one California case has ever cited *Loftis* for any proposition. (See *Davidson v. Baldwin* (1906) 2 Cal.App. 733, 736 [84 P. 238] [citing *Loftis* for a proposition concerning agency law].)

instrument is contrary to public policy constitutes a claim that the instrument is void *ab initio*. (See *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 941 [218 Cal.Rptr. 839].) Thus, in *Moss*, the California Supreme Court concluded that a claim premised on a contention that an instrument is void *ab initio* is subject to a statute of limitation, contrary to its earlier statement in *Loftis*.

Further, numerous cases in the wake of *Moss* have reached results similar to that in *Moss*. (See *Robertson, supra*, 90 Cal.App.4th at p. 1319 [collecting cases]; see also *Sullivan v. Dunnigan* (1959) 171 Cal.App.2d 662, 667 [341 P.2d 404] [deed procured by fraud supported by evidence that grantor had “no present intention to part with title to the interest purportedly conveyed,” was subject to three-year statute of limitations in Code Civ. Proc., § 338, former subd. (4)].) As the *Robertson* court noted, *Moss* and its progeny, “make clear,” that “statutes of limitations apply whether the document under challenge is asserted to be ‘void’ or ‘voidable.’” (*Robertson, supra*, at p. 1326, fn. 6, italics added.) We agree with the *Robertson* court, and conclude that the *Loftis* court’s statement that a claim premised on the theory that a deed is void may be brought at any time (*Loftis, supra*, 134 Cal. at p. 398) is an aberration that was implicitly overruled in *Moss*. Thus, we conclude that *Loftis* and the dicta it spawned in *Erickson* and *Costa Serena* should not be followed.

■ Accordingly, we reject Scott’s contention that a quiet title claim based on the theory that a deed is void *ab initio* is not subject to *any* statute of limitation and “can be brought at *any* time.” (Italics added.) We therefore conclude that Scott has not demonstrated that the trial court erred in determining that his quiet title claim is time-barred insofar as the claim is premised on the theory that the 2003 grant deed is void *ab initio*.¹⁶

¹⁶ The sole argument that Scott raised in his opening brief with respect to this issue was that his quiet title claim could be brought at any time because the first amended complaint alleged that the 2003 grant deed was void *ab initio*, for various reasons, namely, lack of intent, lack of capacity, and fraud. We reject Scott’s argument, for the reasons stated in the text. Scott did not raise any argument pertaining to *which* statute or statutes of limitations applied to his claim, and thus we need not address this issue. (See *Robertson, supra*, 90 Cal.App.4th at p. 1326 [noting that either Code Civ. Proc., § 343 or Code Civ. Proc., § 338, subd. (d) may apply to an action to cancel an instrument as void depending on the theory alleged].) Nor does Scott maintain in his opening brief that his claim was timely under either Code of Civil Procedure section 343 or Code of Civil Procedure section 338, subdivision (d), or that some other statute of limitations applies.

In his *reply* brief, Scott contends for the first time on appeal that the trial court improperly considered “the contents of judicially noticed documents,” in concluding that Randy had notice, no later than 2007, that Boosinger asserted that the Property was held in joint tenancy and that Scott’s claim was therefore untimely under Code of Civil Procedure section 338, subdivision (d). Scott presents no reason why this claim was raised for the first time in reply. Accordingly, we decline to consider this claim. (See *Shade Foods, Inc. v.*

B. *Scott's first amended complaint did not properly state a claim for quiet title premised on the theory that Randy and Boosinger severed the joint tenancy*

Scott contends that he properly stated a claim for quiet title based on his allegation that any joint tenancy ownership of the Property existing between Randy and Boosinger was severed by Randy and Boosinger through the combination of Randy's filing of the original complaint for partition and Boosinger's filing of her verified answer to the complaint.

We consider de novo whether Scott properly stated a quiet title cause of action pursuant to this theory. (See *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] [“On review from an order sustaining a demurrer, ‘we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose’ ”].)¹⁷

1. *Governing law*

■ “A joint tenancy, with its attendant ‘right of survivorship,’ is an estate designed primarily to allow two or more persons who jointly own property to avoid probate upon the death of one of the joint tenants. At common law, four unities were required to create a joint tenancy: interest, time, title, and possession. [Citation.] [Citation.] If one of the unities were destroyed, a tenancy in common would result.” (*Estate of England* (1991) 233 Cal.App.3d 1, 4 [284 Cal.Rptr. 361].)

Section 683.2 outlines a nonexclusive list of methods by which a joint tenancy may be severed. (*Estate of England, supra*, 233 Cal.App.3d at p. 5 [stating that § 683.2 “makes clear that statutory severance is not exclusive”].) Subdivisions (a) through (c) of the statute describe several ways in which a

Innovative Products Sales & Marketing, Inc. (2000) 78 Cal.App.4th 847, 894, fn. 10 [93 Cal.Rptr.2d 364] (*Shade Foods*) [“‘points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before’ ”].)

¹⁷ As noted in part II, *ante*, Boosinger addressed Scott's joint tenant severance theory in her demurrer. However, Scott correctly notes that the “trial court did not address the second alternatively pleaded argument” in its order sustaining Boosinger's demurrer. Nevertheless, because we must affirm the trial court's judgment if it is correct on any theory, we consider de novo whether Scott has properly stated a quiet title cause of action pursuant to this theory. (See *Hendy v. Losse* (1991) 54 Cal.3d 723, 742 [1 Cal.Rptr.2d 543, 819 P.2d 1] [“On appeal from a judgment of dismissal entered after a demurrer has been sustained without leave to amend . . . the appellate court must affirm the judgment if it is correct on any theory”].)

joint tenancy may be *unilaterally* severed by a joint tenant.¹⁸ Section 683.2, subdivision (d), discussing severances effectuated by “all the joint tenants,” provides:

“(d) Nothing in subdivision (c) limits the manner or effect of:

“(1) A written instrument executed by all the joint tenants that severs the joint tenancy.

“(2) A severance made by or pursuant to a written agreement of all the joint tenants.

“(3) A deed from a joint tenant to another joint tenant.”

■ “[A]n agreement between joint tenants to dispense with the right of survivorship terminates a joint tenancy relationship. [Citation.] Furthermore, an agreement between joint tenants which is inconsistent by its terms with one or more of the four essential unities of joint tenancy will be considered a severance even though it does not expressly terminate the joint tenancy.” (*Estate of Blair* (1988) 199 Cal.App.3d 161, 169 [244 Cal.Rptr. 627].)

¹⁸ Section 683.2 provides in relevant part:

“(a) Subject to the limitations and requirements of this section, in addition to any other means by which a joint tenancy may be severed, a joint tenant may sever a joint tenancy in real property as to the joint tenant’s interest without the joinder or consent of the other joint tenants by any of the following means:

“(1) Execution and delivery of a deed that conveys legal title to the joint tenant’s interest to a third person, whether or not pursuant to an agreement that requires the third person to reconvey legal title to the joint tenant.

“(2) Execution of a written instrument that evidences the intent to sever the joint tenancy, including a deed that names the joint tenant as transferee, or of a written declaration that, as to the interest of the joint tenant, the joint tenancy is severed.

“(b) Nothing in this section authorizes severance of a joint tenancy contrary to a written agreement of the joint tenants, but a severance contrary to a written agreement does not defeat the rights of a purchaser or encumbrancer for value in good faith and without knowledge of the written agreement.

“(c) Severance of a joint tenancy of record by deed, written declaration, or other written instrument pursuant to subdivision (a) is not effective to terminate the right of survivorship of the other joint tenants as to the severing joint tenant’s interest unless one of the following requirements is satisfied:

“(1) Before the death of the severing joint tenant, the deed, written declaration, or other written instrument effecting the severance is recorded in the county where the real property is located.

“(2) The deed, written declaration, or other written instrument effecting the severance is executed and acknowledged before a notary public by the severing joint tenant not earlier than three days before the death of that joint tenant and is recorded in the county where the real property is located not later than seven days after the death of the severing joint tenant.”

2. *Factual and procedural background*

In his original April 2013 complaint for partition, Randy alleged in relevant part:

“2. [Randy] is, and was at all relevant times mentioned herein, a resident of San Diego County, California. He is the current co-owner and joint title deed holder in the . . . Property since it was purchased in 2003. [Randy] owns a two-thirds (66.7%) interest in the . . . Property based percentage [*sic*] of original capital and investment made at the time of purchase, as well as the understanding and agreement of [Randy] and co-owner Boosinger at that time.

“3. Defendant [Boosinger] is, and has been at all relevant times mentioned herein, a resident of San Diego County, California. Boosinger owns a one-third (33.3%) interest in the . . . Property based on her smaller proportion of [the] downpayment and investment made at the time of purchase, as well as the agreement and understanding between co-owners [Randy] and Boosinger.”

In addition, among other allegations, paragraph 13 of the complaint alleged: “[Randy] has, and continues to hold, a two-thirds (66.7 %) ownership interest in the . . . Property.”

In her original June 2013 verified answer, Boosinger *admitted* the allegations in paragraphs 2 and 3, but denied paragraph 13.

Randy died on July 3, 2013. The court granted Scott’s motion to be substituted in as the named plaintiff in the action in May 2014.

Boosinger filed a motion for leave to file an amended verified answer to the complaint and a cross-complaint in July 2014. Scott filed a notice of nonopposition to Boosinger’s motion in October 2014. In addition, on November 3, 2014, Scott’s counsel signed a stipulation that states in relevant part: “As a result of newly discovered facts and circumstances, including the death of [Randy] and substitution of his personal representative as Plaintiff, the parties have agreed that Defendant Valerie A. Boosinger be allowed to file her Amended [V]erified Answer to Complaint as well as her Verified Cross-Complaint.”

The trial court granted Boosinger’s motion for leave to file an amended answer and a cross-complaint on November 7, 2014.

[REDACTED]

In her amended verified answer to the complaint, Boosinger alleged the following with respect to paragraphs 2 and 3 of Scott's complaint:

"2. [Boosinger] admits that [Randy], deceased, was at all relevant times a resident of San Diego County California. [Boosinger] admits that when the [P]roperty was purchased, [Randy] owned [a] two-thirds interest in the [P]roperty based on a percentage of [the] original capital and investment made at the time of purchase. [Boosinger] denies that the [P]roperty was purchased in 2003.

"3. [Boosinger] admits she is, and at all relevant times was, a resident of San Diego County. [Boosinger] admits that upon purchase of the property, she owned [a] one-third interest in the [p]roperty based on her smaller portion of the down-payment and investment made at the time of the purchase as well as the agreement and understanding between co-owners [Randy] and Boosinger."

Boosinger denied paragraph 13 of the complaint.

In her cross-complaint, Boosinger alleged the following: "[Boosinger] obtained her interest in fee simple title to the [Property] by a Grant Deed dated February 26, 2003 transferring the [P]roperty to [Randy] and [Boosinger] as joint tenants, and recorded at the official records of the San Diego County Recorder's Offices In July, 2013, [Randy] passed away. [Scott] then initiated probate proceedings and was appointed as personal representative of the estate of [Randy], deceased. However, as a result of the joint tenancy relationship with the right of survivorship, and death of [Boosinger's] Joint Tenant, [Randy's] title to the subject property is manifested to [Boosinger] solely."

Scott filed a first amended complaint in June 2015 in which he alleged in relevant part: "If the joint tenancy was not severed unilaterally^[19] on April 30, 2013 when [Randy] filed and served the [*Original Complaint*], it was severed when Boosinger filed her *Verified Answer* to the [*O*riginal *Complaint*] on or about June 26, 2013 because the [*Original Complaint*] and *Verified Answer* together constituted a signed writing by the parties acknowledging a right to severance and the creating of a tenancy in common with

¹⁹ In his reply brief, Scott contends for the first time on appeal that he properly stated a claim for quiet title premised on the theory that Randy *unilaterally* severed the joint tenancy. While this theory is pled in the first amended complaint, Scott's argument in his opening brief was restricted to his contention that there was a "*bilateral* joint tenancy severance." (Italics added.) Scott did *not* present a legal argument that he had adequately pled a *unilateral* severance, and Scott presents no reason why it was raised for the first time in reply. Accordingly, we decline to consider this claim. (See *Shade Foods, supra*, 78 Cal.App.4th at p. 894, fn. 10.)

[Randy] such that he again owned a two-thirds interest and Boosinger owned a one third interest.”

3. Application

Scott argues that “[b]y the enactment of subdivision (d) [of Section 683.2], the Legislature sought to preserve rights accorded parties via common law and written instruments that communicate a bilateral notice and *intent to sever a joint tenancy.*” (Italics added.) We agree. However, Scott cites no common law authority, and we are aware of none, that holds that a court may interpret a party’s complaint and another party’s *superseded* answer to constitute an *instrument* that severs a joint tenancy.

While there are numerous cases that hold that a joint tenancy may be severed by an express or implied *agreement* of the joint tenants (see, e.g., *Estate of Blair, supra*, 199 Cal.App.3d at pp. 168–169), the complaint and the superseded answer in this case do not constitute evidence of such an agreement. That is because it is unclear, even from Boosinger’s superseded answer, that Boosinger agreed that she and Randy owned different percentage interests in the property (and therefore were not joint tenants). While Boosinger *admitted* paragraphs 2 and 3 of the complaint, which stated that “[Randy] owns a two-thirds (66.7%) interest in the . . . Property,” (¶ 2) and “Boosinger owns a one-third (33.3%) interest in the . . . Property,” (¶ 3, some capitalization omitted) she *denied* the allegation that “[Randy] has, and continues to hold, a two-thirds (66.7 %) ownership interest in the . . . Property.” (¶ 13.)

■ Further, Scott does not claim that Boosinger’s verified but superseded answer constituted a judicial admission. (See *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 456 [154 Cal.Rptr.3d 87] [“The doctrine of judicial admissions also does not apply to allegations in pleadings that have been superseded by amendments, especially where the initial pleading was not verified and the court granted permission to file the amended pleading to correct a potentially damaging admission in the initial pleading that was the result of mistake, inadvertence, or inadequate knowledge of the facts”].) ²⁰

Under these circumstances, we conclude that the first amended complaint did not properly state a claim for quiet title premised on the theory that Randy and Boosinger severed the joint tenancy by way of his complaint and her answer. Accordingly, we conclude that the trial court did not err in

²⁰ Accordingly, we need not decide whether a party’s *judicial admission* that real property is not held in joint tenancy may be considered an *agreement* that the property is not held in joint tenancy.

[REDACTED]

sustaining, without leave to amend,²¹ Boosinger's demurrer to Scott's quiet title cause of action premised on this theory.²²

IV.

DISPOSITION

The judgment is affirmed.

Huffman, Acting P. J., and Prager, J.,* concurred.

²¹ Scott does not argue on appeal that he could amend his complaint to allege additional facts such that he could properly state a claim for quiet title pursuant to this theory. Accordingly, we conclude that Scott has not demonstrated how he could amend his complaint to properly state such a claim. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58] [stating that the burden of demonstrating a reasonable possibility that a defect in a complaint can be cured by an amendment is "squarely on the plaintiff"].)

²² As noted in part II, *ante*, the trial court sustained Boosinger's demurrer to Scott's cause of action for partition on the ground that "[Scott] has no interest in the [P]roperty after the death of [Randy]." Apart from the claims that we have rejected in the text with respect to whether Scott adequately alleged a claim asserting an interest in the Property, Scott does not raise any claim with respect to this aspect of the trial court's ruling. Accordingly, Scott has not demonstrated that the trial court erred in sustaining Boosinger's demurrer to the partition claim without leave to amend.

*Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[No. D068579. Fourth Dist., Div. One. Aug. 12, 2016.]

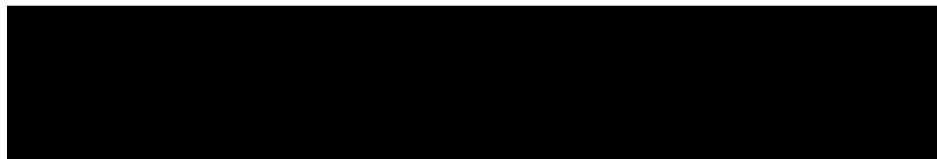
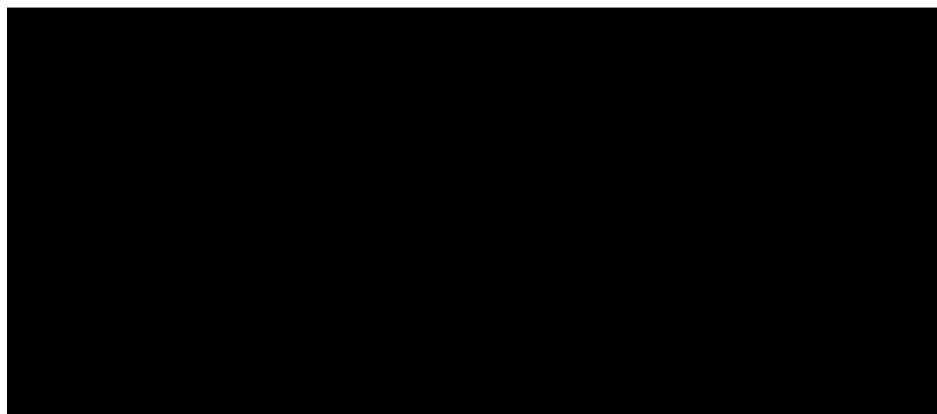
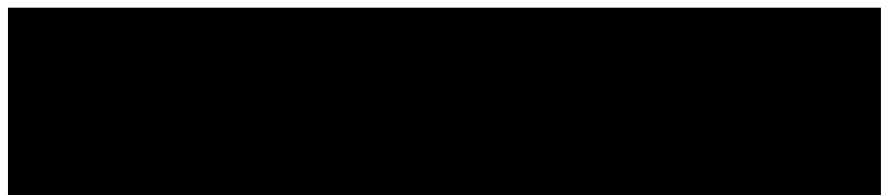
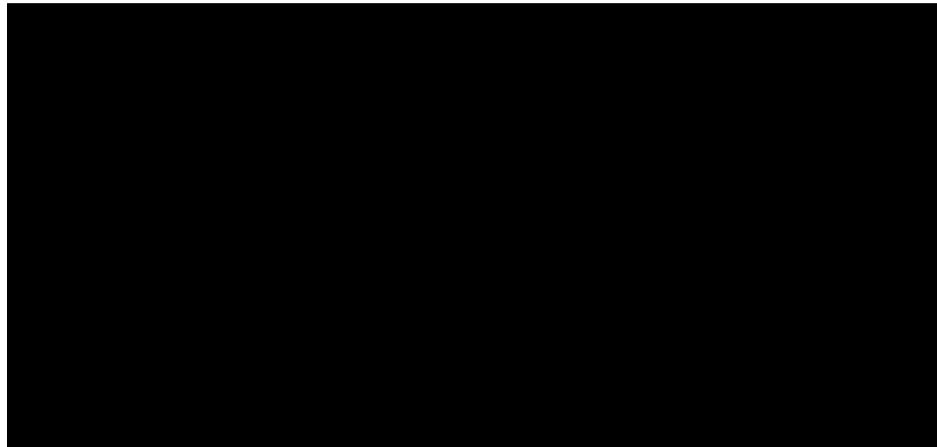
SUSAN CHRIST et al., Plaintiffs and Appellants, v.
DWAYNE SCHWARTZ, Defendant and Respondent.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Law Office of Rocky K. Copley and Rocky K. Copley for Plaintiffs and Appellants.

Law Offices of Kim L. Bensen, Todd G. Glanz; Pollak, Vida & Fisher and Daniel P. Barer for Defendant and Respondent.

OPINION

PRAGER, J.*—Susan Christ (Susan)¹ sued Dwayne Schwartz for personal injury she allegedly suffered when Schwartz’s automobile collided with her vehicle. Jon Christ (Jon), Susan’s husband, also sued Schwartz for loss of consortium based on Susan’s injuries. Despite Schwartz’s stipulation that his negligence was the sole cause of the collision, the jury awarded no damages

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

¹ We use the plaintiffs’ first names for the sake of convenience. We intend no disrespect.

[REDACTED]

to Susan and Jon. The Christs appeal from the judgment contending that the trial court erroneously admitted photographs of the damaged vehicles and evidence of Jon's extramarital affair. They also appeal from the order denying their motion for a new trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts*

In October 2011, Schwartz drove his car at approximately 10 miles per hour around a bus and sideswiped the automobile driven by Susan. Susan was wearing a lap belt and shoulder harness. Her body did not strike anything inside her car, and the air bags did not deploy. Schwartz was not injured in the collision. After the accident, both drivers moved their vehicles to the curb. Susan ran up and down the street looking for witnesses. She told Schwartz that she was calling the police and continued seeking witnesses until police arrived. After a police officer responded and began taking information from Schwartz, Susan repeatedly interfered, stepping between Schwartz and the officer, even after the officer instructed her to stop interfering.

Jon, formerly an auto damage claims supervisor with GEICO insurance for 42 years, arrived at the scene of the accident while Susan was still there. Susan told Jon that she had pain in her shoulder, neck and back, but he did not suggest that she go to the hospital. Jon offered Susan a ride from the scene, but Susan declined and drove herself home.

The day after the accident, Susan visited her family physician, Gregory Babikian, and complained of neck and back pain. Dr. Babikian prescribed a muscle relaxant and physical therapy. However, a week and a half later, Susan began massage therapy twice a week for five to six weeks. Eventually, in January 2012, she started physical therapy. Between January 2012 and March 2012, she had eight sessions. She improved temporarily, but continued to complain of pain and stiffness in her neck. One year after the accident, Susan's only complaint was neck pain.

By June 2012, Susan was seeing a new family care physician, Fahime Lessani. Susan complained about ongoing pain and reduced range of motion. Dr. Lessani ordered X-rays and an MRI, which did not reveal any abnormalities. Dr. Lessani referred Susan to a rheumatologist, whom Susan consulted only once. Dr. Lessani prescribed more physical therapy, which provided improvement. Susan could not recall any treatment between October 2012 and August 2013.

In August 2013, Susan filed suit against Schwartz alleging negligence. In the same lawsuit Jon alleged loss of consortium. That same month Susan

consulted another rheumatologist, Frank Kozin. Susan told Dr. Kozin that since the accident, she had constant pain in her neck and upper back. He diagnosed her as suffering from the “residuals of whiplash injury that was going to be a permanent process.”

In April 2014, defense medical expert Raymond Vance examined Susan. Dr. Vance found her to be completely normal neurologically, with no significant atrophy, and no loss of range of motion of the large joints of her upper and lower extremities. The only indication of injury from the accident stemmed exclusively from Susan’s subjective complaint of neck and back pain after the accident.

Susan had a history of neck pain before the accident. In 2009, Susan was injured in a slip-and-fall accident injuring her shoulder, arm and knee or ankle, with shoulder pain radiating up her neck. She filed a personal injury claim based on this incident and eventually settled the case. Before 2009, Susan had filed a claim in a dog bite case involving injury to her hand. Susan also settled that case. Medical records from 2010 reflect a history of Susan having headaches with pain radiating into her neck and upper back, along with suffering from anxiety, depressive disorders, cervicalgia (neck pain), and facial pain. The records did not identify any organic pathology for the pain in Susan’s neck and upper back.

Soon after Dr. Vance’s examination, Susan wrote him a letter stating that she had underreported the frequency and intensity of her symptoms, and that actually she was in constant pain every minute of every day, even though during the examination she had told him that the pain was not constant. She also stated that she had difficulty with simple household chores and personal care, such as brushing her teeth and getting dressed. She also wrote, “If you would like to clarify anything I’ve told you in this letter, please call my attorney.”

After Dr. Vance’s examination of Susan, and at about the same time she filed this case, Dr. Kozin added the diagnosis of fibromyalgia based on Susan’s complaint of pain throughout her body. In Dr. Kozin’s opinion, Susan’s fibromyalgia constituted a permanent condition. He recommended periodic physical therapy as “beneficial,” even though he stated “[i]t doesn’t do anything for the treatment of fibromyalgia,” but would instead help Susan get “more functional.” He opined that Susan will need medical care for fibromyalgia for the rest of her life. Although Dr. Kozin recommended a drug protocol for Susan, she had not started drug therapy at the time of trial, eight months later.

Dr. Vance disputed the diagnosis of fibromyalgia because it was based on Susan’s subjective complaints, which can easily be manipulated and cannot

[REDACTED]

be objectively confirmed. All of Susan's complaints were similar to those she had made before the accident. In 2010, she reported headaches and pain radiating from her neck and upper back. She had also reported suffering from anxiety, a depressive disorder and cervicalgia (pain in the neck). The records did not identify any organic pathology for the pain in Susan's neck and upper back. In Dr. Vance's opinion, soft tissue injuries such as those Susan claimed usually resolve in days, weeks, or a matter of months. He also opined that soft tissue injury causes a chronic condition in less than 1 percent of the population, and that people who complain of such pain after an accident attribute those claims to the accident when the pain actually may stem from another cause.

The Christs testified that Susan's symptoms interfered with their relationship and made it impossible for them to participate in activities they had enjoyed, such as golf and walking. Susan also testified that since the accident she could not lift anything weighing more than five pounds. Jon testified that he could not touch certain parts of Susan's arms, shoulders, back or neck without causing her to jump, wince and pull back. According to Susan, if she does not first do yoga, she cannot wash her face or brush her teeth. Also she can no longer perform household services she used to regularly provide. Susan presented expert testimony that the future value of household services she can no longer provide was \$192,561.

In contrast to the Christs' testimony regarding Susan's limitations, according to a defense investigator, as shown in a sub rosa video taken at the time of the trial, Susan lifted a large trash can and carried it along the driveway, picked up dogs, held a large handbag and bent at the waist without any apparent pain. Jon touched Susan's back without causing any negative reaction.

In his closing argument, in addition to requesting the \$227,289 in damages for past and future household services, plaintiff's counsel asked the jury to award Susan pain and suffering damages between \$855,000 and \$1,995,000, based on 45 months for past pain and suffering and future life expectancy of 240 months at the rate of \$3,000 to \$7,000 per month. For future medical treatment for fibromyalgia, Susan's counsel calculated figures based on Dr. Kozin's testimony, of \$15,960 for future doctor visits, \$104,025 for medication, and \$27,360 for future opiate medication, totaling \$147,345 for future medical expenses. He also requested \$75,000 for past loss of consortium on behalf of Jon, and \$200,000 for future loss of consortium.

In his closing argument, defense counsel emphasized Susan's lack of credibility and contended that she was not injured in the accident. He did not

directly mention Jon's extramarital affair but argued that there had been no loss of consortium because the accident had not altered Jon's marital relationship with Susan.

The jury voted 11 to one to award Susan zero dollars for past and future economic damages and voted unanimously to award zero dollars for non-economic damages and Jon's loss of consortium claim. A judgment in Schwartz's favor was entered.

The Christs' motion for new trial based on alleged errors in admitting photographs of the vehicles and evidence of Jon's affair, as well as the jury's inadequate award of damages, was denied.

B. *Trial proceedings*

1. *Stipulations*

The parties stipulated that Schwartz was negligent, that Susan was not comparatively negligent, that Schwartz's negligence was 100 percent the cause of the collision, and that Susan did nothing at the time prior to or during the course of the automobile collision to cause the injuries/damages that Susan and Jon are claiming in this litigation. In response to requests for admissions, Schwartz admitted that his negligence caused Susan to suffer "harm." The remaining issues were the nature and extent of Susan's "harm" and Jon's loss of consortium claims.

2. *In limine motions*

a. *Introduction*

■ On appeal, the Christs contend that the trial court erred in denying the in limine motions to preclude the jury from viewing photographs of postcollision damage to the vehicles, and to preclude mention of Jon's extramarital affair that took place 14 years before trial, allegedly pertinent to Jon's loss of consortium claim. We conclude that the trial court did not abuse its discretion in admitting the evidence. In any event, any error was harmless because it was not reasonably probable that the granting of the two in limine motions would have changed the outcome of the case. All of the Christs' claims rested solely on the believability of Susan's subjective, uncorroborated testimony that the accident caused her personal injury. Because of the impeachment of her credibility, the jury reasonably rejected the Christs' claims.

b. *Standard of review*

"A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and 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]) “When reviewing the sufficiency of evidence on appeal, as long as circumstances reasonably justify the fact finder’s determination, we must accept it, even though another fact finder may have reasonably determined the opposite.” (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1106 [92 Cal.Rptr.2d 236].) Claims of evidentiary error under California law are reviewed for prejudice applying the “manifest disregard of justice” or “reasonably probable” harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243], that is embodied in article VI, section 13 of the California Constitution. Under the *Watson* harmless error standard, it is the burden of appellants to show that it is reasonably probable that they would have received a more favorable result at trial had the error not occurred. (*People v. Watson*, at p. 836; Code Civ. Proc., § 475.)

c. *Admissibility of photographs of the vehicles taken after the accident*

Photographs of Susan’s and Schwartz’s vehicles were taken after the accident. Except for the fact that Schwartz pulled the apex of his fender and bumper out before his car was photographed, the photographs accurately reflect the condition of the cars after the accident. The photographs do not show any major damage to the vehicles.

The Christs moved in limine to prevent Schwartz from presenting photographs showing the condition of Susan’s vehicle after the accident. They argued that without proper expert witness testimony to explain the relationship between damage to the vehicle and Susan’s injuries, the jury could easily misinterpret the photographs. Schwartz responded that jurors could use their common experience to evaluate the photographs. He also contended that the photographs were relevant because Dr. Vance had relied on them in forming his medical opinion on causation. The trial court determined that the photographs were relevant to illustrate Dr. Vance’s opinion relating to the injuries sustained in the collision.

1. *Proper foundation*

Relying on out-of-state authority,² the Christs contend that in the absence of foundational expert testimony of biomechanical experts, the postaccident photographs of the vehicles involved in the collision invited the jury to

² California courts are not bound by out-of-state authorities. (*In re Establishment of Eureka Reporter* (2008) 165 Cal.App.4th 891, 899 [81 Cal.Rptr.3d 497].)

speculate on the relationship between visible damage to the plaintiff's vehicle and actual impact on its occupant. They also contend that absent any reported California case on point,³ this court should follow a ruling of the Delaware Supreme Court in *Davis v. Maute* (Del. 2001) 770 A.2d 36, 40 (*Davis*), which states that without foundational expert testimony, a jury cannot be allowed to correlate physical damage to cars involved in a collision with injury to the cars' occupants. However, *Davis* has been strictly limited by the Delaware Supreme Court to allow jurors to consider photographs of vehicles involved in accidents without expert testimony when a court permits. (*Eskin v. Carden* (Del. 2004) 842 A.2d 1222, 1231–1233 (*Eskin*). In *Eskin* the Delaware Supreme Court stated: “*Davis* does not hold that photographs of the vehicles involved in an accident may never be admitted without expert testimony about the significance of the damage to the vehicles shown in the accident and how that damage may relate to an issue in the case. *Davis* has been misinterpreted as a bar to the admission of photographs without expert testimony. It was only [defense counsel’s] disingenuous reference to a ‘fender bender’—after a trial judge’s express ruling forbidding what that phrase implied—that prompted our holding. *Davis* should not be construed broadly to require expert testimony in every case in order for jurors to be permitted to view photographs of vehicles involved in an accident.” (*Id.* at p. 1233.)

■ In any event, we agree with the majority of state courts, which have held that the admission of photographs of vehicles involved in a collision without supporting expert testimony is within the trial judge’s discretion. (*Mason v. Lynch* (2005) 388 Md. 37 [878 A.2d 588, 595–600] [Opinion by the Maryland Court of Appeals, the state’s highest court, which based its opinion on a survey of multiple jurisdictions.]; see, e.g., *Murray v. Mossman* (1958) 52 Wn.2d 885 [329 P.2d 1089, 1091] [Supreme Court of Washington allowed photographs of vehicular damage in an admitted liability case because the photographs and the testimony concerning them tended to show the force and direction of the impact that resulted in injuries to the claimant.]; *Brennan v. Demello* (2007) 191 N.J. 18 [921 A.2d 1110, 1111, 1118–1119] [Supreme Court of New Jersey held that expert testimony is not required as a condition precedent to the admission of photographs of vehicle damage when the cause or extent of plaintiff’s injuries is in issue. “Juries are entitled to infer that which resides squarely in the center of everyday knowledge: the

³ The Christs contend that the lack of California authority on the requirement of a foundation of expert biomechanical testimony for jury consideration of photographs of vehicles damaged in a collision reflects the insurance industry’s concerted effort to avoid an adverse appellate ruling on this question.

[REDACTED]
[REDACTED]

certainty of proportion, and the resulting recognition that slight force most often results in slight injury, and great force most often is accompanied by great injury.”].)⁴

The majority rule, which allows trial courts to permit jurors to consider photographs of vehicles damaged in a collision without a foundation based on expert testimony, rests on the same general principle recognized in California that a trial judge’s determination of admissibility of photographic evidence rests in the court’s sound discretion and will not be disturbed unless plainly arbitrary. (*People v. Allen* (1986) 42 Cal.3d 1222, 1256 [232 Cal.Rptr. 849, 729 P.2d 115].) A trial court has discretion to determine whether evidence on a subject may be shown to a jury without supporting expert testimony because the subject is not “‘sufficiently beyond common experience that the opinion of the expert would assist the trier of fact.’” (*Sanchez v. Brooke* (2012) 204 Cal.App.4th 126, 138 [138 Cal.Rptr.3d 507] [no expert testimony is required when a subject is “within the realm of common knowledge”]; see also *Raven’s Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 797 [171 Cal.Rptr. 334] [Laypersons able to determine whether there were defects in landscaping, paint, and exterior trim without the aid of experts because the matters were not beyond common experience.].) Further, nothing prevented Susan from calling her own expert witness to explain that despite outward appearance of minor physical damage to her vehicle, the collision caused Susan’s injury.

2. Evidence Code section 352 objection

A trial court’s discretion to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value. (*People v. Allen, supra*, 42 Cal.3d at p. 1256.)

In a corollary argument, the Christs contend that under Evidence Code section 352 the photographs were more prejudicial than probative because the appearance of physical damage to the vehicle was unrelated to the actual force on the occupants, which they contend could only be explained by an expert. However, Susan presented no evidence to demonstrate that the

⁴ (See also various cases from other states adopting the majority position: *Accetta v. Provencal* (R.I. 2009) 962 A.2d 56, 61–62 [rejecting *Davis* and its reasoning]; *Ferro v. Griffiths* (2005) 361 Ill.App.3d 738 [297 Ill.Dec. 194, 836 N.E.2d 925, 930] [“[W]e refuse to adopt a rigid rule that proscribes the admission of pictures without an expert.”]; *Flores v. Gutierrez* (Ind. Ct.App. 2011) 951 N.E.2d 632, 637–639; *Marron v. Stromstad* (Alaska 2005) 123 P.3d 992, 1009 [declining to adopt *Davis*’s “rigid approach” requiring expert testimony].)

photographs of the vehicles were prejudicial.⁵ As we have noted, expert testimony is not always required before a jury can view photographs of vehicles involved in a collision. This is because a jury is ordinarily quite capable of correlating outward appearance of damage with likelihood and extent of injury. (See *Brennan v. Demello, supra*, 921 A.2d at pp. 1118–1119.) Therefore, without expert foundational testimony, the trial court can allow the jury to view the photographs based on its determination that the likelihood of prejudice from jurors is slim.

■ The Christs also dispute the relevance of the photographs because Schwartz admitted liability and they did not claim property damage. However, even where, as in this case, liability for an auto accident is admitted, evidence on how the accident happened is probative to show the force of the collision, which is an indicator of injury or lack thereof to passengers in the autos. (*Martin v. Miqueu* (1940) 37 Cal.App.2d 133, 137 [98 P.2d 816].)

■ Moreover, the photographs were probative to illustrate the witnesses' testimony of the side impact nature of the collision. (See *Murray v. Mossman, supra*, 329 P.2d at p. 1091.) Further, they were relevant to impeach Jon's credibility. In deposition testimony read at trial, Jon described extensive damage to Susan's car, including a headlight that appeared to be "hanging loose." However, when shown the photograph of Susan's vehicle at trial, Jon had to admit that the light "wasn't actually dangling, but it was broken and out of place." In addition, the photographs assisted Dr. Vance in formulating his opinion about the nature and extent of Susan's injuries. A trial court has discretion to admit materials on which an expert relies. (See Evid. Code, § 802 [expert may describe materials on which expert relies]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 582–583 [286 Cal.Rptr. 628, 817 P.2d 893].)

d. Admissibility of evidence of Jon's extramarital affair

Susan filed an in limine motion to exclude evidence of Jon's extramarital affair as not relevant under Evidence Code section 350, and unduly prejudicial under Evidence Code section 352. Jon had a six-month extramarital affair in 1997. Ten years later, during a medical visit, when a nurse practitioner asked Susan about stress in her life, Susan responded that her daughter was having problems (her daughter's boyfriend was diagnosed with a serious illness), and volunteered that if she survived her husband's affair, she could survive anything. Susan contended that since the affair took place in 1997, it

⁵ For the first time on appeal, Susan cited various publications to support her contention that there is no necessary correlation between extent of property damage and resulting injury to an occupant of a damaged vehicle. However, publications that are not a part of the trial record cannot be considered on appeal. (See *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 631–632 [227 Cal.Rptr. 491].)

was remote in time and not relevant and that the prejudicial value of the evidence outweighed any probative value. Schwartz objected to the granting of the in limine motion contending that it was premature and that the history of the relationship was relevant. The trial court tentatively ruled that evidence of Jon's affair would be admissible, but that all motions in limine were "subject to being revisited at any time during the trial as the evidence is developed."

At trial, initially defense counsel touched briefly on the subject of the affair. After Susan testified that she was happy in her 45-year relationship with Jon, defense counsel asked Susan whether she had stated during a medical visit that she ignored Jon's indiscretions. Susan's counsel did not object to the question. Susan asked defense counsel to repeat the question, who then asked a different question about treatment for a prior neck and upper back injury. Not responding to that question, Susan volunteered, "afraid you were going to bring this up . . . as if it has anything to do with my injury. So I'll answer that, and I'll try to compose myself." As defense counsel began to ask another question, Susan interrupted and stated, "Because most women would leave their husbands." Defense counsel started to reframe the question about neck injury, but before he could complete the question, Susan stated, "Wrong." The trial judge commented on the sensitivity of the subject and stated that only one party could speak at a time. With no question pending, Susan stated, "I resent it." The judge stated that counsel needs an opportunity to ask questions. Susan queried, "About my entire life?" The trial judge inquired if Susan needed to take a minute to step down, and Susan agreed. As she was leaving the courtroom, Susan stated, "How dare you. How dare you." The court then took a 10-minute break. When trial resumed, defense counsel questioned Susan about taking medications and did not mention the subject of Jon's infidelity. However, later in the cross-examination Susan initiated a discussion on the topic of her husband's infidelity.⁶ Defense counsel then inquired about her physical sensitivity to

⁶ "Q: [by defense counsel] And if the record the day after this accident, the report from Dr. Babikian, says absolutely nothing about massage therapy, would that surprise you?

"A: [by Susan] Yes. [Objection overruled by court.]

"A: If he didn't document it, I—I'm not responsible for what he documents. *But I will say that I'm going to address the issue of the nurse discussing my husband's infidelity because that should not have been in the medical record.* (italics added.) [¶] . . . [¶]

"Q: It has nothing to do with this case or your loss—

"A. Absolutely—How dare you.

"Q. Does your relationship before this accident, ma'am, have anything to do with it afterwards from this accident?

"A. I'm not going to answer you.

"Q. Do you think it unfair, ma'am, for me to ask you questions about the state of your relationship before this accident?

"A. I sure do. I take exception to the fact that you would ask me about my husband's infidelity, which did not belong in a medical record, which you never would have known about

Jon's touches. Next, he asked if everything was fine in their relationship. Again, Susan spontaneously interjected the subject of infidelity not necessarily called for by the question. Susan volunteered, "Oh, so happiness is just physical relationship? Is that what you're intimating? Is it just physical? My husband found out that that's not what it is. If you want to just go have a physical relationship, then you just go screw someone. Pardon me. He found out real fast that's not what it's about. We went on a retreat. And the fact that we're together is, quite frankly, a miracle. We went to [a retreat] if you need to know, and it was about forgiveness." Next, defense counsel asked a few seemingly innocuous follow-up questions⁷ and moved on to another topic.

On redirect examination, Susan's counsel engaged her in a detailed discussion of Jon's infidelity. Susan testified that the affair lasted six months, and that she made Jon tell their kids about it because she was so upset. She and Jon went to counseling through their church, and she forgave him. Since then, they have renewed their marriage vows twice. Susan recounted her conversation with the nurse about stress to explain how the reference to Jon's affair found its way into the medical records.

■ On appeal, Susan contends that the trial court committed reversible error in allowing evidence of the affair. However, the trial court had indicated before presentation of any evidence that its ruling allowing the evidence was tentative and subject to being revisited at the time of trial. During trial, Susan did not renew her objection to questions about Jon's affair. When a court has not finally ruled on an in limine motion, as in this case, Evidence Code section 353 requires a timely objection during presentation of the evidence at trial to preserve the issue on appeal.⁸ By failing to object during trial to admissibility

if that nurse had known better. Because it was not my reason for my being there. My reason for being with her had to do with my cardiac issues and the fact that I was dealing with my daughter's issue. And we were talking casually. [My daughter] had just started dating someone. And I told her, if I can get through my husband's infidelity and what I went through, if my marriage could survive that and made our marriage stronger. [¶] I could talk about it, but not in front of strangers."

⁷ "Q. Has he been supportive?

"A. Very.

"Q. And this accident caused that to go out the window, or he has been supportive?

"A. Our physical relationship has suffered. Now you know.

"Q. The issue with your husband's indiscretions where you saw [a nurse practitioner] that was 2007; is that correct?

"A. Oh, we're still going to talk about this?

"Q. I thought you wanted to talk about it more. Was that—

"A. Go ahead. Let me brace myself.

"Q. Was that 2007, Ma'am.?

"A. Yes."

⁸ "Events in the trial may change the context in which the evidence is offered to an extent that a renewed objection is necessary to satisfy the language and purpose of Evidence Code

of the evidence on the grounds advanced in the in limine motion, Susan and Jon failed to preserve the issue for review on appeal.

■ In any event, the court did not abuse its discretion in allowing the testimony. By claiming loss of consortium and emphasizing the strength of their relationship to support their claim, Susan and Jon put their entire marital relationship at issue and represented that it was totally fine. Consequently, evidence of the extramarital affair was relevant to Jon's claim for loss of love, companionship, comfort, affection, society, solace, moral support or the enjoyment of sexual relations. (See CACI No. 3920; *Morales v. Superior Ct.* (1979) 99 Cal.App.3d 283, 288 [160 Cal.Rptr. 194].) Evidence of an affair that took place many years ago may or may not be relevant to a loss of consortium claim. (*Ibid.*) In this case, four years before trial, Susan brought up her previous marital difficulties at a medical examination. Under these circumstances, the court did not abuse its broad discretion in determining that this subject matter was potentially relevant and thus appropriate for jury consideration.

e. *The Christs' claim of prejudice based on jury's failure to award any damages*

The Christs contend that because Schwartz admitted liability and causing "harm," the jury's failure to award damages indicates they must have been prejudiced by the erroneous admission of the photographs of the vehicles and mention of Jon's affair. They suggest that because Schwartz admitted in response to an interrogatory that Susan suffered "harm," the jury was required to award some monetary compensation for her pain and suffering and future medical expenses. However, Schwartz only admitted causing "harm," but did not admit causing any of the specific damages Susan claimed. "Harm" is an amorphous term that could apply to property damage or past medical expenses, neither of which Susan claimed at trial.⁹

■ Thus, despite the stipulations and admission of "harm," Susan was essentially left with a stipulation of liability. Stipulations of liability do not automatically entitle plaintiffs to damages. (See, e.g., *Nelson v. Black* (1954) 43 Cal.2d 612, 613–614 [275 P.2d 473] (*Nelson*); *Vogt v. McLaughlin* (1959)

section 353. . . . '[U]ntil the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility.' " (*People v. Morris* (1991) 53 Cal.3d 152, 190 [279 Cal.Rptr. 720, 807 P.2d 949].)

⁹ Susan sought only general damages for pain and suffering, damages for future medical expenses and loss of ability to provide household services caused by the accident. Jon's claim for loss of consortium required Susan to prove her claim. (CACI No. 3920 [Loss of consortium claim requires the claimant's spouse to prove her claim against the defendant.].)

172 Cal.App.2d 498, 502 [342 P.2d 481] (“But the rule is clear that a defense verdict may be returned even where liability is admitted, if the evidence would sustain a conclusion that plaintiff’s injuries were not proximately caused by the negligent event sued upon.”). Susan still needed to prove that the accident caused her to incur household expenses, to suffer noneconomic damages and to require future medical expenses. (See CACI No. 3901.) Lacking objective proof of her injury, her entire claim was subjective and rested solely upon her credibility, which was materially impeached at trial. For example, she claimed that she was so seriously injured in the accident that she could not lift items heavier than five pounds and that Jon could not touch her in her upper body without causing pain and causing her to jump. She also testified that unless she first does yoga, she cannot wash her face or brush her teeth. However, the defense presented convincing impeachment evidence, including a sub rosa video taken prior to trial, showing Susan lifting and carrying a trash can, holding a large handbag, and bending at the waist without it causing any apparent pain. It also showed Jon touching Susan’s back without it causing her any noticeable discomfort. Susan also impeached her own credibility when she told Dr. Vance the day after he examined her, that what she reported to him was not correct, i.e., that she had significantly underreported the frequency and intensity of her pain, and that she was in constant, not intermittent, pain and could no longer perform simple household chores or brush her teeth.

Additional evidence could also have led the jury to conclude that Susan suffered no injury. Her lack of injury was corroborated by medical testimony showing no objective manifestation of injury in X-rays or MRIs, and by her admissions that she did not bump against any objects during the collision and her vehicle’s air bags did not deploy, by her ability to drive home after the accident, and by her failure to request medical help at the scene. Further, when asked on cross-examination about her past medical treatment, Susan was evasive, repeatedly answering, “I don’t remember.” Given her pre-accident history of various health issues, the jury could have reasonably determined that she was not candid about acknowledging past conditions that may have caused her current complaints.

After receiving some diagnostic care and treatment, Susan did not receive medical care for almost one year before filing suit. However, the month she did file suit, she began treatment with Dr. Kozin, who eventually diagnosed her with fibromyalgia. She consulted Dr. Kozin only after rejecting another rheumatologist as her physician. A jury could reasonably conclude that when she filed suit, she searched until she found a physician willing to validate her reports of chronic pain. We also note that Susan based her claims for future medical expenses on suffering from fibromyalgia, which was based exclusively on her subjective complaints, which remained undiagnosed until she filed suit after a long hiatus with no medical treatment. The jury could also

have considered that although Dr. Kozin prescribed medication to treat Susan's fibromyalgia, Susan did not take the medication. Under these circumstances, the jury could have reasonably believed Dr. Vance's testimony that Susan did not suffer from fibromyalgia, or if she did suffer from fibromyalgia, it was not as a result of the accident.

■ Based on this convincing impeachment of Susan's testimony, a jury could have reasonably rejected her entire testimony as not credible and have concluded that she, like Schwartz, was not injured in the accident. (See *Halagan v. Ohanesian* (1967) 257 Cal.App.2d 14, 21 [64 Cal.Rptr. 792] ["[T]he trier of fact may disregard all of the testimony of a party, whether contradicted or uncontradicted, if it determines that [she] testified falsely as to some matters covered by [her] testimony."] A jury may conclude that a plaintiff who testifies falsely concerning injuries suffered no injuries. (*Carruthers v. Cunha* (1955) 133 Cal.App.2d 91, 96 [283 P.2d 384] [Upholding a defense verdict in an admitted liability case because plaintiff lacked credibility].)

Finally, even assuming that the court erred in admitting evidence of the photographs of the vehicles and evidence of the affair, reversal is not warranted unless it resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b).) Prejudice is not presumed. (Code Civ. Proc., § 475.) Rather, appellant has the burden of affirmatively demonstrating prejudice. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069 [232 Cal.Rptr. 528, 728 P.2d 1163].) A "miscarriage of justice" will be declared only where the appellate court, after examining all the evidence, is of the opinion that "'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 [16 Cal.Rptr.3d 374, 94 P.3d 513].)

Based on the totality of evidence in this case, the photographs of the damaged vehicles and the testimony concerning marital infidelity were tangential to the main question of the credibility of Susan's claims of injury. The Christs' entire case rested upon the believability of Susan's subjective, uncorroborated statements, which the jury rejected. Based on the abundant evidence unrelated to the vehicles' photographs or to Jon's affair, which significantly impeached Susan's credibility, it is unlikely that exclusion of the contested evidence would have changed the outcome of the case. (See *Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 800; *Carruthers v. Cunha*, *supra*, 133 Cal.App.2d at p. 96 [upholding a defense verdict in an admitted liability case because the jury logically concluded that plaintiff testified falsely concerning his injuries.]; see also *Nelson v. Black*, *supra*, 43 Cal.2d at

pp. 613–614 [admitted liability case where the claims of injury were subjective and the jury properly refused to award damages because they did not believe he suffered injury].)

In summary, each of the Christs' claims depended on the credibility of Susan's testimony that she suffered personal injury as a result of the accident with Schwartz. The jury reasonably found her testimony not credible and therefore properly rejected each of the Christs' claims.

DISPOSITION

The judgment and order are affirmed. Schwartz is entitled to his costs on appeal.

McConnell, P. J., and Aaron, J., concurred.

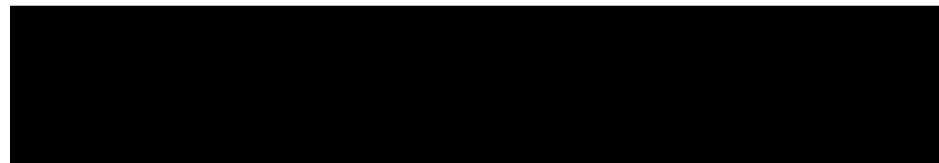
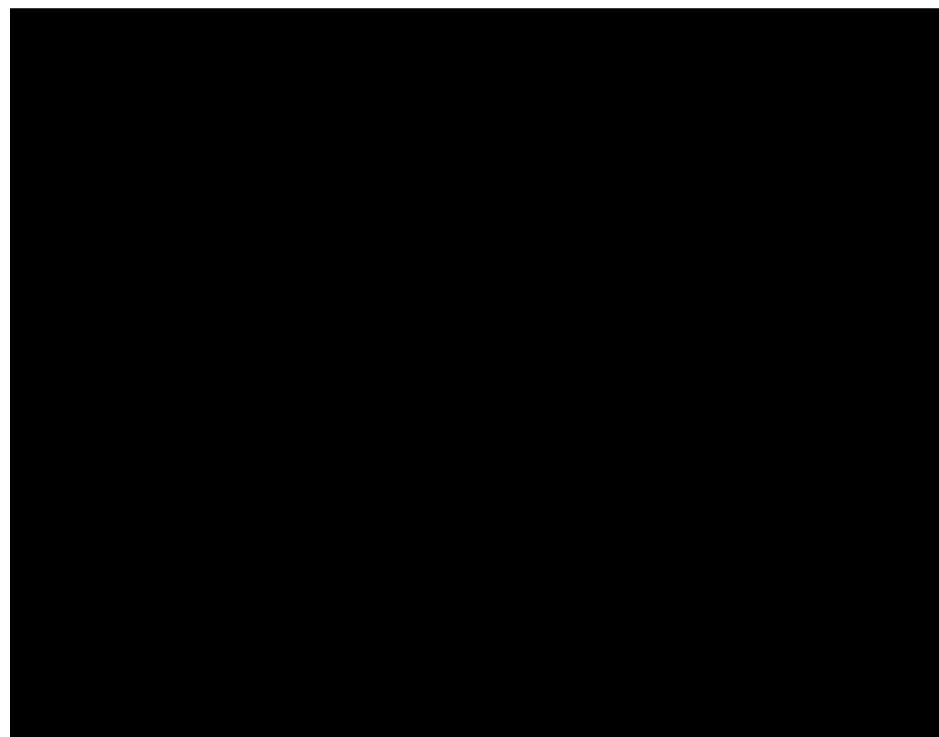
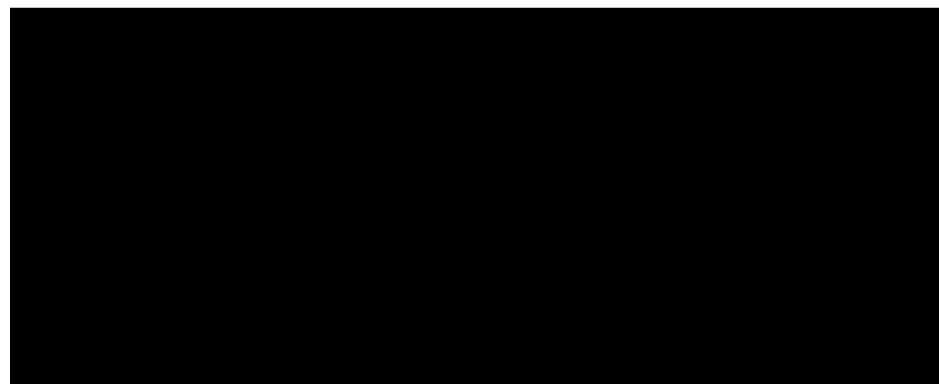
[No. H041563. Sixth Dist. Aug. 12, 2016.]

FRIENDS OF THE WILLOW GLEN TRESTLE, Plaintiff and Respondent,
v.
CITY OF SAN JOSE et al., Defendants and Appellants.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Richard Doyle, City Attorney, Nora Frimann, Assistant City Attorney, and Kathryn J. Zoglin, Deputy City Attorney, for Defendants and Appellants.

Stoel Rives, Timothy M. Taylor and Carissa M. Beecham for League of California Cities as Amicus Curiae on behalf of Defendants and Appellants.

Brandt-Hawley Law Group and Susan Brandt-Hawley for Plaintiff and Respondent.

OPINION

MIHARA, J.—“A project that may cause a substantial adverse change in the significance of *an historical resource* is a project that may have a significant effect on the environment.” (Pub. Resources Code, § 21084.1, italics added.)¹ “If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared.” (§ 21080, subd. (d).) “If a lead agency determines that a proposed project . . . would not have a significant effect on the environment, the lead agency shall adopt a negative declaration to that effect. The negative declaration shall be prepared . . . [¶] . . . [if] [t]here is no substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.” (§ 21080, subd. (c).) “‘Substantial evidence’ . . . means 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. Whether a fair argument can be made that

¹ Subsequent statutory references are to the Public Resources Code unless otherwise specified.

the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency.” (Cal. Code Regs., tit. 14, div. 6, ch. 3, § 15384, subd. (a).)²

Appellant City of San Jose (the City) proposed a project to demolish the Willow Glen railroad trestle (the Trestle) and replace it with a new steel truss pedestrian bridge to service the City’s trail system. The City found that the Trestle was not a “historical resource,” and therefore the project would not have a significant effect on the environment. It adopted a mitigated negative declaration (MND) under the California Environmental Quality Act (CEQA) (§ 21000 et seq.). Respondent Friends of the Willow Glen Trestle (Friends) challenged by a petition for writ of mandate the City’s determination that an environmental impact report (EIR) was not required. The trial court issued a peremptory writ of mandate invalidating the City’s approval of the project. It held that the City’s adoption of an MND was invalid because there was a “fair argument” that the Trestle was a historical resource. The court ordered the City to prepare and certify an EIR in compliance with CEQA.

On appeal, the City contends that the trial court applied the wrong standard of judicial review. The City claims that it had discretion to determine whether the Trestle is a historical resource and that its discretionary determination was not subject to review under the “fair argument” standard but was instead to be reviewed under a deferential substantial evidence standard of judicial review. Friends argues that the trial court correctly applied the fair argument standard of judicial review. It relies on this court’s decision in *Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4th 1095 [19 Cal.Rptr.3d 469] (*Monterey*). We conclude that our decision in *Monterey* did not accurately state the appropriate standard of judicial review that applies in this case. The statutory scheme created by the Legislature requires application of a deferential substantial evidence standard of judicial review in this case. Therefore, we will reverse and remand for the trial court to conduct its judicial review of the administrative record under the correct standard.

I. Background

The Trestle is a wooden railroad bridge that was built in 1922 as part of a “spur line” to provide “rail freight access” to “canning districts” near downtown San Jose. In 2004, the City obtained a one-page “BRIDGE

² This chapter contains the California Environmental Quality Act (§ 21000 et seq.) guidelines. Subsequent references to “Guidelines” will be to this chapter. “In interpreting CEQA, we accord the [California Environmental Quality Act] Guidelines great weight except where they are clearly unauthorized or erroneous.” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428, fn. 5 [53 Cal.Rptr.3d 821, 150 P.3d 709] (*Vineyard*)).

EVALUATION SHORT FORM” from consulting architectural historian Ward Hill regarding the Trestle in connection with a proposed City trail project that did not threaten the Trestle’s existence. Hill opined that “[t]he [Trestle’s] design is based on standard plans for wood trestle bridges,” and “the trestles and superstructure were likely replaced during the last 30 to 40 years.” He concluded that the Trestle “is a typical example of a common type and has no known association with important events or persons in local history.” The City also obtained a one-page letter from a state historic preservation officer stating that the City’s proposed 2004 project would not affect any “historic properties.”

The City acquired ownership of the Trestle in 2011. In 2013, the City proposed a project to demolish the Trestle and replace it with a new steel truss pedestrian bridge as a component of the City’s Three Creeks Trail system. The City determined that it would cost about the same amount to replace the Trestle as to restore and retrofit it. A new steel bridge would present less of a fire hazard and have lower maintenance costs.

In March 2013, the City approved the project after concluding that it was not a project and therefore did not require CEQA review.³ Eight months later, in November 2013, the City published a notice of intent to adopt an MND supported by an initial study. The initial study relied on the two 2004 documents to support its finding that there would be no impact on historical resources because “the bridge is an example of a common type of trestle, and was not associated with important events or persons in local history.” The initial study emphasized that the Trestle was not distinctive or unique. The initial study took note of “the role of the railroad spur and the trestle in the incorporation of Willow Glen and activism regarding roadway/railroad grade separations.” It “acknowledge[d] the history of the trestle and the former Western Pacific Railroad alignment through Willow Glen” and the fact that the Trestle was “locally important,” but it concluded that this history did not make the Trestle a historical resource.

The City received numerous comments on the proposed MND. Jean Dresden, a local historian, submitted extensive comments describing the uniqueness and historic importance of the Trestle. Marvin Bamburg, a

³ The City’s actions in approving the project *before* preparing and adopting the MND violated CEQA. “Prior to carrying out or *approving a project* for which a negative declaration has been adopted, the lead agency shall consider the negative declaration together with comments . . .” (§ 21091, subd. (f), *italics added*.) The City’s 2012 feasibility study explicitly acknowledged that the project would require a new initial study and a “new CEQA document.” This CEQA violation was not raised by Friends below nor is it addressed by either party on appeal.

“CHRIS-listed”⁴ historical architect, agreed with Dresden that the Trestle “is an important historical icon of the past” and “that it qualifies for listing in the California Register under Criteria 1 and 3.”⁵ Susan M. Landry, an environmental architect, agreed, and she noted that the 2004 documents relied on by the City were “outdated” and that “reports and documents” had been uncovered after 2004 demonstrating that the Trestle had long been considered historic.

In January 2014, the city council adopted the MND based on the initial study. The city council found that “the existing wood railroad trestle bridge is not a historic resource” because “the design is based on standard plans for wood trestle bridges, and has no known association with important persons”; the “bridge materials were likely replaced during the last 30 or 40 years”; “the trestle is not unique [and] is unlikely to yield new, historically important information”; and “the trestle . . . did not contribute to broad patterns of California’s history and cultural heritage.” The city council therefore concluded that the project would have no significant impact on the environment.

In February 2014, Friends filed a writ petition challenging the City’s approval of the project and adoption of the MND. Friends asserted that there was substantial evidence to support a fair argument that the Trestle was a historical resource and therefore an EIR was required.⁶ Friends also argued that “there is not substantial evidence that the Trestle is not historic.” The City, relying on *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039 [72 Cal.Rptr.3d 690] (*Valley Advocates*), contended that the fair argument standard did not apply. It alternatively argued that Friends had failed to satisfy the fair argument standard. The City also argued that Friends was “estopped from challenging the conclusion that the trestle is not a historic resource” due to the City’s 2004 conclusion in the MND for the earlier project.

In July 2014, the trial court found that the fair argument standard applied and that substantial evidence supported a fair argument that the Trestle was a historical resource.⁷ In August 2014, the court entered judgment granting

⁴ CHRIS is the California Historical Resources Information System, which is operated by the State Office of Historic Preservation.

⁵ See footnote 14, *post*.

⁶ In May 2014, the superior court issued a preliminary injunction barring the City from taking any action that “may physically alter” the Trestle during the pendency of this action.

⁷ Although Friends cites in its appellate brief to a supplemental administrative record, no such record has been lodged in this court. There was a dispute between the parties in the trial court regarding a supplemental administrative record prepared by Friends. However, at the hearing on the petition, counsel for Friends stated: “[T]o just be clear that the record is, I think we all agree, the certified administrative record that the City . . . has provided . . . We do have supplemental documents we’d ask be part of the record as well.” The trial court’s order stated

Friends' petition and issuing a peremptory writ of mandate directing the City to set aside its approval of the project and its adoption of the MND. The court ordered the City to "refrain from further action to approve the demolition of the Willow Glen Trestle pending preparation and certification of an EIR and compliance with the requirements of the California Environmental Quality Act."⁸ In October 2014, the City timely filed a notice of appeal from the judgment.

II. Discussion

A. Mootness

Friends asks us to dismiss this appeal as moot because the City has already certified an EIR for this project. The trial court ordered the City to vacate its approval of the project, prepare an EIR, and comply with CEQA. The City has not vacated its approval of the project and reconsidered the project in light of the EIR as would be required by CEQA. If the City succeeds in this appeal, it might not be required to vacate its approval of the project or consider the impact of the demolition of the Trestle. Consequently, this appeal is not actually moot.

B. Standard of Appellate Review

"An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: The appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is *de novo*." (*Vineyard, supra*, 40 Cal.4th at p. 427.)

C. Standard of Judicial Review

The key dispute in this case concerns the identification of the standard for judicial review of a lead agency's determination that a project will not have an adverse impact on a "historical resource."⁹ The City contends that the trial

that it "assumed that [the] record certified by the City (designated 'CAR') is the correct record." The administrative record lodged in this court is the one "designated 'CAR'" that the trial court considered, and we therefore consider it to be the appropriate one for us to consider in reviewing the trial court's decision.

⁸ The City was ordered to file its return on or before November 6, 2015, and the court retained jurisdiction over the case.

⁹ The City asserts in its opening appellate brief: "One of the critical issues before this Court is whether the trestle is a historic resource as defined by CEQA." This is not true. As the trial court acknowledged, "I'm not deciding whether the structure is historic or not . . ." The issue before this court concerns the process for determining whether the Trestle is a historic

court erroneously utilized the “fair argument” standard of judicial review. Friends maintains that the trial court properly employed the “fair argument” standard of judicial review. Friends alternatively argues that, even if the “fair argument” standard does not apply, the City’s decision was not supported by “substantial evidence.”¹⁰

1. *Hillside* Did Not Resolve This Issue

At the outset, we reject the City’s claim that we are bound to adopt the holding in *Valley Advocates* on this issue because the California Supreme Court allegedly approved of the holding of *Valley Advocates* on this issue in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086 [184 Cal.Rptr.3d 643, 343 P.3d 834] (*Hillside*). In *Valley Advocates*, the Fifth District Court of Appeal held, among other things, based on its construction of section 21084.1, “that the fair argument standard does not govern a lead agency’s application of the definition of an historical resource.” (*Valley Advocates, supra*, 160 Cal.App.4th at p. 1072.)

Hillside concerned the “unusual circumstances exception” to the application of a categorical exemption from CEQA. (*Hillside, supra*, 60 Cal.4th at p. 1097.) One issue before the California Supreme Court in *Hillside* was whether “in reviewing the City’s conclusion that the [unusual circumstances] exception is inapplicable” the appropriate standard of judicial review was “whether there was substantial evidence in the record to support that conclusion” or instead “whether the record contains evidence of a fair argument of a significant effect on the environment.” (*Ibid.*) The California Supreme Court construed the Guidelines, which set forth both the categorical exemptions and the unusual circumstances exception, and the statutes by which the Legislature had authorized categorical exemptions. It concluded that both the exemptions and the exception would be meaningless if the exception meant that the exemptions did not apply if a fair argument could be made that the project would have a significant effect on the environment. (*Hillside*, at pp. 1097–1104.) “[T]o establish the unusual circumstances exception, it is not enough for a challenger merely to provide substantial evidence that the project *may* have a significant effect on the environment, because that is the inquiry CEQA requires absent an exemption.” (*Hillside*, at p. 1105.)

The California Supreme Court proceeded to consider what was the appropriate standard of judicial review for the agency’s decision in the case before it. (*Hillside, supra*, 60 Cal.4th at pp. 1112–1114.) It pointed out that the fair

resource. The actual question of whether the Trestle is or is not a historic resource is not a question for this court or any court.

¹⁰ An agency abuses its discretion under CEQA if it makes a decision that “is not supported by substantial evidence.” (§ 21168.5.)

argument standard indisputably applied to the lead agency's decision on "whether to prepare an EIR for a nonexempt project." (*Hillside*, at p. 1112.) Consequently, a bifurcated standard of judicial review applied. The agency's decision regarding the applicability of a categorical exemption was reviewed under the fair argument standard; the agency's decision regarding the applicability of the unusual circumstances exception was reviewed under a deferential standard that asked only whether the agency's decision was supported by substantial evidence. (*Hillside*, at pp. 1114–1115.)

It was in this context that the California Supreme Court referenced *Valley Advocates*. "Finally, and again contrary to respondents' [the agency's] assertion, our approach is fully consistent with—and is, indeed, affirmatively supported by—the decision in *Valley Advocates v. City of Fresno*[, *supra*,] 160 Cal.App.4th 1039. At issue there were the following CEQA provisions: (1) section 21084.1, which provides that '[a] project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment'; (2) section 21084, subdivision (e), which provides that '[a] project that may cause a substantial adverse change in the significance of a historical resource, as specified in Section 21084.1, shall not be exempted from [CEQA] pursuant to subdivision (a)'; and (3) Guidelines section 15300.2, subdivision (f), which provides that '[a] categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.' The court held that, in applying these provisions, 'the fair argument standard does not govern' an agency's determination of whether a building qualifies as a 'historical resource.' (*Valley Advocates*, *supra*, at p. 1072.) However, the court continued, 'once the resource has been determined to be an historical resource, then the fair argument standard applies to the question whether the proposed project "may cause a substantial adverse change in the significance of an historical resource" [citation] and thereby have a significant effect on the environment.' (*Ibid.*) This discussion supports the conclusion that, if 'unusual circumstances' are established, an agency should apply the fair argument standard in determining whether there is 'a reasonable possibility' that those circumstances will produce 'a significant effect' within the meaning of CEQA. (Guidelines, § 15300.2, subd. (c).)" (*Hillside*, *supra*, 60 Cal.4th at p. 1117.)

The California Supreme Court did not consider in *Hillside* the validity of the *Valley Advocates* court's holding regarding the standard of judicial review applicable to an agency's decision as to whether a resource is a historical resource. The California Supreme Court cited *Valley Advocates* solely to reject the agency's claim that the fair argument standard had *no role to play whatsoever*. The California Supreme Court relied on *Valley Advocates* to support its conclusion that a bifurcated standard could apply where one part of the agency's decision was subjected to the substantial evidence standard

and another part to the fair argument standard. Since the California Supreme Court did not resolve in *Hillside* the issue of whether the fair argument standard applies to an agency's decision as to whether a resource is a historical resource, nothing in *Hillside* requires us to follow the holding in *Valley Advocates*. We must ourselves resolve the issue raised in this case.

2. Statutory Construction

■ Selection of the correct standard of judicial review necessarily depends on our construction of the statute that governs the lead agency's determination, section 21084.1. "We apply well-settled principles of statutory construction. Our task is to discern the Legislature's intent. The statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs. On the other hand, if the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190 [48 Cal.Rptr.3d 108, 141 P.3d 225].)

We begin with the statutory language. "A project that may cause a substantial adverse change in the significance of *an historical resource* is a project that may have a significant effect on the environment. *For purposes of this section, an historical resource* is a resource listed in, or determined to be eligible for listing in, the California Register of Historical Resources. Historical resources included in a local register of historical resources, as defined in subdivision (k) of Section 5020.1, or deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1^[11], are presumed to be historically or culturally significant for purposes of this section, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant. The fact that a resource is not listed in, or determined to be eligible for listing in, the California Register of Historical Resources, not included in a local register of historical resources, or not deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1 *shall not preclude a lead agency from determining* whether the resource may be an historical resource for purposes of this section." (§ 21084.1, italics added.)

¹¹ Section 5024.1, subdivision (g) provides: "A resource identified as significant in an historical resource survey may be listed in the California Register if the survey meets all of the following criteria . . ." It is undisputed in this case that the Trestle was not identified as significant in a historical survey.

The parties do not dispute that the Trestle had not been (1) “listed” in the California Register of Historic Resources (California Register), (2) “determined to be eligible” for listing in the California Register, (3) “included in a local register of historical resources,” or (4) “deemed significant” under section 5024.1, subdivision (g). Thus, under section 21084.1, the Trestle was not a resource that the lead agency was required to find to be a historical resource or was required to presume to be a historical resource. The lead agency’s determination as to whether the Trestle was a historical resource rested on the final sentence of section 21084.1. A “lead agency” is “not preclude[d] . . . from determining” whether the Trestle “may be an historical resource for purposes of this section.” (§ 21084.1.)

■ This final sentence of section 21084.1 clearly *permits* a lead agency to *make a determination* as to whether a resource that is neither deemed nor presumed to be a historical resource is nevertheless a historical resource for CEQA purposes. However, the statutory language does not affirmatively identify the standard that the lead agency is to utilize in making this determination, and, as a result, it does not indicate the standard of judicial review that applies to such a determination.

Nonetheless, the statute’s treatment of “presumed” historical resources provides substantial guidance in determining the standard of judicial review that applies to a determination under the final sentence of section 21084.1. A resource included in a local historical register is “presumed” historical “unless the preponderance of the evidence demonstrates” that it is not. The fact that a lead agency may find even a *presumptively* historical resource *not* to be a historical resource if “the preponderance of the evidence” supports the lead agency’s finding necessarily establishes that such a finding would not be reviewed under the fair argument standard. The inclusion of a resource in a local historical register will by itself generally create a fair argument that the resource is historical, yet the statute plainly permits the lead agency to conclude that it is not. It would make no sense for the statute to permit the lead agency to make a finding based on a preponderance of the evidence that a resource is not a historical resource if the fair argument review standard would generally result in the invalidation of that finding. By allowing the lead agency to eliminate the presumption by making a contrary finding supported by a “preponderance” of the evidence, the statute expressly selects an evidentiary standard for the lead agency’s decision that is inconsistent with that decision’s being subject to a fair argument standard of judicial review.¹² If the lead agency’s standard for its decision is “preponderance of the

¹² The legislative history of section 21084.1 is consistent with this construction of the statute. An enrolled bill report notes that “for resources listed on a local register, the lead

evidence,” the standard of judicial review logically must be whether substantial evidence *supports the lead agency’s decision*, not whether a fair argument can be made to the contrary.

Since the standard of judicial review for a presumptively historical resource is substantial evidence rather than fair argument, it cannot be that the Legislature intended for the standard of judicial review for a lead agency’s decision under the final sentence of section 21084.1 to be fair argument rather than substantial evidence. The final sentence of section 21084.1 imposes no presumption and sets no standard for the lead agency’s decision. The Legislature intended the lead agency to have more, not less, discretion under the final sentence, and it is inconceivable that the lead agency’s decision under that sentence would be subject to *less deferential* review than its decision regarding a resource that is presumed to be a historical resource.¹³

The Guidelines are consistent with our construction of section 21084.1. “[T]he term ‘historical resources’ shall include the following: [¶] . . . [¶] . . . Any object, building, structure, site, area, place, record, or manuscript which a lead agency determines to be historically significant or significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California may be considered to be an historical resource, provided the lead agency’s determination is supported by substantial evidence in light of the whole record. Generally, a resource shall be considered by the lead agency to be ‘historically significant’ if the resource meets the criteria for listing on the California Register”¹⁴ (Guidelines, § 15064.5, subd. (a)(3), italics added.) The Guidelines state that the lead agency’s determination must be “supported by

agency would be allowed to declare a project [*sic*] not historically significant if a ‘preponderance of the evidence demonstrates that the resource is not historically or culturally significant.’” (Off. of Planning & Research, Enrolled Bill Rep. on Assem. Bill No. 2881 (1991–1992 Reg. Sess.) Sept. 11, 1992, pp. 3–4.)

¹³ The voluminous legislative history of section 21084.1 contains no indications to the contrary.

¹⁴ The Guidelines identify the criteria for the lead agency’s determination as “Public Resources Code sections 5020.1(j) or 5024.1”; these statutes contain the same criteria set forth in the Guidelines. (Guidelines, § 15064.5, subd. (a).) Public Resources Code section 5024.1 provides: “A resource may be listed as an historical resource in the California Register if it meets any of the following National Register of Historic Places criteria: [¶] (1) Is associated with events that have made a significant contribution to the broad patterns of California’s history and cultural heritage. [¶] (2) Is associated with the lives of persons important in our past. [¶] (3) Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values. [¶] (4) Has yielded, or may be likely to yield, information important in prehistory or history.” (§ 5024.1, subd. (c).) Section 5020.1, subdivision (j) provides: “‘Historical resource’ includes, but is not limited to, any object, building, structure, site, area, place, record, or manuscript which is historically or archaeologically significant, or is significant in

substantial evidence,” which is inconsistent with a fair argument standard of judicial review, which does not look to the evidence supporting the lead agency’s decision but to whether a fair argument can be made. (Guidelines, § 15064.5, subd. (a)(3).) We conclude that the Legislature did not intend for the fair argument standard to apply to a lead agency’s decision that a resource is not a historical resource under the final sentence of Public Resources Code section 21084.1.

3. Case Authority

None of the cases cited by the parties convinces us that our construction of the statute is inconsistent with the Legislature’s intent.

The earliest decision cited by the parties is *Citizens’ Com. to Save Our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157 [44 Cal.Rptr.2d 288] (*Claremont*). The appellants in *Claremont* contended that they had “raised a fair argument regarding historical resources thereby requiring an EIR, not an MND.” (*Claremont*, at p. 1168.) The Second District Court of Appeal did not consider whether the fair argument standard was the correct standard to apply. The court simply held that the appellants had not satisfied even that standard. (*Claremont*, at pp. 1168–1172.)

In *League for Protection of Oakland’s etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896 [60 Cal.Rptr.2d 821] (*League*), the First District grouped into three categories the resources referenced in section 21084.1. It identified those resources listed in or determined to be eligible for listing in the California Register as “mandatory” historical resources. Those listed in a local historical register or recognized by a local government by ordinance or resolution to be historically significant were called “presumptive” historical resources. It referred to the remaining resources as those “deemed historical resources at the discretion of the lead agency.” (*League*, at pp. 906–907.) Because the City of Oakland had designated the property involved in *League* as “historic” in its general plan, the First District found that the property was a presumptive historical resource and that the presumption was unrebutted. The First District did not consider whether the fair argument standard applied to the issue of whether the property was historic. (*League*, at p. 908.)

In *Monterey, supra*, 122 Cal.App.4th 1095, this court, citing *League* and without any substantive analysis, stated, “[i]n this case, the fair argument standard applies to all three substantive issues—historicity, impact, and

the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California.”

mitigation—since they all bear on the question of whether an EIR is required.” (*Monterey*, at p. 1109.) The parties in *Monterey* did not dispute that the fair argument standard applied to the “historicity” issue in that case, and consequently this court did not consider whether the statutory scheme and the legislative history required application of a deferential substantial evidence standard of judicial review to the issue of whether the jailhouse, which would be demolished as a result of the *Monterey* project, was a historical resource within the meaning of CEQA. (*Monterey*, at pp. 1112–1113.)

Neither *Claremont*, nor *League*, nor *Monterey* explicitly considered whether the fair argument standard of judicial review rather than the deferential substantial evidence standard of judicial review was the standard that the Legislature intended to apply under section 21084.1.

The first substantive analysis of the appropriate standard of judicial review to apply to a lead agency’s determination of whether a resource was a historical resource under section 21084.1 was undertaken by the Fifth District Court of Appeal in *Valley Advocates*. In *Valley Advocates*, the project proposed the demolition of a 90-year-old apartment building. The City of Fresno’s Historic Preservation Commission had nominated the building for placement on the local historic register. Fresno’s city council had rejected the nomination. Fresno’s planning department then found the project to be categorically exempt from CEQA. When the exemption was challenged before the city council on the ground that the building was historic, the city council mistakenly believed that its earlier decision to reject the nomination had already determined that the building was not historic for CEQA purposes. The city council confirmed the categorical exemption, and the planning department approved the project. (*Valley Advocates*, *supra*, 160 Cal.App.4th at pp. 1045–1050.)

The superior court denied a petition challenging Fresno’s determination that the building was not historic for CEQA purposes and its determination that the project was categorically exempt. (*Valley Advocates*, *supra*, 160 Cal.App.4th at p. 1050.) The Fifth District reversed on the ground that Fresno had improperly analyzed whether the building was historic. (*Valley Advocates*, at pp. 1050–1051.) First, relying on *League*, the Fifth District evaluated whether the building came within any of the three categories of historical resources. The building was not a mandatory historical resource because the State Historical Resources Commission had neither listed the building nor found it to be eligible for listing in the California Register. (*Valley Advocates*, at pp. 1051–1054.) There was also no evidence that the building came within the presumptive category. (*Valley Advocates*, at pp. 1054–1058.)

The Fifth District then addressed the contention that the building came within what the First District had described in *League* as the “discretionary”

category.¹⁵ (*Valley Advocates, supra*, 160 Cal.App.4th at p. 1058.) It began with the statutory language. “The last sentence of section 21084.1 is phrased in terms of what a lead agency is not precluded from doing. This phrasing, as well as the lack of a reference to the lead agency in the second sentence of section 21084.1, creates ambiguity as to (1) what, if anything, a lead agency is required to do (i.e., its affirmative obligations) [fn. omitted] and (2) the extent of its discretionary authority. The provisions of CEQA do not address these ambiguities either in section 21084.1 or elsewhere.” (*Ibid.*)

The Fifth District then proceeded to the Guidelines. “Guidelines section 15064.5, subdivision (a)(3) addresses aspects of a lead agency’s discretionary authority in two ways. First, it limits what the lead agency is allowed to do. Second, it appears to impose an affirmative obligation on the lead agency. [¶] The limitation is stated at the beginning of Guidelines section 15064.5, subdivision (a)(3): ‘Any object [or] building . . . which a lead agency determines to be historically significant . . . may be considered to be an historical resource, provided the lead agency’s determination is supported by substantial evidence in light of the whole record.’ The Guidelines use the word ‘may’ to identify discretionary authority. (Guidelines, § 15005, subd. (c); see § 15 [‘may’ defined].) Thus, Guidelines section 15064.5, subdivision (a)(3) confirms the lead agency’s discretion to treat an object or building as an historical resource for purposes of CEQA and limits that discretion to situations where substantial evidence supports the lead agency’s determination of historical significance. [¶] The second sentence of Guidelines section 15064.5, subdivision (a)(3) contains the following mandatory language: ‘Generally, a resource *shall* be considered by the lead agency to be “historically significant” if the resource meets the criteria for listing on the California Register of Historical Resources . . .’ (Italics added.) The word ‘shall’ is used in the Guidelines to identify ‘a mandatory element which all public agencies are required to follow.’ (Guidelines, § 15005, subd. (a).)’ (*Valley Advocates, supra*, 160 Cal.App.4th at pp. 1059–1060, fns. omitted.) Yet the court noted: “In contrast to this explicit limitation, the Guidelines do not address the level of evidence, if any, that must support the opposite determination—namely, that the object or building is *not* historically significant.”¹⁶ (*Valley Advocates*, at p. 1059, fn. 15.)

¹⁵ The Fifth District distinguished *Monterey* on the grounds that the standard was not in dispute in *Monterey* and the “circumstances” were different in *Monterey* because the agency had initially identified the building as historic. (*Valley Advocates, supra*, 160 Cal.App.4th at pp. 1068–1069.)

¹⁶ The Fifth District did not address this issue. “[W]e do not address the scope of the discretion granted to lead agencies. We go only so far as to interpret Guidelines section 15064.5 to mean that, at a minimum, a lead agency has the discretion to address separately whether an object or building is an historical resource for purposes of CEQA’s discretionary historical resources category.” (*Valley Advocates, supra*, 160 Cal.App.4th at p. 1060.)

The Fifth District then considered the issue of whether the fair argument standard of judicial review applied to the agency's decision on whether a resource fell within the discretionary category.¹⁷ (*Valley Advocates, supra*, 160 Cal.App.4th at p. 1067.) Based on its construction of the statute, the Fifth District concluded that "the fair argument standard is not applicable to the determination whether the [buildings] qualify as historical resources at this stage of the CEQA review process."¹⁸ (*Valley Advocates*, at p. 1068.) "Therefore, the only reasonable interpretation of section 21084.1 [was] that the fair argument standard does not govern a lead agency's application of the definition of an historical resource. Of course, once the resource has been determined to be an historical resource, then the fair argument standard applies to the question whether the proposed project 'may cause a substantial adverse change in the significance of an historical resource' (§ 21084.1) and thereby have a significant effect on the environment." (*Valley Advocates*, at p. 1072.)

The only other case cited by the parties that addressed this issue is the Fifth District's decision in *Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340 [177 Cal.Rptr.3d 96] (*L Street*). In *L Street*, the Fifth District again considered whether the fair argument standard applied to the lead agency's decision under the final sentence of section 21084.1 as to whether a resource was a "discretionary" historical resource. (*L Street*, at p. 365, fn. 17.) The project proposed demolition of two houses, neither of which had been identified as a historical resource. (*L Street*, at pp. 348–349.) The City of Fresno decided that the two houses were not

¹⁷ The Fifth District held that the fair argument standard also did not apply to the lead agency's decision as to the application of the unusual circumstances exception to a categorical exemption. (*Valley Advocates, supra*, 160 Cal.App.4th at pp. 1072–1074.) That issue is not before us in this case.

¹⁸ The Fifth District relied on what the court characterized as "a staff analysis, which appears to be attached to or included in an analysis of Senate Floor Amendments by the Senate Committee on Natural Resources and Wildlife." (*Valley Advocates, supra*, 160 Cal.App.4th at p. 1070.) From this document, the Fifth District concluded that the Legislature had intended for the lead agency to have the discretion to decide that a presumptive or discretionary resource was not significant for CEQA purposes. (*Valley Advocates, supra*, 160 Cal.App.4th at pp. 1070–1072.)

There is no indication that this document, which was found in the files of the natural resources committee, was ever presented to any committee or to the Legislature as a whole. As far as can be gleaned from the Legislature's archives, when the chairman of the Assembly Committee on Water, Parks, and Wildlife submitted proposed amendments to the bill that became section 21084.1 to the Legislative Counsel's office in August 1992, he included an analysis of the proposed amendments. It is this analysis upon which the Fifth District relied. This analysis stated that, under the amended version of the bill, "'[r]esources which have not been considered for the California Register, for a local register or for the State Historic Resources Inventory may, at the discretion of a lead agency, be evaluated to determine if they are significant for purposes of CEQA.'" (*Valley Advocates, supra*, 160 Cal.App.4th at p. 1071.) Because the provenance of this document is uncertain, we do not rely on it.

historical resources for purposes of CEQA and approved the project with an MND. (*L Street*, at pp. 351–352.) The trial court rejected a claim that an EIR was required because the project might have an adverse impact on historical resources. (*L Street*, at pp. 352–353.) On appeal, the Fifth District considered whether the fair argument standard applied to the determination of whether the houses were historical resources and reaffirmed its holding in *Valley Advocates* that the fair argument standard did not apply to judicial review of a lead agency's finding that a resource was not a discretionary historical resource.¹⁹ (*L Street*, at pp. 367–369.)

4. Conclusion

■ The issue in this case is one of statutory construction to which we have applied well-settled rules. Our construction of section 21084.1 is congruent with the Fifth District's construction of this statute in *Valley Advocates* and *L Street*. The statutory scheme and the legislative history of section 21084.1 require application of a deferential substantial evidence standard of judicial review, rather than a fair argument standard of judicial review, to a lead agency's decision that a resource is not a discretionary historical resource under the final sentence of section 21084.1. To construe the statute otherwise would be inconsistent with the Legislature's explicit provision authorizing a lead agency to find that a resource that was presumed to be a historical resource was not a historical resource if the lead agency found that a preponderance of the evidence supported its finding. We therefore conclude that the deferential substantial evidence standard of review is the correct standard to apply to the City's finding that the Trestle is not a historical resource.

D. Remand

Although we exercise de novo review in this appeal from the trial court's ruling, we deem it inappropriate for us to exercise judicial review in the first instance in this case. We are a reviewing court. The trial court is tasked with conducting the requisite review in the first instance. Hence, we will remand this matter to the trial court for it to conduct judicial review under the correct standard.

III. Disposition

The judgment is reversed. On remand, the trial court is directed to (1) vacate its judgment granting the petition and issuing a peremptory writ of

¹⁹ The Fifth District again relied on the same document that it had relied on in *Valley Advocates* and viewed as part of the legislative history of section 21084.1. (See fn. 18, *ante*.)

mandate, and (2) determine whether the City's adoption of the MND is supported by substantial evidence that the Trestle is not a "historical resource" under CEQA. In the interests of justice, the parties shall bear their own costs on appeal.

Bamattre-Manoukian, Acting P. J., and Grover, J., concurred.

A petition for a rehearing was denied September 7, 2016, and respondent's petition for review by the Supreme Court was denied October 26, 2016, S237378.

[No. E063687. Fourth Dist., Div. Two. Aug. 12, 2016.]

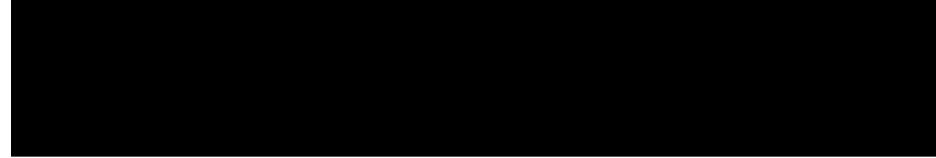
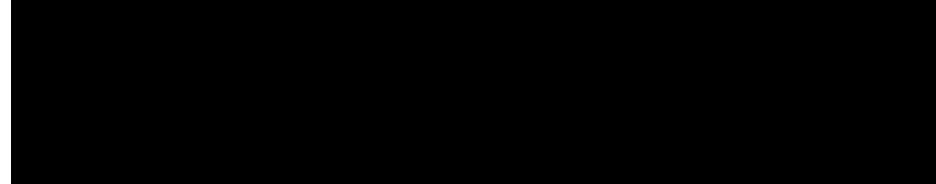
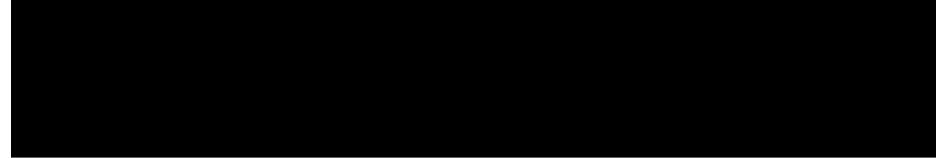
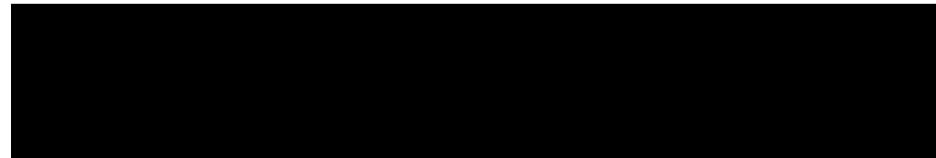
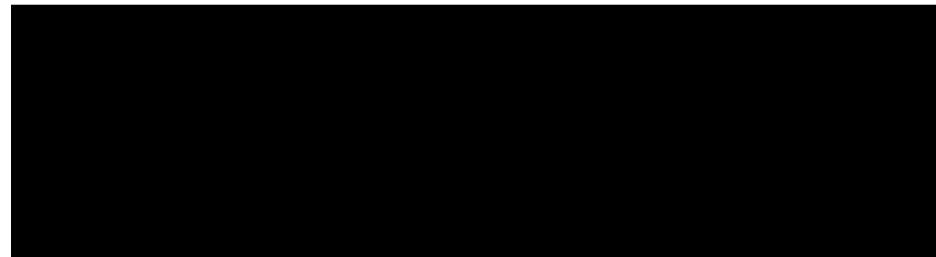
THE PEOPLE, Plaintiff and Appellant, v.
WILLIE ABARCA, JR., Defendant and Respondent.

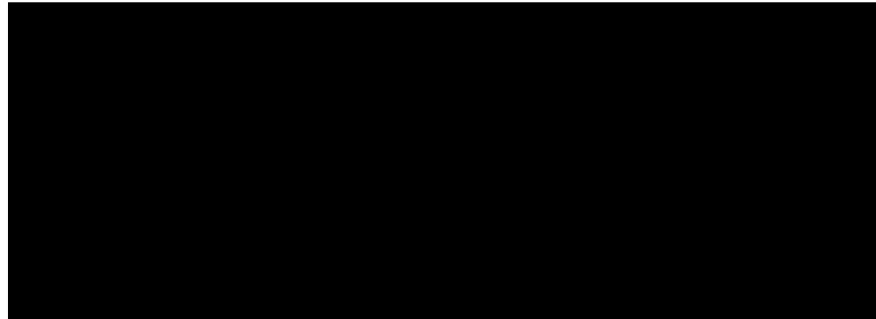
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) October 19, 2016, S237106.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Michael A. Hestrin, District Attorney, and Emily R. Hanks, Deputy District Attorney, for Plaintiff and Appellant.

Thien Huong Tran, under appointment by the Court of Appeal, for Defendant and Respondent.

OPINION

SLOUGH, J.—The People appeal from the superior court’s order granting defendant Willie Abarca, Jr.’s, Proposition 47 resentencing petition. (Pen. Code, § 1170.18.)

Abarca pled guilty to one felony count of second degree burglary (§ 459)¹ based on his attempt to pass a forged check for \$300 at a bank. After the electorate passed Proposition 47, Abarca sought to have his felony conviction redesignated as the newly created misdemeanor of shoplifting—entering an open commercial establishment with intent to commit larceny of \$950 or less. (§ 459.5, subd. (a).) Abarca’s petition says “the value of the check . . . does not exceed \$950.00.” The People responded by contending Abarca’s offense does not constitute shoplifting because banks are not commercial establishments. The superior court concluded banks are commercial establishments, granted Abarca’s petition, and resentenced him.

The People advance three grounds for reversing the superior court order granting the petition. First, the People contend the superior court erred in reaching the merits because Abarca did not carry his initial burden by attaching evidence to his petition. Second, the People contend the superior

¹ Unlabeled statutory citations refer to the Penal Code.

court erred in determining a bank is a commercial establishment. Third, they contend the superior court erred because Abarca's underlying conduct could have been punished as felony burglary even after Proposition 47, because Abarca's act of passing a forged check constituted identity theft. We disagree with each asserted error and therefore affirm.

I

FACTUAL BACKGROUND

According to a declaration supporting an arrest warrant for Abarca, on July 10, 2013, "Willie Abarca walked into the U.S. Bank [at 12612 Limonite Avenue] and attempted to cash a check (#557) from Newport Coach Works Inc. in the amount of \$300.00." Abarca left the bank without obtaining cash while a bank employee was checking the signature against bank records. The investigating deputy sheriff "contacted the account owner[,] Carter Read," who reported "he does not know Abarca, never gave Abarca a check . . . and did not give permission for any of his employees to give Abarca a check."

The Riverside County District Attorney charged Abarca with one felony count of burglary (§ 459; count 1) and one felony count of forgery (§ 475, subd. (c); count 2). The information also alleged Abarca had five prison priors within the meaning of section 667.5, subdivision (b).

In the burglary count, the prosecution accused Abarca of committing "a violation of Penal Code section 459, a felony, in that on or about July 10, 2013, in the County of Riverside, State of California, he did wilfully and unlawfully enter a certain building located at 12612 LIMONITE AVE, EASTVALE, CA, with intent to commit theft and a felony."

In the forgery count, the prosecution accused Abarca of committing "a violation of Penal Code section 475, subdivision (c), a felony, in that on or about July 10, 2013, in the County of Riverside, State of California, he did wilfully and unlawfully possess a completed check, money order, traveler's check, warrant, and county order, with the intent to utter and pass and facilitate the utterance and passage of the same, in order to defraud READ C."

On November 18, 2013, Abarca pled guilty to the commercial burglary count and admitted two prison priors. At the plea hearing, the superior court asked Abarca, "[I]s it true on July 10th, 2013 in Riverside County, you went into a building with the intent to commit a felony?" Abarca replied, "Yes." The superior court found "a factual basis for the plea and . . . accept[ed] the plea."

On December 9, 2013, in accordance with the plea agreement, the superior court dismissed the forgery count and struck the remaining three prison prior allegations. The superior court sentenced Abarca to an upper term of three years in county jail on the burglary count and consecutive one-year enhancements for each of the two prison priors. The court suspended execution of the final two years of the sentence and ordered two years of mandatory supervision.

■ 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) [redefining some grand theft as petty theft], 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 December 10, 2014, Abarca submitted a petition asking the superior court to recall his commercial burglary conviction and resentence him under section 1170.18, subdivision (a). The petition declares “the value of the check or property does not exceed \$950.”

On March 11, 2015, the prosecution submitted a response stating “[d]efendant is *not entitled* to the relief requested” because a “[b]ank is not a commercial establishment.” The prosecution did not contest the value of the forged check or contend Abarca was ineligible for resentencing for any other reason. Nor did the prosecution check boxes provided to request a hearing to determine whether defendant poses an unreasonable risk of danger to the public safety or for any other reason.

On April 23, 2015, the superior court entered an order granting Abarca’s petition.² The order indicates the superior court did not hold a hearing on his petition. The order overruled the prosecution’s “objection that [a] bank is not [a] commercial establishment.” The superior court ordered count one “deemed a misdemeanor . . . amend[ed] count 001 to a violation of 459.5 PC,” and sentenced Abarca to county jail “for the term of 364 days.” Because Abarca had already served 364 days, the superior court ordered him released. The superior court also gave both parties “10 days to file briefs preserving

² The same superior court judge presided over Abarca’s plea and sentencing hearings and his resentencing proceedings.

appellate issues.” The appellate record indicates neither party filed a brief raising additional issues.

On May 27, 2015, the People filed a notice of appeal.

II

DISCUSSION

A. *Petitioner’s Burden*

The People contend the superior court erred in granting the petition because Abarca did not “present any evidence whatsoever regarding the underlying facts of his section 459 conviction.” In effect, the People contend the superior court was not permitted to reach the merits of Abarca’s petition without first finding the petitioner had made a *prima facie* case of entitlement to resentencing. We find no error.

In the first place, the People fail to set forth what constitutes a *prima facie* case or how Abarca’s petition was defective. “An appellate court is not required to examine undeveloped claims, nor to make arguments for parties.” (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 [87 Cal.Rptr.2d 754].) We decline to do so here.

Even assuming the People’s argument is that Abarca failed to show he passed a forged check for an amount that did not exceed \$950, we refuse to reverse on that basis. Abarca filed a signed petition declaring, under penalty of perjury, that “the value of the check” he was convicted of passing “does not exceed \$950.” The People did not contest the assertion in their responsive pleading in the superior court. Nor did they in any way address the sufficiency of the petition. Even when the superior court granted the petition and gave the People “10 days to file briefs preserving appellate issues,” they chose not to object to the sufficiency of the petition.

Moreover, in this court, the People admit Abarca’s offense involved passing a bad \$300 check, and also admit “[t]he trial court’s order granting the petition was based on a review of the court’s record,” which contained the arrest warrant showing the value of the bad check. Under these circumstances, we cannot find the superior court abused its discretion by reaching the merits of Abarca’s petition.³

³ The People do not appeal the superior court’s finding based on its review of the record of conviction that the value of the check did not exceed \$950, nor do they argue the court’s finding was not supported by substantial evidence.

B. Commercial Establishment

The People contend the superior court erred by determining Abarca was entitled to resentencing on his conviction for burglarizing U.S. Bank as shoplifting (§ 459.5) on the ground that a bank is not a commercial establishment. Again, we find no error.

Proposition 47 added section 459.5 to the Penal Code. The new section provides: “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.” We review de novo the superior court’s interpretation of this provision. (*People v. Rizo* (2000) 22 Cal.4th 681, 685 [94 Cal.Rptr.2d 375, 996 P.2d 27].)

■ 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].)

■ “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. Degrade* (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 Dict. Online (2016) <Merriam-Webster.com> [as of Aug. 18, 2013] [defining “commerce” as “activities that relate to the buying and selling of goods and services”]; Business Dict. Online (2016) <BusinessDictionary.com> [as of Aug. 12, 2016] [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. (Accord, *In re J.L.* (2015) 242 Cal.App.4th 1108, 1114 [195 Cal.Rptr.3d 482].)

Banks satisfy this definition. Bank customers use banks to deposit and withdraw funds in exchange for fees. In the context of approving banks’

ability to collect fees from nondepositors who use their automatic teller machines, the United States Court of Appeals for the Ninth Circuit noted “[t]he depositing of funds and the withdrawal of cash are services provided by banks since the days of their creation. Indeed, such activities define the business of banking.” (*Bank of America v. City & County of San Francisco* (9th Cir. 2002) 309 F.3d 551, 563.) Thus, a business like U.S. Bank 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 did not err in holding Abarca’s offense qualified as shoplifting under section 459.5, subdivision (a).

■ The People argue we should take a narrower view of the ordinary meaning of “commercial establishment” as meaning a place of business established for the purpose of exchanging goods or merchandise. Some definitions of “commerce” and “commercial” are in accord with this argument. (E.g., American Heritage Dict. (New College ed. 1976) p. 267 [defining commerce as “the buying and selling of *goods*” (italics added)].) Under that definition, banks 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. (Nov. 4, 2014) text of Prop. 47, § 15, p. 74, online at <<http://vigcdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf>>; see also *id.*, § 18 at p. 74 [act shall be “liberally construed to effectuate its purposes”].) The stated purposes of the electorate include “[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession.” (*Id.*, subds. (3) & (4), § 3, at 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) to include as shoplifting thefts from commercial ventures, such as banks, which sell services.

C. *Identity Theft*

The People contend the superior court erred in granting Abarca’s petition for resentencing because identity theft, not larceny or forgery, was the predicate act for the burglary conviction.

To begin with, the People have forfeited this claim of error. The prosecution did not raise identity theft in relation to the original conviction. Instead, it charged Abarca with entering the bank with the intent to commit “theft and a felony” (the burglary count) and forgery. Neither the prosecution nor the superior court mentioned identity theft at the plea hearing. The superior court

asked only if Abarca “went into a building with the intent to commit a felony.” Nor did the prosecution raise identity theft in any way during resentencing proceedings. It did not claim identity theft was the predicate for Abarca’s burglary conviction. Nor did it contend Abarca was ineligible for resentencing for that reason. The People’s only objection to resentencing Abarca was their contention that a bank does not qualify as a commercial establishment. In addition, in its order granting the petition, the superior court allowed both parties 10 days to brief any additional issues they wished to preserve for appeal. The People did not take advantage of the opportunity to raise identity theft even then, and therefore forfeited the issue. (*People v. Taylor* (2009) 174 Cal.App.4th 920, 937 [94 Cal.Rptr.3d 756].)

Even if the claim had not been forfeited, we would find no error on the merits. Abarca was entitled to resentencing if his conviction for burglary was predicated on his intent to commit theft or forgery, both of which are eligible offenses under Proposition 47. (§§ 490.2, subd. (a) [“obtaining any property by theft where the value of the money . . . does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor”], 473, subd. (b) [“any person who is guilty of forgery relating to a check . . . where the value of the check . . . does not exceed nine hundred fifty dollars (\$950), shall be punishable by imprisonment in a county jail for not more than one year”].) The superior court’s determination that Abarca was entitled to resentencing was based on the implicit finding that his conviction was predicated on his intent to commit theft or forgery. On review, we indulge in every presumption to uphold the judgment and look to the appellant to show error. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549 [59 Cal.Rptr.3d 876].) The People have not shown error here.

As we have discussed, identity theft played no role in the prosecution of Abarca. The People charged him with burglary and forgery. The prosecution entered a plea bargain with Abarca whereby he pled guilty to burglary, and the People agreed to dismiss the forgery count. At the plea hearing, the superior court asked Abarca whether he had entered a building with the intent to commit a felony. The same court decided Abarca’s petition for resentencing and presumably had access to all the records we have on appeal. Based on this history and these records, we conclude the superior court did not abuse its discretion in finding theft or forgery to be the predicate of the burglary charge, and therefore did not err in granting Abarca’s petition.

■ Proposition 47 provides a petitioning procedure allowing offenders to seek resentencing on existing felony *convictions* by showing Proposition 47 reclassified the crime of conviction as a misdemeanor. (§ 1170.18, subd. (a).) If a petitioner qualifies, the remedy in subdivision (b) is for “the petitioner’s felony sentence [to] be recalled and the petitioner resentenced to a misdemeanor.” (§ 1170.18, subd. (b).) The statutory language is entirely focused on

resentencing offenders for existing, but reclassified, *convictions*. It does not require a petitioner to examine the Penal Code for other offenses his conduct would have supported and prove he would not have been convicted of those in addition. (§ 1170.18, subd. (a).) Nor does it suggest the superior court must examine the Penal Code to assure itself before granting a petition that an offender could not have been convicted of a different felony for the same underlying conduct. (§ 1170.18, subd. (b).) Accordingly, we decline to reverse the superior court's order granting the petition on the basis that the People could have prosecuted Abarca for felony burglary predicated on identity theft.

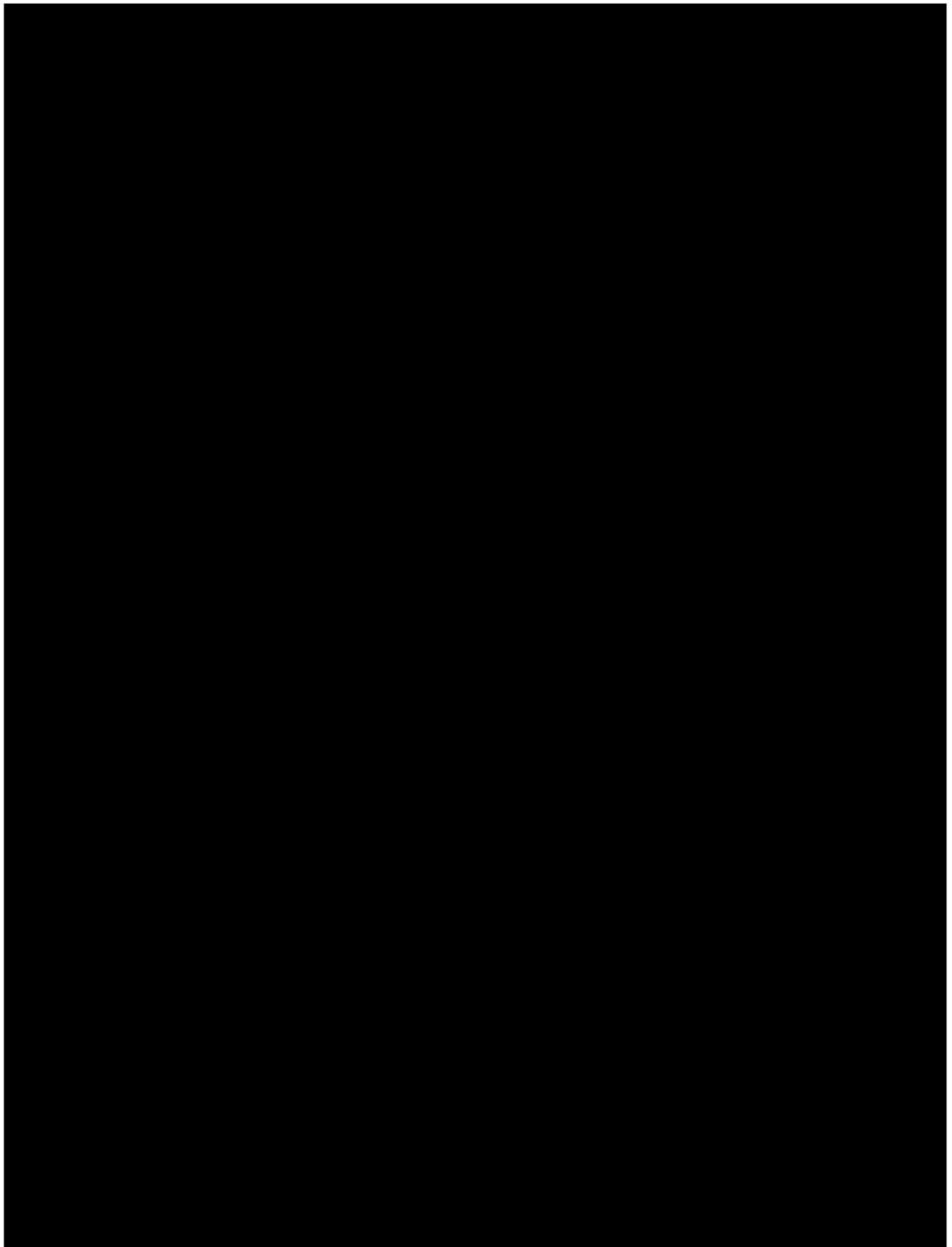
III

DISPOSITION

We affirm the order granting Abarca's petition for resentencing.

McKinster, Acting P. J., and Miller, J., concurred.

Appellant's petition for review by the Supreme Court was granted October 19, 2016, S237106.



[No. B260833. Second Dist., Div. Seven. July 25, 2016.]

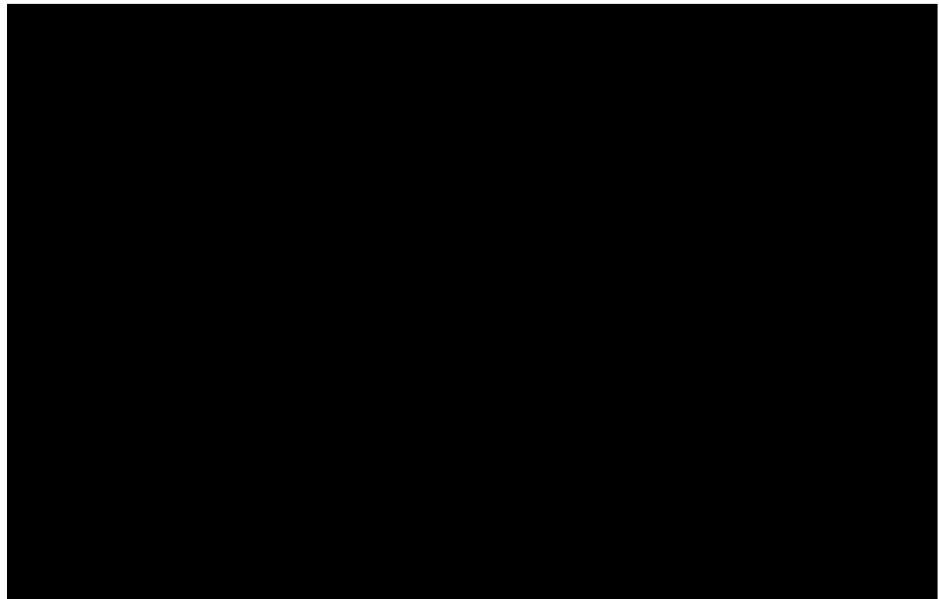
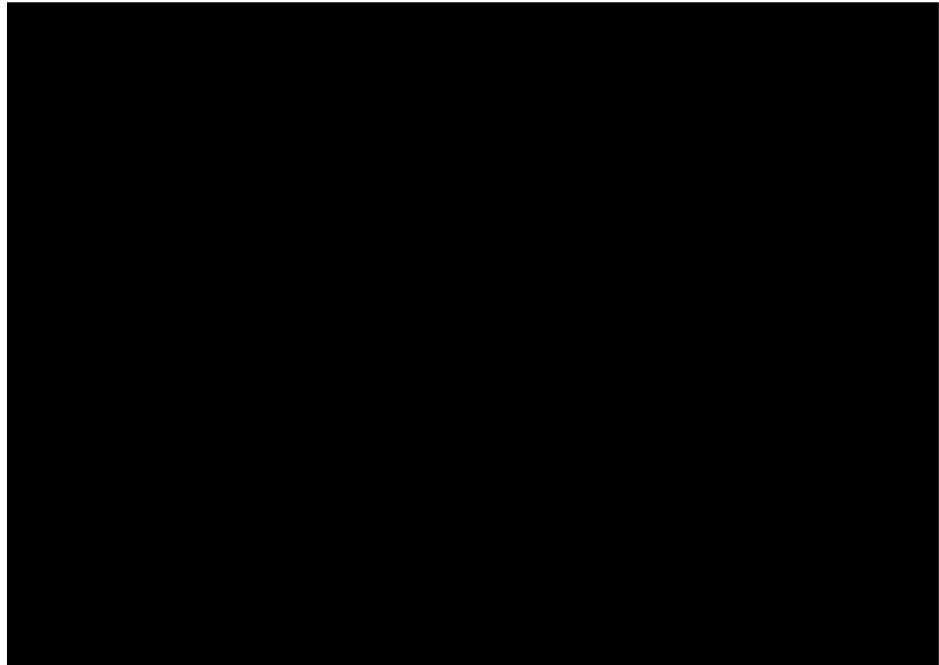
LAURA BETH BARICKMAN et al., Plaintiffs and Respondents, v.
MERCURY CASUALTY COMPANY, Defendant and Appellant.

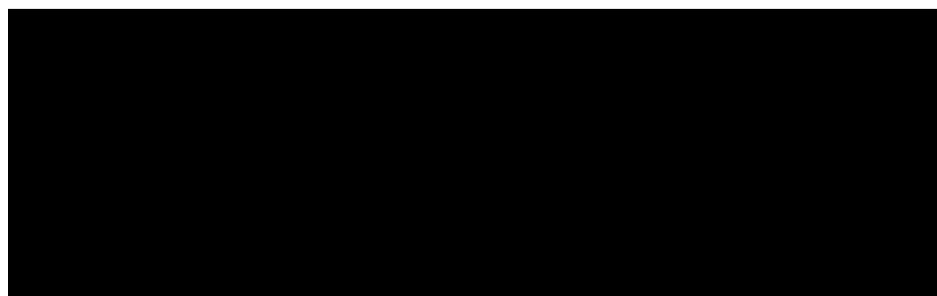
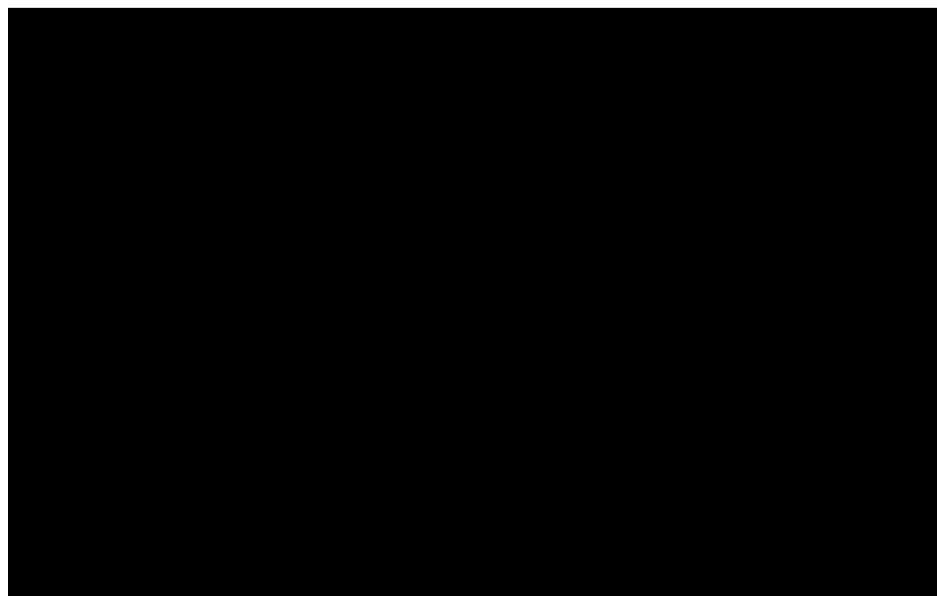
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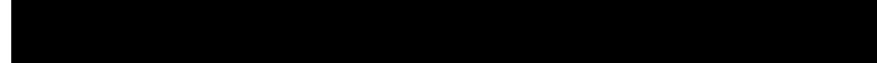
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COUNSEL

Hager & Dowling, Christine W. Chambers, John V. Hager and Thomas J. Dowling for Defendant and Appellant.

The Yarnall Firm and Delores A. Yarnall; Dewitt Algorri & Algorri and Mark S. Algorri for Plaintiffs and Respondents.

OPINION

PERLUSS, P. J.—Timory McDaniel, driving while intoxicated in a car insured by Mercury Casualty Company, ran a red light, and struck and seriously injured Laura Beth Barickman and Shannon McInteer, who were in a crosswalk with the walk signal in their favor. Barickman and McInteer agreed to settle their claims against Timory¹ for her insurance coverage limits, \$15,000 each, but Mercury would not agree to additional language inserted by Barickman and McInteer’s lawyer in Mercury’s form release of all claims: “This does not include court-ordered restitution.” After Barickman and McInteer sued Timory and settled the case with a stipulated judgment for \$3 million, Timory assigned her rights against Mercury to Barickman and McInteer, who filed this action for breach of contract and breach of the implied covenant of good faith and fair dealing. Following a trial by reference, judgment was entered in favor of Barickman and McInteer for \$3 million plus interest from the date of judgment in the personal injury action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Accident and Claim Processing*

During the early morning hours on July 11, 2010, Timory entered the intersection of Pacific Coast Highway and East Second Street in Long Beach

¹ Because Timory McDaniel and her mother, Helen McDaniel, who was authorized to act on Timory’s behalf while she was incarcerated, share the same name, we refer to them by their first names for convenience.

against a red light and struck Barickman and McInteer with her sports utility vehicle while they were in a crosswalk. Timory fled the scene, but was apprehended shortly thereafter. It was determined Timory was driving under the influence of alcohol. The incident was witnessed by several individuals, who gave statements to the police.

The day after the incident Timory informed Mercury she had been in an accident, but, on advice of counsel, did not provide any additional information. On August 4, 2010 Mark Algorri, counsel for Barickman and McInteer, sent Mercury a letter describing their extensive injuries and enclosing a copy of the police report.

On September 1, 2010 Mercury offered Timory's policy limits of \$15,000 per person to Barickman and McInteer. On September 24, 2010 Algorri requested Timory complete a statement of assets to assist his clients in determining whether to accept Mercury's offer in satisfaction of all civil claims. During the following months Algorri and Oliver Chang, the Mercury field representative responsible for processing the claim, exchanged correspondence about the statement of assets.

In late October 2010 Timory was sentenced to three years in state prison and ordered to pay approximately \$165,000 in restitution. In mid-December 2010 Algorri informed Mercury that Barickman and McInteer accepted the policy limits offer and returned signed releases on the form provided by Mercury, but added an explanatory sentence to Mercury's recitation of a \$15,000 payment: "This does not include court-ordered restitution."² Algorri also demanded as a condition of settlement that payment be made within five days of delivery of the executed releases.

For the next several weeks Mercury considered whether it would agree to the additional language inserted by Algorri, requesting and receiving extensions of time to respond. As part of its review process, Mercury consulted with Timory's mother, Helen, as well as Timory's criminal defense attorney, Bruce McGregor. Additionally, Chang spoke to Algorri to determine whether

² In substantially identical letters Algorri wrote Chang confirming that Barickman and McInteer had each "settled her case against your insured Timory J. McDaniel for her policy limits of \$15,000 (excluding court-ordered restitution) . . ." The letters enclosed the form releases provided by Mercury, signed by each of Algorri's clients, with asterisks next to the recitation of the "payment of \$15,000," with the typed explanation, "THIS DOES NOT INCLUDE COURT-ORDERED RESTITUTION." The printed release on Mercury's form covered "all claims, demands, actions, causes of action, known or unknown, suspected or unsuspected relating to the referenced incident and matters" and included a waiver of the provisions of Civil Code section 1542.

the proposed language was intended only to ensure the release did not waive Barickman's and McInteer's right to the restitution award or also to preclude offset against the restitution award by the amount of the insurance settlement. As reflected in a note written by Chang memorializing a December 23, 2010 conversation, "[Algorri] just says he doesn't want this settlement to stop his client[s] from receiving restitution[.] [¶] Asked if this settlement w/[Mercury] would impact/offset any restitution settlement and he says he is not sure[.] [¶] He hasn't handled restitution for quite some time and can't answer us right now[.] [¶] He says he doesn't believe that is the case but he can't be sure of it[.] [¶] Advised we will provide to him a response by 1/7/2011." A note by Chang of a January 6, 2011 conversation states, "[Algorri] confirms that his clients want 100 percent restitution on top of the 15K [policy limit] offers for settlement [Mercury] is offering. . . . He says that his clients are firm on this and won't reconsider anything less."

On January 7, 2011, the final deadline to respond imposed by Algorri, Chang informed him Mercury required a further extension because it did not have "an official response" from McGregor. Algorri responded, "As you know Mercury has dilly dallied for months in concluding a settlement, even though they have had full power, authority, obligation and opportunity to do so from the outset. [¶] Hence, there is no settlement of this case and my clients are now forced to file suit, effective immediately, to pursue fair and reasonable compensation for their devastating losses."

On January 10, 2011 Chang advised Algorri that McGregor had instructed Mercury not to accept the revised releases and asked Algorri to reconsider whether the matter could be settled without the added language.³ Although it is not apparent from the record what precipitated Algorri's next letter to Chang or whether he was addressing a specific conversation, on January 11, 2011 Algorri wrote, "Just to make my point clear Mercury has intentionally mischaracterized my added language. The added language simply eliminates any argument that the Court's restitution order is wiped out by the release. Your characterization that Mercury's payments would not . . . act as a credit on what your insured owes under the restitution order is not only false but, as you undoubtedly know, would violate Cal. Law under [*People v. Bernal* (2002) 101 Cal.App.4th 155 [123 Cal.Rptr.2d 622]]."

³ In a January 14, 2011 letter to Mercury, McGregor explained the reason he did not approve the language: "[W]e would object to any clause in the release of [Timory's] policy limits to the plaintiffs which waives her legal right to offset those payments against any criminal court ordered restitution. We believe that the current law specifies that if Ms. McDaniel personally paid insurance premiums [then] she is entitled under law to offset any payments in regards to any criminal restitution order." McGregor attached to his letter a decision from this court filed December 13, 2010, *People v. Vasquez* (2010) 190 Cal.App.4th 1126 [119 Cal.Rptr.3d 29].

2. *The Personal Injury Action; the Continuing Dispute Regarding the Additional Language*

On January 13, 2011 Barickman and McInteer sued Timory for personal injuries. For the next several weeks Chang and Algorri exchanged letters disputing what had led to the impasse. For example, in a January 25, 2011 letter Algorri wrote, “To reiterate my past discussions with you, my clients never objected to a Mercury payment set off against the court ordered restitution and axiomatically, they never requested that your insured waive any set off. Indeed, I told you early on that case law specifically allowed your insured a set off, and I gave you the case citation. I again clarified this position to you in my letter of January 11, 2011. Also, the language my client[s] added to the release simply clarified their rights of restitution—that there could be no later dispute or subsequent contrary argument made by your insured.” Mercury appointed the law firm of Ghormley & Associates to represent Timory in the personal injury lawsuit.

Although Helen had informed Chang on February 4, 2011 that Algorri’s proposed “vague and confusing language” was not acceptable, on February 24, 2011 she advised Chang that she and McGregor had met with the restitution paralegal assigned to Timory’s case and had learned the language “would not and could not impact the insurance money offsetting the restitution. [¶] Therefore, with Timory’s agreement, and acting as her Attorney in Fact, I am instructing Mercury Insurance to Pay the policy limits of \$15,000.00 to each of the claimants at the earliest possible date, despite any pending civil action.”

On March 8, 2011 Scott Ghormley spoke to Algorri about the dispute regarding the proposed language. Notwithstanding that Helen had advised Mercury she no longer objected to the modified release and had instructed Mercury to pay Barickman and McInteer as soon as possible, in a letter written that day, Ghormley offered to draft language making clear Algorri’s intent that his clients’ right to restitution be protected with no waiver of any offset rights so the matter could be settled. Algorri, however, chose to proceed with the personal injury lawsuit that had been filed the previous month. Additionally, notes made in Mercury’s online claims processing database on March 29 and April 1, 2011 indicate Mercury was still attempting to persuade Barickman and McInteer to sign the unedited releases.

In August 2012 the personal injury action was settled with a stipulated judgment in favor of McInteer against Timory for \$2.2 million and in favor of Barickman against Timory for \$800,000. Timory assigned her rights against Mercury to Barickman and McInteer in exchange for their agreement not to attempt to collect the judgment against her. Mercury paid each woman the \$15,000-per-person policy limits.

3. *The Bad Faith Action*

On April 4, 2013 Barickman and McInteer filed the instant action asserting claims for breach of contract and breach of the implied covenant of good faith and fair dealing. The complaint alleged Timory's liability for the catastrophic injuries caused to Barickman and McInteer was virtually certain, as was the likelihood that their damages would result in judgments against Mercury's insured well in excess of the \$15,000/\$30,000 policy limits. As a result, Mercury's failure to make an offer without unacceptable terms and conditions, its refusal to settle the case at policy limits when it had the opportunity to do so, and its unwillingness to make efforts to reach a reasonable settlement constituted a breach of its obligation of good faith and fair dealing, exposing Timory to excess damages.

On May 13, 2014 the parties agreed to a trial by reference of all issues of fact and law pursuant to Code of Civil Procedure section 638; the Honorable Robert Feinerman (retired) was appointed as referee. The parties stipulated that Justice Feinerman's statement of decision would be entered as a judgment as though the case had been tried to the court pursuant to Code of Civil Procedure section 644, subdivision (a).

After a bench trial, which included testimony from Chang, Algorri and claims-handling experts for both sides, the referee found Mercury had breached the covenant of good faith and fair dealing by refusing to accept the releases with the language added by Algorri. Resolving Chang and Algorri's conflicting testimony and the documentary evidence regarding Algorri's intent, the referee found, "In December 2010 Mercury asked Algorri for a clarification of his intent in adding the additional language to the release. Algorri told them that he was just interested in preserving his client[s'] restitution rights and was not seeking to affect McDaniels' rights to an offset for the amounts paid by Mercury against the restitution ordered by the criminal court. Algorri reconfirmed his position in writing in January of 2011 in letters he sent to Mercury. Despite these assurances from Algorri, Mercury refused to go forward with the settlements without an unedited release."

The referee further explained, based upon the totality of the evidence, the language did not constitute a nonacceptance of the policy limits and was essentially superfluous: "It was unnecessary for [Algorri] to put it in the release, because the law was clear that a release in a civil case would not release a defendant in a criminal case from a restitution order made by a criminal court. The language added was not vague or ambiguous. It only dealt with the Plaintiffs' legal right to receive restitution. It did not refer to the insured's right to offset the money paid by the insurer against the restitution ordered by the criminal court. Mercury's contention that the language added

to the release ‘did not protect the insured against a waiver of her right to restitution offset’ has no merit.” With respect to Helen’s, Timory’s and McGregor’s objection to the language, the court found, “[T]he law is clear that an insured does not have a right to object to a settlement within the policy limits of an automobile liability policy.” The referee awarded Barickman and McInteer damages in the amounts of the judgment in the underlying case (\$2.2 million for McInteer; \$800,000 for Barickman) plus 10 percent interest from the date of the August 31, 2012 judgment and costs of suit. The superior court entered judgment based on the statement of decision on November 14, 2014.

DISCUSSION

1. Standard of Review

Code of Civil Procedure section 638, subdivision (a), provides that a referee may be appointed by agreement of the parties to “hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision.” The judgment based on a statement of decision following a consensual general reference, as here, is treated as if the action had been tried by the court (Code Civ. Proc., § 644, subd. (a)) and is reviewed on appeal using the same rules that apply to a trial court’s decision following a bench trial. (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513 [75 Cal.Rptr.3d 771].) “ ‘In general, in reviewing a judgment based upon a statement of decision following a bench trial, ‘any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]’ [Citation.] In a substantial evidence challenge to a judgment, the appellate court will ‘consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]’ [Citation.] We may not reweigh the evidence and are bound by the trial court’s credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment.’ ” (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1102 [192 Cal.Rptr.3d 354]; accord, *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765 [123 Cal.Rptr.3d 562].)

2. Governing Legal Principles

a. The covenant of good faith and fair dealing

■ “In each policy of liability insurance, California law implies a covenant of good faith and fair dealing. This implied covenant obligates the

insurance company, among other things, to make reasonable efforts to settle a third party's lawsuit against the insured. If the insurer breaches the implied covenant by unreasonably refusing to settle the third party suit, the insured may sue the insurer in tort to recover damages proximately caused by the insurer's breach." (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 312 [84 Cal.Rptr.2d 455, 975 P.2d 652]; see *id.* at pp. 314–315 ["covenant imposes a number of obligations upon insurance companies, including an obligation to accept a reasonable offer of settlement"].) "The duty to settle is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose." (*Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 941 [132 Cal.Rptr. 424, 553 P.2d 584].) Thus, "the insurer must settle within policy limits when there is substantial likelihood of recovery in excess of those limits." (*Ibid.*; see *Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 792, fn. 12 [244 Cal.Rptr. 655, 750 P.2d 297] ["reasonable-ness of a settlement offer is to be evaluated by considering whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer"].)

"[A]n insurer, who . . . refuses to accept a reasonable settlement within the policy limits in violation of its duty to consider in good faith the interest of the insured in the settlement, is liable for the entire judgment against the insured even if it exceeds the policy limits." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 661 [328 P.2d 198]; accord, *Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 989 [136 Cal.Rptr. 331].)

b. Restitution

A victim is entitled to restitution for economic losses incurred as a result of the commission of a crime from the defendant convicted of that crime. (Pen. Code, § 1202.4.) In addition to compensating the victim, a restitution order is intended to rehabilitate a defendant and deter crime. (*People v. Vasquez* (2010) 190 Cal.App.4th 1126, 1133 [119 Cal.Rptr.3d 29] (*Vasquez*)).

■ "An order of restitution pursuant to [Penal Code] section 1202.4 does not preclude the crime victim from pursuing a separate civil action based on the same facts from which the criminal conviction arose." (*Vasquez, supra*, 190 Cal.App.4th at p. 1132.) A restitution order reimburses the crime victim only for economic losses; noneconomic losses, such as pain and suffering, are recoverable in a civil action. (*Ibid.*) "Because of the separate interests at stake and different purposes served by a restitution order and a civil action for damages by the crime victim, as well as the different categories of damages recoverable in the two proceedings, the settlement of a civil action and release of the defendant by the crime victim does not discharge the defendant's responsibility to satisfy the restitution order: 'Even when a victim

obtains a settlement from a company that insured the defendant for civil liability, the court in a criminal action may order the defendant to pay victim restitution. This is so because the victim “might rationally choose to accept an insurance settlement for substantially less than his or her losses rather than risk the uncertain . . . possibility that the defendant will pay the entire restitution amount” [citation], and the “victim’s willingness to accept the [insurance settlement] in full satisfaction for all civil liability, . . . does not reflect the willingness of the People to accept that sum in satisfaction of the defendant’s rehabilitative and deterrent debt to society.”’” (*Id.* at p. 1133, fn. omitted.)

■ Although payments received by a crime victim from the victim’s insurance company or from an independent third party such as Medicare for economic losses suffered as a result of the defendant’s criminal conduct cannot reduce the amount of restitution the defendant owes, the defendant is entitled to an offset to the extent those payments are from his or her own insurance for items of loss included in the restitution order. (*Vasquez, supra*, 190 Cal.App.4th at pp. 1133–1134; see *People v. Bernal, supra*, 101 Cal.App.4th 155, 167–168.) “The defendant’s own insurance company is different than other sources of victim reimbursement, in that (1) the defendant procured the insurance, and unlike the other third party sources, its payments to the victim are not fortuitous but precisely what the defendant bargained for; (2) the defendant paid premiums to maintain the policy in force; (3) the defendant has a contractual right to have the payments made by his insurance company to the victim, on his behalf; and (4) the defendant’s insurance company has no right of indemnity or subrogation against the defendant. In sum, the relationship between the defendant and its insurer is that payments by the insurer to the victim are ‘directly from the defendant.’” (*Vasquez*, at p. 1134; accord, *Bernal*, at pp. 167–168.)

3. *Substantial Evidence Supports the Finding Mercury Unreasonably Refused To Accept the Modified Release⁴*

a. *The offering of the policy limits was not sufficient in and of itself to defeat a bad faith claim as a matter of law*

Relying primarily on language from *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414 [179 Cal.Rptr.3d 717] (*Graciano*), Mercury

⁴ Barickman and McInteer argue Mercury’s challenge to the sufficiency of the evidence should be deemed forfeited because it failed to submit an adequate record on appeal. We agree the record is deficient—Mercury failed to include key documents including Algorri’s January 11, 2011 letter to Chang. Mercury’s argument the record is adequate because it includes the evidence Mercury contends is insufficient (as opposed to all the evidence bearing on the issues) borders on frivolous (see Cal. Rules of Court, rule 8.124(b)(1)(B) [appendix must contain trial

contends it acted in good faith as a matter of law because it timely (nine weeks after the accident) offered Timory's policy limits to Barickman and McInteer. According to Mercury, the only reason the case did not settle was Algorri's insistence on the unacceptable additional language he had drafted, not its failure to offer Timory's policy limits.

Mercury reads far too much into the holding and analysis in *Graciano*. In that case Sonia Graciano had been injured after she was struck by a car driven by the defendant's insured. Less than three weeks after Graciano's attorney contacted the insurance company, misidentifying the driver, the applicable policy number and the date of the accident, the insurance company completed its investigation, identified the correct insured and policy number and offered the full policy limits to Graciano. That offer was made within the 10-day time limit specified in a policy limits demand letter sent by Graciano's attorney that continued to misidentify the driver and referred to an expired insurance policy. Graciano did not accept the offer and instead pursued her previously filed action against the driver. Graciano obtained a judgment in excess of \$2 million and received an assignment of the driver's rights against his insurer. Graciano then sued the insurance company for wrongful failure to settle. The complaint alleged the insurance company "could have and should have earlier discovered the facts, and should have made the full policy limits offer more quickly." (*Graciano, supra*, 231 Cal.App.4th at pp. 418–419.)

The Court of Appeal reversed, holding there was no substantial evidence the insurance company had unreasonably rejected an offer to settle the driver's liability because the only demand letter from Graciano's attorney identified a different driver and a different, expired insurance policy. (*Graciano, supra*, 231 Cal.App.4th at pp. 427–428.) The court also held there was no substantial evidence the insurance company had unreasonably failed to accept an otherwise reasonable offer within the time specified for acceptance. The court explained, "A claim for bad faith based on an alleged wrongful refusal to settle also requires proof the insurer unreasonably failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance. [Citation.] However, when a liability insurer *timely* tenders its 'full policy limits' in an attempt to effectuate a reasonable settlement of its insured's liability, the insurer has acted in good faith as a matter of law [citations] because 'by offering the policy limits in exchange

exhibits "the appellant should reasonably assume the respondent will rely on"]). Nevertheless, we reach the merits because Barickman and McInteer have filed a respondents' record that permits our review of the issues.

for a release, the insurer has done all within its power to effect a settlement.’” (*Id.* at p. 426.)

■ Mercury relies on the *Graciano* court’s assessment that the insurer in that case had acted in good faith as a matter of law (that is, that no substantial evidence supported a conclusion it had acted in bad faith) to assert that it, too, acted in good faith as a matter of law. However, that argument ignores the fundamental principle, articulated in *Graciano* and other cases, that, “[w]hen a claim is based on the insurer’s bad faith, . . . the ultimate test is whether the insurer’s conduct was unreasonable under all of the circumstances.” (*Graciano, supra*, 231 Cal.App.4th at p. 427; accord, *Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1237 [96 Cal.Rptr.3d 744] [“[i]f an insurer is to avoid liability for bad faith, its actions and positions with respect to the claim of an insured, and the delay or denial of policy benefits, must be ‘founded on a basis that is reasonable under all the circumstances’”]; see *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 888 [93 Cal.Rptr.2d 364] [“[o]rdinarily, the question whether the insurer has acted unreasonably in responding to a settlement offer is a question of fact to be determined by the jury”]; see also *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724, fn. 7 [68 Cal.Rptr.3d 746, 171 P.3d 1082].) In *Graciano* there were no other circumstances that raised a question of the insurer’s good faith either before or after it tendered the full policy limits. As the appellate court held, the evidence was undisputed that the insurer did “‘all within its power to effect a settlement.’” (*Graciano*, at p. 435.)⁵

In the case at bar, in contrast, although Mercury did initially act in good faith by offering Timory’s policy limits—the minimum \$15,000/\$30,000 bodily injury liability coverage required by California law (Veh. Code, §§ 16050, 16056, subd. (a)—in exchange for a general release of all claims, there were disputed facts, including significant issues of credibility, as to whether Mercury did all within its power to effect a settlement once

⁵ In support of its holding the *Graciano* court cited *State Farm Mut. Auto. Ins. Co. v. Crane* (1990) 217 Cal.App.3d 1127, 1135 [266 Cal.Rptr. 422], in which the Court of Appeal held only that “in the present context” the insurer had acted in good faith as a matter of law by making a timely policy limits settlement offer, rejecting the argument it was bad faith not to evaluate the likelihood of success of its settlement offer. And the *Graciano* court quoted *Lehto v. Allstate Ins. Co.* (1994) 31 Cal.App.4th 60, 73 [36 Cal.Rptr.2d 814], in which the appellate court rejected the argument the insurer should have attempted to settle the case without obtaining a full set of releases from the injured parties, holding that, “by offering the policy limits in exchange for a release, the insurer has done all within its power to effect a settlement.” Neither case stands for the proposition asserted by Mercury that, regardless of any other circumstances, a timely policy limits settlement offer insulates an insurer from a claim of bad faith.

Barickman and McInteer accepted that offer but proposed a slightly modified version of the accompanying release. Here, as is true in many bad faith cases, the reasonableness of the insurer's claims-handling conduct was a question of fact to be resolved following a trial. (See *Lee v. Fidelity National Title Ins. Co.* (2010) 188 Cal.App.4th 583, 599 [115 Cal.Rptr.3d 748]; *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 794 [90 Cal.Rptr.3d 74]; see also *Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173] ["liability based on an implied covenant exists whenever the insurer refuses to settle in an appropriate case and that liability may exist when the insurer unwarrantedly refuses an offered settlement where the most reasonable manner of disposing of the claim is by accepting the settlement".]) Mercury's contrary position, if accepted, would mean an insurer that at one point acted in good faith during settlement negotiations has fully discharged its obligations under the implied covenant and has no further responsibility to make reasonable efforts to settle a third party's lawsuit against its insured. Mercury cites no authority for that rather remarkable proposition.

b. *Substantial evidence supports the referee's finding that Mercury unreasonably rejected the policy limits settlement proposed by Algorri*

Barickman and McInteer each agreed in mid-December 2010 to settle her civil claims against Timory for \$15,000, as offered by Mercury, after their lawyer had finished his due diligence regarding Timory's insurance, assets and employment. The only obstacle to completion of the settlement was the dispute between Algorri and Mercury over the language of the accompanying release. Mercury contends the addition proposed by Algorri could have been interpreted as a waiver by Timory of her right to an offset and it had an obligation to its insured not to jeopardize that right. (See *Coe v. State Farm Mut. Auto. Ins. Co.*, *supra*, 66 Cal.App.3d at p. 994 ["[b]ad-faith refusal to accept a settlement offer cannot occur where 'acceptance' would itself be bad faith"].) However, after hearing conflicting testimony from Algorri and Chang regarding their conversations as to the import of the language added by Algorri—"this does not include court-ordered restitution"—the referee found, in the portion of his statement of decision quoted above, that Algorri assured Mercury both orally and in writing that he intended only to preserve his clients' basic restitution rights and was not seeking to eliminate Timory's right to an offset for the amounts paid by Mercury. In view of that finding, Algorri's added language was simply intended to incorporate and make explicit what *Vasquez*, *supra*, 190 Cal.App.4th 1126 and *People v. Bernal*, *supra*, 101 Cal.App.4th 155 required: A civil settlement does not eliminate a victim's right to restitution ordered by the criminal court, but the defendant is

entitled to an offset for any payments to the victim by the defendant's insurance carrier for items included within the restitution order. Based on these foundational findings and Timory's certain exposure to substantial liability, the referee could properly conclude that Mercury's refusal to accept the release as amended by Algorri or, at least, to present to Barickman and McInteer in a timely fashion a revised release that included both Algorri's language and his explanation of its meaning (for example, by inserting after Algorri's addition, "and does not affect the insured's right to offset") was unreasonable. (See *Heredia v. Farmers Ins. Exchange* (1991) 228 Cal.App.3d 1345, 1360 [279 Cal.Rptr. 511] [insurer's duty of good faith requires it to explore details of a settlement offer with a view toward resolving issues that may take the offer outside policy limits]; cf. *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 708 [201 Cal.Rptr. 528] [insurer should seek clarification rather than simply reject settlement offer it finds ambiguous or incomplete].)

■ Instead of accepting the amended release or modifying it to clarify the mutual intent of the parties, Mercury purported to place the decision whether to settle in the hands of Timory's criminal defense lawyer, McGregor, without providing him with the relevant facts. The referee impliedly found that Chang had neglected to communicate to McGregor in December that Algorri sought only to preserve his client's right to seek criminal restitution rather than to disturb Timory's offset rights. (See *State Bar of California v. Statile* (2008) 168 Cal.App.4th 650, 673 [86 Cal.Rptr.3d 72] [reviewing court presumes trial court made all factual findings that support the judgment].) This implied finding is supported by McGregor's letter dated January 14, 2011, in which he "object[ed] to any clause in the release . . . which waives [his client's] legal right to offset those payments against any criminal court ordered restitution" and argued that his client was "entitled under law to offset [those] payments." Had McGregor been aware of Algorri's stated position that he was not seeking to alter Timory's offset rights, there would have been no need for such an objection and argument. Instead, a proposed language change to clarify Algorri's intent in modifying the release would have sufficed. In view of the referee's findings that Algorri clearly conveyed the limited purpose of his proposed language, there is thus no merit to Mercury's additional argument that it had to consult with Helen, as Timory's legal representative, and Timory's criminal defense attorney because the additional language in the release potentially affected Timory's rights on a matter outside the policy.

In sum, the referee's finding that Mercury breached its duty of good faith and fair dealing and that, as a result, it was liable for the amounts of the judgment entered against its insured, is supported by the evidence presented at trial.

DISPOSITION

The judgment is affirmed. Barickman and McInteer are to recover their costs on appeal.

Zelon, 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. A146704. First Dist., Div. One. Aug. 4, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
RICHARD LYNCH, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

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

Page 1

Figure 10. The effect of the number of hidden neurons on the performance of the proposed model. The proposed model with 10 hidden neurons has the best performance.

ANSWER The answer is (A) $\frac{1}{2}$. The probability of getting a head on a single flip of a coin is $\frac{1}{2}$.

For more information about the study, please contact Dr. John D. Cawley at (609) 258-4626 or via email at jdcawley@princeton.edu.

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.

COUNSEL

L. Richard Braucher, under appointment by the Court of Appeal for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Jeffrey M. Laurence, Assistant Attorneys General, René A. Chacón and Bruce Ortega, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION**DONDERO, J.—****INTRODUCTION**

This is an appeal from a sentence imposed by the trial court. Appellant focuses on a condition of probation forbidding appellant from “resid[ing] within 2000 feet of any public or private school, or park where children regularly gather.” (Pen. Code, § 3003.5, subd. (b).)¹ Appellant contends the condition is not mandatory, as the trial court believed. Respondent agrees the condition is not mandatory, and also concurs with appellant the condition should be stricken. We agree with the parties and strike the condition under the facts of this case. We otherwise affirm the judgment.

STATEMENT OF THE CASE

The District Attorney of Solano County filed a felony complaint against appellant on August 8, 2014. The document charged him with one count of possession or control of child pornography, a violation of section 311.11, subdivision (a). Appellant entered a plea of not guilty. On June 25, 2015, a plea agreement was reached between appellant and the prosecution, with a felony plea to possession of child pornography. Appellant would receive a probation sentence. After being advised of his rights and waiving them, appellant entered a no contest plea.

On September 29, 2015, appellant was sentenced. The court suspended the imposition of sentence, placing appellant on probation for a period of three years. One of the conditions of probation was he could not “reside within 2000 feet of any public or private school, or park where children regularly gather.” Because of the court’s concerns regarding this probation condition, it stayed the condition pending this appeal. Appellant filed a timely appeal on September 29, 2015.

DISCUSSION

Appellant argues section 3003.5, subdivision (b) and its residency restriction was improperly imposed here because the section only applies to registered sex offenders who are on parole. Because appellant is on probation, the condition is improper and should be stricken. Respondent agrees with appellant’s position.

¹ Unless otherwise stated, all statutory references herein are to the Penal Code.

Section 3003.5, subdivision (b) is part of the Sexual Predator Punishment and Control Act: Jessica's Law, approved by our voters on November 7, 2006 as Proposition 83. In this case, as part of plea colloquy, appellant affirmed he would be required to register under section 290. Yet appellant contended he should not be subject to the residency restriction because the statute only applied to parolees. He also claimed the condition had no relationship to his crime or future criminality. Appellant noted he lived very close to a park, perhaps "on the absolute 2,000 foot edge."

At the time of sentencing, the district attorney objected to appellant's contention the condition did not apply to him. Instead, the prosecutor claimed section 3003.5, subdivision (b), applied to all section 290 registrants, not just parolees.

The trial court indicated it would not impose a residency restriction in this case if it had the discretion to do so, because appellant was being sentenced to probation. However, the court believed the condition was mandatory and imposed the restriction, but stayed it pending appeal. The court stated: "The facts of this situation are such that the Court—I think I had been pretty candid about this—did not want to impose the residency restriction requirement on Mr. Lynch for several reasons. . . . [T]his case was a possessory case of child pornography. He had no priors, no other issues. He resolved his case early. . . . [H]e resides with his mother 900—almost the distance away from the home. And . . . he is basically on probation and not a parolee. [¶] So those are the reasons why the Court sought to not impose the residency requirement. The People have filed their objection. . . . They take a very expansive view on 3003.[5]."

Section 3003.5, subdivision (a), provides: "Notwithstanding any other provision of law, when *a person is released on parole* after having served a term of imprisonment in state prison for any offense for which registration is required pursuant to Section 290, that person may not, *during the period of parole*, reside in any single family dwelling with any other person also required to register pursuant to Section 290, unless those persons are legally related by blood, marriage, or adoption." (Italics added.) Section 3003.5, subdivision (b), adopted later in time with the passage of Proposition 83, states: "Notwithstanding any other provision of law, it is unlawful for *any person* for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." (Italics added.) The drafters of Jessica's Law chose to locate the provision following section 3003.5, subdivision (a), arguably incorporating that section's scope of coverage.

■ Our Supreme Court, in *In re E.J.* (2010) 47 Cal.4th 1258, 1271 [104 Cal.Rptr.3d 165, 223 P.3d 31], noted: "[A]s the section's language reflects, its

provisions are obviously intended to apply to ‘person[s] . . . released on parole.’” The court has also addressed whether Jessica’s Law’s residency requirement rendered discretionarily imposed sex offender registration pursuant to section 290.006 unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348] without a jury trial on the facts to support the registration order. (*People v. Mosley* (2015) 60 Cal.4th 1044, 1048 [185 Cal.Rptr.3d 251, 344 P.3d 788].) The court observed, “The People posit that as a matter of statutory intent, section 3003.5[, subdivision](b)’s residency restrictions apply only to parolees while they are on parole, and have no effect on a nonparolee misdemeanant such as defendant.” (*Mosley*, at p. 1049.) However, in neither *E.J.* nor *Mosley* did the court address whether the restriction applied to persons other than parolees. Yet the Attorney General argued in *Mosley* the residency requirement was so limited. (*Mosley*, at p. 1049.)

■ We do know the voters enacted Jessica’s Law on November 7, 2006. Proposition 83 added the new subdivision (b) to the existing section 3003.5, which already contained subdivision (a) quoted above. The placement of Jessica’s Law residency restrictions immediately after the previously enacted subdivision (a), which was applicable only to parolees, indicates the intent of Proposition 83’s drafters to align and limit the “any person” reference in subdivision (b) to the class of persons identified in subdivision (a)—parolees. Therefore, the language of section 3003.5 as a whole indicates the subdivision (b) residency restriction applies, as does subdivision (a), only to parolees for the period of their parole term.

Respondent presents several policy reasons for limiting the residency restriction to parolees while on parole. Imposing the residency restriction on probationers would interfere with fashioning probationary conditions for individual probationers based on the specific facts of the particular case. Requiring a blanket condition in all probation cases interferes with traditional policies of probation departments to rely on individual expertise in handling sex offenders on probation. It goes without saying that housing restrictions for probationers convicted of such crimes are appropriately left to the local supervisor familiar with community housing conditions.

Additionally, applying the residency restriction to nonparolees would conflict with the purpose of registration. We believe section 290 registration laws aim at permitting local enforcement authorities to monitor these registrants in the community. Less restriction on housing sites for probationers permits this supervision function. Also, restricting access to housing opportunity disrupts the rehabilitation process for the broader group of men and women on probation; they should focus on treatment and rehabilitation instead of a limited residential market.

■ These realities, and others, support the concurrence by the Attorney General with appellant's position in this case, in spite of the position taken by the prosecutor below. The bottom line is that statutes should be examined in context and harmonized internally with related statutes. (*People v. Arias* (2008) 45 Cal.4th 169, 177 [85 Cal.Rptr.3d 1, 195 P.3d 103].) Whenever possible, the intent of the legislation "prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].)

DISPOSITION

We agree with the parties in this appeal the residency restriction in this case was improper, and we therefore strike the condition. In all other respects the judgment is affirmed.

Margulies, Acting P. J., and Banke, J., concurred.

[No. B263072. Second Dist., Div. Four. Aug. 15, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
ADAM STYLZ, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

ANSWER The answer is 1000. The first two digits of the number are 10, so the answer is 1000.

100

Figure 10. The effect of the number of hidden neurons on the performance of the proposed model. The proposed model with 10 hidden neurons has the best performance.

the first time in history that the United States has been involved in a war of aggression against another nation. The United States has been involved in wars of aggression before, but this is the first time that it has been involved in a war of aggression against another nation.

Figure 10. The effect of the number of hidden neurons on the performance of the proposed model. The proposed model is trained with 1000 training samples and tested with 100 testing samples. The proposed model is trained with 1000 training samples and tested with 100 testing samples.

Figure 1. The relationship between the number of species and the area of forest cover in each state.

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

David Blake Chatfield, 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, Chung L. Mar and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION**MANELLA, J.—****INTRODUCTION**

Appellant Adam Stylz was charged with burglary for forcibly entering a storage unit with intent to commit larceny. He pled no contest to second degree commercial burglary, and was sentenced to three years formal probation. On March 4, 2015, appellant filed a petition for resentencing pursuant to Penal Code section 1170.18, subdivisions (a) and (f).¹ In his petition, appellant argued his felony burglary conviction was reducible to misdemeanor “shoplifting” under section 459.5. 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).” The trial court denied the petition, after determining that appellant’s crime was not shoplifting. Based on guidance from the California Supreme Court’s recent decision in *People v. Garcia* (2016) 62 Cal.4th 1116 [199 Cal.Rptr.3d 164, 365 P.3d 928] (*Garcia*), we conclude that appellant was convicted of second degree burglary of a specific storage unit, not burglary of a commercial establishment open during regular business hours. Accordingly, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On October 13, 2013, appellant forced entry into a locked storage unit rented by Paul Foley, and took property Foley estimated to be worth \$4,805. Subsequently, appellant was charged with burglary for entering storage unit No. B309 with intent to commit larceny (§ 459), and grand theft of personal property belonging to Foley (§ 487, subd. (a)). On August 6, 2014, appellant pled no contest to second degree burglary, and the charge of grand theft was dismissed. The trial court suspended imposition of sentence and placed appellant on formal probation for three years.

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

On March 4, 2015, appellant filed a petition for resentencing pursuant to section 1170.18, subdivisions (a) and (f). In his petition, appellant contended that the felony conviction for second degree burglary was reducible to misdemeanor shoplifting. He argued that he entered the storage facility—a commercial establishment—during regular business hours with the intent to commit larceny and took property worth less than \$950. In support of his valuation, appellant submitted a declaration by his counsel estimating the value of the property based on eBay listings.

On March 6, 2015, the trial court denied the petition for resentencing, determining that appellant's crime did not constitute shoplifting, as a public storage business is not “open[] for the sale of items.” It reserved jurisdiction on the property valuation in the event this court determined that appellant's crime could constitute shoplifting. Appellant filed a timely appeal from the order denying his petition for resentencing.

On November 30, 2015, appellant's court-appointed counsel filed an opening brief requesting this court independently review the record pursuant to the holding of *People v. Wende* (1979) 25 Cal.3d 436, 441 [158 Cal.Rptr. 839, 600 P.2d 1071]. Subsequently, we identified a potential issue and asked the parties to address the following: “Whether the crime of forcing entry into a public storage unit when the storage facility was open to the public and taking property belonging to another is—assuming the property taken is worth less than \$950—shoplifting as defined by Penal Code section 459.5.”

DISCUSSION

■ On November 4, 2014, California voters approved Proposition 47, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 [183 Cal.Rptr.3d 362] (*Rivera*).) Proposition 47 was intended to “ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.) It reclassified certain drug- and theft-related offenses as misdemeanors, unless the offenses were committed by ineligible defendants. (*Rivera, supra*, 233 Cal.App.4th at p. 1091; *People v. Contreras* (2015) 237 Cal.App.4th 868, 889–890 [188 Cal.Rptr.3d 698].) It also included a provision that allows a defendant currently serving a sentence for a felony that would have been a misdemeanor had Proposition 47 been in effect at the time of the offense to file a petition for recall of sentence and resentencing. (§ 1170.18.)

Proposition 47 added section 459.5, which provides: “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.” As explained below, we conclude appellant’s crime of forcing entry into a locked storage unit and taking property belonging to another did not fit within the statutory definition of shoplifting under section 459.5.

■ Appellant was convicted of second degree burglary. Burglary is defined as entry into “any house, room, . . . warehouse . . . or other building . . . with intent to commit grand or petit larceny or any felony.” (§ 459.) In *Garcia*, the California Supreme Court clarified that a defendant may be convicted of burglary (1) for entering a structure with intent to commit larceny or other felony, or (2) for entering a specific room within that structure with intent to commit larceny or another felony, “if the subsequently entered room provides a separate and objectively reasonable expectation of protection from intrusion relative to the larger structure.” (*Garcia, supra*, 62 Cal.4th at p. 1120.) The court explained: “Such a separate expectation of privacy and safety may exist where there is proof that the internal space is owned, leased, occupied, or otherwise possessed by a distinct entity; or that the room or space is secured against the rest of the space within the structure, making the room similar in nature to the stand-alone structures enumerated in section 459.” (*Ibid.*) Here, the record shows that appellant was charged with—and pled no contest to—entering storage unit No. B309 with intent to commit larceny. The storage unit was leased by Foley, an individual separate from the commercial entity that owned the storage facility. In addition, the storage unit was locked and thus “secured against the rest of the space within the structure.” In short, appellant was properly charged with and convicted of second degree burglary for entering a specific storage unit with the intent to commit larceny.

■ Appellant’s crime did not fall within the statutory definition of shoplifting. The factual basis for appellant’s burglary conviction was that (1) he forced entry into a specific locked storage unit (2) with intent to commit larceny (3) during the regular business hours of the storage facility and (4) took property belonging to another. As set forth in section 459.5, the elements of shoplifting are (1) entry into a “commercial establishment” (2) with intent to commit larceny (3) while the establishment is open during regular business hours, and (4) taking or intending to take property valued at \$950 or less. Setting aside the valuation of the stolen property, appellant has not demonstrated that a specific locked storage unit—as opposed to the storage facility—is a commercial establishment. “Giving the term its commensense meaning, a commercial establishment is one that is primarily engaged in commerce, that is, the buying and selling of goods or services.” (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1114 [195 Cal.Rptr.3d 482] [interpreting

§ 459.5].) ■ No evidence suggests that Foley rented the storage unit to engage in commerce. Similarly, no evidence suggests that the locked storage unit was open to the public during “regular business hours.” Thus, appellant’s conduct in forcing entry into a private locked storage unit did not constitute shoplifting, as defined by section 459.5. Accordingly, the trial court properly denied appellant’s petition for resentencing.

DISPOSITION

The order is affirmed.

Willhite, Acting P. J., and Collins, J., concurred.

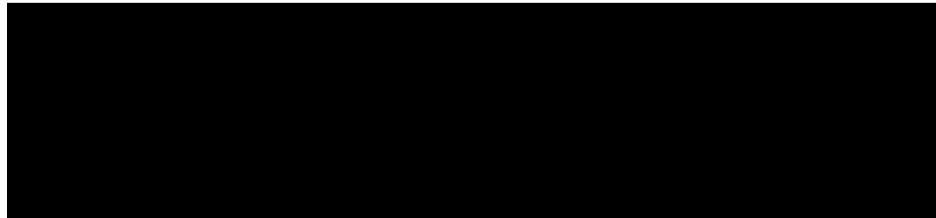
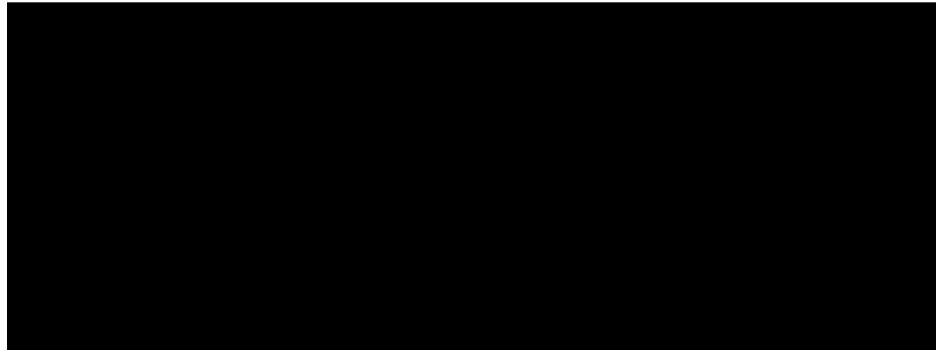
[No. B268361. Second Dist., Div. Seven. Aug. 15, 2016.]

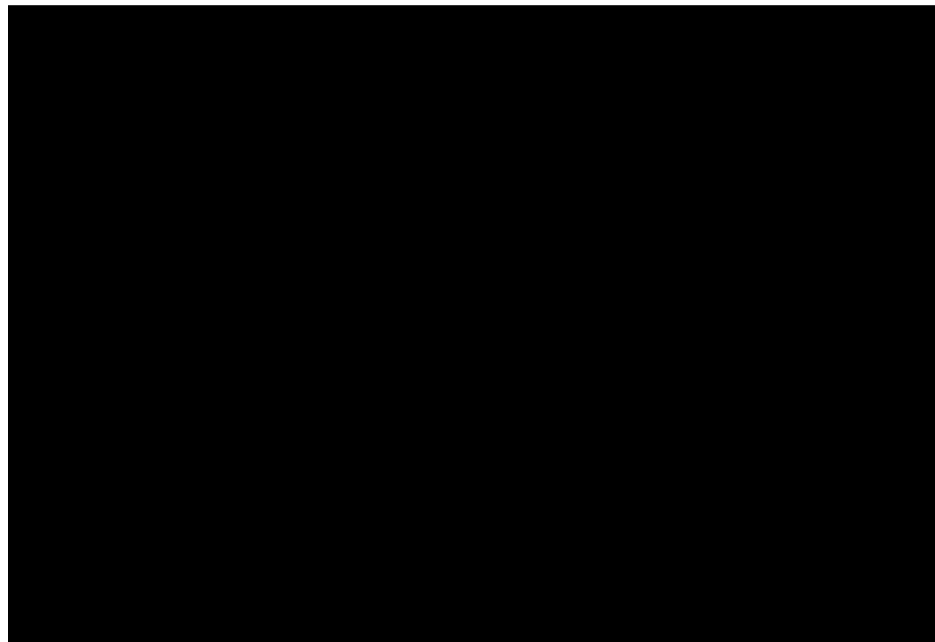
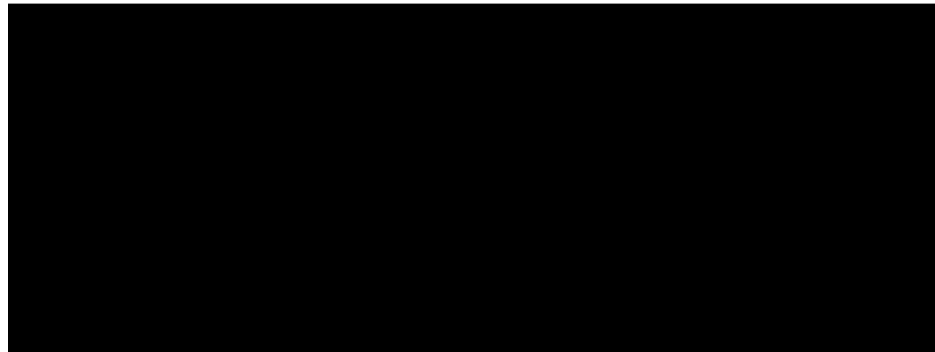
In re ANDREW S. et al., Persons Coming Under the Juvenile Court Law.
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY
SERVICES, Plaintiff and Respondent, v.
JONATHAN G., Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Peter Ferrera, Principal Deputy County Counsel, for Plaintiff and Respondent.

OPINION

PERLUSS, P. J.—Jonathan G., the presumed father of eight-year-old Andrew S. and four-year-old Kailey J., appeals the juvenile court's October 5, 2015 jurisdiction finding pursuant to Welfare and Institutions Code section 300, subdivision (b),¹ that he failed to provide the children with the necessities of life, placing them at substantial risk of serious physical harm or illness, and its disposition order of the same date removing the children from his and their mother's custody and ordering them suitably placed pursuant to section 361, subdivision (c). The court had previously sustained jurisdiction allegations relating to physical abuse by the children's mother, Gloria S., under section 300, subdivisions (a) (serious physical harm nonaccidentally inflicted), (b) (failure to protect) and (j) (abuse of sibling).

We reverse the jurisdiction finding and removal order as to Jonathan and remand the matter for the juvenile court to reconsider Jonathan's request for custody of the children under the proper standard for noncustodial parents (§ 361.2) and in light of Jonathan's and the children's then-current circumstances. On remand the juvenile court is also to reconsider its determination the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) does not apply in this case.

FACTUAL AND PROCEDURAL BACKGROUND

The Los Angeles County Department of Children and Family Services (Department) received and investigated several reports that Gloria was neglecting Andrew and Kailey and had physically abused Andrew. After Gloria failed to cooperate with a voluntary services plan, which included counseling and parenting instruction, the Department detained the children on June 3, 2015 and filed a section 300 petition alleging Andrew and Kailey were at substantial risk of harm because of Gloria's physical abuse. Gloria identified Jonathan as the children's father and reported he was incarcerated in Texas following a conviction for burglary in 2012. She said he was expected to be released by September 2015.

The Department filed a first amended petition in July 2015. As to Gloria the amended petition alleged counts under section 300, subdivisions (a), (b)

¹ Statutory references are to this code unless otherwise stated.

and (j), based on Gloria's physical abuse of Andrew by repeatedly slapping his mouth with her hand, causing a bleeding laceration and swelling to his eye; striking his chin, legs and back with a shoe; and striking him on prior occasions with hangers, shoes and her hands. The amended petition also alleged, again pursuant to section 300, subdivisions (a), (b) and (j), that Gloria had physically abused Kailey by pulling her hair and pinching her. As to Jonathan, the amended petition alleged in a single count pursuant to section 300, subdivision (b), "The children, Andrew [S.] and Kailey [S.]'s father [Jonathan G.] has failed to provide the children with the necessities of life including (e.g., food, clothing, shelter, and medical treatment). Further, the children's father is currently incarcerated for burglary charges. Such failure to provide for the children on part of the father, [Jonathan G.] endangers the children's physical and emotional health, safety, and well being and places the children at risk of physical and emotional harm and damage."

Jonathan was interviewed by the Department's investigating social worker by telephone. He told the social worker he wanted to reunite with his children when he was released from prison. The social worker advised him to contact the Department once he was released from custody so he could be evaluated. Jonathan also indicated he might have Indian ancestry on his father's side but could not identify a tribe and said he had no further information. Although neither of his parents was alive, Jonathan informed the social worker he had three brothers and four sisters. In its combined report for the jurisdiction and disposition hearing, the Department wrote that Jonathan "remains incarcerated and is unable to provide [Andrew and Kailey] with their basic needs, which is why they were placed in foster care following their removal from their mother."

The allegations of abuse by Gloria were again amended, striking the word "repeatedly" from the counts regarding Andrew and deleting entirely the counts regarding physical abuse of Kailey. Gloria pleaded no contest to the amended allegations, and on July 28, 2015 the court sustained the allegations in the remaining counts concerning her conduct. The jurisdiction hearing as to Jonathan and the disposition hearing were continued.

In early August 2015 the court found Jonathan was the presumed father of Andrew and Kailey. As of August 31, 2015 both children were placed in the home of their maternal grandmother. On September 4, 2015 the Department learned that Jonathan's release date had been extended from September 21, 2015 to October 18, 2015.

The continued jurisdiction and disposition hearing was held on October 5, 2015. Jonathan appeared by telephone. His appointed counsel, present in court, argued the section 300, subdivision (b) count as to Jonathan should be

dismissed, citing *In re Anthony G.* (2011) 194 Cal.App.4th 1060 [123 Cal.Rptr.3d 660], which held a jurisdiction finding under section 300, subdivision (g), requires proof the child was left without provision for support, not simply that the absent parent had not provided support for the child. Counsel noted that Jonathan believed Gloria and the maternal relatives were taking care of the children. The Department's jurisdiction/disposition report had stated Jonathan was surprised by the allegations regarding Gloria's physical abuse. The children's counsel joined in Jonathan's request, stating it appeared Jonathan had been taking care of the children before he was incarcerated. Counsel for the Department responded that Jonathan was unable to provide for the children when they were removed from mother: "Parents have to be available to provide care for their children when another parent is not available for whatever reason—death, injury, drug overdose, relapse. . . . He was not available. He had no plans of providing for them. . . . He was not there for his kids"

The juvenile court sustained the allegation as to Jonathan, explaining the Court of Appeal in *In re Anthony G.* had reversed the section 300, subdivision (g), but not the subdivision (b) count: "The failure to protect was sustained. And that's what they plead here, a failure to protect. And that's different. And that's what makes this a different case. Yes, I will acknowledge the way it was worded, it rings as a (g), but it's not a (g). It's not [pleaded] as a (g). I have to deal with the pleadings as they are made. If it was a (g), I would follow *In re Anthony G.*, and I would not sustain it. But it's not a failure to provide. It's a failure to protect." The court added that Jonathan should have been in contact with Gloria while she was participating in voluntary services, learned she was not succeeding and made arrangements for the children with maternal relatives if she lost custody. That, in the court's view, was the failure to protect.

Counsel for Jonathan responded that her client could make a plan for the children with the maternal grandmother, the relative who currently was caring for them, pointing out that parents frequently make such plans when they are incarcerated. The court tersely replied, "Noted."

Turning to disposition the court declared the children dependents of the court and found, based on the true findings made, that continued placement in the home of Gloria and Jonathan "would create a substantial risk of detriment to the children's protection, physical, emotional well-being. There's no reasonable means to keep them safe without removal." The court ordered the children suitably placed with the maternal grandmother. Family reunification services were ordered for both parents.

DISCUSSION

1. *The Juvenile Court Erred in Sustaining the Section 300, Subdivision (b), Count as to Jonathan*

The juvenile court made a jurisdiction finding relating to Jonathan under section 300, subdivision (b), based on his alleged failure to provide Andrew and Kailey with the necessities of life and his then-current incarceration on burglary charges in Texas. That finding, as Jonathan argues and the Department now concedes, suffers from several fundamental flaws and must be reversed.²

■ First, section 300, subdivision (b), establishes as a basis for dependency jurisdiction “the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment . . . ,” provided there is a substantial risk the child will suffer serious physical harm or illness as a result of that failure. Section 300, subdivision (g), authorizes the exercise of dependency jurisdiction if “[t]he child has been left without any provision for support” Neither provision justifies the juvenile court’s assumption of jurisdiction over an otherwise well-cared-for child simply because an absent parent has not provided support. (See *In re X.S.* (2010) 190 Cal.App.4th 1154, 1160 [119 Cal.Rptr.3d 153] [reversing § 300, subd. (b), jurisdiction finding that father had failed to provide for child where child was well cared for by mother and maternal grandmother until mother’s recent abuse; father’s failure to provide did not cause child to suffer harm or create risk of future harm]; *In re Anthony G.*, *supra*, 194 Cal.App.4th at p. 1065 [“Mother and Grandmother provided Anthony with support. That E.U. failed to contribute to that support does not justify jurisdiction under section 300, subdivision (g).”].) Although Gloria’s improper discipline of Andrew constituted physical abuse, the Department reported she had “adequate income and housing” and “extended family support”; there was no evidence that Andrew and Kailey at any time lacked adequate food, clothing,

² Gloria has not appealed the juvenile court’s jurisdiction findings; and Jonathan acknowledges, even if we reverse the subdivision (b) finding as to him, Andrew and Kailey will remain subject to the jurisdiction of the court based solely on its findings regarding Gloria’s physical abuse of Andrew. (See *In re I.A.* (2011) 201 Cal.App.4th 1484, 1492 [134 Cal.Rptr.3d 441] [jurisdiction finding involving one parent is good against both; “‘ ‘the minor is a dependent if the actions of either parent bring [him or her] within one of the statutory definitions of a dependent’ ’ ”]; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [90 Cal.Rptr.3d 44] [same].) “However, when, as here, the outcome of the appeal could be ‘the difference between father’s being an ‘offending’ parent versus a ‘non-offending’ parent,’ a finding that could result in far-reaching consequences with respect to these and future dependency proceedings, we find it appropriate to exercise our discretion to consider the appeal on the merits.” (*In re Quentin H.* (2014) 230 Cal.App.4th 608, 613 [179 Cal.Rptr.3d 58]; see *In re Christopher M.* (2014) 228 Cal.App.4th 1310, 1316 [175 Cal.Rptr.3d 837]; *In re D.P.* (2014) 225 Cal.App.4th 898, 902 [170 Cal.Rptr.3d 656].)

shelter or medical treatment or that Gloria—or the children’s maternal grandmother in Gloria’s absence—had otherwise failed to meet their needs.

■ Second, section 300, subdivision (b), which was the only jurisdiction provision pleaded in the Department’s first amended petition concerning Jonathan’s conduct, does not address a parent’s incarceration. Like leaving a child without any provision for support, a parent’s incarceration may provide a basis for dependency jurisdiction under section 300, subdivision (g), but only if that parent “cannot arrange for the care of the child.” That is, neither incarceration alone nor the failure to make an appropriate advance plan for the child’s ongoing care and supervision is sufficient to permit the exercise of jurisdiction under subdivision (g). (*In re M.M.* (2015) 236 Cal.App.4th 955, 964–965, fn. 9 [187 Cal.Rptr.3d 19]; *Maggie S. v. Superior Court* (2013) 220 Cal.App.4th 662, 672 [163 Cal.Rptr.3d 337].) As the Court of Appeal explained in *In re Aaron S.* (1991) 228 Cal.App.3d 202, 208 [278 Cal.Rptr. 861], “[S]ection 300, subdivision (g) applies when, at the time of the hearing, a parent has been incarcerated and does not know how to make, or is physically or mentally incapable of making, preparations or plans for the care of his or her child.” (See *In re S.D.* (2002) 99 Cal.App.4th 1068, 1077 [121 Cal.Rptr.2d 518] [“[i]f [the mother] could *arrange for* care of [the minor] during the period of her incarceration, the juvenile court had no basis to take jurisdiction in this case”]; *In re Monica C.* (1995) 31 Cal.App.4th 296, 305 [36 Cal.Rptr.2d 910] [“section 300, subdivision (g), requires only that an incarcerated parent arrange adequately for the care of the child during the period of his or her incarceration”].) ■ As its appellate counsel now recognizes, because the Department presented no evidence that Jonathan could not arrange care while he was incarcerated, either before or after the children were detained from Gloria, it failed to satisfy its burden of proof to establish jurisdiction based on Jonathan’s incarceration and his inability to arrange for the children’s care. (*In re S.D.*, at p. 1078 [child protection agency has initial burden of establishing that incarcerated parent could not arrange for child’s care].)

■ Third, the juvenile court’s reasoning to the contrary notwithstanding, that the wording of the allegations concerning Jonathan “rings as a (g),” but was pleaded under section 300, subdivision (b), does not rescue the jurisdiction finding.³ As discussed, to the extent the first amended petition alleged

³ The juvenile court’s attempt to distinguish the holding and analysis of *In re Anthony G.*, *supra*, 194 Cal.App.4th 1060 by observing “what they struck from *In re Anthony G.* was the (g) count, not the (b) count” rests on a misreading of the appellate court’s decision. As explained during the hearing by Jonathan’s counsel, the *In re Anthony G.* court reversed the juvenile court’s section 300, subdivision (g) finding as to Anthony’s absent father, E.U., because, although E.U. had not contributed to his son’s support, his mother and grandmother did. Subdivision (g) was the sole basis for asserting jurisdiction over E.U. The section 300, subdivision (b) failure to protect finding was made as to Brandon, Sr., the father of Anthony’s half sibling, Brandon, Jr., based on a violent incident in the home between that man and the

Jonathan had failed to provide for the children, either before or after they were detained, the evidence presented by the Department did not satisfy its burden of proof under section 300, subdivisions (b) or (g). To the extent the juvenile court interpreted the petition to charge that Jonathan had failed to protect the children from Gloria's physical abuse, the Department never made any such allegation;⁴ and Jonathan had no notice or opportunity to defend against it. (See *In re Wilford J.* (2005) 131 Cal.App.4th 742, 751 [32 Cal.Rptr.3d 317] ["a parent whose child may be found subject to the dependency jurisdiction of the court enjoys a due process right to be informed of the nature of the hearing, as well as the allegations upon which the deprivation of custody is predicated, in order that he or she may make an informed decision whether to appear and contest the allegations"]; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188 [19 Cal.Rptr.3d 801] ["[d]ue process requires that a parent is entitled to notice that is reasonably calculated to apprise him or her of the dependency proceedings and afford him or her an opportunity to object"]; see generally *Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 117–118 [50 Cal.Rptr.3d 208] [juvenile court safeguarded parent's rights to procedural and substantive due process by providing him notice and an opportunity to be heard, including the right to present evidence and to confront witnesses].)

2. *The Juvenile Court Erred in Ordering the Children's Removal from Jonathan Pursuant to Section 361, Subdivision (c)*

■ At disposition the juvenile court removed Andrew and Kailey from both Gloria and Jonathan's custody pursuant to section 361, subdivision (c), concluding, "based on the true findings made," there was a "substantial risk of detriment to the children's protection, physical, emotional well-being" if they were to continue in the home of the mother and father. Because we reverse the jurisdiction finding as to Jonathan, the court's findings cannot support a disposition order denying him custody of the children. In addition, as the Department explains in its respondent's brief, the court improperly relied upon section 361, subdivision (c), which governs the removal of children from the physical custody of a parent or guardian "with whom the child resides at the time the petition was initiated." (§ 361, subd. (c)(1).) Jonathan was a noncustodial parent; he had lived apart from the family while

children's maternal grandmother. It was not reviewed on appeal and had nothing at all to do with the appellate court's analysis of jurisdiction based on a failure to provide support.

⁴ A juvenile court may amend a dependency petition to conform to the evidence received at the jurisdiction hearing to remedy immaterial variances between the petition and proof. (§ 348; Code Civ. Proc., § 470.) However, material amendments that mislead a party to his or her prejudice are not allowed. (Code Civ. Proc., §§ 469–470; *In re Andrew L.* (2011) 192 Cal.App.4th 683, 689 [121 Cal.Rptr.3d 664].) On appeal the Department concedes the juvenile court erred when it construed the section 300, subdivision (b) count concerning Jonathan as alleging a failure to protect rather than a failure to provide for the children.

incarcerated for nearly three years at the time the section 300 petition was filed. Thus, his request for custody should have been assessed under section 361.2, which requires a child who has been removed from his or her custodial parent be placed with a parent with whom the child was not residing if that parent requests custody unless the court finds “that placement with that parent would be detrimental to the safety, protection or physical or emotional well-being of the child.” (§ 361.2, subd. (a).)⁵ On remand, if Jonathan still desires custody of Andrew and Kailey, the court is to reconsider that request pursuant to section 361.2 in light of Jonathan’s and the children’s then-current circumstances.

3. The Juvenile Court’s Finding That ICWA Does Not Apply Must Be Reconsidered on Remand

On June 8, 2015 Gloria completed and filed the Judicial Council’s mandatory Parental Notification of Indian Status form (ICWA-020), stating she had no Indian ancestry as far as she knew. At the detention hearing on June 11, 2015 the court found it had no reason to know that Andrew or Kailey was an Indian child within the meaning of ICWA and did not order notice to any tribe or to the federal Bureau of Indian Affairs (BIA). Jonathan, who was incarcerated, did not appear at that hearing; no counsel had been appointed for him; and as of June 11, 2015 no one from the Department had spoken to him.

In the jurisdiction/disposition report prepared for the July 28, 2015 hearing, the Department stated Gloria on June 18, 2015 “denied any ICWA knowledge on the father’s part.” As discussed, on June 25, 2015, in a telephone interview with the Department’s social worker, Jonathan stated he may have Indian ancestry on his father’s side but did not know which tribe. He also stated he had no further information and that both of his parents were dead. The Department reported Jonathan had three brothers and four sisters; there is no indication the Department made any attempt to obtain contact information for any of Jonathan’s siblings or to interview them to determine if they had information regarding their family’s possible Indian ancestry.

Counsel appeared for Jonathan at hearings on July 28, 2015 and September 4, 2015, but Jonathan did not participate by telephone. No ICWA issue was discussed at either hearing. When Jonathan appeared telephonically on October 5, 2015, his first personal appearance in the dependency proceedings, the

⁵ The substantial danger finding required to remove a child under section 361, subdivision (c), and the detriment finding required to deny custody to a noncustodial parent under section 361.2, subdivision (a), are fundamentally the same—and in each case must be founded upon clear and convincing evidence. Accordingly, in most cases the error in applying the wrong statute will be harmless. (See, e.g., *In re D’Anthony D.* (2014) 230 Cal.App.4th 292, 303–304 [178 Cal.Rptr.3d 574].)

court made no ICWA inquiry. The record on appeal does not reflect that Jonathan ever filed a form ICWA-020 or that he was ever advised that he should do so.

■ ICWA provides, “In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe” of the pending proceedings and its right to intervene. (25 U.S.C. § 1912(a); see *In re Isaiah W.* (2016) 1 Cal.5th 1, 8 [203 Cal.Rptr.3d 633, 373 P.3d 444]; *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1385 [194 Cal.Rptr.3d 679].)⁶ Similarly, California law requires notice to the Indian custodian and the Indian child’s tribe in accordance with section 224.2, subdivision (a)(5), if the Department or court knows or has reason to know that an Indian child is involved in the proceedings. (§ 224.3, subd. (d).) The circumstances that may provide reason to know the child is an Indian child include, without limitation, when a person having an interest in the child provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child’s parents, grandparents or great-grandparents are or were a member of a tribe. (§ 224.3, subd. (b)(1); *In re Kadence P.*, at p. 1386; see also *In re Isaiah W.*, at p. 15 [“section 224.3, subdivision (b) sets forth a nonexhaustive list of ‘circumstances that may provide reason to know the child is an Indian child’ ”].)

In his opening brief in this court Jonathan argued his statement to the social worker that he may have Indian ancestry was sufficient to trigger ICWA’s notice requirement, citing as support *In re Levi U.* (2000) 78 Cal.App.4th 191 [92 Cal.Rptr.2d 648], which held notice to the BIA was required (and sufficient) based on the paternal grandmother’s report she might have Indian ancestry on her deceased mother’s side of the family but did not know the tribal affiliation. (*Id.* at p. 198.) In its respondent’s brief the Department, although conceding error with respect to the jurisdiction finding and removal order, argued Jonathan’s reference to possible Indian ancestry was insufficient to require any form of notice under ICWA. (See, e.g., *In re O.K.* (2003) 106 Cal.App.4th 152, 157 [130 Cal.Rptr.2d 276] [grandmother’s statement that child “‘may have Indian in him,’ ” without more, insufficient to invoke ICWA notice requirements]; see also *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520 [92 Cal.Rptr.3d 203] [“more than a bare suggestion that a child might be an Indian child” is required to trigger ICWA notice requirements].)

⁶ As the Supreme Court explained in *In re Isaiah W., supra*, 1 Cal.5th at page 8, “ICWA’s notice requirements serve two purposes. First, they facilitate a determination of whether the child is an Indian child under ICWA. . . . [¶] Second, ICWA notice ensures that an Indian tribe is aware of its right to intervene in or, where appropriate, exercise jurisdiction over a child custody proceeding involving an Indian child.”

Following the filing of respondent's brief, Jonathan's counsel wrote this court that, in light of the parties' agreement as to the error in the juvenile court's jurisdiction finding and removal order, and to expedite return of the matter to the juvenile court, Jonathan would not pursue the ICWA notice issue in this appeal. Counsel observed, "[R]emand will give Father the opportunity to adduce additional information [on the ICWA issue], and the court can then determine the sufficiency of his showing."

■ We accept Jonathan's withdrawal of the ICWA notice issue but direct the juvenile court on remand to reconsider its decision that ICWA does not apply in this case and that no notice to tribes or the BIA is necessary whether or not additional information regarding Jonathan's Indian ancestry is presented. As the Supreme Court held last month in *In re Isaiah W.*, *supra*, 1 Cal.5th 1, ICWA and the corresponding provisions of California law impose an affirmative and continuing duty on the juvenile court to inquire whether the child is an Indian child. (*Isaiah W.*, at p. 6.) "[A]ny finding of ICWA's inapplicability before proper and adequate ICWA notice has been given is not conclusive and does not relieve the court of its continuing duty under section 224.3(a)^[7] to inquire into a child's Indian status in all dependency proceedings. [Citation.] Only after proper and adequate notice has been given and neither a tribe nor the BIA has provided a determinative response within 60 days does section 224.3(e)(3) authorize the court to determine that ICWA does not apply." (*Isaiah W.*, at p. 11.) The *Isaiah W.* court, moreover, emphasized this continuing duty to inquire into a child's Indian status "does not contain an exception for situations where no new information is submitted between one proceeding and the next." (*Id.* at p. 12.) Thus, even if Jonathan does not provide additional information regarding his Indian ancestry, the applicability of ICWA must be revisited on remand.

To be sure, the juvenile court's analysis whether the evidence is sufficient to trigger ICWA's notice requirements for Andrew and Kailey will be enhanced if additional information concerning Jonathan's Indian ancestry is presented to the court. But the burden of developing that information is not properly placed on Jonathan alone. Section 224.3, subdivision (a), imposes on child protection agencies, as well as the juvenile court, the affirmative and continuing duty to inquire whether a dependent child is or may be an Indian child. (See *In re Kadence P.*, *supra*, 241 Cal.App.4th at p. 1386; *In re H.B.* (2008) 161 Cal.App.4th 115, 121 [74 Cal.Rptr.3d 27]; see also Cal. Rules of Court, rule 5.481(a).) As soon as practicable, the social worker is required to

⁷ Section 224.3, subdivision (a), provides, "The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . has been . . . filed is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceedings if the child is at risk of entering foster care or is in foster care."

interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility. (§ 224.3, subd. (c); *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539 [83 Cal.Rptr.3d 513]; Cal. Rules of Court, rule 5.481(a)(4).) From the record presented to us, it appears the Department and the juvenile court failed to satisfy that duty; neither the court nor the Department made any effort to develop additional information that might substantiate Jonathan's belief he may have Indian ancestry by contacting his siblings or other extended family members. Both federal and state law require more than has been done to date. On remand, an adequate investigation by the Department with a full report to the court must be promptly completed.

DISPOSITION

The juvenile court's October 5, 2015 jurisdiction finding and disposition order as to Jonathan are reversed. On remand the court is to reconsider Jonathan's request for custody of Andrew and Kailey pursuant to section 361.2 in light of Jonathan's and the children's then-current circumstances, as well as its determination ICWA does not apply to this case.

Zelon, J., and Segal, J., concurred.

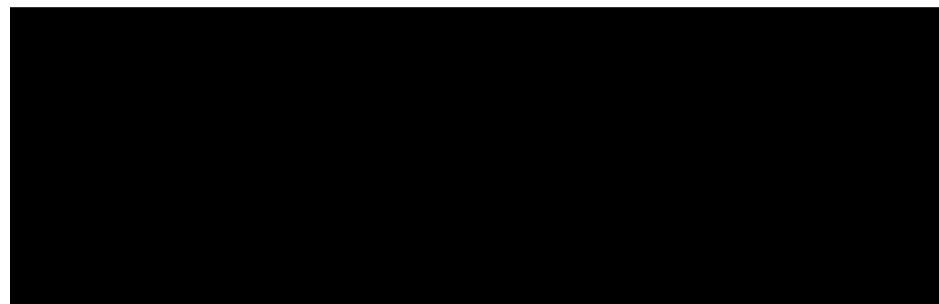
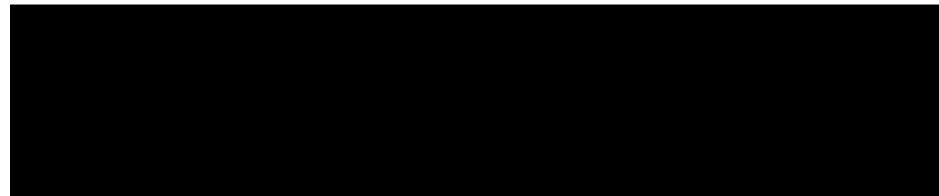
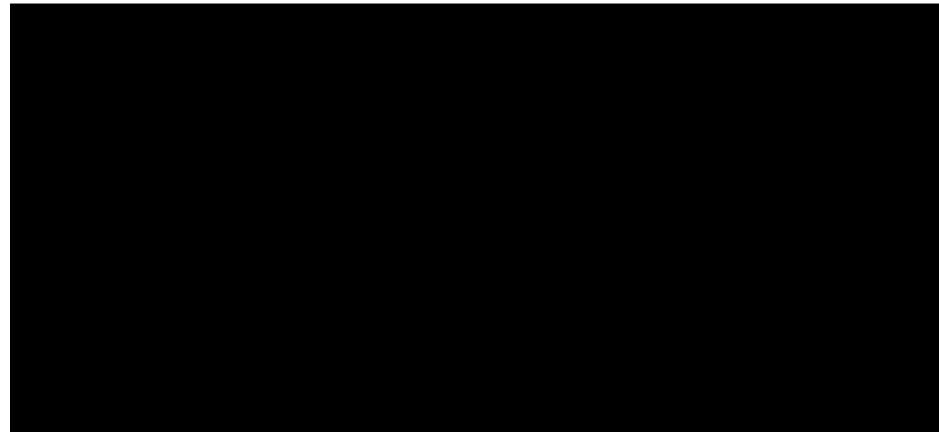
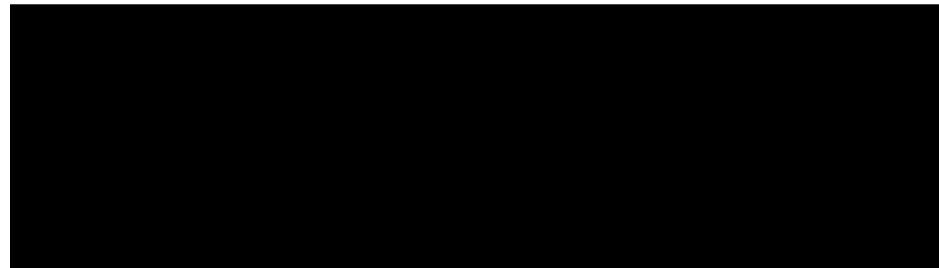
[No. B268700. Second Dist., Div. Seven. Aug. 15, 2016.]

ANDREW HERNANDEZ, Petitioner, v.
WORKERS' COMPENSATION APPEALS BOARD and DEPARTMENT
OF THE CALIFORNIA HIGHWAY PATROL, Respondents.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Law Offices of Tommy A. Ruedaflores and Tommy A. Ruedaflores for Petitioner.

Richard L. Newman, Anne Schmitz, John F. Shields and Peter Ray for Respondent Workers' Compensation Appeals Board.

State Compensation Insurance Fund, Lisa Liebson, Deputy Chief Counsel, Mary Huckabaa, Assistant Chief Counsel, Wade Dorann Dicosmo and Darren P. Wong, Appellate Counsel, for Respondent California Highway Patrol.

OPINION

PERLUSS, P. J.—Labor Code section 4800.5, subdivision (a),¹ provides that a sworn member of the Department of the California Highway Patrol (CHP) who has been disabled by a single work-related injury is entitled to a leave of absence without loss of salary, in lieu of disability payments, for a period not to exceed one year. In a February 2013 decision a workers' compensation administrative law judge (WCJ) found Andrew Hernandez, a CHP sergeant, to be temporarily totally disabled from July 18, 2011 to November 8, 2011. Although Hernandez received payments equal to the full amount of his salary during that period, a portion of those sums was charged against his accrued annual vacation leave.

Hernandez petitioned in January 2015 for recovery of the full amount he should have received as paid leave-of-absence benefits under section 4800.5, plus penalties for unreasonable delay under section 5814, subdivision (a), and interest. The WCJ agreed Hernandez was entitled to the relief he had requested, but the Workers' Compensation Appeals Board (Board), in a divided decision after reconsideration, rescinded her ruling, concluding (1) Hernandez's claim for reimbursement of accrued leave involved employee

¹ Statutory references are to this code unless otherwise stated.

benefits and was outside the jurisdiction of the Board; (2) the February 1, 2013 award by the WCJ barred Hernandez's 2015 claim for additional section 4800.5 payments under the doctrine of res judicata; and (3) there was no basis for awarding a penalty because Hernandez had received the full amount of his salary during the period of his temporary disability. We annul the decision of the Board and remand the matter with directions to award Hernandez additional compensation under section 4800.5 in an amount equal to the value of annual leave used during the disputed period of temporary disability and to hear and determine the issue of penalties and interest.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Original WCJ Decision*

On November 17, 2004 Hernandez, a CHP sergeant in Valencia, slipped and fell while assisting in the pursuit of a suspect who had fled on foot, injuring his low back and cervical spine. The parties—Hernandez and the CHP through its adjuster State Compensation Insurance Fund (State Fund)—agreed Hernandez's injuries arose out of, and in the course of, his employment. The parties also agreed Hernandez was 35 percent permanently disabled and would need future medical treatment for his low back.

The principal issue in the initial proceeding before the WCJ concerned payments for temporary total disability. The CHP had agreed Hernandez was temporarily totally disabled and paid him the equivalent of his full salary pursuant to section 4800.5 for the period November 17, 2010 to July 15, 2011, referred to in the proceedings as "4800 time,"² as well as for "further periodic hours thereafter." Hernandez was also paid permanent disability at the agreed rate of \$200 per week for the period July 18, 2011 forward. Hernandez claimed he was entitled to additional temporary disability/4800 time payments for the period July 18, 2011 to November 8, 2011 based on the report of his primary treatment physician. The CHP argued Hernandez's temporary total disability ceased and his permanent and stationary date was July 18, 2011 based on the agreed medical examiner's report; it sought credit for overpayment of 4800 time during the period July 18, 2011 to November 15, 2011.

On February 1, 2013 the WCJ ruled Hernandez was entitled to temporary disability for the period July 18, 2011 to November 8, 2011 "at the rate of

² Article 6 of the workers' compensation statutes (§ 4800 et seq.) provides for special payments to law enforcement officers, entitling disabled officers to leave of absence without loss of salary in lieu of disability payments. Section 4800 applies to members of the Department of Justice who fall within the "state peace officer/firefighter" class; section 4800.5 applies to California Highway Patrol officers. The term "4800 time" was sometimes used in these proceedings as a shorthand for benefits under section 4800.5.

\$881.56 per week, less 15% attorney's fees"—the sum the parties had previously agreed was the indemnity rate for temporary disability based on Hernandez's weekly earnings at the time of injury. The WCJ also denied the CHP's claim for overpayment of 4800 time for the same period. The WCJ issued an award in favor of Hernandez and against the CHP.

The CHP petitioned for reconsideration by the Board, arguing, in part, the WCJ had erred in awarding temporary disability for the period July 18, 2011 to November 8, 2011 because the agreed medical examiner had determined Hernandez was only partially disabled and the CHP had offered modified work within the required restrictions to accommodate his physical limitations. The petition was denied by the Board on April 19, 2013. Hernandez did not file an answer or his own petition for reconsideration.

2. The Petition for Penalties and the WCJ Decision

On January 14, 2015 Hernandez filed a petition for penalties (§ 5814, subd. (a)), contending payment of leave-of-absence benefits under section 4800.5 for the period July 18, 2011 to November 8, 2011 pursuant to the WCJ's findings and award dated February 1, 2013 had been unreasonably delayed. As phrased by the WCJ, "It is the applicant's contention that instead of paying the 4800.5 time, the applicant was forced to use his vacation time and was not reimbursed for that cost." The CHP raised res judicata as a defense.

At the hearing Hernandez testified he had been paid section 4800.5 benefits from December 26, 2010 through July 17, 2011. Effective July 18, 2011, however, he was told by State Fund his section 4800.5 benefits were terminated. Hernandez had to use his accrued vacation time when section 4800.5 benefits were disallowed. Although he was paid his usual gross salary of \$10,494.36 each month, most of that sum came from annual leave time. Hernandez was not reimbursed for the vacation/annual leave time when he retired in December 2011.

In her findings and award on February 4, 2015 the WCJ found Hernandez was entitled to section 4800.5 benefits for the period July 18, 2011 to November 8, 2011, less credit for temporary disability payments that had been made. The WCJ explained, once temporary disability has been established for a CHP officer, the Labor Code mandates the officer receive leave-of-absence benefits without loss of salary. The WCJ also ruled res judicata did not apply: "This trial concerned only the nonpayment of the temporary disability benefits or 4800.5 time and penalties. The issue of nonpayment and penalties had not previously been raised." Given the mandate of section 4800.5, the WCJ found there was an unreasonable delay in

payment and concluded under section 5814 Hernandez was entitled to a statutory increase of 25 percent or \$10,000, whichever was less.

The CHP petitioned for reconsideration by the Board, arguing the WCJ in her February 1, 2013 order had awarded Hernandez temporary disability only, instead of section 4800.5 benefits. Because Hernandez failed to seek reconsideration of that award, it was now final, and relitigation of the issue was barred by res judicata. The CHP also asserted that Hernandez had admitted there was no loss of salary during the disputed period of temporary disability—he had received a gross salary of \$10,494.36 each month. To the extent Hernandez now sought adjustment of the payment for accrued annual leave he received upon his retirement, that claim was outside the Board’s jurisdiction.

In her report and recommendation on the petition for reconsideration, the WCJ explained the issue in the 2015 trial was enforcement of the February 1, 2013 award, which had found Hernandez was temporarily disabled during the period July 18, 2011 to November 8, 2011. There were no additional benefits awarded, and the issue of nonpayment that she determined had not previously been raised. In addition, although Hernandez had received payments equal to his regular salary, he “credibly testified that, although he did receive his salary, the salary came from a combination of the 4800.5 time and his accrued annual leave that was never reimbursed. Defendants had no evidence to the contrary.” The WCJ recommended the petition for reconsideration be denied.

3. The Board’s Opinion and Decision After Reconsideration

On May 1, 2015 the Board voted to reconsider the WCJ’s February 4, 2015 decision. On October 22, 2015, by a vote of two to one, the Board rescinded the WCJ’s February 4, 2015 findings and award and substituted new findings that denied Hernandez any recovery. The Board majority ruled Hernandez had received the full amount of his salary during the period of his temporary disability notwithstanding that a portion of the amount he was paid was charged against his accrued annual leave and other benefits. For that reason, the majority concluded, there was no basis for awarding a penalty for unreasonable delay pursuant to section 5814 or interest. It then held Hernandez’s claim for reimbursement of accrued leave time involved employee benefits that are outside the Board’s jurisdiction. Finally, without offering any explanation, the Board majority held the 2013 award was res judicata.

The dissenting WCAB member cited the Board’s exclusive jurisdiction over an employer’s compliance with section 4800.5 (§§ 5300, 5301) and argued the CHP’s conversion of Hernandez’s previously accrued paid leave

into cash in order to pay a portion of his salary during the period of temporary disability was a loss of salary previously earned, contrary to the requirements of that statute. The dissent also disagreed that res judicata was a bar to Hernandez's claim, explaining the WCJ's February 1, 2013 award did not supersede the CHP's obligations under section 4800.5 once the finding of temporary disability had been made.

4. Proceedings in This Court

Hernandez petitioned this court for writ of review on December 7, 2015 seeking to annul the Board's decision rescinding the WCJ's findings and award in favor of Hernandez. On December 30, 2015 the Board notified us it was not filing an answer to the petition. On January 22, 2016 State Fund on behalf of the CHP filed its answer, arguing the WCAB correctly found Hernandez had been paid in full with no unreasonable delays and Hernandez had waived all objections regarding section 4800.5 benefits. The writ of review issued on February 26, 2016, directing the Board to file a response by April 13, 2016 and allowing Hernandez and the CHP to file reply briefs 30 days thereafter.

Concurrently with issuance of the writ of review we invited the parties to specifically address in their response and reply briefs whether the Board has jurisdiction to fashion a remedy in the event we concluded use of Hernandez's accrued annual leave was an improper taking of his salary. In response the Board requested we summarily annul its decision and remand the case for further proceedings that would determine the source of the payments Hernandez received during the disputed time period. In his reply Hernandez argued such a remand was unnecessary because the source of those payments was apparent on the record now before this court; Hernandez also argued the Board had jurisdiction under section 5300 to enforce the CHP's liability for the full value of section 4800.5 compensation to which he was entitled. The CHP implicitly agreed that a remand was not required, asserting Hernandez was seeking reimbursement for annual leave that had been used in place of section 4800.5 benefits during the period in question, not compensation under section 4800.5, and arguing the California Department of Human Resources (formerly the Department of Personnel Administration), not the Board, had exclusive jurisdiction over leave credits.

DISCUSSION

1. The Statutory Framework

■ The workers' compensation system is intended to create and enforce a liability on the part of employers to compensate their workers for injury or

disability incurred or sustained in the course of employment without regard to fault. (Cal. Const., art. XIV, § 4; see *Claxton v. Waters* (2004) 34 Cal.4th 367, 373 [18 Cal.Rptr.3d 246, 96 P.3d 496]; *Le Parc Community Assn. v. Workers' Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1171 [2 Cal.Rptr.3d 408] [“[t]he primary purpose of workers' compensation laws is to provide employees the certainty of medical benefits and compensation for work-related injuries by eliminating the need to prove negligence and abolishing the common law defenses of contributory negligence, assumption of the risk and fault of a fellow employee”].) The workers' compensation statutes are liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment. (§ 3202; *Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 277 [92 Cal.Rptr.3d 894, 206 P.3d 430].) Given the goal of placing liability for work-related injuries entirely on the employer, the Legislature has provided that “[n]o employer shall exact or receive from any employee any contribution, or make or take any deduction from the earnings of any employee, either directly or indirectly, to cover the whole or any part of the cost of compensation under this division.” (§ 3751, subd. (a).)

Article 6 of the workers' compensation statutes (§ 4800 et seq.), entitled Special Payments to Certain Persons, provides additional benefits to law enforcement officers, who undertake their particularly hazardous occupations on behalf of the public. (*City of Sacramento v. Workers' Comp. Appeals Bd.* (2002) 94 Cal.App.4th 1304, 1309 [115 Cal.Rptr.2d 63].) Section 4800.5, subdivision (a), at issue in the case at bar, provides, “Whenever any sworn member of the Department of the California Highway Patrol is disabled by a single injury . . . arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the patrol, to leave of absence while so disabled without loss of salary, in lieu of disability payments under this chapter, for a period of not exceeding one year.”

■ The Board has exclusive jurisdiction over all proceedings for “the recovery of compensation, or concerning any right or liability arising out of or incidental thereto” (§ 5300, subd. (a)), as well as for “the enforcement against the employer or an insurer of any liability for compensation imposed upon the employer by this division in favor of the injured employee, his or her dependents, or any third person.” (§ 5300, subd. (b); see also § 5301 [Board “is vested with full power, authority and jurisdiction to try and determine finally all the matters specified in Section 5300 subject only to the review by the courts as specified in this division”].) Section 4800.5, subdivision (d), specifically confers Board jurisdiction to award and enforce payment of the benefits provided CHP officers by that provision of the workers' compensation laws.

Section 5800 provides that all awards for payment of compensation “shall carry interest at the same rate as judgments in civil actions on all due and unpaid payments from the date of the making and filing of said award.” Section 5814, subdivision (a), authorizes imposition of a penalty for an employer’s unreasonable delay in paying an injured worker: “When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars (\$10,000), whichever is less. In any proceeding under this section, the appeals board shall use its discretion to accomplish a fair balance and substantial justice between the parties.”

2. *The Board Has Jurisdiction to Enforce the CHP’s Liability for Unpaid Section 4800.5 Benefits*

There can be no dispute that section 4800.5 obligated the CHP to pay Hernandez his full salary, in lieu of disability payments, while he was temporarily disabled or that the use of his accrued annual leave to make up a portion of those required payments between July 18, 2011 and November 8, 2011 constituted a “loss of salary” in violation of section 4800.5 and an illegal deduction from Hernandez’s earnings, prohibited by section 3751, subdivision (a). That was precisely the conclusion of our colleagues in Division Three of this court in *Austin v. City of Santa Monica* (1965) 234 Cal.App.2d 841 [44 Cal.Rptr. 857], which involved a City of Santa Monica police officer covered by section 4850, another of the article 6 provisions that guarantees law enforcement officers a one-year leave of absence without loss of salary in lieu of temporary disability payments. The City had deducted a day of accumulated sick leave for each day worker’s compensation was paid to Officer Austin. “The consequence of this procedure was that for each day of sick leave taken from him Austin was paying himself a day’s workmen’s compensation.” (*Austin*, at p. 846.) The *Austin* court held the City’s policy violated sections 4850 and 3751 and directed that “[w]hatever rights were taken from him in this manner should be fully restored to him” (*Austin*, at p. 846.)

■ There is no basis to distinguish between sick leave at issue in *Austin* and annual leave at issue in the case at bar. The Government Code expressly provides that annual leave programs are in lieu of sick leave and vacation. (Gov. Code, § 19858.4.) Indeed, both sick leave and annual leave accrue and vest simply by virtue of an employee’s attendance at work. (Gov. Code, §§ 19858.4, 19859.) ■ As in *Austin*, compelling CHP Sergeant Hernandez to use his annual leave to pay for his salary in lieu of temporary disability payments compelled him to pay for his own workers’ compensation benefits in violation of sections 4800.5 and 3751.

In light of this clear violation of Hernandez's rights under the workers' compensation laws, the argument the Board lacks jurisdiction to provide a remedy borders on sophistry. To be sure, as the Board majority and State Compensation have explained, if Hernandez's injury were described as seeking an additional lump sum payment for accumulated annual leave that was improperly denied to him, his claim would be properly pursued before the Department of Human Resources, which has jurisdiction over employee benefit matters. (See Gov. Code, § 18502, subd. (a); Cal. Code Regs., tit. 2, § 599.768(b).) But exclusive jurisdiction over proceedings for "the recovery of compensation, or concerning any right or liability arising out of or incidental thereto" (§ 5300, subd. (a)), as well as for "the enforcement against the employer . . . of any liability for compensation imposed upon the employer by this division in favor of the injured employee . . ." (§ 5300, subd. (b)), is vested in the Board. Even more specifically, section 4800.5, subdivision (d), grants the Board jurisdiction to enforce payment of benefits to CHP officers provided by that provision. Hernandez has been paid all his accrued annual leave—initially as part of the salary he received during the period July 18, 2011 to November 8, 2011 and the balance in a lump sum when he retired. His complaint is not that he is entitled to more annual leave; it is that he was not properly compensated during his period of temporary disability as required by section 4800.5. Enforcement of that liability for compensation rests squarely within the Board's jurisdiction.

3. *Res Judicata Does Not Bar Hernandez's Claim for Unpaid Section 4800.5 Benefits*

Without seriously disputing that it was unlawful to use Hernandez's accrued annual leave to pay portions of his salary while he was temporarily disabled, the CHP contends Hernandez's petition for penalties was barred by waiver, or alternatively the doctrine of res judicata, because he failed to seek reconsideration of the WCJ's February 1, 2013 award. This argument is premised on a misinterpretation of the initial WCJ award as ruling Hernandez was entitled only to temporary disability payments at the statutory rate and not the equivalent of his full salary pursuant to section 4800.5 for the period July 18, 2011 through November 8, 2011.

In their pretrial conference statement prepared on September 19, 2012, the parties expressly identified Hernandez's entitlement to payments pursuant to section 4800.5 from July 18, 2011 through November 8, 2011 as the central issue to be decided by the WCJ. In the minutes of hearing from November 1, 2012, the WCJ confirmed her understanding that the first issue to be decided was "[t]emporary disability/4800 time, with the employee claiming the period July 18, 2011, to November 8, 2011, per the [primary treatment physician] report of Dr. Kayvanfar." In her February 1, 2013 award the WCJ ruled in

favor of Hernandez, finding he was temporarily disabled during the disputed period, which necessarily meant he was entitled, as a matter of statutory right, to “a leave of absence without loss of salary, in lieu of disability payments.”

To be sure, in paragraph 2 of her findings and award of February 1, 2013 the WCJ found “Applicant is entitled to temporary disability for the period 7/18/11 to 11/8/11 at the rate of \$881.56 per week, less 15% attorney’s fees.” But in light of the parties’ statement of issues to be decided, as well as the statutory mandate that a temporarily disabled CHP officer must receive his or her full salary in lieu of disability payments, the recitation by the WCJ of the amount Hernandez would have received in disability payments absent section 4800.5 cannot reasonably be construed as a determination that he was not to receive those benefits. Any possible ambiguity in that regard was eliminated by the WCJ’s further ruling denying the CHP’s claim for credit for overpayments under section 4800.5 during the disputed time period: If the WCJ had intended that Hernandez receive only disability payments, not leave-of-absence benefits under section 4800.5, any section 4800.5 payments the CHP had made for the period July 18, 2011 through November 8, 2011 would have been returned to it (or credited against its future obligations to Hernandez). Finally, the WCJ herself, in her report and recommendation on petition for reconsideration, confirmed her intention that Hernandez receive section 4800.5 benefits based on her initial award, explaining, “Once temporary disability is established for a California Highway Patrol officer, the Labor Code mandates that he shall receive a leave of absence without loss of salary.”

Because Hernandez was entitled to “section 4800.5 time” based on the February 1, 2013 findings and award of temporary disability during the period July 18, 2011 through November 8, 2011, there was no reason for him to seek reconsideration of that decision. His failure to do so does not constitute a waiver of his right to those benefits, nor does the doctrine of res judicata bar his recovery of unpaid section 4800.5 benefits.

4. Whether to Award Penalties and Interest Must Be Redetermined on Remand

As discussed, the Board majority erred in ruling that Hernandez had received his full salary while temporarily disabled from July 18, 2011 to November 8, 2011 and that the use of his accrued annual leave to pay a portion of that salary simply raised an issue of employee benefit credits, not the CHP’s liability for compensation due pursuant to section 4800.5. Its related conclusion that, because he had received his full salary, there was no basis to award Hernandez penalties for the CHP’s unreasonable delay in paying him is similarly flawed. Accordingly, on remand the issue of penalties under section 5814 and interest must be reconsidered.

DISPOSITION

The decision after reconsideration of the Workers' Compensation Appeals Board entered on October 22, 2015 is annulled, and the cause remanded with directions to award Hernandez additional compensation under section 4800.5 in an amount equal to the value of annual leave used during the disputed period of temporary disability (July 18, 2011 to Nov. 8, 2011), to hear and determine the issue of penalties and interest and to conduct further proceedings consistent with this opinion.

Zelon, J., and Segal, J., concurred.

A petition for a rehearing was denied August 30, 2016.

[No. A144196. First Dist., Div. One. Aug. 15, 2016.]

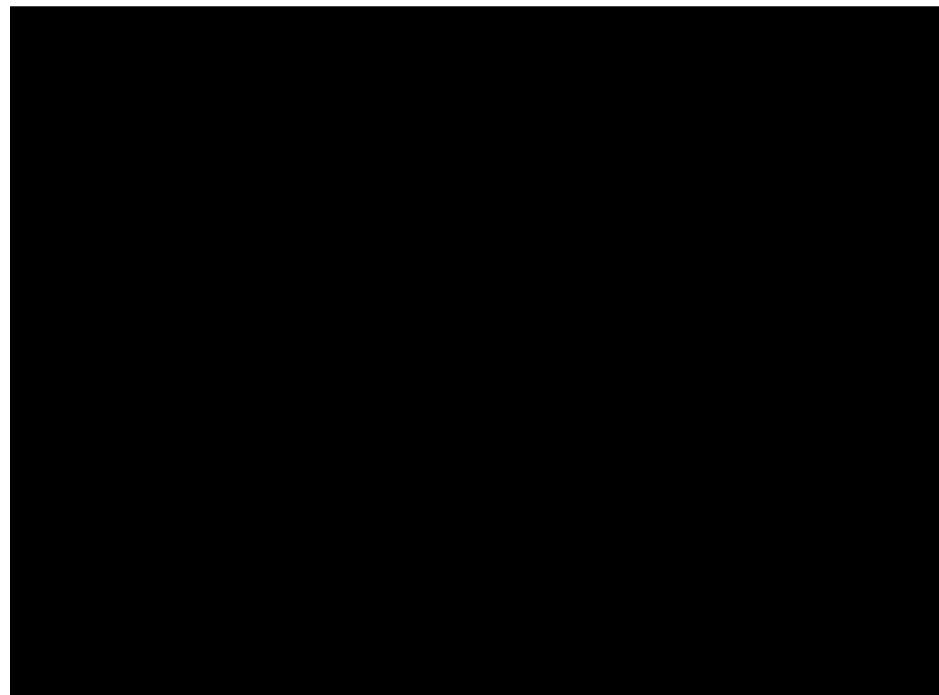
THE PEOPLE, Plaintiff and Respondent, v.
JODY CHATMAN, Defendant and Appellant.

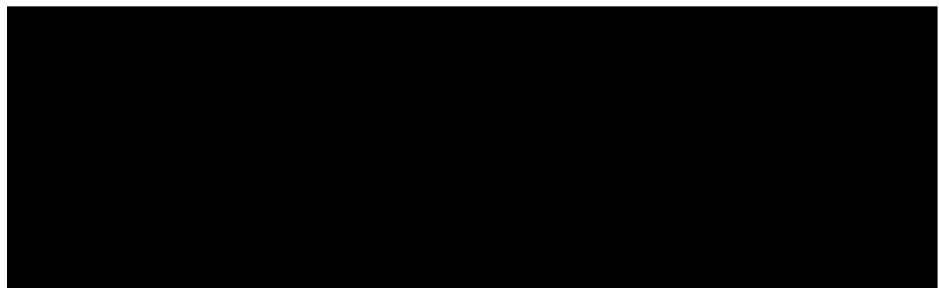
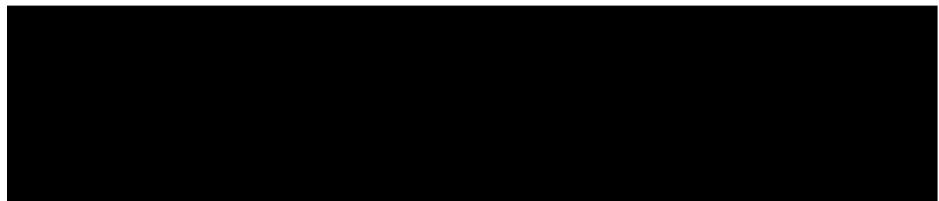
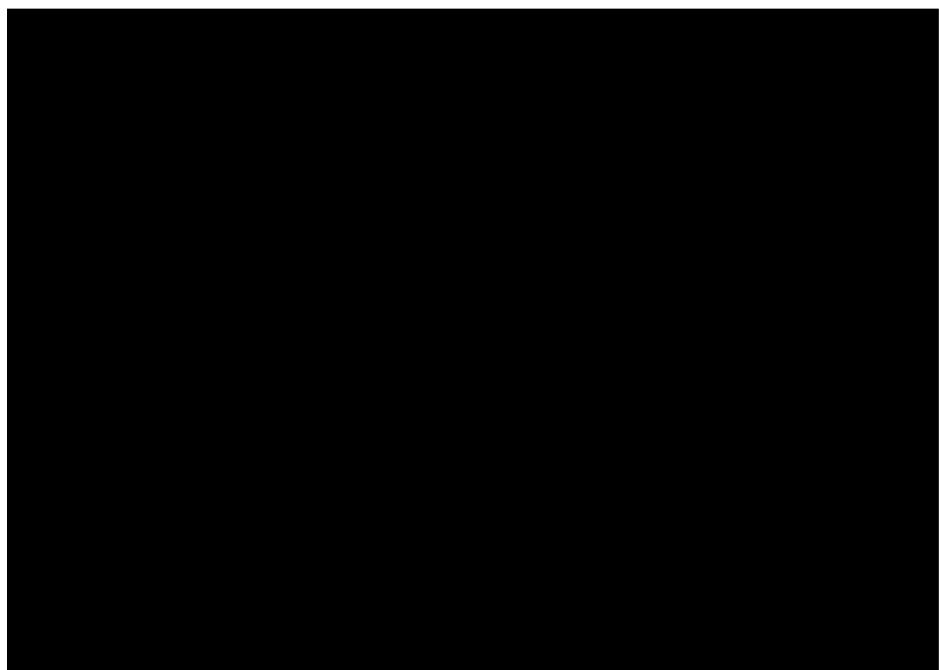
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) November 16, 2016, S237374.

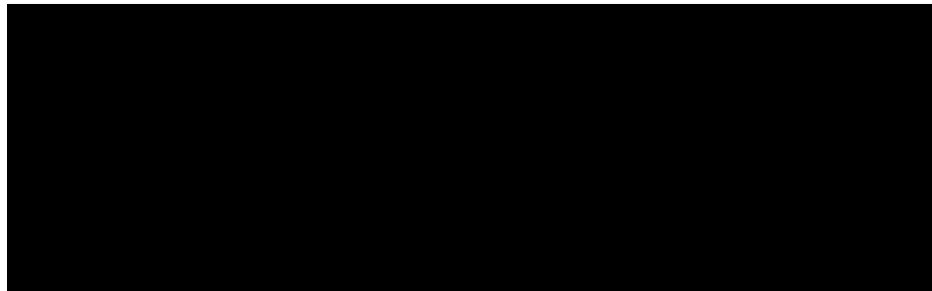
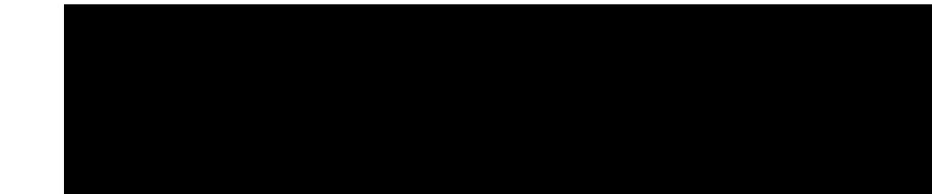
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COUNSEL

David Reagan for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Acting Assistant Attorney General, Seth K. Schalit and Kevin Kiley, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

HUMES, P. J.—Jody Chatman appeals from the trial court's denial of his petition for a certificate of rehabilitation under Penal Code section 4852.01.¹ The trial court denied the petition because the statute denies certificate eligibility to felons, such as Chatman, who have completed a sentence of probation (former felony probationers) and are subsequently incarcerated. Chatman contends that the statute denies his rights to equal protection

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

because it grants certificate eligibility to felons who have completed a *prison* sentence (former felony prisoners) and are subsequently incarcerated. We agree. While it might make sense to deny certificate eligibility to all subsequently incarcerated former felons, we have been offered, and we can discern, no rationale to deny certificate eligibility only to those who have served sentences of probation. We therefore reverse the trial court's order and remand for a consideration of the merits of Chatman's petition.

I.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001, Chatman pleaded no contest to a felony count of robbery (§ 211), and he was placed on five years' probation. About two years later, he was convicted of misdemeanor reckless driving with alcohol involved (Veh. Code, § 23103). He eventually successfully applied under section 1203.4 to have both his convictions dismissed. The reckless driving conviction was dismissed in 2006, and the robbery conviction was dismissed in 2007.

In June 2008, Chatman was convicted of another misdemeanor, driving under the influence (Veh. Code, § 23152, subd. (b)). He was placed under three years' probation with a condition that he serve 10 days in jail. Unlike Chatman's previous convictions, this one was never dismissed under section 1203.4.

Starting around 2011, Chatman volunteered at a youth center. An executive director of a community organization became familiar with Chatman's efforts there and offered Chatman a job as an administrator of a group home for foster and delinquent youth. Chatman was statutorily ineligible for the position, however, because of his felony conviction. (Health & Saf. Code, § 1522, subds. (a), (d).) Seeking to avail himself of a statutory exemption from ineligibility, Chatman applied for a certificate of rehabilitation in October 2014. (Health & Saf. Code, § 1522, subd. (g)(1)(A)(ii).)

In his petition under section 4852.01, Chatman acknowledged that the statute rendered him ineligible for the certificate because he was a former felony probationer who had spent time in jail after obtaining dismissals of his prior convictions. But he argued that his ineligibility violated his right to equal protection. The People opposed the petition and argued that Chatman's equal protection claim was foreclosed by *People v. Jones* (1985) 176 Cal.App.3d 120, 128 [221 Cal.Rptr. 382] (*Jones*). The trial court agreed

that *Jones* was dispositive and denied the petition for a certificate of rehabilitation.

II.

DISCUSSION

A. *Felons May Seek Relief from Disabilities Resulting from Their Convictions.*

Convicted felons are “uniquely burdened by a collection of statutorily imposed disabilities.” (*People v. Moreno* (2014) 231 Cal.App.4th 934, 942–943 [180 Cal.Rptr.3d 522].) “‘Upon [their] release from prison, . . . ex-felon[s] cannot simply resume the life [they] led before prison as if nothing had happened. Besides the well-known informal discriminations, [they] confront[] a battery of statutory disabilities . . .’ such as the loss of the right to vote, the inability to serve on petit or grand juries, and in some instances the inability to possess a concealable weapon. [Citation.]” (*Ibid.*) They may also be impeached as witnesses, and their prior convictions may be used to enhance subsequent criminal sentences. (*Ibid.*) And, as Chatman discovered, convicted felons are barred from certain occupations.

The Legislature has enacted several methods for felons to remove or reduce these disabilities. One method allows felons who successfully completed a sentence of probation, such as Chatman, to have their conviction set aside and the underlying charges dismissed (§ 1203.4), which is often a step in seeking further relief. (E.g., § 4852.01, subd. (b).) Another method allows felons to seek a pardon from the Governor on the grounds that they either are rehabilitated or are innocent. (Cal. Const., art. V, § 8; see generally 5 Erwin et al., *Cal. Criminal Defense Practice* (LexisNexis 2016) Executive Clemency, § 105.03[1], p. 105-6.) Yet another method—the subject of this appeal—allows rehabilitated felons to petition for a certificate of rehabilitation under section 4852.01. Typically, felons petition for a certificate of rehabilitation before seeking a pardon from the Governor. (5 Erwin, § 105.03[1], p. 105-6.)

■ A certificate of rehabilitation “is available to convicted felons who have successfully completed their sentences, and who have undergone an additional and sustained ‘period of rehabilitation’ in California. (§ 4852.03, subd. (a) [imposing general minimum requirement of five years’ residence in this state, plus an additional period typically ranging between two and five years depending upon the conviction]; see §§ 4852.01, subds. (a)–(c),

4852.06.) During the period of rehabilitation, the person must display good moral character, and must behave in an honest, industrious, and law-abiding manner. (§ 4852.05; see § 4852.06.)” (*People v. Ansell* (2001) 25 Cal.4th 868, 875 [108 Cal.Rptr.2d 145, 24 P.3d 1174].) A certificate is not available to persons serving a mandatory life parole, persons who have been sentenced to death, persons who have been convicted of various serious crimes, or persons in the military. (§ 4852.01, subd. (c).) “[T]he purpose of section 4852.01 is to afford an avenue for felons who have proved their rehabilitation to reacquire lost civil and political rights of citizenship.” (*People v. Moreno*, *supra*, 231 Cal.App.4th at p. 943.)

A certificate of rehabilitation certifies that a felon “has demonstrated by his or her course of conduct his or her rehabilitation and his or her fitness to exercise all of the civil and political rights of citizenship.” (§ 4852.13, subd. (a).) Such a certificate serves as an application for a full pardon upon receipt by the Governor (§ 4852.16), and it recommends that the Governor grant a full pardon to the petitioner (§ 4852.13, subd. (a)). (See *People v. Ansell*, *supra*, 25 Cal.4th at p. 876.) Some statutes provide that certain disabilities resulting from a felony conviction are removed by a Governor’s pardon, while other statutes provide that certain disabilities are removed by the issuance of a certificate of rehabilitation alone. (*Id.* at p. 877 & fns. 16–17, and statutes cited therein.) Chatman wants relief under the latter type of statute, whereby he would qualify for an exemption from a disqualification for a license to work in a group home by securing a certificate of rehabilitation, with no requirement he also secure a pardon from the Governor. (Health & Saf. Code, § 1522, subd. (g)(1)(A)(ii).)

The basis of Chatman’s equal protection claim involves one eligibility differentiation for a certificate of rehabilitation. Section 4852.01, subdivision (b), covers former felony probationers such as Chatman and provides: “A person convicted of a felony . . . , the accusatory pleading of which has been dismissed pursuant to Section 1203.4, may file a petition for certificate of rehabilitation and pardon pursuant to the provisions of this chapter if the petitioner has not been incarcerated in a prison, jail, detention facility, or other penal institution or agency since the dismissal of the accusatory pleading,^[2] is not on probation for the commission of any other felony, and the petitioner presents satisfactory evidence of five years’ residence in this state prior to the filing of the petition.” Chatman is ineligible for a certificate of rehabilitation under this subdivision because, although he obtained a

² This provision broadly applies to people who were “incarcerated,” without specifying that they were actually convicted of the offenses underlying their incarceration. Section 4852.01 was amended and its subdivisions renumbered effective January 1, 2016 (after the trial court ruled on Chatman’s petition), in ways that do not affect this court’s analysis. Our citations are to the current version of the statute.

dismissal of the pleading underlying his felony conviction (§ 1203.4), he was subsequently incarcerated after he was ordered to spend 10 days in jail when he was again granted probation for his 2008 misdemeanor conviction of driving under the influence.

In contrast to section 4852.01, subdivision (b), subdivision (a) of the statute provides that “[a] person convicted of a felony who is committed to a state prison or other institution or agency, including commitment to a county jail pursuant to subdivision (h) of Section 1170, may file a petition for a certificate of rehabilitation and pardon pursuant to the provisions of this chapter.” In other words, former felony prisoners may petition for a certificate of rehabilitation, with no requirement that they remain free from incarceration after the completion of their state-prison sentence (or sentence to county jail under § 1170, subd. (h)).

B. Challenges to Laws Under the Equal Protection Clause.

With this eligibility distinction in mind, we turn to discuss the well-established standards governing a challenge to a statute on equal protection grounds.³ “The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” [Citation.] ‘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.’ [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged.’” (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 [127 Cal.Rptr.2d 177, 57 P.3d 654], original italics; see also *In re Eric J.* (1979) 25 Cal.3d 522, 530 [159 Cal.Rptr. 317, 601 P.2d 549].) “In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws.” (*People v. McKee* (2010) 47 Cal.4th 1172, 1202 [104 Cal.Rptr.3d 427, 223 P.3d 566].) If an equal protection claim does not satisfy this preliminary requirement, the argument must fail. (*Cooley*, at p. 254.)

If two groups are sufficiently similar with respect to the law being challenged, we consider whether disparate treatment of the two groups is

³ While our state Supreme Court can construe the California Constitution as independent from the federal Constitution, there is no reason to suppose that an analysis under the federal equal protection clause in a case such as this one, which involves the consequences flowing from different convictions, would lead to a result other than the result reached under a state analysis. (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 [183 Cal.Rptr.3d 96, 341 P.3d 1075].)

justified. (*People v. McKee, supra*, 47 Cal.4th at p. 1207.) The state “is required to give some justification for th[e] differential treatment.” (*Id.* at p. 1203.) “Unless the law treats similarly situated persons differently on the basis of race, gender, or some other criteria calling for heightened scrutiny, we review the legislation to determine whether the legislative classification bears a rational relationship to a legitimate state purpose.” (*People v. Moreno, supra*, 231 Cal.App.4th at p. 939.) “This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated. [Citation.] While the realities of the subject matter cannot be completely ignored [citation], a court may engage in ‘rational speculation’ as to the justifications for the legislative choice [citation]. It is immaterial for rational basis review “whether or not” any such speculation has “a foundation in the record.”’ [Citation.] To mount a successful rational basis challenge, a party must ‘“negative every conceivable basis”’ that might support the disputed statutory disparity. [Citations.] If a plausible basis exists for the disparity, courts may not second-guess its ‘“wisdom, fairness, or logic.”’ [Citations.]” (*Johnson v. Department of Justice, supra*, 60 Cal.4th at p. 881.)

C. *There Is No Rational Basis for Denying Eligibility for Certificates of Rehabilitation to Subsequently Incarcerated Former Felony Probationers While Granting Eligibility to Subsequently Incarcerated Former Felony Prisoners.*

This case is not the first time a court has considered the constitutionality of the eligibility discrepancy between subsequently incarcerated former felony probationers and subsequently incarcerated former felony prisoners. In *Jones, supra*, 176 Cal.App.3d 120, the defendant, like Chatman, was convicted of a felony, served a sentence of probation, and later obtained a dismissal under section 1203.4. (*Jones*, at p. 125.) After the dismissal, the defendant was jailed for a short time (about 15 days) in connection with other offences. (*Ibid.*) He was therefore ineligible for a certificate of rehabilitation under section 4852.01, former subdivision (c), now subdivision (b). (*Jones*, at p. 125.) As Chatman argues here, he contended that as a subsequently incarcerated former felony probationer he was similarly situated with subsequently incarcerated former felony prisoners for purposes of certificate eligibility. (*Ibid.*)

Jones rejected his argument. In concluding that these two classes were not similarly situated, it observed that “separate and distinct statutory procedures” apply to former probationers and former parolees. (*Jones, supra*, 176 Cal.App.3d at pp. 127–128.) In reaching its conclusion, the court quoted heavily from *People v. Borja* (1980) 110 Cal.App.3d 378 [167 Cal.Rptr. 813], in which Division Two of this court held that section 1203.4, which allows

probationers to vacate their convictions, did not apply to the defendant who had spent time in prison and was later discharged from parole. (*Borja*, at pp. 380–381.) *Borja* did not involve an equal protection analysis, but it instead involved a question of statutory interpretation: whether a felon who has been sentenced to prison can take advantage of section 1203.4, which applies to former probationers and does not mention parolees. (*Borja*, at pp. 381–382.) After relying on *Borja* to highlight all the procedural differences between parole and probation, *Jones* concluded “that former probationers do not have the same status and, therefore, are not similarly situated with former state prisoners (and those discharged from parole) *for purposes of applying section 1203.4.*” (*Jones*, at p. 128, italics added.)

In our view, this passage from *Jones* simply makes the uncontroversial point that the relief provided under section 1203.4’s plain language—i.e., the ability to have a sentence vacated—is not similarly available to former state prisoners and former probationers. But equal protection analysis does not ask whether different groups are similarly situated for *all purposes*; it asks instead whether they are similarly situated for *purposes of the law challenged*—in this case section 4852.01, not section 1203.4. (*Cooley v. Superior Court*, *supra*, 29 Cal.4th at p. 253.)

Although *Jones* next asserted that there is a rational basis for treating former felony prisoners and former felony probationers differently under section 4852.01 (*Jones*, *supra*, 176 Cal.App.3d at pp. 128, 131), it did not articulate a rationale to support the assertion. Instead, the court examined “the purpose of section 1203.4 and its relation with section 4852.01.” (*Id.* at p. 128.) It found the restriction preventing former felony probationers from obtaining dismissals when they are currently serving a sentence (§ 1203.4, subd. (a)(1)) to be similar to, and consistent with, the restriction preventing former felony probationers from obtaining a certificate of rehabilitation if they were incarcerated subsequent to the dismissal of their felony case. (*Jones*, at p. 129; see current § 4852.01, subd. (b).) It further found that former felony prisoners are not similarly situated with former probationers because former prisoners have not previously benefited from dismissal of their charges and “bear the full onus and stigma of ex-convicts that those former probationers who have previously obtained section 1203.4 relief do not share.” (*Jones*, at pp. 129–130.) But this observation is merely another way of saying that these groups are not identical and face different procedural requirements to obtain a certificate of rehabilitation. Indeed, as *Jones* explained, the Legislature had “established two separate and distinct procedures in sections 1203.4 and 4852.01 for ex-felons who seek relief from criminal penalties and disabilities and seek a restoration of their civil rights and the opportunity to obtain a pardon.” (*Id.* at p. 130.) When read together, the two procedures “can be seen to form part of the broad statutory scheme for rehabilitation and restoration of rights attending relief from criminal penalties

and disabilities to all ex-felons by setting forth the criteria of rehabilitation that the Legislature has deemed appropriate for these two classifications of former offenders.” (*Id.* at p. 131.)

We do not think it follows that former felony prisoners and former felony probationers are dissimilarly situated for equal protection purposes just because they are required to use different procedures to petition for a certificate of rehabilitation under section 4852.01. Both groups are convicted felons seeking certificates of rehabilitation to reduce the disabilities that resulted from their prior convictions. We conclude, contrary to *Jones, supra*, 176 Cal.App.3d at page 128, that these two groups are similarly situated for purposes of section 4852.01.

■ We therefore turn to examine whether there is a rational basis for denying certificates of rehabilitation to former felony probationers, but not former prisoners, who are subsequently incarcerated. (E.g., *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 707–708, 711 [139 Cal.Rptr. 620, 566 P.2d 254] (*Newland*) [no rational basis under equal protection clause to permit felons, but not misdemeanants, to seek certificate of rehabilitation under § 4852.01]; *Jones, supra*, 176 Cal.App.3d at p. 128 [applying rational-relationship standard].) In doing so, we must consider whether the classification bears some rational relationship to a conceivable legitimate state purpose or that the classification rests upon a ground of difference having a fair and substantial relationship to the object of the legislation. (*Newland*, at p. 711.) We conclude that the classification does neither.

Jones concluded that “a rational relationship exists between the criteria of eligibility for a certificate of rehabilitation for these two classes of ex-felons and the state’s legitimate purpose of rehabilitating and restoring rights to ex-felons who are not similarly situated.” (*Jones, supra*, 176 Cal.App.3d at p. 131.) But while *Jones* pointed out that the Legislature has established different eligibility prerequisites for these two classes, it failed to articulate a rationale for the different treatment. (Cf. *People v. McKee, supra*, 47 Cal.4th at pp. 1207–1208 [remanding to trial court to determine whether differential treatment of two types of civil commitment was justified].) We consider it circular to suggest that disparate treatment of two groups is justified because the two groups are treated differently.

The Attorney General in this appeal similarly fails to offer a rationale for the differential treatment, except to repeat the observations contained in *Jones, supra*, 176 Cal.App.3d 120 and to contend that the case is “settled law.” True, that case was decided more than 30 years ago and addressed the identical question presented here. But it never articulated a rational basis for the differential treatment, and the Attorney General all but recognizes as much by

declaring that *Jones* “identified a ‘reasonably conceivable state of facts that could provide a rational basis for the classification’ (*FCC v. Beach Communications, Inc.* [(1993) 508 U.S. 307,] 313 [124 L.Ed.2d 211, 113 S.Ct. 2096]),” without explaining what that rational basis was.

■ We recognize that rational basis review in this context is deferential. “[W]e must accept any gross generalizations and rough accommodations that the Legislature seems to have made.’ ” (*Johnson v. Department of Justice, supra*, 60 Cal.4th at p. 887.) “A statute is *presumed constitutional* [citation], and ‘the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,’ [citations], whether or not the basis has a foundation in the record.” (*Heller v. Doe* (1993) 509 U.S. 312, 320–321 [125 L.Ed.2d 257, 113 S.Ct. 2637], italics added.) But the state must at some point proffer *some* justification for the differential treatment (*People v. McKee, supra*, 47 Cal.4th at p. 1203), and it has not done so here.

Our conclusion that the statutory scheme governing eligibility for certificates of rehabilitation denies Chatman his rights to equal protection is supported by our Supreme Court’s decision in *Newland, supra*, 19 Cal.3d 705. In *Newland*, the petitioner had been convicted of a misdemeanor violation of lewd conduct in a public place statute (§ 647, subd. (a)) and had obtained a dismissal of the charges under section 1203.4 after a brief period of summary probation that did not include jail time. (*Newland*, at pp. 707–709.) He later applied for a community college credential, but his application was rejected because a former provision of the Education Code barred credentials to anyone convicted of a sex offense. (*Ibid.*) The statute allowed applicants to obtain a credential if they obtained a certificate of rehabilitation, but this meant that only people convicted of a felony qualified while people convicted of a misdemeanor, such as the petitioner in *Newland*, did not. (*Id.* at pp. 709–710, 712.)

Newland held that there was no rational reason to treat misdemeanants more harshly than felons for purposes of obtaining community college credentials: “Because a misdemeanant is not eligible to petition for a certificate of rehabilitation, the [Education Code provision that permitted felons to seek a certificate of rehabilitation] works the Kafka-like perverse effect of providing that a person convicted of a *felony* sex crime who applies for a certificate of rehabilitation and who is otherwise fit, can obtain certification to teach in the community college system but that an otherwise fit person, convicted of a *misdemeanor* sex crime, is forever barred. This statutory discrimination against misdemeanants can claim no rational relationship to the protective purpose of [the provision of the Education Code regarding credentials].” (*Newland, supra*, 19 Cal.3d at p. 712, original italics.)

■ The same perverse effects are at play here. A subsequently incarcerated felon is eligible for a certificate of rehabilitation if he or she originally served a sentence of imprisonment and meets other requirements. (§ 4852.01, subd. (a).) But a subsequently incarcerated felon is ineligible for such a certificate if he or she was originally sentenced to probation, successfully completed it, and obtained a dismissal under section 1203.4. (§ 4852.01, subd. (b).) We discern no rational justification for this different treatment.⁴

In *Newland*, the Attorney General “virtually concede[d] that if [former] Education Code section 13220.16 and Penal Code section 4852.01 together work[ed] to deny misdemeanants relief available to felons, that discrimination *render[ed] either or both statutes unconstitutional.*” (*Newland*, *supra*, 19 Cal.3d at p. 713, italics added.) In this appeal, however, respondent claims that the constitutionality of section 4852.01 was “not at issue” in *Newland* and that *Newland* is “certainly irrelevant” to Chatman’s current equal protection challenge to the statute. To the contrary, *Newland* addressed how section 4852.01 worked together with the Education Code to deprive applicants of community college credentials, which is directly relevant here in evaluating whether section 4852.01 works together with the Health and Safety Code to deprive former felony probationers of the opportunity to qualify for a community care license.

■ Because Chatman has established that the statutory scheme denied him equal protection, we remand to the trial court with directions to consider the merits of Chatman’s petition for a certificate of rehabilitation. Nothing in this opinion shall be viewed as expressing an opinion on whether the court should grant Chatman’s petition, a question the trial court never reached because it concluded that Chatman was not otherwise qualified to seek one. And nothing in this opinion should be viewed as expressing an opinion on whether Chatman is otherwise barred from obtaining a community care license because he was convicted of a “crime against an individual” under Health and Safety Code section 1522, subdivision (g)(1)(A)(i), an argument that the People raised below but that has not been raised on appeal. Whether Chatman will qualify to receive such a license is immaterial to whether the statutory distinctions rendering him ineligible to be considered for a certificate of rehabilitation violate equal protection.

⁴ The Legislature is of course free to disqualify certain felons it deems incapable of being rehabilitated. We express no opinion on whether there would be a justification for denying certificate eligibility to *both* former felony probationers *and* former felony prisoners who are subsequently incarcerated. (E.g., *Johnson v. Department of Justice*, *supra*, 60 Cal.4th at pp. 878, 884.) We similarly express no opinion on whether there would be a rational basis for granting certificate eligibility to former felony probationers, but not to former felony prisoners, who are subsequently incarcerated.

III.

DISPOSITION

The trial court's order denying Chatman's petition for a certificate of rehabilitation is reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

Margulies, J., and Dondero, J., concurred.

Respondent's petition for review by the Supreme Court was granted November 16, 2016, S237374.

[No. D068439. Fourth Dist., Div. One. Aug. 16, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
BABYRAY HUDSON, Defendant and Appellant.

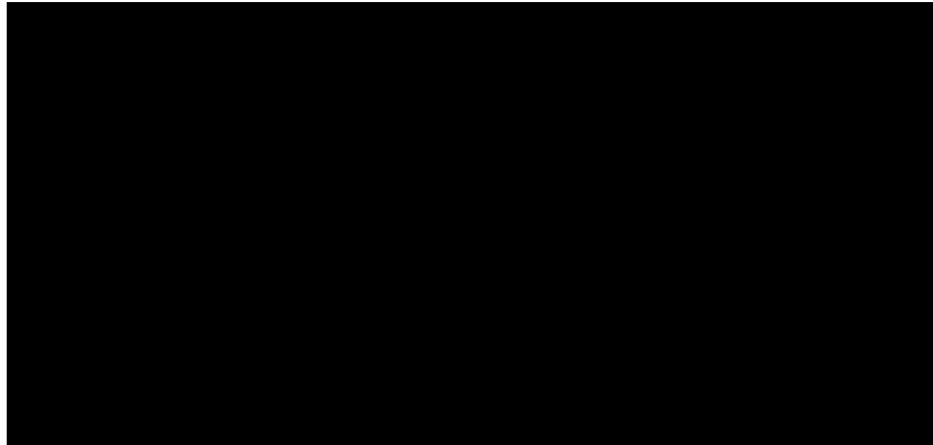
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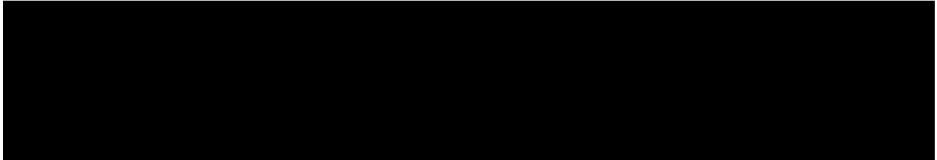
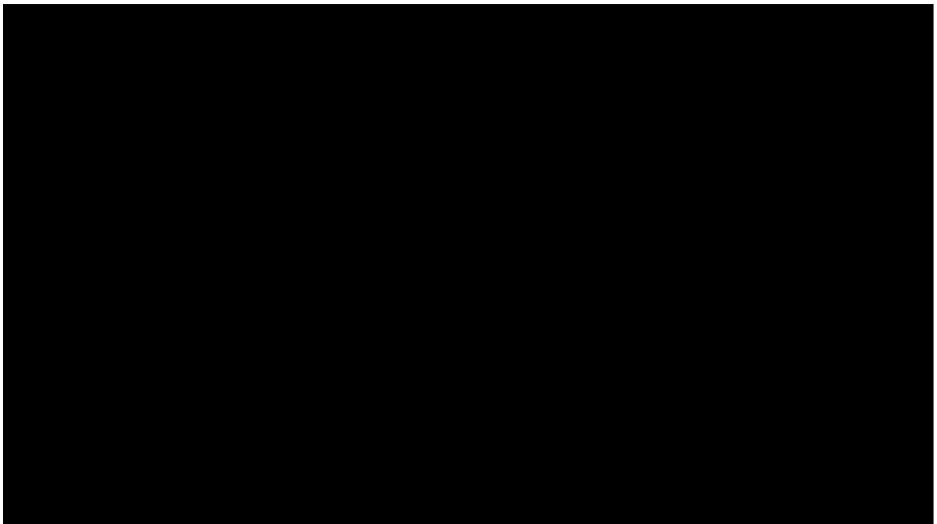
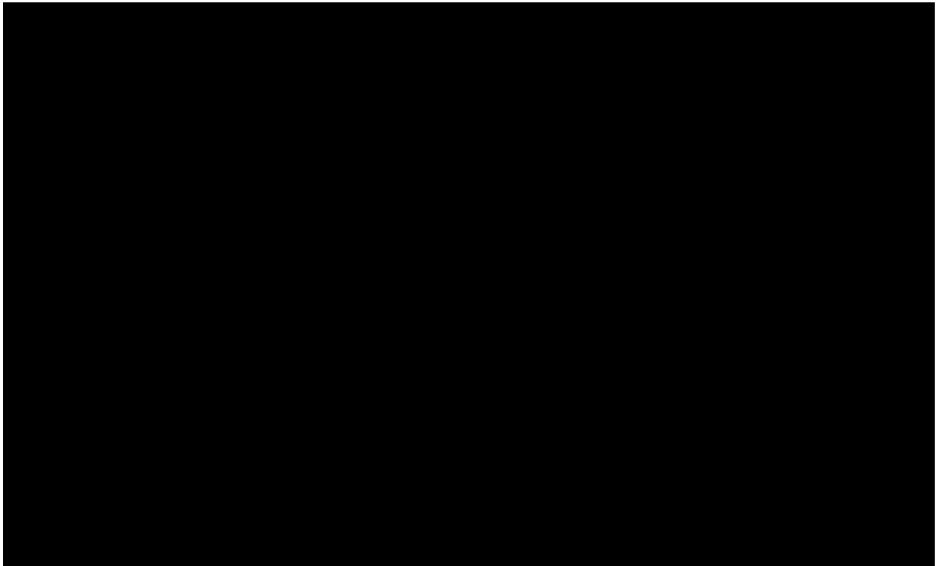
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) October 26, 2016, S237340.

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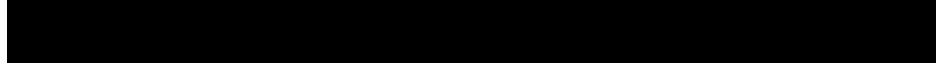
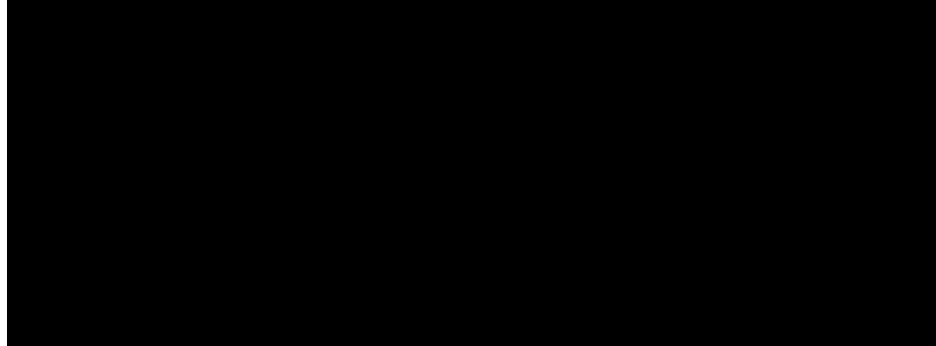
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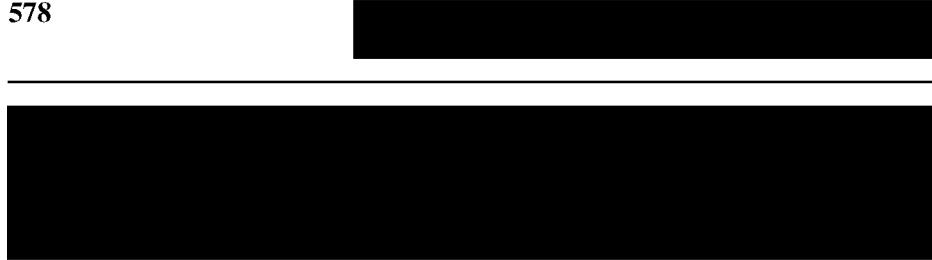
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COUNSEL

Jill M. Klein, 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, Randall D. Einhorn and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

HUFFMAN, J.—Babiray Hudson appeals from an order denying his petition to reduce his second degree burglary and forgery convictions to misdemeanors under Proposition 47, the Safe Neighborhoods and Schools Act (the Act). (Pen. Code,¹ § 1170.18.) Hudson's convictions involve a 2011 incident in which he entered a bank and falsely impersonated another person, with the intent to commit a felony by signing someone else's name to a check. We conclude that, while a bank is a commercial establishment (§ 459.5), the trial court properly denied the petition because Hudson failed to establish his eligibility for resentencing.

PROCEDURAL BACKGROUND

Hudson pled guilty to one count each of second degree burglary (§ 459), forgery (§ 470, subd. (a)), and false impersonation (§ 529, subd. (a)(2)). He also admitted the truth of two prior prison term commitment allegations. (§§ 667.5, 668.) The trial court sentenced Hudson to a total term of five years, suspended execution of the sentence, granted three years' formal probation and indicated Hudson was to complete a residential treatment program of no less than six months. The trial court later revoked and terminated probation and imposed the previously stayed five-year commitment, to be served locally under section 1170, subdivision (h).

¹ Undesignated statutory references are to the Penal Code.

In 2014, after passage of the Act, Hudson filed a petition asserting his second degree burglary and forgery convictions must be reduced to misdemeanors, and asking the court to exercise its discretion to reduce the false impersonation conviction to a misdemeanor. The trial court denied the petition, finding a bank is not a commercial establishment under the Act and that Hudson intended to take property in excess of \$950. Hudson timely appealed.

DISCUSSION

I

GENERAL LEGAL PRINCIPLES

■ In November 2014, the electorate approved the Act, which makes certain theft-related and drug-related offenses misdemeanors. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091 [183 Cal.Rptr.3d 362] (*Rivera*).) Among other things, the Act reduced certain types of forgeries identified in section 473, subdivision (b) to misdemeanors, including forgery by check under section 475, as long as the value of the check does not exceed \$950. (§ 473, subd. (b).) The Act added section 459.5, which classifies shoplifting as a misdemeanor “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).)

The Act also created a new resentencing provision under which certain individuals may petition the superior court for a recall of sentence and request resentencing. (§ 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.’ (§ 1170.18, subd. (b).)” (*Rivera, supra*, 233 Cal.App.4th at p. 1092.)

■ “In interpreting a voter initiative, we apply the same principles that govern our construction of a statute.” (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006 [22 Cal.Rptr.3d 869, 103 P.3d 270].) “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.]’ [Citation.] We also ‘‘refer to other

indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.] 'Using these extrinsic aids, we "select the construction that comports most closely with the apparent intent of the [electorate], with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.'" "(*People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1014 [171 Cal.Rptr.3d 86].)

II

SECOND DEGREE BURGLARY CONVICTION

Hudson pled guilty to second degree burglary based on his act of entering a bank and falsely impersonating another person, with the intent to commit a felony by signing someone else's name to a check. The question presented is whether the circumstances of the offense entitle Hudson to resentencing under the Act. The inquiry is one of statutory interpretation, which we review de novo. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 919 [49 Cal.Rptr.3d 211].)

■ Section 459.5 defines "shoplifting" as (1) entry into a commercial establishment; (2) while that establishment is open during regular business hours; (3) with the intent to commit larceny; and (4) the value of the property that is taken or intended to be taken does not exceed \$950. Hudson argues elements 1, 3 and 4 in this appeal. As we shall explain, the trial court did not err in refusing to resentence Hudson's second degree burglary conviction; while a bank is a commercial establishment and Hudson's actions qualified as larceny, Hudson failed to carry his burden of showing that he was eligible for resentencing.

A. Commercial Establishment

The trial court denied the petition, finding that a bank is not a commercial establishment under the Act. Hudson asserts the trial court erred because the plain language of section 459.5 and the legislative intent behind the Act compel the conclusion that a "commercial establishment" as used in the new shoplifting statute must be broadly construed to include a bank.

The Act does not define the term "commercial establishment." The People noted there are no published cases in California addressing whether a bank constitutes a commercial establishment. However, in cases published after the People filed their respondent's brief, the People conceded that a bank constituted a commercial establishment. (*People v. Root* (2016) 245 Cal.App.4th 353, 356 [199 Cal.Rptr.3d 516] (*Root*), review granted May 11,

2016, S233546; *People v. Triplett* (2016) 244 Cal.App.4th 824, 829, 831 [198 Cal.Rptr.3d 678], review granted Apr. 27, 2016, S233172 [plea agreement established defendant entered a bank and the People conceded at a hearing on the petition that defendant entered a commercial establishment].)

■ Focusing on the common definition of “shoplifting,” the People contend a bank is a financial business where transactions are held, not a commercial establishment where items are on display for sale. (Black’s Law Dict. (10th ed. 2014) p. 1590 [defining “shoplifting” as “[t]heft of merchandise from a store or business; specif., larceny of goods from a store or other commercial establishment by willfully taking and concealing the merchandise with the intention of converting the goods to one’s personal use without paying the purchase price.”].) The plain language of section 459.5 compels the conclusion that a bank qualifies as a commercial establishment.

The People erroneously focus on the word “shoplifting,” which is not an element of the crime. Rather section 459.5 gives shoplifting a more technical definition involving four separate elements, including entry into a commercial establishment. Significantly, the Act does not define “shoplifting” according to its common meaning and there is nothing in the text of the Act to support a conclusion that the voters intended to adopt the common meaning of “shoplifting.”

The court in *In re J.L.* (2015) 242 Cal.App.4th 1108 [195 Cal.Rptr.3d 482] discussed the definition of “commercial establishment” in the context of a minor stealing a cell phone from the high school locker of another student. (*Id.* at p. 1111.) The *J.L.* court affirmed the adjudication of the minor for burglary, holding the location of the theft did not occur at a “commercial establishment” as contemplated by section 459.5. (*J.L.*, *supra*, at p. 1114.) The *J.L.* court noted that the commonsense meaning of the term commercial establishment “is one that is primarily engaged in commerce, that is, the buying and selling of goods or services. That commonsense understanding accords with dictionary definitions and other legal sources. (Webster’s 3d New Internat. Dict. (2002) p. 456 [‘commercial’ means ‘occupied with or engaged in commerce’ and ‘commerce’ means ‘the exchange or buying and selling of commodities esp. on a large scale’]; The Oxford English Reference Dict. (2d ed. 1996) p. 290 [defining ‘commerce’ as ‘financial transactions, esp. the buying and selling of merchandise, on a large scale’]; Black’s Law Dict. (10th ed. 2014) p. 325 [‘commercial’ means ‘[o]f, relating to, or involving the buying and selling of goods; mercantile’]; see 37 C.F.R. § 258.2 . . . [copyright regulation defining the term ‘commercial establishment’ as ‘an establishment used for commercial purposes, such as bars, restaurants, private offices, fitness clubs, oil rigs, retail stores, banks and financial institutions, supermarkets, auto and boat dealerships, and other establishments with

common business areas’]; Gov. Code, § 65589.5, subd. (h)(2)(B) [defining ‘neighborhood commercial’ land use as ‘small-scale general or specialty stores that furnish goods and services primarily to residents of the neighborhood’]; *People v. Cochran* (2002) 28 Cal.4th 396, 404–405 [121 Cal.Rptr.2d 595, 48 P.3d 1148] [quoting dictionary definition of commerce, ‘“[t]he buying and selling of goods, especially on a large scale,”’ in interpreting statutory phrase ‘commercial purpose’].) (J.L., *supra*, at p. 1114.)

■ Because “commercial” involves being engaged in commerce, including financial transactions, we conclude that the term “commercial establishment” includes a bank. The People attempt to narrow the term “commercial establishment” to businesses where items are offered for sale. We acknowledge that a common understanding of the word “commercial” encompasses the buying and selling of merchandise in a retail establishment. However, nothing in the text of the Act supports this narrow interpretation and we reject it.

■ Even assuming the term “commercial establishment” is ambiguous, we must effectuate the intent of the voters who passed the initiative measure. (*People v. Briceno* (2004) 34 Cal.4th 451, 459 [20 Cal.Rptr.3d 418, 99 P.3d 1007].) Additionally, we must read a statute “‘with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.’” (*People v. Pieters* (1991) 52 Cal.3d 894, 899 [276 Cal.Rptr. 918, 802 P.2d 420].) The “Findings and Declarations” state that the Act requires “misdemeanors instead of felonies for nonserious, nonviolent crimes . . . unless the defendant has prior convictions for specified violent or serious crimes.” (Historical and Statutory Notes, 32A Pt. 3 West’s Ann. Gov. Code (2016 supp.) foll. § 7599, p. 163, § 3, subd. (3).) The Act directs that it is to be broadly and liberally construed to achieve its stated purpose of requiring misdemeanors instead of felonies for nonserious, nonviolent crimes. (*Id.*, §§ 3, subd. (3), 15, 18, pp. 163, 164.) Here, entering a bank and attempting to cash a forged check is precisely the type of nonviolent crime encompassed by the Act.

B. Larceny

To constitute shoplifting the entry must be into a commercial establishment “with intent to commit larceny.” (§ 459.5.) Hudson contends the conduct for which he sustained his second degree burglary conviction falls within the scope of “larceny” as encompassed by section 459.5. The People do not address this argument in their respondent’s brief.

The California Supreme Court will ultimately resolve the question as it is currently reviewing whether a defendant convicted of second degree burglary

for entering a bank to cash forged checks is entitled to resentencing under section 1170.18 on the ground the offense meets the definition of shoplifting under section 459.5. (*People v. Gonzales* (2015) 242 Cal.App.4th 35 [194 Cal.Rptr.3d 856], review granted Feb. 17, 2016, S231171 [entry into a bank to cash a forged check was not larceny within the meaning of § 459.5]; *People v. Vargas* (2016) 243 Cal.App.4th 1416 [197 Cal.Rptr.3d 638], review granted Mar. 30, 2016, S232673 [entry into check cashing establishment with intent to commit theft by false pretenses by cashing a forged check was an intent to commit “larceny”].) Until our high court resolves this issue, we follow the view that entering a bank with intent to commit theft by false pretenses by cashing a forged check meets the definition of shoplifting under section 459.5.

C. Remaining Elements

As we discussed, a bank is a commercial establishment and Hudson’s actions qualified as larceny. (Pt. II.A, B, *ante*.) To be eligible for resentencing, however, the entry into the establishment must have been during regular business hours and the value of the property taken or intended to be taken must not have exceeded \$950. (§ 459.5, subd. (a).) The parties do not address whether Hudson entered the bank during its normal business hours. Regarding the value of the property he intended to take, Hudson asserts the trial court erred when it found that he intended to take more than \$950 because the trial court came to this conclusion by looking at information in the postconviction probation report and thus outside the record of conviction. He contends the record of conviction did not disclose sufficient facts establishing the nature of the offense or the value of the property; thus, the trial court was required to presume that the conviction was for the “least offense punishable” which, here, would be misdemeanor shoplifting.

■ Section 1170.18 is silent as to which party has the burden of establishing eligibility for resentencing. It is well established, however, that a party seeking relief typically carries the burden of proof as to each fact necessary to the party’s claim for relief, unless a different burden is specifically assigned by law. (Evid. Code, § 500.) Accordingly, the defendant bears the burden of demonstrating eligibility for relief under the Act. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 [191 Cal.Rptr.3d 295] (*Sherow*); *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448–449 [193 Cal.Rptr.3d 651].)

■ Here, the record shows that Hudson pled guilty to second degree commercial burglary. His guilty plea “constitutes an admission of every element of the offense charged and constitutes a conclusive admission of guilt” and “obviate[d] the need for the prosecution to come forward with any

evidence.” (*People v. Turner* (1985) 171 Cal.App.3d 116, 125 [214 Cal.Rptr. 572].) Thus, the record of conviction establishes Hudson was guilty of second degree burglary.

In *Sherow*, we held that the petitioner has the burden of presenting evidence showing eligibility for resentencing under the Act. (*Sherow, supra*, 239 Cal.App.4th at p. 880.) Hudson presented no evidence below that he entered the bank during its regular business hours; thus, he failed to meet his initial burden of showing eligibility for resentencing. (§ 459.5, subd. (a).) Hudson similarly failed to carry his burden of showing the value of the property he intended to take did not exceed \$950. (*Ibid.*) On both elements, Hudson could have presented new evidence to establish eligibility for resentencing. (*Sherow, supra*, at pp. 879–880.)

■ Hudson asserts *Sherow, supra*, 239 Cal.App.4th 875 was wrongly decided as it suggests that the trial court is empowered to look beyond the record of conviction in determining whether a petitioner’s offense qualifies for relief under the Act. To the extent Hudson contends a *petitioner* under the Act is limited to the record of conviction to prove sentencing eligibility this argument works against him in situations where, as here, the record is silent. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 140, fn. 5 [197 Cal.Rptr.3d 743] [in many 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”; petitioners may seek to meet their burden on this issue by “submit[ting] extra-record evidence probative of the value when they file their petitions for resentencing”].) *Sherow* does not address a situation where the *People* went outside the record of conviction to prove resentencing eligibility. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 [119 Cal.Rptr.2d 903, 46 P.3d 372] [“[I]t is axiomatic that cases are not authority for propositions not considered.”].)

Finally, contrary to Hudson’s assertion, on this silent record we cannot presume that his conviction was for the “least offense punishable” which, here, would be a misdemeanor shoplifting. For this proposition, Hudson relies on *People v. Williams* (1990) 222 Cal.App.3d 911 [272 Cal.Rptr. 212] (*Williams*). *Williams* held that “[i]n determining the nature of a prior conviction allegation, the ‘court may look to the entire record of the conviction . . . but when the record does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable . . .’ [Citation.]” (*Id.* at p. 915.)

■ *Williams* is inapposite because it concerned the use of multiple hearsay statements in a probation report in the context of determining beyond a reasonable doubt whether a prior conviction allegation was true for sentence

enhancement purposes under the “Three Strikes” law. (*Williams, supra*, 222 Cal.App.3d at pp. 917–918.) In this situation, the prosecution has the burden of establishing enhancements apply. (*People v. Towers* (2007) 150 Cal.App.4th 1273, 1277 [57 Cal.Rptr.3d 530] [“The prosecution bears the burden of proving beyond a reasonable doubt that a defendant’s prior convictions were for either serious or violent felonies.”].) On a silent record, the prosecution cannot meet its burden to show the nature of the prior offense triggered a sentence enhancement. Here, the issue before the trial court was not a sentence enhancement that required the People to present proof beyond a reasonable doubt.

Based on these conclusions, we need not, and therefore do not, address Hudson’s argument that the trial court erred by relying on evidence outside the record of conviction presented by the People.

III

*FORGERY CONVICTION**

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DISPOSITION

The order denying Hudson’s petition for recall of his felony prison sentences and for resentencing is affirmed.

Benke, Acting P. J., and Haller, J., concurred.

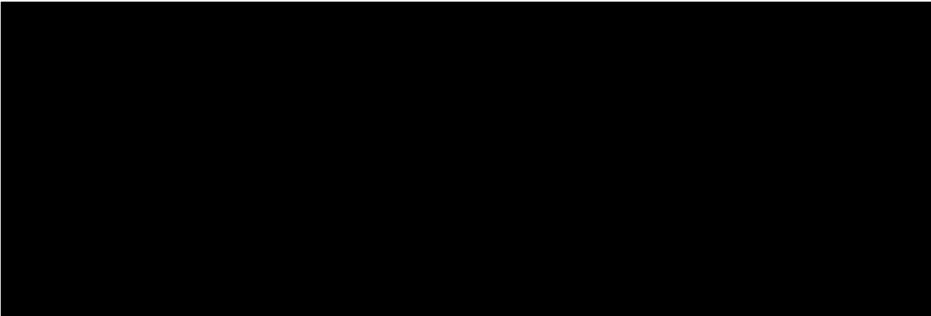
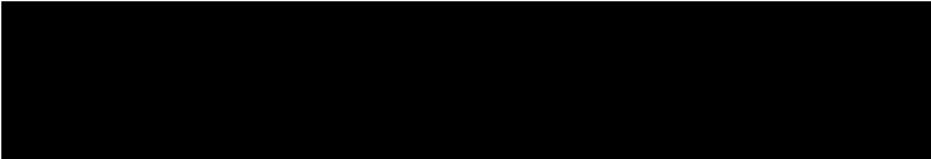
Appellant’s petition for review by the Supreme Court was granted October 26, 2016, S237340.

*See footnote, *ante*, page 575.

[No. B258033. Second Dist., Div. Seven. Aug. 16, 2016.]

LA MIRADA AVENUE NEIGHBORHOOD ASSOCATION OF HOLLYWOOD, Plaintiff and Appellant, v.
CITY OF LOS ANGELES et al., Respondents;
TARGET CORPORATION, Real Party in Interest and Appellant.

CITIZENS COALITION LOS ANGELES, Plaintiff and Respondent, v.
CITY OF LOS ANGELES et al., Respondents;
TARGET CORPORATION, Real Party in Interest and Appellant.



[REDACTED]

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COUNSEL

The Silverstein Law Firm, Robert P. Silverstein and James S. Link for Plaintiff and Appellant.

Hecht Solberg Robinson Goldberg & Bagley, Richard A. Schulman and Sara G. Vakulskas for Real Party in Interest and Appellant.

The Law Offices of David Lawrence Bell and David Bell for Plaintiff and Respondent.

Michael N. Feuer, City Attorney, Terry Kaufmann Macias, Assistant City Attorney, and Kenneth T. Fong, Deputy City Attorney, for Respondents City of Los Angeles, Los Angeles City Council and Los Angeles Department of City Planning.

OPINION

PERLUSS, P. J.—After the superior court invalidated a number of exceptions to the specific plan governing development in Hollywood and halted construction by Target Corporation of a full-size, 75-foot-tall store at Sunset Boulevard and Western Avenue, Target appealed the ruling to this court and concurrently asked the Los Angeles City Council to amend the plan, which would make the invalidated exceptions unnecessary. The plan amendments have now been finally approved. Accordingly, the appeals and cross-appeal in this matter are dismissed as moot.

PROCEDURAL BACKGROUND

On July 31, 2014 the superior court entered judgment granting in part and denying in part the petitions for writ of mandate filed by two citizens groups, La Mirada Avenue Neighborhood Association of Hollywood (La Mirada) and Citizens Coalition of Los Angeles, to compel the City of Los Angeles (City) to vacate its decision to grant real party in interest Target Corporation's requests for exceptions from the City's specific plan—The Vermont/Western Transit Oriented District Specific Plan/Station Neighborhood Area Plan (SNAP)—that governs development in Hollywood. The superior court ruled the City had improperly granted Target six of eight exceptions from SNAP requirements for its development at Sunset Boulevard and Western Avenue (the Project), including its prohibition of commercial buildings more than 35 feet in height. (Target's development plan included a 75-foot-tall building.) The court found Target had not demonstrated the exceptional conditions justifying a departure from SNAP's height restrictions and other requirements. It upheld the City's grant of two other exemptions from SNAP, including more parking spaces than the number permitted under SNAP. The court also found no violations of the California Environmental Quality Act (CEQA) or CEQA guidelines (Pub. Resources Code, § 21000 et seq.) and no

due process or Meyers-Milias-Brown Act (Gov. Code, § 3500) violations in the City's consideration of exceptions for the Project.

The peremptory writ of mandamus, directed to the City and its officers, employees and agents, invalidated the six specified SNAP exceptions and the approvals granted and obtained for the Project based on those exceptions; enjoined the City from any further actions or approvals, including granting permits, in furtherance of the invalid SNAP exceptions; and required "the cessation, restraint and enjoining of all construction activities by Real Party in Interest Target Corporation and any of its agents at the Project site."

Target filed a notice of appeal in the La Mirada action and, a week later, a petition to lift the automatic stay pursuant to Code of Civil Procedure section 1094.5, subdivision (g), of the City's approval of the six invalidated SNAP exceptions, which would allow construction to proceed during the appellate process. In support of its request Target explained it had applied to the City to amend SNAP, "which will render the exceptions unnecessary and the trial court's adverse decision moot." Target also asserted, "No one can guarantee the result of a plan amendment process, but City Council approval is nearly certain given that it had requested the project in this form and approved it unanimously three times, and given the trial court's approval of the EIR." La Mirada opposed Target's request. We denied the petition on September 3, 2014 and ordered briefing completed within the minimum time periods specified in the California Rules of Court with no extensions absent exceptional circumstances. Target thereafter filed a notice of appeal in the Citizens Coalition action, and La Mirada filed a notice of cross-appeal. The appeals were consolidated.

Shortly after briefing was completed, Target notified this court that hearings had been scheduled by the City on Target's application for amendments to SNAP. Target requested we hold the consolidated appeals and cross-appeal in abeyance until the City had the opportunity to vote on approval of the amendments. We granted that request and took the appeals off calendar pending notice of the City's resolution of the proposed amendments. Target subsequently filed additional notices, keeping the court and the other parties advised of the progress of the proposed amendments.

On May 13, 2016 Target notified us that the City had finally approved the amendments. Accordingly, Target reported it was now unnecessary to rely on any exemptions from SNAP to complete the Project and the appeals relating to the propriety of the City's decision to grant Target exceptions from the original SNAP were moot. Rather than request a dismissal of the pending appeals, however, Target asked that we continue to hold them in abeyance and eventually consolidate them with the anticipated appeals when the next

round of litigation (that is, the citizens groups' challenges to the amendments to SNAP) reached this court. Although recognizing the issues on appeal had been mooted by the City's action adopting the amended SNAP, La Mirada opposed Target's request, urging us to decide the pending appeals because they purportedly raised matters of continuing public interest that were likely to recur. Alternatively, La Mirada asked that we stay all construction at the Project site until ultimate resolution of the issues raised by these appeals and the litigation (which has now been filed) challenging the new SNAP amendments.

On June 9, 2016 we set Target's motion to stay for oral argument and requested the parties address in letter briefs whether the appeals and cross-appeal should be dismissed as moot on the ground we could no longer grant any effective relief. Letter briefs were filed by Target, La Mirada and the Citizens Coalition on July 11, 2016. Oral argument was heard on August 4, 2016.

DISCUSSION

■ “[A]n appeal is moot if ‘‘the occurrence of events renders it impossible for the appellate court to grant appellant any effective relief.’’” (*Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 175 [156 Cal.Rptr.3d 607]; accord, *Disenhouse v. Peevey* (2014) 226 Cal.App.4th 1096, 1103 [172 Cal.Rptr.3d 549]; see *van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 560 [6 Cal.Rptr.3d 746] [‘‘[s]ubsequent legislation can render a pending appeal moot’’]; *Equi v. San Francisco* (1936) 13 Cal.App.2d 140, 141–142 [56 P.2d 590] [same].) “It is well settled that an appellate court will decide only actual controversies. Consistent therewith, it has been said that an action which originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised therein have become moot by subsequent acts or events.” (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 10 [244 Cal.Rptr. 581]; see *Lenahan v. City of Los Angeles* (1939) 14 Cal.2d 128, 132 [92 P.2d 1014].)

Ordinarily, when, as here, a case becomes moot pending an appellate decision, the reviewing court will simply dismiss the appeal on the ground it can no longer grant any effective relief. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 134 [41 Cal.Rptr. 468, 396 P.2d 924] (*Milk Depots*); *Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863 [167 P.2d 725].) However, when subsequent legislative or administrative action renders an entire controversy moot and dismissal of the appeal would have the effect of affirming the underlying judgment without having reached the merits, appellate courts usually “‘dispose of the case, not merely of the appellate proceeding which brought it here . . .’ [citation] . . . by reversing the

judgment solely for the purpose of restoring the matter to the jurisdiction of the superior court, with directions to the court to dismiss the proceeding.” (*Milk Depots*, at p. 134 [when ordinance that was subject of appeal was rescinded, the basis for the trial court’s judgment has “disappeared”; under those circumstances it was proper to reverse the judgment and remand with directions to the trial court to dismiss the proceeding rather than impliedly affirm by dismissing the appeal as moot]; accord, *Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal.App.4th 939, 944–945 [130 Cal.Rptr.3d 520]; *City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 959 [195 Cal.Rptr. 465].)

■ In the *Milk Depots*, *City of Yucaipa* and *City of Los Angeles* cases, however, the events that mooted the underlying controversies were not initiated by the appellants. Here, in contrast, after six of the eight exceptions to SNAP it had sought were invalidated by the superior court in the underlying administrative mandate proceeding, Target requested the City amend SNAP for the very purpose of removing the question of the exceptions’ validity from further litigation. Under these circumstances dismissing the appeal, rather than reversing the judgment with directions to the superior court to dismiss the case, is the proper disposition. ■ (See *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters* (9th Cir. 1982) 686 F.2d 720, 721 [distinction between litigants who are and are not responsible for rendering their case moot at the appellate level is significant; if the case has become moot as the result of actions by the appellant (the losing party below), proper course is to dismiss the appeal, not to vacate the trial court’s judgment]; see also *Allard v. DeLorean* (9th Cir. 1989) 884 F.2d 464, 467 [“a dissatisfied litigant should not be allowed to destroy the collateral consequences of an adverse judgment by destroying his own right to appeal”]; *U.S. v. Garde* (D.C.Cir. 1988) 848 F.2d 1307, 1310 [“[I]n a case in which ‘review is prevented, not by happenstance, but by the deliberate action of the losing party before the district court, . . . the district court should not be ordered to vacate its decision.’ [Citation.] Rather, ‘the prevailing party, . . . ought to be left in the same position as if no appeal had been taken.’ ”]; see also *Cammermeyer v. Perry* (9th Cir. 1996) 97 F.3d 1235, 1239 [declining to vacate lower court judgment mooted by defendant’s replacement of challenged regulation and remanding to district court to allow consideration of the equities involved].)

As discussed, the superior court’s writ of mandate not only invalidated the approvals and permits issued based upon the six invalidated SNAP exceptions but also required the cessation of all construction activities by Target at the Project site. Whether, and to what extent, the new SNAP amendments require a modification of that portion of the writ of mandate is properly addressed by the superior court in the first instance.

DISPOSITION

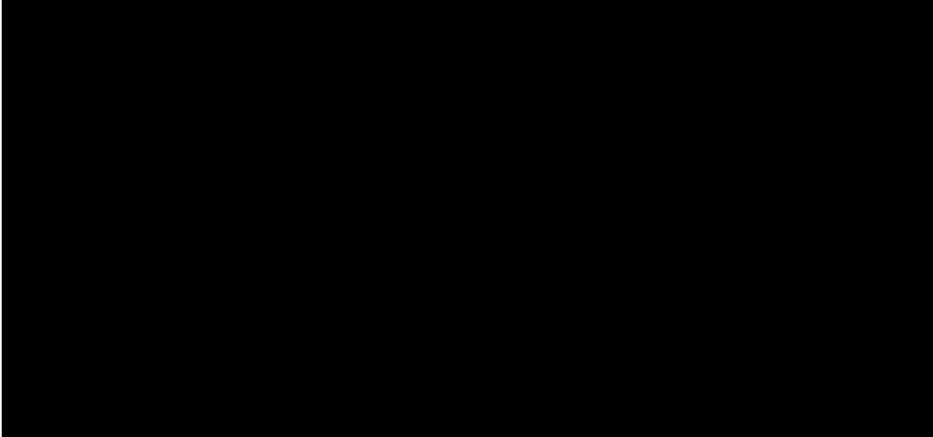
The appeals and cross-appeal are dismissed as moot. Each party is to bear its own costs on appeal and/or cross-appeal.

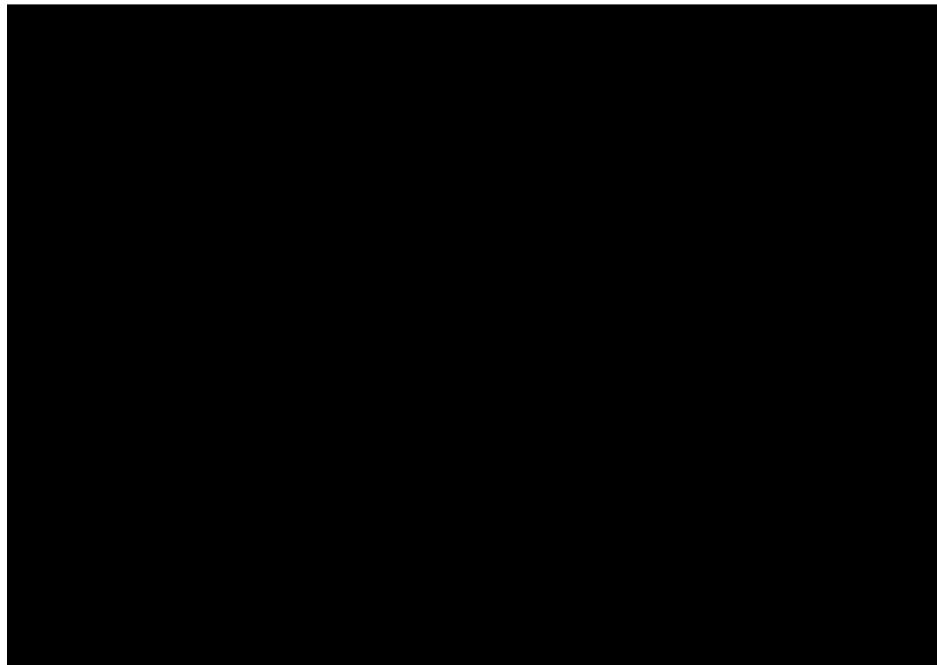
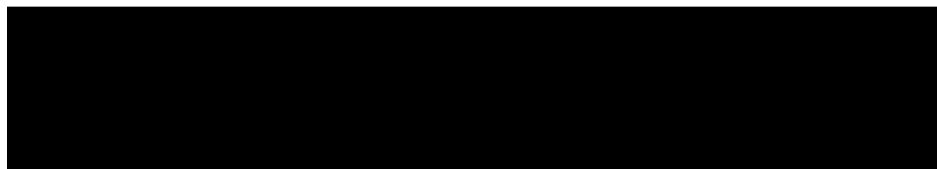
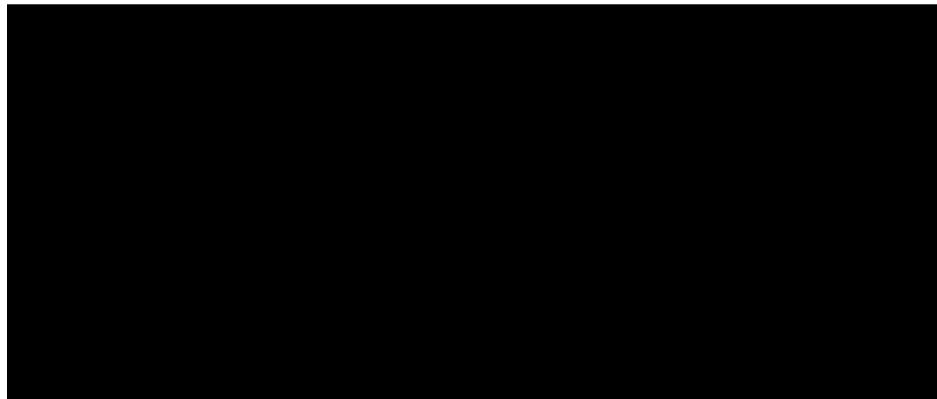
Zelon, J., and Segal, J., concurred.

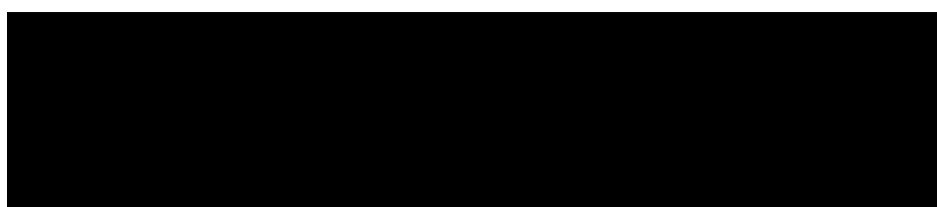
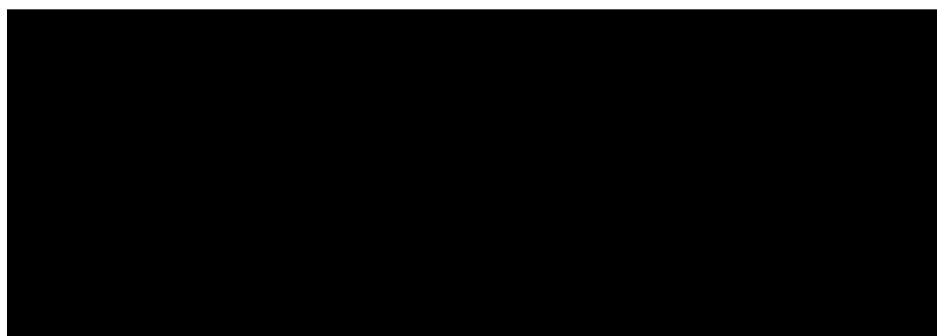
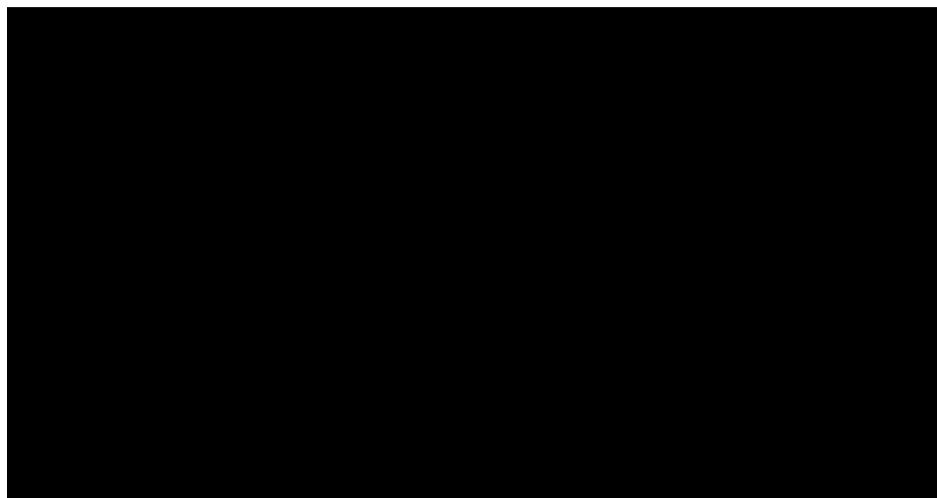
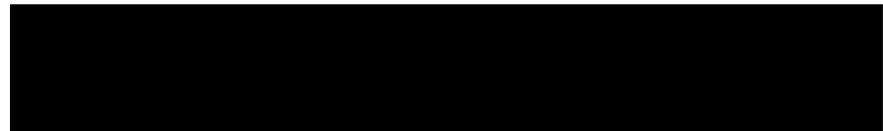
A petition for a rehearing was denied August 31, 2016.

[No. B262978. Second Dist., Div. Four. Aug. 16, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
JOHN PAUL RAYGOZA, Defendant and Appellant.







COUNSEL

Law Offices of William J. Kopeny, William J. Kopeny; Ferrentino & Associates and Correen Ferrentino for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stacy S. Schwartz and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

MANELLA, J.—In 2011, while awaiting trial, appellant John Paul Raygoza fell \$105,000 short in posting the bail set by the court. The court agreed to reduce bail if appellant agreed to be confined to his home under an electronic monitoring program established by the County of Los Angeles. In 2014, after pleading no contest to a charge of false imprisonment and receiving a sentence of four years, he sought presentence custody credit under Penal Code section 2900.5, which requires courts to award such credit for all “days served in home detention pursuant to . . . Section 1203.018.”¹ The trial court denied the request, finding that appellant’s confinement did not fall under section 1203.018, as that provision applies to inmates held “in lieu of bail,” whereas appellant’s home detention resulted from an agreement to post a lesser bail. Appellant contends this was error. We find that appellant’s home detention entitled him to presentence custody credit under section 2900.5. Accordingly, we reverse in part, and remand for recalculation of presentence custody credit.

FACTUAL AND PROCEDURAL BACKGROUND**A. Information and Plea Agreement**

Appellant was charged by information filed January 24, 2012, with false imprisonment by violence (§ 236) and four other crimes. It was further alleged that appellant personally used a deadly weapon within the meaning of section 12022, subdivision (b)(1), that a principal used a firearm within the meaning of section 12022, subdivision (a)(1), and that appellant had a prior conviction for battery that fell within section 667, subdivisions (a) through (i) and section 1170, subdivision (h)(3).

¹ Undesignated statutory references are to the Penal Code.

In September 2014, appellant pled no contest to false imprisonment (§ 236) and admitted the special allegations. The plea agreement included imposition of a four-year sentence consisting of three years (the high term) for false imprisonment (see §§ 237, 1170, subd. (h)), plus one year for the special allegation under section 12022, subdivision (a)(1), and a three-year concurrent sentence for a probation violation.

B. Appellant's Pre-conviction Home Detention and Sentence

Appellant was arrested on April 12, 2011, and released four days later after posting \$455,000 bail. On April 27, he was brought back into custody. At a new bail hearing on May 9, 2011, a representative for the bonding company reported that based on appellant's finances, he qualified for no more than a \$350,000 bond. Appellant asked that bail be reduced to that amount. The court agreed to reduce bail, provided appellant agreed to electronically monitored home detention, "24-hour except for qualified medical and/or emergencies."

Subsequent to the court's order, appellant executed a "participant contract" for the Los Angeles County electronic monitoring program. The contract provided that on the day he began the program, a transmitter would be "fitted to [his] ankle and a reporting unit . . . installed on [his] telephone," and that a case manager would establish "a schedule based on [his] permitted activities such as employment, counseling, drug or alcohol abuse treatment, and any other permitted activities." Under the contract, appellant agreed "to remain within the interior premises of [his] residence at all times, except for the days [he] work[ed], or to keep appointments for which [he had] received permission in advance." He was forbidden the use of alcohol or possession of any weapons. He further agreed to "admit any person or agent designated by the correctional administrator into [his] residence at any time for purposes of verifying [his] compliance with [the] conditions of home detention," to "respond to all telephone calls generated from the Electronic Monitoring Program staff and monitoring equipment when [he was] at home regardless of the time of day or night," and to "submit [his] person, property, place of residence and/or personal effects to search at [any] time, with or without a warrant, and with or without probable cause." He agreed that the correctional administrator could retake him into custody if he failed to comply with the terms of the program.

The contract provided that "participation in the Probation Electronic Monitoring Program (EMP) is voluntary," and that if appellant preferred, he could "serve [his] sentence in custody at a jail facility." It stated that if he

“willfully [left] [his] residence without authorization [or] fail[ed] to return to [his] residence at the prescribed time,” he could be “prosecuted for escape under Penal Code section 4532.” It included a provision stating: “I understand that if I am returned to custody for any reason, I will not receive any accelerated release credits and may be subjected to additional loss of good/work time.”

Prior to the sentencing hearing (before a different judge), appellant filed a motion requesting that his time in home detention be included in calculating presentence custody credit under section 2900.5. His moving papers pointed out that the restrictions he lived under during this period mirrored those imposed on inmates participating in home detention under section 1203.018. Respondent did not dispute appellant’s representation concerning the restrictions under which he lived, but contended that because he was “out on bail and not being held in lieu of bail,” the provisions did not apply. The court denied appellant’s request, finding that because appellant agreed to home detention with electronic monitoring as a condition of reduced bail and not “in lieu of bail” he was not entitled to the requested credit. The court awarded 19 days’ custody credit for the two brief periods appellant spent in jail, plus 19 days’ good time/work time credit. This appeal followed.

DISCUSSION

■ Section 2900.5, subdivision (a) applies to all convicted criminal defendants, awarding them credit for days spent “in custody.” (See *People v. Johnson* (2010) 183 Cal.App.4th 253, 289 [107 Cal.Rptr.3d 228].) Its twofold legislative purpose is “‘to eliminate the unequal treatment suffered by indigent defendants who, because of their inability to post bail, served a longer overall confinement than their wealthier counterparts . . . [citations]’” (*People v. Mendez* (2007) 151 Cal.App.4th 861, 864 [60 Cal.Rptr.3d 182], quoting *In re Rojas* (1979) 23 Cal.3d 152, 156 [151 Cal.Rptr. 649, 588 P.2d 789]), and to “equaliz[e] the actual time served in custody by defendants convicted of the same offense” (*In re Joyner* (1989) 48 Cal.3d 487, 494 [256 Cal.Rptr. 785, 769 P.2d 967]; see *In re Young* (1973) 32 Cal.App.3d 68, 75 [107 Cal.Rptr. 915] [failure to provide presentence custody credit to defendant who could not afford to post bail “operates to create an unconstitutional discrimination” between “persons who are convicted of the same crime who are able to afford bail and so secure liberty and those who cannot do so and are confined”]). “Recognizing that defendants may be in pretrial custody in institutions other than ‘jails’ for reasons other than indigency, the Legislature and the courts have extended subdivision (a) of the statute to include a broad range of custodial situations for which credit must be granted . . .” (*In re Rojas*, *supra*, 23 Cal.3d at p. 156.)

Subdivision (a) of section 2900.5 currently provides in relevant part: “In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, . . . all days of custody of the defendant, including . . . days served in home detention pursuant to Section 1203.016 or Section 1203.018, shall be credited upon his or her term of imprisonment . . .”²

■ Section 1203.018 authorizes “the board of supervisors of any county” to “offer a program under which inmates being held in lieu of bail in a county jail or other county correctional facility may participate in an electronic monitoring program” under specified conditions. (§ 1203.018, subd. (b).)

■ The statute leaves the exact terms of the electronic monitoring program to the discretion of county authorities, but requires the programs created to obtain the participant’s assent in writing to the following conditions: (1) the participant “shall remain within the interior premises of his or her residence during the hours designated by the correctional administrator”; (2) the participant “shall admit any person or agent designated by the correctional administrator into his or her residence at any time for purposes of verifying the participant’s compliance with the conditions of his or her detention”; (3) the electronic monitoring “may include global positioning system devices or other supervising devices for the purpose of helping to verify the participant’s compliance with the rules and regulations of the electronic monitoring program” which may be used to record “conversation[s] between the participant and the person supervising the participant . . . for the purposes of voice identification”; and (4) the administrator in charge of the facility from which the participant has been released may “immediately retake the person into custody” if the electronic monitoring device malfunctions, the participant fails to remain at home, the participant fails to pay the fees associated with the program, or the participant “for any other reason no longer meets the established criteria.” (*Id.*, subd. (d)(1)-(4).) The correctional administrator is empowered to “permit electronic monitoring program participants to seek and retain employment in the community, attend psychological counseling sessions or educational or vocational training classes, or seek medical and dental assistance.” (*Id.*, subd. (h).)

■ The first sentence of section 1203.018 states that it applies “only . . . to inmates being held in lieu of bail and on no other basis.” (§ 1203.018, subd. (a).) Subdivision (c) provides that to qualify for participation in the

² The provision was added to the statute in 2011, in the same legislation that enacted section 1203.018. (See Stats. 2011, ch. 15, § 466.) Section 1203.016 governs electronic monitoring programs for convicted defendants committed to “a county jail or other county correctional facility or granted probation, or . . . participating in a work furlough program,” and other than in its description of the category of inmates to whom it applies, contains substantially the same language as section 1203.018. (§ 1203.016, subd. (a).)

electronic monitoring program, the inmate must have “no holds or outstanding warrants,” and that one of the following must apply: “[t]he inmate has been held in custody for at least 30 calendar days from the date of arraignment pending disposition of only misdemeanor charges”; “[t]he inmate has been held in custody pending disposition of charges for at least 60 calendar days from the date of arraignment”; or “[t]he inmate is appropriate for the program based on a determination by the correctional administrator that the inmate’s participation would be consistent with the public safety interests of the community.” (§ 1203.018, subd. (c)(1)(A)–(C).) Subdivision (g)(2) grants to the correctional administrator “discretionary authority consistent with this section to permit program participation as an alternative to physical custody,” and subdivision (g)(1) provides: “A person shall be eligible for participation in an electronic monitoring program only if the correctional administrator concludes that the person meets the criteria for release established under this section”

■ There is no dispute that appellant was enrolled in the county’s electronic monitoring program. The contract he signed was entitled “Electronic Monitoring Program Los Angeles County Participant Contract.” Its first sentence read, “You have been placed in the Los Angeles County Probation Department Electronic Monitoring Program (EMP) as an alternative to incarceration.” Nor is there any dispute that appellant’s electronically monitored confinement was subject to the conditions described in section 1203.018: he was tagged with an electronic monitor, he was required to remain in his home during the hours designated by the administrator, he was required to admit agents of the administrator into his home to search and ensure compliance, and he was subject to being taken into custody if he failed to meet the program’s requirements. Thus, he was in custody as restrictive as that of any defendant assigned to the County’s electronic monitoring program who was eligible for custody credit under section 2900.5.

Respondent disputes that appellant was in custody “pursuant to” section 1203.018. Respondent’s primary contention is that appellant’s detention was not “in lieu of bail and for no other reason” because he “voluntarily entered into a special agreement with the court to post bail of \$350,000 and stay on home confinement in exchange for reduction of bail from \$455,000.” We disagree. Appellant’s home detention was “in lieu of” \$455,000 bail. The court specifically advised appellant that to avoid remand, he would be required either to post an additional \$105,000 or, in lieu of such additional bond, submit to home confinement. This placed appellant in the same position as any other defendant who lacked the financial resources to post a \$105,000 bond in order to remain at liberty pending trial. The statutory purpose of “‘eliminat[ing] the unequal treatment suffered by indigent defendants who, because of their inability to post bail, served a longer overall confinement than their wealthier counterparts . . . [citations]’ ” is equally served where the

defendant must suffer home confinement because he or she cannot afford the bail set by the court and agrees to home confinement in exchange for a reduced amount. (*People v. Mendez, supra*, 151 Cal.App.4th at p. 864.)

Respondent directs our attention to a variation in the procedure that led to appellant's assignment to home detention under the County's electronic monitoring program, pointing out that no "correctional administrator" determined that appellant's participation would be consistent with the public safety interests of the community.³ (See § 1203.018, subd. (c)(1)(C).) There is no dispute that the court, rather than a correctional administrator, made this determination. (See § 1275, subd. (a)(1) ["In setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration"].) We view this as a distinction without a difference. Indeed, respondent suggests no reason why, in assessing a defendant's entitlement to custody credit, a judicial determination that the defendant may be placed in home confinement without jeopardizing public safety should be treated any differently than the same determination by a correctional administrator.

■ Accordingly, we conclude that the phrase "pursuant to . . . Section 1203.018" must be read to require the award of custody credit if the home-detained defendant participated in an electronic monitoring program established "pursuant to" section 1203.018 without regard to the manner in which the defendant came to be assigned to the program. The Legislature could not have intended to exclude home detentions that met the standards outlined in section 1203.018 from section 2900.5's definition of "in custody" merely because the defendant became a participant as a result of a court order. Denying a defendant presentence custody credit for days spent in home detention based on the manner in which he or she came to participate in the program would elevate form over substance; the focus is properly on whether the placement met certain custodial conditions and standards, not the procedure by which the defendant was placed. (See *People v. Mobley* (1983) 139 Cal.App.3d 320, 322–323 [188 Cal.Rptr. 583] [trial court erroneously denied defendant presentence custody credit for time spent in halfway house because defendant lived there as a condition of release on his own recognizance rather than as a condition of probation; "[t]he right to credit is based not on the

³ Respondent also points out that appellant was in actual custody for only 19 days, falling short of the 60 calendar days that an inmate facing felony charges must be held in custody before seeking home detention under section 1203.018, subdivision (c)(1)(B). However, subdivision (c)(1)(C) of section 1203.018, allows an inmate to avoid serving the minimum jail time if the correctional administrator agrees that his or her participation in the electronic monitoring program "would be consistent with the public safety interests of the community." As noted, here the court determined that appellant could safely be detained at home.

procedure by which a defendant is placed in such a facility, but on the requirements that the placement be ‘custodial’ ”].)

That appellant’s home detention was under the provisions of an electronic monitoring program established by Los Angeles County for pretrial detainees who meet the standards of section 1203.018 is not disputed. An interpretation of section 2900.5 that includes within the definition of “in custody” all “home detention[s]” under programs established pursuant to section 1203.018 provides appellant and all other defendants placed in the County’s electronic monitoring program by the court the same presentencing custody credit awarded to defendants assigned to the program by the correctional administrator. Such interpretation ensures that like defendants are treated alike, and equalizes punishment for the same crimes. In addition, such interpretation harmonizes section 2900.5 with the federal and state constitutions’ equal protection clauses.⁴ Accordingly, we adopt this interpretation and conclude the trial court erred in refusing the requested custody credit.

⁴ A statute that precludes similarly detained defendants from receiving similar custody credit raises serious constitutional concerns. A precursor to the current provision appeared in section 2900.5 between 1991 and 1999 (see Stats. 1991, ch. 437, § 10, p. 2218; Stats. 1994, ch. 770, § 7, p. 3845), and was interpreted as applying only to “‘home detention programs’” authorized under section 1203.016 (applicable to convicted defendants serving their sentences and no others). (*People v. Lapaille* (1993) 15 Cal.App.4th 1159, 1163–1168 [19 Cal.Rptr.2d 390].) As a result, the defendant in *Lapaille* received no credit for spending over a year in home detention ordered as a condition of the trial court’s decision to release him prior to trial on his own recognizance. (See *id.* at pp. 1162–1164.) In determining whether the state had a compelling interest in making this distinction, the court examined whether the defendant’s confinement to his home was “as custodial, or restraining” as the confinement faced by those held in home detention pursuant to programs authorized by section 1203.016, and concluded that “defendant in this case was subject to restraints at least as confining as those placed on persons in electronic home detention programs, so that his house arrest was just as ‘custodial.’” (*Lapaille, supra*, 15 Cal.App.4th at p. 1169.) Accordingly, the court found the procedural differences were “not legitimate bases for treating defendant differently from those placed in electronic home detention program pursuant to section 1203.016,” and held that the defendant was entitled to custody credits under the state and federal constitutions’ equal protection clauses. (*Lapaille, supra*, at pp. 1169–1170.)

In reaching this conclusion, the court relied on the Supreme Court’s decision in *In re Kapperman* (1974) 11 Cal.3d 542 [114 Cal.Rptr. 97, 522 P.2d 657], where the court considered a provision in a prior version of section 2900.5 mandating that convicted defendants receive credit for all days spent in custody starting from the date of arrest, but restricting its application to those “‘delivered into the custody of the Director of Corrections on or after . . . [March 4, 1972].’” (*In re Kapperman, supra*, 11 Cal.3d at p. 544, fn. 1.) The court concluded that the limitation violated “article I, sections 11 and 21, of the California Constitution and the equal protection clause of the Fourteenth Amendment in that it constitute[d] a legislative classification which [was] not reasonably related to a legitimate public purpose.” (*Id.* at p. 545.) Accordingly, the court “invalidat[ed] . . . the invidious exception” and “extend[ed] the statutory benefits to those whom the Legislature improperly excluded.” (*Id.* at p. 550.)

DISPOSITION

The judgment is reversed as to the award of custody credit and the matter is remanded for a determination of the number of days of additional presentence custody credit to award appellant. In all other matters, the judgment is affirmed.

Willhite, Acting P. J., and Collins, J., concurred.

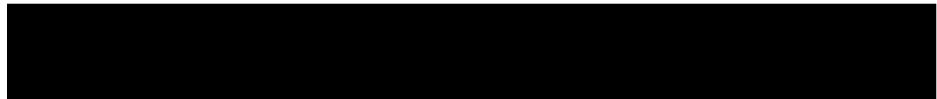
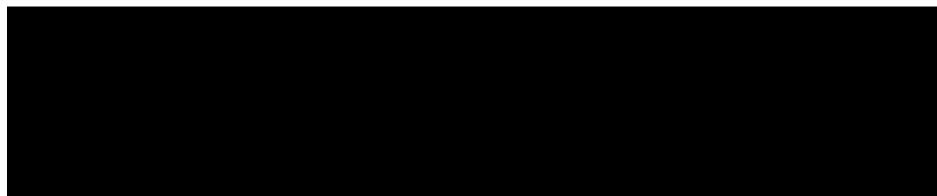
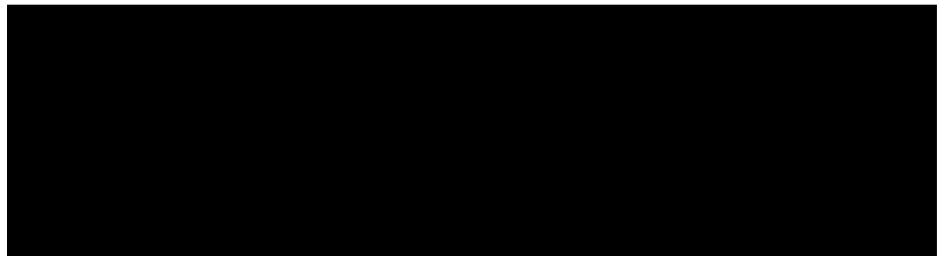
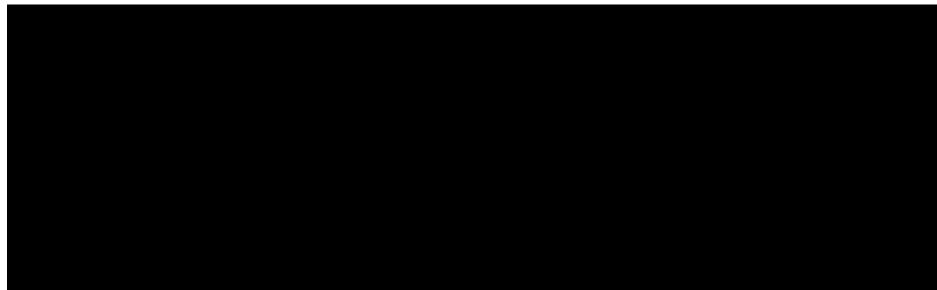
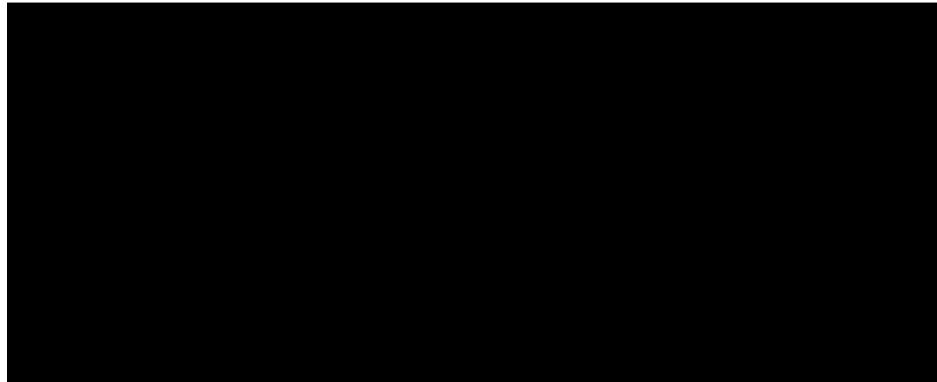
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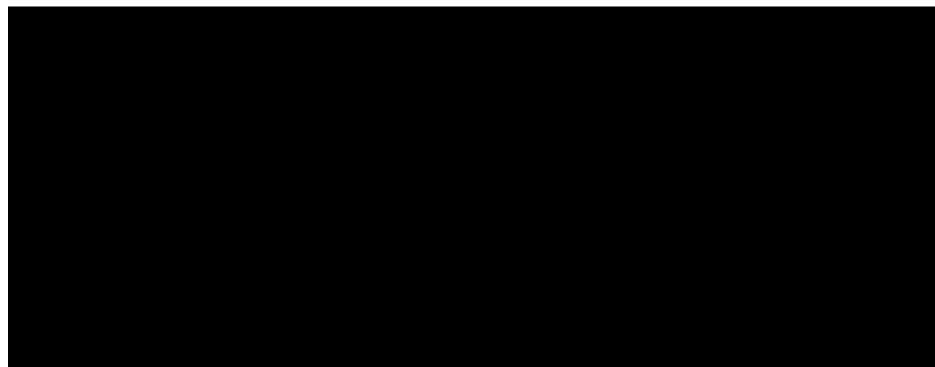
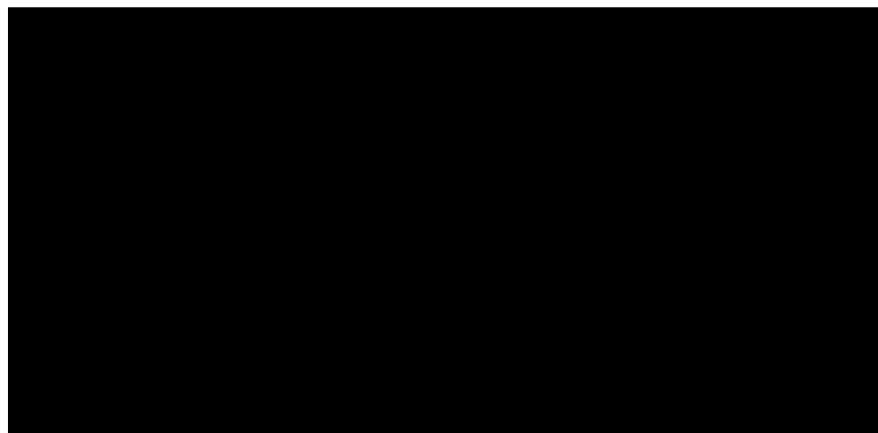
MICHELLE M. NICHOLS, Plaintiff and Appellant, v.
CENTURY WEST, LLC, et al., Defendants and Respondents.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Rosner, Barry & Babbitt, Christopher P. Barry and Lacee B. Smith for Plaintiff and Appellant.

James G. Lewis for Defendant and Respondent Century West.

Caley & Associates, Christopher M. Domin and Rebecca A. Caley for Defendant and Respondent BMW Financial Services.

OPINION**COLLINS, J.—****INTRODUCTION**

Plaintiff Michelle Nichols purchased a car from defendant Century West, LLC, using three checks as a down payment. Two of the checks were dated the day after the contract was signed, and one check was dated about two weeks later. After owning the car for 11 months, Nichols sued Century West and defendant BMW Financial Services NA, LLC, which financed the vehicle, seeking to rescind the contract. Nichols's evidence at trial focused mostly on whether she received a fair deal for her trade-in vehicle, a new car she had leased one month earlier. Following a bench trial, the court found in favor of defendants.

On appeal, Nichols's sole argument is that because Century West entered her three-check down payment on the line of the sales contract describing it as a down payment, rather than on the line describing it as a "deferred" down payment, she has the right to rescind the contract under the Rees-Levering Motor Vehicle Sales and Finance Act (Civ. Code, § 2981 et seq.)¹ (the Act). We affirm the judgment. Neither the language of the Act nor the cases Nichols cites compel a finding that a car dealer's informal agreement to wait to deposit a check tendered the day of the purchase—as opposed to scheduling a payment to be made at a later date—constitutes a deferred down payment. Nichols therefore has not demonstrated that the Act authorizes her to rescind the contract under the circumstances here.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves two different vehicle transactions: first a lease, and then a sale. Only the sale is relevant to the appeal, but several of Nichols's causes of action were based on issues related to the lease.² We discuss the lease here only for context, and focus on the evidence and argument relevant to the appeal. The following facts were presented to the trial court at a bench trial.

Nichols testified that in September 2012, she had a BMW 640 she had leased the previous January. She decided that "the 640 was a little small for me," and in late September 2012, she went to Century West to look for a new

¹ All further statutory references are to the Civil Code unless otherwise indicated.

² Nichols also sued defendants for violations of the Song-Beverly Consumer Warranty Act (§ 1790 et seq.), violations of the Consumers Legal Remedies Act (§ 1750 et seq.), unlawful business practices (Bus. & Prof. Code, § 17200), fraudulent misrepresentation, negligent misrepresentation, and a violation of Vehicle Code section 11711.

car with her boyfriend, Claudio Torres. Nichols knew she was “upside down” on the 640, meaning she owed about \$5,000 more than the car was currently worth. Nichols leased a new BMW 750Li, but because it was a larger car, she was concerned it might not fit into her garage. When she got home, she found that the 750Li in fact did not fit into her garage.

Nevertheless, Nichols and Torres drove the 750Li for nearly a month, putting about 1,700 miles on the car. They then took it back to Century West to exchange it for another car. Much of the trial focused on whether Nichols had been told when she leased the 750Li that she could return it. When Nichols took the 750Li back to Century West, employees told her that she could not return the car after using it for a month, but she could trade it in for a different car. However, the car had depreciated considerably in the month Nichols had leased it, so she was further “upside down” on the next transaction because the trade-in value of the 750Li was less than what she owed on the lease.

Nichols and Century West entered into a contract on October 26, 2012, for Nichols to purchase a BMW X6. Nichols agreed to pay a \$3,000 down payment, and provided Century West with three checks: one check for \$1,000, dated October 27, 2012, from Medilogic, Inc., Torres’s company; one check for \$1,000, dated October 27, 2012, from Carmen Torres Interpreting, Torres’s mother’s business; and one check for \$1,000, dated November 9, 2012, also from Carmen Torres Interpreting. The general manager of Century West, Edelmiro Rosas, knew Torres’s father; Rosas testified that as a favor to Torres, he agreed to allow Nichols to pay with three checks and to hold those checks briefly before depositing them. Rosas testified that Century West rarely held checks for customers. He also testified that according to his understanding, there was no legal requirement that the dealership deposit checks within any particular time frame after receiving them.

The contract for the BMW X6 was a printed, fill-in-the-blanks form, which included the following section with the underlined parts filled in:

“6. Total Downpayment

“A. Agreed Trade-In Value Yr 2012 Make BMW \$70000.00

Model 7 Series Odom 1771

VIN []

“B. Less Prior Credit or Lease Balance \$84585.00

“C. Net Trade-in (A less B) (indicate if a negative number) \$-14585.00

“D. Deferred Downpayment \$N/A

“E. Manufacturer’s Rebate \$750

“F. Other N/A \$N/A

“G. Cash \$3000.00

“Total Downpayment (C through G) \$0.00³

Gary Weisberg, a finance manager for Century West, testified that all checks are typically listed on purchase contracts as cash: “There [are] no separate lines on a purchase order to call something a check or a cashier’s check or cash, whatever. All down payments are cash.”

Nichols testified that she did not read the contract for the X6 the day she purchased the car. She testified in her deposition, which was read at trial, that her only concern about the contract was that the monthly payments remained relatively consistent from the 640, to the 750Li, to the X6. She was not concerned about the other terms of the contract. In her complaint, Nichols stated that she was unaware that Century West listed the down payment checks as a down payment until her attorneys looked at the contract in 2013.

Century West submitted the three down payment checks to the bank on November 9, but the two \$1,000 checks from Carmen Torres Interpreting were returned unpaid. Century West called Nichols about the returned checks sometime in November; she was with Torres when she received the call. Torres provided Century West with a bank account number to charge \$500 of the down payment. The rest of the down payment remained unpaid, and in March 2013 Century West filed a small claims lawsuit against Nichols seeking the remaining \$1,500. Nichols testified that she paid the \$1,500 as soon as she was served with the complaint in the small claims action.

Nichols’s monthly car payments were to be made to BMW Financial. Nichols made the payments over the phone from Torres’s Mediologic checking account number until September 2014, when Nichols began making the payments from her personal checking account. Nichols testified that at the time of trial in March 2015, the X6 currently had 40,000 miles on it.

³ Section 2982, subd. (a)(6)(G) requires the “total downpayment” to be listed as zero when the down payment amount, including trade-in value, is a negative number.

In closing arguments, Nichols's counsel asserted that various violations of the Act had been proved. Counsel stated that there was a "failure to disclose a deferred down payment," since "some or all of the checks were agreed to be held until November 9th." This was the basis for two different code section violations: "2982[, subdivision (a)(6)(D)], which requires disclosure for deferred down payment, and 2982[, subdivision](c), which requires that the [deferred down] payment schedule be disclosed in the contract." Nichols's counsel reasoned, "If the checks were being held to a particular date, there is a payment scheduled in the cont[r]act where it should say payment of \$1,000 on November 9th." Counsel argued that it did not matter whether Nichols asked that the checks be held, because "the statute places the burden on the dealership to make a proper disclosure."

Nichols's attorney also argued, "If the court were to somehow conclude that a hold check is different from a deferred down payment,^[4] we nevertheless still believe the Automobile Sales Finance Act is violated because the agreement to hold the checks would violate the single document rule. The single document rule in section 2981.9 requires all agreements of the buyer and seller with respect to the terms of the payment be disclosed in the contract, and this contract does not disclose the agreement that down payment checks will be held to a certain date."

Counsel continued, "[T]he failure to itemize the deferred down payment and the violation of the single document rule are violations of the statute that entitle the consumer under 2983 and 2983.1 to rescind the contract, and that is the remedy that Ms. Nichols seeks for that violation. The dollar figure that we put on that is the \$3,000 down payment, 27 payments of \$1,291.79, and one payment of \$591.79 for a total of \$38,470.12. And then under revision [sic], she would return the vehicle, and the dealership would be obligated to pay off the remainder of the contract to BMW Financial."

Counsel for Century West argued in closing, "The tender of a check . . . appears to be a payment. There is no agreement for a subsequent payment date." He also argued, "[A]ll three checks were cashed on the ninth of November. . . . There is no law that says you have to deposit them right away. If a dealer takes a deposit and doesn't deposit it right away but holds it for even a month before he deposits it, does that become part of a deferred down payment?" Counsel for defendant BMW Finance, which financed the loan, argued that it could not be liable because it did not prepare the contract.

⁴ There was some confusion over the terminology used at trial. At one point during trial, the court asked counsel, "Are you using the words deferred down payment and a check being held as being interchangeable?" Plaintiff's counsel answered, "Plaintiff is, yes." Counsel for Century West said, "Plaintiff is; we're not."

Two weeks after the trial, the court issued a tentative decision. The court found for defendants on all of Nichols's claims relating to both the lease of the 750Li and the sale of the X6. In the portion of the tentative decision relevant to this appeal, the court stated, "Plaintiff provided no evidence that the holding of the checks affected any aspect of the purchase transaction. It did not increase the purchase price, the amount financed, the annual percentage rate, monthly payments, payment schedule or the balloon final payment. Indeed, it was the dealer who lost the use of the funds for the period of time held and the subsequent period until they were all fully collected." The court discussed two cases Nichols cited relating to deferred down payments under the Act, *Rojas v. Platinum Auto Group, Inc.* (2013) 212 Cal.App.4th 997 [151 Cal.Rptr.3d 562] (*Rojas*) and *Munoz v. Express Auto Sales* (2014) 222 Cal.App.4th Supp. 1 [166 Cal.Rptr.3d 921] (*Munoz*), both of which are discussed more fully below. The court held that while those cases involved down payments that were made in installments, here "plaintiff clearly made her \$3,000 down payment at the time of purchase" and "there was nothing further for her to do." The court concluded, "Absent legal authority that a dealer's agreement to hold a check for a period of time or accept a post-dated check constitutes a deferred payment, the court finds in favor of defendants."

Nichols objected to the tentative statement of decision, and cited *Highway Trailer of California, Inc. v. Frankel* (1967) 250 Cal.App.2d 733 [58 Cal.Rptr. 883] (*Highway Trailer*) (discussed more fully below), which held that a postdated check that was not accurately represented in a contract should not have been listed as a "cash" down payment. Nichols concluded, "Thus, there is legal authority directly on point that a post-dated check is a deferred down payment under the Automobile Sales Finance Act." Defendants filed responses pursuant to the court's request for further briefing, and the trial court issued a "further tentative decision." In it, the court noted that *Highway Trailer* had not been cited by any other court in the 48 years since it was published. It also observed that *Highway Trailer* relied on an earlier version of the Act in which deferred down payments were not mentioned. The court stated that its tentative ruling would not change based on Nichols's citation to *Highway Trailer*.

The court entered judgment for defendants, and Nichols appealed.

STANDARD OF REVIEW

■ Nichols argues that "the trial court's refusal to enforce the Automobile Sales Finance Act's disclosure requirements is a legal error requiring reversal." This case therefore presents a question of statutory interpretation, which we consider de novo. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387 [97 Cal.Rptr.3d 464, 212 P.3d 736].) In any case

involving statutory interpretation, our fundamental task is to determine and effectuate the Legislature's intent. (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268 [36 Cal.Rptr.2d 563, 885 P.2d 976]; *People v. Murphy* (2001) 25 Cal.4th 136, 142 [105 Cal.Rptr.2d 387, 19 P.3d 1129].) "We consider the ordinary meaning of the statutory language, its relationship to the text of related provisions, terms used elsewhere in the statute, and the overarching structure of the statutory scheme." (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 155–156 [202 Cal.Rptr.3d 447, 370 P.3d 1011].) If there is no ambiguity in the statutory language, the plain meaning controls. (*Lennane, supra*, 9 Cal.4th at p. 268.) "When the language of a statutory provision remains opaque after we consider its text, the statute's structure, and related statutory provisions, we may take account of extrinsic sources—such as legislative history—to assist us in discerning the Legislature's purpose." (*Winn, supra*, 63 Cal.4th at p. 156.)

DISCUSSION

Nichols contends that because her down payment checks were postdated, and Century West did not list them on the contract as a deferred down payment, Century West violated the Act and the contract must be rescinded. (See § 2983, subd. (a) ["[I]f the seller, except as the result of an accidental or bona fide error in computation, violates any provision of 2981.9 or of subdivision (a), (j), or (k) of Section 2982, the conditional sale contract shall not be enforceable."].) The statute does not support Nichols's argument.

Section 2981 provides definitions for the Act. It includes the following definition: "'Downpayment' means a payment that the buyer pays or agrees to pay to the seller in cash or property value or money's worth at or prior to delivery by the seller to the buyer of the motor vehicle described in the conditional sale contract. The term shall also include the amount of any portion of the downpayment the payment of which is deferred until not later than the due date of the second otherwise scheduled payment, if the amount of the deferred downpayment is not subject to a finance charge. The term does not include any administrative finance charge charged, received or collected by the seller as provided in this chapter." (§ 2981, subd. (f).)

Section 2982 sets out the formalities of conditional sales contracts.⁵ That statute requires "[t]he amount of the buyer's downpayment" to be "itemized to show the following: [¶] . . . [¶] The amount of any portion of the

⁵ A "[c]onditional sale[s] contract," such as the one here, is a "contract for the sale of a motor vehicle between a buyer and a seller, with or without accessories, under which possession is delivered to the buyer and . . . [¶] . . . [t]he title vests in the buyer thereafter only upon the payment of all or a part of the price, or for the performance of any other condition." (§ 2981, subd. (a)(1)(A).)

downpayment to be deferred until not later than the due date of the second regularly scheduled installment under the contract and that is not subject to a finance charge.” (§ 2982, subd. (a)(6)(D).)⁶ “If payment of all or a portion of the downpayment is to be deferred, the deferred payment shall be reflected in the payment schedule disclosed pursuant to Regulation Z.”⁷ (§ 2982, subd. (c).)

On October 26, 2012, the day she purchased the X6, Nichols provided Century West with three checks: two checks for \$1,000, dated October 27, 2012, and one check for \$1,000, dated November 9, 2012. Nichols’s monthly payments were set to begin on November 25, 2012, so none of the checks was deferred to “later than the due date of the second otherwise scheduled payment.” All three checks therefore fell under the definition of “downpayment” in section 2981, subdivision (f).

■ The question presented, therefore, is whether down payment checks provided to the seller on the date of purchase—as opposed to payments scheduled to be made at a later date—are deferred down payments. The Act does not include any definition for “deferred.” As such, nothing in the language of the statute barred Century West from accepting checks on the

⁶ The complete text of section 2982, subdivision (a)(6) is as follows:

“(a) The contract shall contain the following disclosures, as applicable, which shall be labeled ‘itemization of the amount financed’: [¶] . . . [¶]

“(6) The amount of the buyer’s downpayment itemized to show the following:

“(A) The agreed value of the property being traded in.

“(B) The prior credit or lease balance, if any, owing on the property being traded in.

“(C) The net agreed value of the property being traded in, which is the difference between the amounts disclosed in subparagraphs (A) and (B). If the prior credit or lease balance of the property being traded in exceeds the agreed value of the property, a negative number shall be stated.

“(D) The amount of any portion of the downpayment to be deferred until not later than the due date of the second regularly scheduled installment under the contract and that is not subject to a finance charge.

“(E) The amount of any manufacturer’s rebate applied or to be applied to the downpayment.

“(F) The remaining amount paid or to be paid by the buyer as a downpayment.

“(G) The total downpayment. If the sum of subparagraphs (C) to (F), inclusive, is zero or more, that sum shall be stated as the total downpayment, and no amount shall be stated as the prior credit or lease balance under subparagraph (I) of paragraph (1). If the sum of subparagraphs (C) to (F), inclusive, is less than zero, then that sum, expressed as a positive number, shall be stated as the prior credit or lease balance under subparagraph (I) of paragraph (1), and zero shall be stated as the total downpayment. The disclosure required by this subparagraph shall be labeled ‘total downpayment’ and shall contain a descriptor indicating that if the total downpayment is a negative number, a zero shall be disclosed as the total downpayment and a reference made that the remainder shall be included in the disclosure required pursuant to subparagraph (I) of paragraph (1) [relating to the amount charged for a service contract].”

⁷ Regulation Z is a regulation promulgated under the federal Truth in Lending Act, 15 United States Code section 1601 et seq. (See § 2981, subd. (m).)

date of purchase and agreeing to deposit them later. Similarly, the language of the statute does not require such checks to be categorized as deferred payments.

Because the statute does not provide guidance on the definition of “deferred,” we may consider other sources. When “statutory terms are ambiguous . . . we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] In such circumstances, we ‘select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.’” (Day v. City of Fontana (2001) 25 Cal.4th 268, 272 [105 Cal.Rptr.2d 457, 19 P.3d 1196].)

Turning to the Legislature’s intentions behind the Act, it is clear that the Act “was designed to provide . . . comprehensive protection for the unsophisticated motor vehicle consumer.”⁸ (Hernandez v. Atlantic Finance Co. (1980) 105 Cal.App.3d 65, 69 [164 Cal.Rptr. 279].) “[A]mong other things,” the Act “requires a person selling or leasing a motor vehicle under a conditional sale contract to disclose certain information to a buyer.” (Legis. Counsel’s Dig., Assem. Bill No. 238 (2011–2012 Reg. Sess.) Oct. 7, 2011.) The parties have not pointed us to anything in the legislative history to suggest that the Legislature adopted any particular definition of the term “deferred down payment.” The legislative history therefore does not provide guidance on the issue before us.

Nichols cites four cases involving various versions of the Act to support her position that her checks constituted a deferred down payment. The earliest case is Bratta v. Caruso Car Co. (1958) 166 Cal.App.2d 661 [333 P.2d 807] (Bratta), in which the plaintiffs contracted to purchase a car from a dealership defendant, and the contract stated that the plaintiffs made a \$300 cash down payment. In fact, the plaintiffs “did not pay \$300 or any sum in cash” as a down payment, but instead “executed a promissory note in this amount” and agreed with the defendant that plaintiffs “would procure a loan elsewhere in a sufficient amount to pay the note.” (*Id.* at p. 663.) The court noted that section 2982 required a contract to reflect the “‘amount of the buyer’s down payment, and whether made in cash or represented by the net agreed value of described property traded in, or both, together with a

⁸ Defendant BMW Financial cites this language to argue that the Act should not apply to Nichols, because she was not an unsophisticated purchaser. Nichols testified that before leasing the BMW 640 in January 2012, she had leased a BMW 528 in March 2010, a Mercedes CLS 550 in December 2007, and a Mercedes CLA 500 in August 2006. Although the Act is intended to protect unsophisticated vehicle consumers, nothing in the Act suggests that its protections do not apply equally to all vehicle consumers.

statement of the respective amounts credited for cash and for such property.’” (*Bratta*, at p. 664.) The court held that the plaintiffs’ promissory note was not properly categorized: “The promise of appellants as evidenced by the execution of the promissory note is no more ‘cash’ than their promise in the contract to pay the balance of the contract price as therein set forth in installments. Each is a mere promise to pay and such a promise does not constitute ‘cash’ within the meaning of the statute.” (*Id.* at p. 665.) The court held that the contract was unenforceable because it did not comply with the requirements of section 2982. (*Bratta*, at p. 667.)

The court in *Highway Trailer of California, Inc. v. Frankel, supra*, 250 Cal.App.2d 733 relied on the holding of *Bratta*. There, the defendant agreed to purchase two trailers from the plaintiff, and they entered into separate contracts for each trailer. Each contract stated that the defendant had made a cash down payment of \$700. The defendant submitted three checks: a \$200 check dated two days before the contracts were signed, a \$1,000 check dated the same day as the contracts, and a \$200 check dated the day after the contracts. The court characterized the question before it as follows: “Did the checks constitute two cash payments of \$700? . . . If they did not, did that fact render the contracts so invalid that the plaintiff may not recover them?” (*Id.* at p. 734.) The court noted that the version of section 2982 at issue when the contracts were signed required a contract to state “[t]he amount of the buyer’s down payment, and whether made *in cash* or represented by the net agreed value of described property traded in, or both, together with a statement of the respective amounts credited for *cash* and for such property.” (*Highway Trailer*, at p. 734, original italics.) The court discussed the holding in *Bratta* that a promise to pay at a later date should not be characterized as cash, and concluded, “Assuming, without deciding, that a currently dated check, drawn on an account having sufficient funds to pay it, is ‘cash’ within the meaning and intent of section 2982, certainly a post-dated check is not ‘cash’ within that meaning and intent, being no better than any other promise to pay in the future.” (*Highway Trailer, supra*, 250 Cal.App.2d at p. 736.) The court concluded, “Since the [post-dated] \$200 check dated February 25, 1961 (and not actually cashed until March 1, 1961) was, so far as this record discloses, applied to the two contracts without separate allocation, it follows that the statement in each contract that the down payment was \$700 *in cash* was incorrect and that contracts so phrased violated section 2982.” (*Ibid.*)

■ Nichols argues that because *Highway Trailer* held that the postdated \$200 check was simply a “promise to pay,” any postdated check necessarily must be a deferred down payment under the Act. But *Highway Trailer* does not support this dichotomy. *Highway Trailer* did not discuss the definition of a deferred down payment, and therefore it does not speak to the proper definition of that phrase within the Act. (See *In re Chavez* (2003) 30 Cal.4th

643, 656 [134 Cal.Rptr.2d 54, 68 P.3d 347] [“As is well established, a case is authority only for a proposition actually considered and decided therein.”].) Moreover, the court in *Highway Trailer* decided the contract case before it; the court was not stating new law or policy about how postdated checks should be treated under the Act. (See *McGee v. Superior Court* (1985) 176 Cal.App.3d 221, 226 [221 Cal.Rptr. 421] [“The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning.”].) In addition, we have found no other law or case suggesting that whether a check may be characterized as a down payment depends on the date of the check.⁹ To the extent *Highway Trailer* can be read to suggest that a postdated check, as a matter of law, cannot be listed on a contract as a down payment under the Act, we disagree.

Nichols also cites *Rojas v. Platinum Auto Group, Inc., supra*, 212 Cal.App.4th 997. In that case, the plaintiff purchased a car with no cash down; instead, he paid his \$2,000 down payment in four installments over a period of about three months. (*Id.* at p. 999.) On the sales contract, the dealership entered \$2,000 on the “total downpayment” line, instead of listing it on the line for a deferred down payment. (*Id.* at p. 1000.) The plaintiff sued under the Act, alleging that the down payment was improperly categorized on his contract. The trial court sustained the defendant dealership’s demurrer, finding that placing the down payment on the wrong line was trivial and caused the plaintiff no actual loss. (*Id.* at p. 1001.) The Court of Appeal reversed, finding that the down payment should have been characterized as deferred instead of a regular down payment: “Because the Legislature drew the distinction [in the Act], we cannot conflate the two types of down payments as if they were one and the same.” (*Id.* at p. 1003.) The court also noted that the amount of down payment listed on the contract was wrong, because the plaintiff’s payments toward the down payment were not completed by “‘the due date of the second otherwise scheduled payment.’” (*Ibid.*, italics omitted.) The last payment therefore did not satisfy the definition of a down payment in section 2981, subdivision (f), nor was it a deferred down payment under section 2982, subdivision (a)(6)(D). (*Rojas*, at p. 1003.) The court held that even though plaintiff had not suffered damages as a result of these errors, the plaintiff had stated a claim for relief under the Act and the demurrer should have been overruled. (*Rojas*, at p. 1005.)

Nichols also relies on *Munoz v. Express Auto Sales, supra*, 222 Cal.App.4th Supp. 1, a case from the Appellate Division of the Los Angeles Superior

⁹ Section 2982, subdivision (b), states that “[n]o particular terminology is required to disclose the items set forth in subdivision (a) except as expressly provided in that subdivision.” Certain items throughout subdivision (a) specifically state that they “shall be labeled” in a certain way. Neither “cash” nor “check” is included as required language.

Court. In that case, the plaintiffs purchased a car with a down payment of \$3,000: “The downpayment consisted of \$1,500 paid by check at the time of the sale, \$1,000 for a [trade-in car], and two \$250 deferred cash payments which would be made by plaintiffs within a month.” (*Id.* at p. 5.) The contract listed the entire \$3,000 down payment as cash, while “[s]elections in paragraph 6 that allowed information regarding any trade-in vehicle, including the vehicle’s agreed trade-in value, its model and make, were left blank. The value of the trade-in, as well as the amount of any deferred downpayment, was listed as ‘\$0.00.’” (*Ibid.*) At the behest of plaintiffs’ counsel, the dealer corrected the error. Plaintiffs sued and the trial court entered judgment for the defendants. The Appellate Division reversed, because according to section 2984, the correction of any “willful” error in a contract must be made within 30 days of the execution of the contract; only an inadvertent error may be corrected later. Because the trial court had not made any determination as to whether the error was willful or inadvertent, the Appellate Division held that the judgment in favor of defendants should be reversed. (*Munoz, supra*, 222 Cal.App.4th at p. Supp. 10.)

None of these cases offers guidance on whether postdated checks provided to a dealership at the time of a sale should be categorized as deferred down payments in a contract under the Act instead of as regular down payments. The circumstances here, where Nichols provided Century West with checks on the day she purchased the X6, are unlike those in *Rojas* and *Munoz*, in which the buyers paid portions of their down payments at later dates. Moreover, unlike the circumstances in *Bratta, Highway Trailer, Rojas*, and *Munoz*, the contract’s notation of \$3,000 as the down payment for the X6 accurately stated the parties’ understanding as to the down payment Nichols was making for the X6, and matched the amount on the checks Nichols provided on the day she purchased the X6.

■ Even under de novo review, it is the appellant’s responsibility to affirmatively demonstrate error. (See *Mark Tanner Construction, Inc. v. HUB Internat. Ins. Services, Inc.* (2014) 224 Cal.App.4th 574, 583–584 [169 Cal.Rptr.3d 39].) While it is arguable that a postdated check could be categorized as a deferred down payment rather than a down payment, neither the statutory language, legislative history, nor the case law compels such a result. The Act is intended to include complete and accurate disclosures about vehicle financing, and here the contract accurately stated the parties’ understanding, the amount of the down payment, the amount of the trade-in, and the amount financed. We therefore find no error in the trial court’s rejection of Nichols’s argument that the contract violated the Act by listing the three-check down payment as a down payment rather than a

deferred down payment. Nichols is therefore not entitled to rescind the contract based on alleged violations of section 2982, subdivisions (a)(6)(D) or (c).

Nichols also argues that the contract violated the single document rule in section 2981.9: “Every conditional sale contract subject to this chapter shall be in writing and . . . shall contain in a single document all of the agreements of the buyer and seller with respect to the total cost and the terms of payment for the motor vehicle, including any promissory notes or any other evidences of indebtedness.” Nichols argues that because she and Century West agreed that at least one of her checks would not be deposited until November 9, and that agreement was not stated in the contract, the contract violated the single document rule. She reasons that “[w]hen a payment is due is a ‘term of payment,’ ” and therefore the dates the checks were to be deposited should have been disclosed as a “term of payment” under section 2981.9. She concludes, “Because the Contract does not accurately disclose the true amount of the cash down payment, or the amount of or timing of the deferred down payments, and the information cannot be learned from the single Contract, the Contract violates the [Act’s] single document rule.”

■ We have found no authority supporting Nichols’s assertion that an informal agreement to accommodate a customer by not immediately depositing a check constitutes a “term of payment” requiring disclosure under section 2981.9. As stated above, when Nichols provided her \$3,000 down payment checks to Century West, no further down payment was due from Nichols. Nichols and Century West did not reach any agreement that Nichols was to pay an additional down payment at a later date. Moreover, nothing in the history or stated purposes of the Act suggests that the Act was intended to allow a buyer to rescind a contract where a dealer has accommodated a buyer’s request to hold a down payment check for a few days. And to the extent Nichols’s argument rests on the assumption that the checks constituted a deferred down payment and should have been listed in the contract as such, her argument fails for the reasons stated above.¹⁰

In sum, nothing in the Act compels a finding that an informal agreement to hold down payment checks provided to a dealership at the time of the contract makes the down payment a deferred down payment under the Act. The trial court therefore did not err when it ruled in favor of defendants on Nichols’s claim under the Act.

¹⁰ BMW Financial asks that if we reverse and remand the case, we should instruct the court to rule on BMW Financial’s motion for nonsuit, which the court did not decide. Because we are affirming the judgment, we do not reach this issue.

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

Epstein, P. J., and Manella, J., concurred.

A petition for a rehearing was denied September 14, 2016, and appellant's petition for review by the Supreme Court was denied November 9, 2016, S236875.

[No. A145734. First Dist., Div. Five. Aug. 16, 2016.]

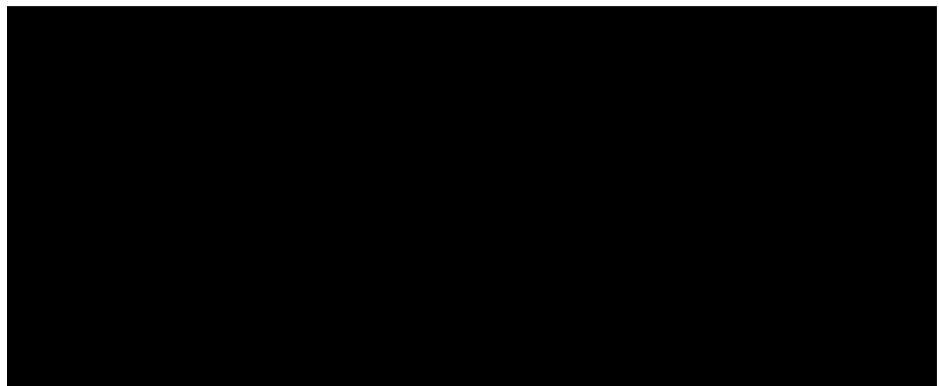
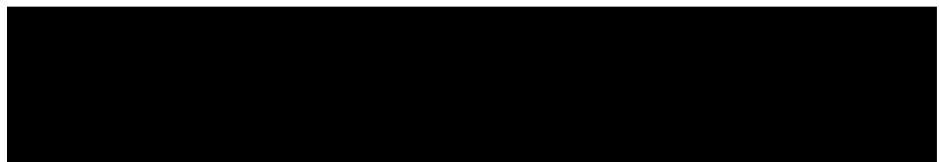
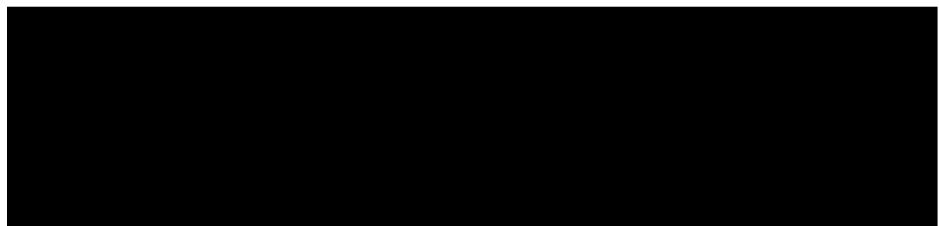
ALUMA SYSTEMS CONCRETE CONSTRUCTION OF CALIFORNIA,
Plaintiff and Appellant, v.
NIBBI BROS. INC. et al., Defendants and Respondents.

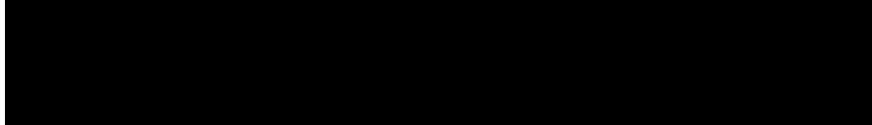
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COUNSEL

Haight, Brown & Bonesteel, Vangi M. Johnson; Yukevich, Cavanaugh, Steven D. Smelser; Cantey Hanger and Al Kroemer for Plaintiff and Appellant.

Wood, Smith, Henning & Berman, Steven R. Disharoon, Gregory P. Arakawa; Fisher & Kong and Raymond E. Kong for Defendants and Respondents.

OPINION

SIMONS, Acting P. J.—Aluma Systems Concrete Construction of California, Inc. (hereafter, Contractor), was sued by employees of respondents Nibbi Bros. Inc., and Nibbi Bros. Associates, Inc., doing business as Nibbi Concrete (hereafter, Employer), for injuries sustained on the job. Subsequently, Contractor sued Employer for indemnification based on a specific provision in the parties' contract. The trial court sustained Employer's demurrer to Contractor's complaint, relying on the allegations in the underlying lawsuit that set forth claims only against Contractor and not against Employer. Because the allegations in the underlying lawsuit are not determinative of Contractor's claim for indemnity, we reject that analysis, reverse and remand.

BACKGROUND¹

In March 2011, Contractor entered into an agreement with Employer to design and supply the materials for wall formwork and deck shoring at Employer's construction project (the Contract). The terms of the Contract included the following indemnification provision: "To the extent permitted by law, [Employer] shall defend, indemnify and hold harmless [Contractor]

¹ Because we are reviewing an order sustaining a demurrer, we assume the truth of the complaint's factual allegations and consider judicially noticed matters. (*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] (*Committee for Green Foothills*).)

against any and all claims, actions, expenses, damages, losses and liabilities, including attorneys fees and expenses, for personal injuries (including death) and/or property damage arising from or in connection with this contract and/or [Contractor]’s equipment and services, except to the extent such claims, actions, expenses, damages, losses and liabilities are caused by the acts or omissions of [Contractor] or anyone directly or indirectly employed by [Contractor] or anyone for whose acts [Contractor] may be liable.”²

Subsequently, two lawsuits were filed by Employer’s employees against Contractor (the Employee Lawsuits) alleging that in August 2011, the employees were injured after a shoring system designed by Contractor collapsed. The Employee Lawsuits alleged the collapse was due to Contractor’s negligence. Contractor’s answers alleged as affirmative defenses that the employees’ injuries were proximately caused by the negligence of Employer and unnamed others. Contractor tendered the Employee Lawsuits to Employer for defense and indemnification, but received no response.

Contractor then filed the instant action against Employer for breach of contract, express indemnification, and declaratory relief.³ Employer demurred to the complaint. The demurrer argued the contractual indemnification provision does not apply because the Employee Lawsuits allege Contractor alone, not Employer, was negligent. The demurrer also argued that the complaint should be dismissed as to Nibbi Bros. Inc. because the Contract was with Nibbi Concrete only, and that the claim for declaratory relief is unnecessary because Contractor can determine its rights in the Employee Lawsuits.

The trial court sustained the demurrer without leave to amend. As to the breach of contract and express indemnification claims, the trial court found “the exception included in the Contract’s indemnity provision plainly states that the [Employer’s] duty to defend, indemnify, or hold harmless does not arise from acts caused by or omissions of the [Contractor]. . . . The underlying complaints in this action allege negligence as to the [Contractor] only because the employees are required to pursue worker’s compensation claims against the [Employer]. The acts and/or omissions for which [Contractor] seeks indemnity against arose from [Contractor’s] alleged negligence and is barred by the plain language of the Contract.” The court sustained the demurrer as to the declaratory relief claim on the ground that Contractor can determine its rights in the Employee Lawsuits.

² Separate provisions of the Contract provided for indemnification if Employer failed to perform certain duties, for example, to comply with all applicable safety regulations.

³ The declaratory relief claim sought a determination of Employer’s liability to indemnify Contractor. The complaint also alleged claims against Employer’s insurer, which are not at issue in this appeal.

Contractor filed a motion for reconsideration, pointing in part to the fact that the Employee Lawsuits had now settled. The trial court denied the motion and entered judgment for Employer.

DISCUSSION

“On review from an order sustaining a demurrer, ‘we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose. [Citations.]’ [Citation.] We may also consider matters that have been judicially noticed.” (*Committee for Green Foothills, supra*, 48 Cal.4th at p. 42.)

■ The parties agree that, pursuant to Labor Code section 3864, Employer is only liable to indemnify Contractor pursuant to the terms of the Contract.⁴ They dispute whether the indemnity provision—which applies to claims and damages in connection with the Contract “except to the extent” they are “caused by the acts or omissions of [Contractor]”—applies to the Employee Lawsuits. Employer argues the Employee Lawsuits allege solely Contractor’s negligence and the indemnification provision therefore does not apply. Contractor argues that the provision may apply because Contractor is jointly and severally liable for *all* economic damages in the Employee Lawsuits, including any attributable to the negligence of Employer or others, as long as Contractor’s negligence is partially responsible.

As an initial matter, Contractor argues the indemnification provision provides for proportionate liability: Employer must indemnify Contractor for any portion of economic damages attributable to the negligence of Employer and/or others, but is not obligated to indemnify Contractor for any portion of damages attributable to Contractor’s negligence. Employer does not contest this interpretation, which we think is a reasonable construction of the Contract’s language. “‘When reviewing whether a plaintiff has properly stated a cause of action for breach of contract, we must determine whether the alleged agreement is “reasonably susceptible” to the meaning ascribed to it in the complaint. [Citation.] “‘So long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing upon the sufficiency of the complaint, we must accept as correct plaintiff’s allegations as to the meaning of the agreement.’”” (*Marzec v. Public Employees’ Retirement System* (2015) 236 Cal.App.4th 889, 909 [187

⁴ Labor Code section 3864 provides that if a personal injury action prosecuted by an employee against a party other than the employer “results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury.”

Cal.Rptr.3d 452] (*Marzec*).) We therefore accept Contractor's interpretation for purposes of this appeal.

■ We next turn to relevant principles of workers' compensation and tort law. Because the employees were working for Employer at the time of their injuries, they cannot sue Employer for damages but must pursue benefits through the workers' compensation system. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 598 [7 Cal.Rptr.2d 238, 828 P.2d 140] (*DaFonte*) ["[A]n employer cannot be sued in tort for the work-related injury of an employee. The employer's sole liability is for benefits payable, regardless of fault, under the workers' compensation law."].) This limitation on Employer's liability does not extend to third parties, however, and the employees may sue Contractor for damages caused by its negligence. (*Ibid.* ["the employee may sue any other responsible person for 'all damages proximately resulting' from the injury"]; see also Lab. Code, § 3852 ["The claim of an employee . . . for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer."].)

■ If a fact finder found Contractor's negligence was a proximate cause of the employees' injuries—even if Contractor's negligence was one of two or more proximate causes—Contractor would be liable to the employees for 100 percent of their economic damages. (*DaFonte, supra*, 2 Cal.4th at p. 600 [tort law provides for "the joint liability of all tortfeasors, regardless of their respective shares of fault, with respect to all objectively provable expenses and monetary losses"].) As for noneconomic damages, Contractor is only liable to the employees for its proportionate share. "[Civil Code] section 1431.2^[5] plainly limits a defendant's share of noneconomic damages to his or her own proportionate share of comparative fault." (*DaFonte*, at p. 604.) These tort law principles apply in suits by injured employees against third parties. (*Ibid.*)

Employer argues that Proposition 51, codifying these joint and several liability principles, does not apply because it derives from equitable principles and this case is governed by the Contract. The argument is unpersuasive. To be sure, Contractor's indemnification claim against Employer is properly based on the Contract, not on principles of equitable indemnity. (Lab. Code, § 3864.) But Proposition 51 is relevant to Contractor's liability to the employees in the Employee Lawsuits and does apply in those actions. (*DaFonte, supra*, 2 Cal.4th at p. 604 [rejecting argument that Prop. 51 does not apply in cases brought by injured employees against third parties, reasoning "[t]he statute states or implies no exception for third party suits by

⁵ Civil Code section 1431.2 was enacted in 1986 by Proposition 51, which also amended and added other Civil Code sections. (*DaFonte, supra*, 2 Cal.4th at pp. 596, 599.)

injured employees” and “[n]o compelling reason appears to infer such an exception in derogation of the measure’s literal words”].)

■ Employer argued below that the availability of an offset for workers’ compensation benefits obviates the need for indemnification. We disagree. Contractor, like all third parties so sued, may be entitled to offset part or all of the workers’ compensation benefits received by the employees if Employer is also at fault for the injuries. “[A]n employee’s damage judgment against third parties must be reduced by an amount attributable to the employer’s proportionate share of fault, up to the amount of workers’ compensation benefits paid.” (*DaFonte, supra*, 2 Cal.4th at p. 599.) Contractor alleged such an offset claim in the Employee Lawsuits. However, when “the employer’s share of fault exceed[s] the benefits paid or owed . . . , third party defendants remain[] jointly and severally liable to the injured employee for all damages attributable to the employer’s fault which were not covered by workers’ compensation benefits,” except for noneconomic damages. (*Ibid.*; see also *id.* at p. 600.) Therefore, despite Contractor’s claim in the Employee Lawsuits for an offset of workers’ compensation benefits attributable to Employer, Contractor may still be liable for a portion of Employer’s share of the employees’ economic damages. Contractor could only recover this portion pursuant to the indemnification provision, if it applies.

Employer’s primary argument is that the Employee Lawsuits alleged only Contractor’s negligence, which is expressly excluded from the indemnification provision. Employer contends the application of the indemnity provision turns on whether the Employee Lawsuits alleged the negligence of any party other than Contractor, rather than on what a fact finder ultimately determines about the parties’ respective negligence.⁶ We disagree.

We look first at the language of the Contract. Employer notes the indemnification provision applies to “claims” and argues this indicates the allegations of the Employee Lawsuits control the provision’s application. Assuming this is an appropriate construction of the word “claims,” the provision also requires indemnification for Contractor’s “damages” and “losses.” We see no basis to restrict the damages and losses so indemnified to the allegations of the Employee Lawsuits, rather than to the damages Contractor is ultimately found liable for. Even if Employer’s construction of the Contract were possible, we must accept Contractor’s reasonable interpretation for purposes of this demurrer. (*Marzec, supra*, 236 Cal.App.4th at p. 909.)

⁶ The extent of each party’s negligence, if any, will not be determined in the Employee Lawsuits, but can be litigated in the instant action. (*Mel Clayton Ford v. Ford Motor Co.* (2002) 104 Cal.App.4th 46, 59–60 [127 Cal.Rptr.2d 759] (*Mel Clayton Ford*) [where indemnitee’s negligence is relevant to application of indemnification provision and indemnitee settled underlying claim with third party, negligence must be litigated in indemnification action].)

Employer points to cases in which the application of indemnification provisions turned on the allegations of the third party's complaint. These cases, however, all involve the duty to defend. The duty to indemnify is distinct from the duty to defend: the former "require[s] one party to *indemnify* the other, under specified circumstances, for moneys paid or expenses incurred . . . as a result of" a third party claim, while the latter "assign[s] one party . . . responsibility for the other's *legal defense* when a third party claim is made." (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 551 [79 Cal.Rptr.3d 721, 187 P.3d 424] (*Crawford*).) Depending on the contractual language, a duty to defend may exist even if no duty to indemnify is ultimately found. (*Id.* at p. 561 [under contractual language, "even if the indemnity obligation is triggered only by an ultimate finding of the indemnitor's fault, the defense obligation applies before, and thus regardless of, any finding to be made in the course of the litigation for which a defense is owed"]); *UDC-Universal Development, L.P. v. CH2M Hill* (2010) 181 Cal.App.4th 10, 21 [103 Cal.Rptr.3d 684] (*UDC*) [rejecting indemnitor's argument that "the jury's eventual 'no negligence' finding rendered the entire indemnity clause, including the defense provision, inapplicable"].)

The duty to defend "necessarily arises as soon as [the specified] claims are made against the promisee." (*Crawford, supra*, 44 Cal.4th at p. 554.) Therefore, the duty to defend may depend on the framing of the third party's complaint. (*Id.* at p. 558 [duty to defend "arises . . . before the litigation to be defended has determined whether indemnity is actually owed" and therefore is triggered by claims "which, at the time of tender, *allege* facts that would give rise to a duty of indemnity"]); *UDC, supra*, 181 Cal.App.4th at p. 21 [discussing whether allegations of third party complaint were "sufficient to trigger [indemnitor's] duty to defend"].)⁷ Unlike the duty to defend, however, the duty to indemnify does not arise until liability is proven. (*Crawford, supra*, at p. 559 ["One can only indemnify against 'claims for damages' that have been resolved against the indemnitee, i.e., those as to which the indemnitee has actually sustained liability or paid damages."]; see also *id.* at p. 558 [duty to defend "was not dependent on whether the very litigation to be defended later established [the indemnitor's] obligation to pay indemnity"].)

Contractor's complaint alleges Employer owed a duty to both defend and indemnify. Employer's demurrer argues the entire indemnification provision does not apply to the Employee Lawsuits, and the parties make no distinction between Employer's duty to defend and its duty to indemnify. Therefore, we

⁷ Contrary to Employer's characterizations of these cases, the relevant discussions involved only the duty to defend, not the duty to indemnify. Indeed, in both cases the court found the indemnitor owed a duty to defend, despite *not* owing a duty to indemnify. (*Crawford, supra*, 44 Cal.4th at p. 547; *UDC, supra*, 181 Cal.App.4th at pp. 21–22.) An additional case relied on by Employer similarly involved the duty to defend. (*Mel Clayton Ford, supra*, 104 Cal.App.4th at p. 55.)

need not decide whether the complaint sufficiently states a claim with respect to the duty to defend; if it states a claim with respect to the duty to indemnify, Employer's demurrer fails.

The cases cited above considering a third party's allegations to determine whether there is a duty to defend do not govern the question of whether these allegations determine the duty to indemnify. As noted above, we see no basis in the Contract's language to so limit the indemnification provision. We note also, as Contractor argues, the employees have no reason to allege Employer was liable, as they cannot recover damages from Employer. (*DaFonte, supra*, 2 Cal.4th at p. 598.) Indeed, the employees have reason *not* to make such allegations, because their damages from Contractor may be reduced by workers' compensation benefits attributable to Employer's fault. (*Id.* at p. 599.) While the allegations may be relevant to Employer's duty to defend, they do not govern Employer's duty to indemnify.⁸

Finally, we reject the additional arguments Employer raised below. (*Coppinger v. Rawlins* (2015) 239 Cal.App.4th 608, 612 [191 Cal.Rptr.3d 414] ["The judgment must be affirmed if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons."].) Employer argued the contract was made with Nibbi Concrete only, but Contractor's complaint alleges that each defendant "was the agent, servant and/or employee" of each of the other defendants. We assume this allegation to be true. (*Committee for Green Foothills, supra*, 48 Cal.4th at p. 42.) Principals may be liable for contracts executed by their agents, even where the principal is not disclosed in the contract. (3 Witkin, *Summary of Cal. Law* (10th ed. 2005) Agency and Employment, § 158, p. 202 ["If the principal is undisclosed, i.e., if an agent acting for his principal makes a contract in his or her own name either orally or in writing, the result will ordinarily be that either the principal or the agent may be held liable on it by the third party. [Citations.] ¶ . . . And if the contract is in writing, parol evidence is admissible to prove that the undisclosed principal is in fact the party for whom the contract was made."].) Employer's demurrer raised no argument disputing liability based on agency principles and Employer has not pursued this argument on appeal. As for Employer's argument on the declaratory relief claim, the Employee Lawsuits have settled and there is no longer any argument that they provide an adequate forum for Contractor to determine Employer's indemnification obligations.

⁸ Because we conclude Contractor's complaint states a claim based on the Contract's primary indemnity provision, we need not decide Employer's argument that Contractor fails to state a claim based on the Contract's additional indemnity provisions, which apply in certain circumstances. (See *ante*, fn. 2.)

Because we conclude Employer's demurrer does not establish Contractor failed to state a claim, we reverse and remand for further proceedings.

DISPOSITION

The judgment is reversed with directions to the superior court to vacate its order sustaining the demurrer without leave to amend and to enter a new order overruling the demurrer. Appellant shall recover its costs on appeal.

Needham, J., and Bruiniers, J., concurred.

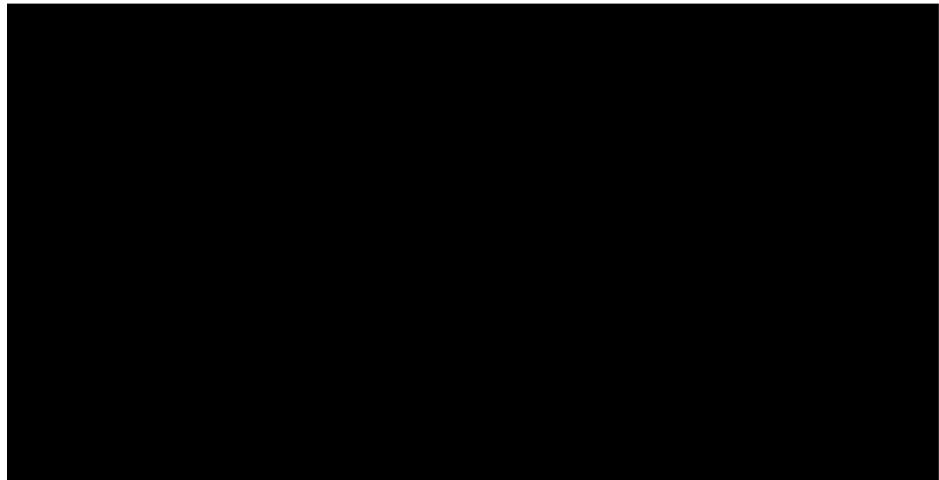
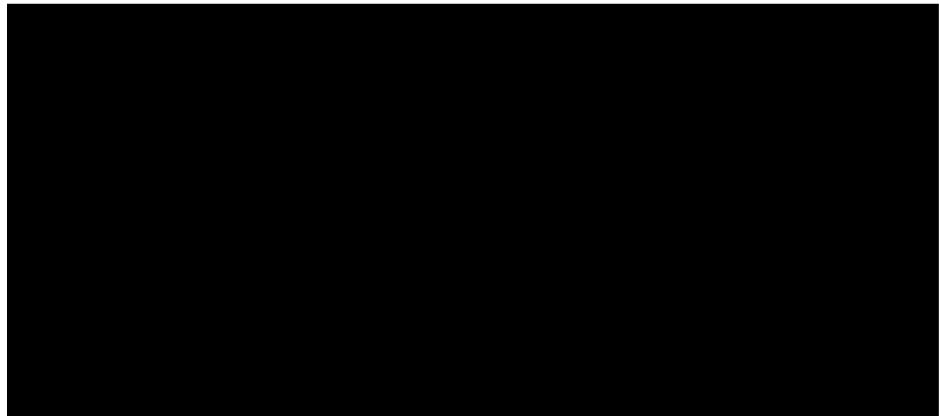
[No. A143786. First Dist., Div. Five. July 26, 2016.]

VANESSA YOUNG, Plaintiff and Appellant, v.
REMX, INC., et al., Defendants and Respondents.

[REDACTED]

[REDACTED]

[REDACTED]



COUNSEL

Setareh Law Group, Shaun Setareh, Tuvia Korobkin and Farrah Grant for Plaintiff and Appellant.

Seyfarth Shaw, Timothy L. Hix, Andrew M. McNaught, Daniel C. Whang and Tamara Fisher for Defendant and Respondent.

OPINION

SIMONS, J.—In this wage and hour lawsuit, plaintiff Vanessa Young appeals from the trial court’s order compelling arbitration of her individual claims, dismissing her class claims, bifurcating her representative claim pursuant to the Labor Code Private Attorneys General Act of 2004 (PAGA; Lab. Code, § 2698 et seq.), and staying the PAGA claim pending completion of the arbitration on her individual claims. We conclude the order is nonappealable because we reject appellant’s argument that the “death knell” doctrine applies in these circumstances. The appeal is dismissed.

BACKGROUND

Plaintiff’s operative first amended complaint (complaint) alleges that, after her employment with defendants terminated, defendants failed to timely pay her all of her final wages. The complaint asserts, on behalf of plaintiff and a putative class, a cause of action for this failure under Labor Code sections 201 through 203. The complaint also asserts a representative PAGA claim seeking civil penalties on behalf of plaintiff and other aggrieved employees.¹

Defendants filed a motion to compel individual arbitration, dismiss plaintiff’s class claims, and bifurcate and stay the PAGA claim. In support of the motion, defendants submitted an arbitration agreement signed by plaintiff. The arbitration agreement provided any disputes “arising out of or relating to my employment or the termination of my employment” will be submitted to arbitration. The agreement further provided “[a]ny such claims must be submitted on an individual basis only and I hereby waive the right to bring or join any type of collective or class claim in arbitration, in any court, or in any other forum.” Defendants conceded in their motion that under *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 [173 Cal.Rptr.3d 289, 327 P.3d 129], the arbitration agreement cannot require plaintiff to waive her representative PAGA claim, and therefore asked the court to bifurcate and stay that claim.

Plaintiff opposed the motion, arguing (1) the arbitration agreement only identifies a nonparty entity called RXOS, and therefore does not extend to disputes with defendants; (2) the agreement is unenforceable; and (3) the agreement is unconscionable. In reply, defendants noted the arbitration

¹ “Under PAGA, ‘an ‘aggrieved employee’ may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. [Citation.] Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the ‘aggrieved employees.’” (*Miranda v. Anderson Enterprises, Inc.* (2015) 241 Cal.App.4th 196, 199, fn. 1 [193 Cal.Rptr.3d 770] (*Miranda*)).

agreement, by its terms, applies to plaintiff and her “Employer.” Although Employer is not defined in the agreement, defendants argued it is undisputed that they were plaintiff’s employer and, in any event, RXOS is a division of defendants. Defendants also argued the agreement was enforceable and not unconscionable.

The trial court granted defendants’ motion. The order compelled arbitration of plaintiff’s individual claim, dismissed the class claims, bifurcated the representative PAGA claim, and stayed the PAGA claim pending the completion of arbitration. This appeal followed.

DISCUSSION

■ “‘Orders granting motions to compel arbitration are generally not immediately appealable.’” (*Miranda, supra*, 241 Cal.App.4th at p. 200.) Plaintiff argues the appealed-from order is nonetheless directly appealable under the death knell doctrine. This doctrine “‘provides that an order which allows a plaintiff to pursue individual claims, but prevents the plaintiff from maintaining the claims as a class action, . . . is immediately appealable because it “effectively r[ings] the death knell for the class claims.”’ [Citations.] Appealability under the death knell doctrine requires ‘an order that (1) amounts to a de facto final judgment for absent plaintiffs, under circumstances where (2) the persistence of viable but perhaps de minimis individual plaintiff claims creates a risk no *formal* final judgment will ever be entered.’” (*Ibid.*) In *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1288 [90 Cal.Rptr.3d 539], the Court of Appeal concluded that an order upholding a class arbitration waiver and compelling arbitration of individual claims constitutes the death knell of the class litigation.

■ Although the death knell doctrine is usually discussed in the context of class claims, both class claims and representative PAGA claims “are forms of representative actions, whereby one or more plaintiffs seek recovery on behalf of nonparties. [Citation.] In both types of action[], the potential recovery is greater if the claim is brought as a class or representative action than it would be if the plaintiff sought only individual relief. [Citations.] In both, the represented nonparties are bound by any final judgment.” (*Miranda, supra*, 241 Cal.App.4th at pp. 200–201.) “The rationale underlying the death knell doctrine—‘that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination,’ thereby rendering the order ‘effectively immunized by circumstance from appellate review’ [citation]—applies equally to representative PAGA claims.” (*Id.* at p. 201.)

■ We conclude plaintiff's appeal does not fall within the death knell doctrine. As an initial matter, in light of the remaining representative PAGA claim, it appears the order does not "‘amount[] to a de facto final judgment for absent plaintiffs.’" (*Miranda, supra*, 241 Cal.App.4th at p. 200.) Our Supreme Court has "emphasized that orders that only limit the scope of a class or the number of claims available to it are not similarly tantamount to dismissal and do not qualify for immediate appeal under the death knell doctrine; only an order that entirely terminates class claims is appealable." (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757–758 [122 Cal.Rptr.3d 153, 248 P.3d 681] (*In re Baycol Cases*).) Although the only class claim has been dismissed, the representative PAGA claim remains and plaintiff does not contend there are any putative class members who are not also aggrieved employees for purposes of the PAGA claim. Accordingly, the order does not appear to constitute a de facto final judgment for absent plaintiffs—the putative class members/aggrieved employees under PAGA—because their PAGA claims remain pending.

■ In any event, because of the remaining PAGA claim, plaintiff has not established the second rationale for the death knell doctrine: that "‘the persistence of viable but perhaps de minimis individual plaintiff claims creates a risk no formal final judgment will ever be entered.’" (*Miranda, supra*, 241 Cal.App.4th at p. 200, italics omitted.) *Munoz v. Chipotle Mexican Grill, Inc.* (2015) 238 Cal.App.4th 291 [189 Cal.Rptr.3d 134] (*Munoz*), is instructive. In *Munoz*, the trial court denied class certification in a lawsuit alleging class claims and a representative PAGA claim. (*Munoz*, at p. 294.) The Court of Appeal found the continued presence of the PAGA claim precluded application of the death knell doctrine: "Given the potential for recovery of significant civil penalties if the PAGA claims are successful, as well as attorney fees and costs, plaintiffs have ample financial incentive to pursue the remaining representative claims under the PAGA and, thereafter, pursue their appeal from the trial court's order denying class certification. Denial of class certification where the PAGA claims remain in the trial court would not have the ‘legal effect’ of a final judgment . . ." (*Munoz*, at p. 311).²

Plaintiff argues *Munoz* is distinguishable because she must arbitrate her individual claim before she can pursue her PAGA claim. The focus of the death knell doctrine is whether plaintiff has a sufficient incentive to proceed and here, as in *Munoz*, the PAGA claim provides that incentive. Plaintiff contends the arbitrator may rule against her on her individual claim and her "incentive to pursue PAGA claims [will be] exterminated if the arbitrator

² In contrast, in *Miranda*, the trial court's order compelling arbitration of the plaintiff's individual PAGA claim and dismissing his representative PAGA claim fell within the death knell doctrine. (*Miranda, supra*, 241 Cal.App.4th at pp. 200–203.)

decides that [plaintiff's] individual claims have no merit" in light of the narrow scope of review for an arbitration award. Our inquiry, however, looks at the impact of the appealed-from interlocutory order. That a *possible* outcome in a *subsequent* order might eliminate plaintiff's incentive to pursue the PAGA claim does not render the current order appealable.³

■ In her reply brief, plaintiff urges us to treat the appeal as a petition for writ of mandate. "The rationale behind the rule making an order compelling arbitration nonappealable is that inasmuch as the order does not resolve all of the issues in controversy, to permit an appeal would delay and defeat the purposes of the arbitration statute.' [Citation.] Thus, writ review of orders directing parties to arbitrate is available only in 'unusual circumstances' or in 'exceptional situations.' [Citations.] ¶ Nevertheless, California courts have held that writ review of orders compelling arbitration is proper in at least two circumstances: (1) if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement or (2) if the arbitration would appear to be unduly time consuming or expensive." (*Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 160 [53 Cal.Rptr.3d 69] (*Zembsch*)).

Plaintiff argues the first circumstance is present here because the challenged order compels plaintiff "to arbitrate her issues with parties not even identified in the [arbitration agreement]." While expressing no opinion on the ultimate merits of plaintiff's challenge, we do not find plaintiff's claims "fall *clearly* outside the scope of the arbitration agreement." (*Zembsch, supra*, 146 Cal.App.4th at p. 160, italics added.) Plaintiff next contends the second circumstance applies because of "the high cost of arbitrating . . . and the amount of time necessary to complete arbitration." Plaintiff has provided no support for her claim that she will be subject to undue expense in the arbitration.⁴ Plaintiff has also failed to explain why the arbitration would be unduly time consuming. As writ relief is available only in extraordinary circumstances, the fact that the arbitration will take time is not sufficient. We find no extraordinary circumstances warranting writ review.

³ In any event, if the arbitrator does rule against plaintiff and the ruling has preclusive effect that will defeat plaintiff's PAGA claim, plaintiff could concede or stipulate to this in the trial court and thereby quickly obtain an appealable final judgment. (See *In re Baycol Cases, supra*, 51 Cal.4th at p. 760 [death knell doctrine does not apply where "[n]o risk arose that the named plaintiff . . . might fail to press on until the entry of an appealable final judgment"].)

⁴ Indeed, as defendants argued below, it appears that under the arbitration rules specified in the arbitration agreement, the employer pays the arbitrator's fees and expenses and the employee pays only a \$200 filing fee.

DISPOSITION

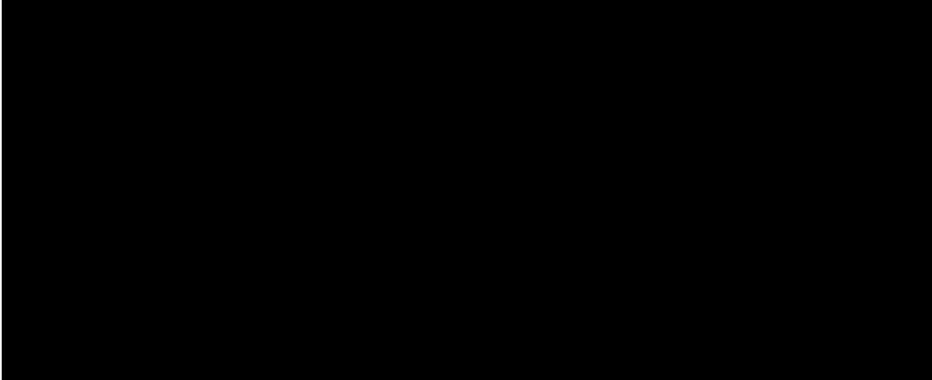
The appeal is dismissed. Defendants are awarded their costs on appeal.

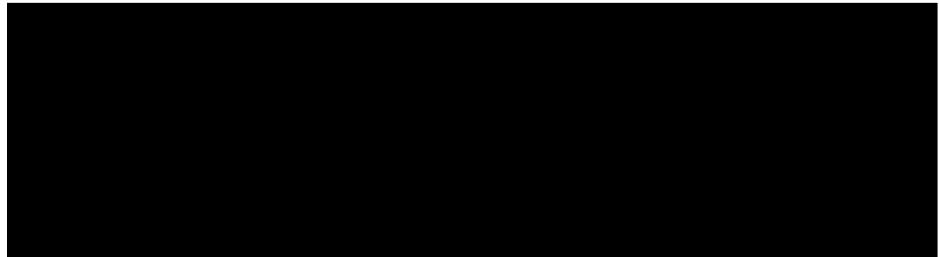
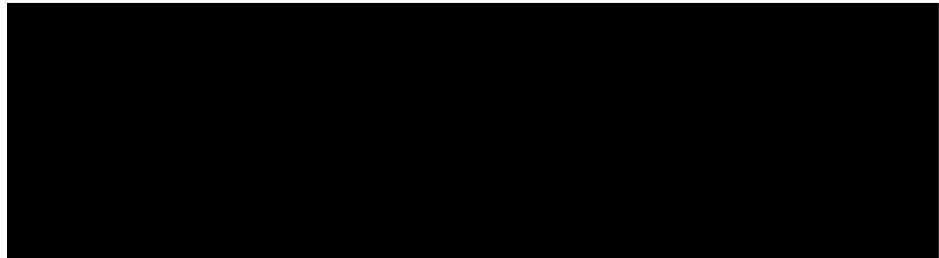
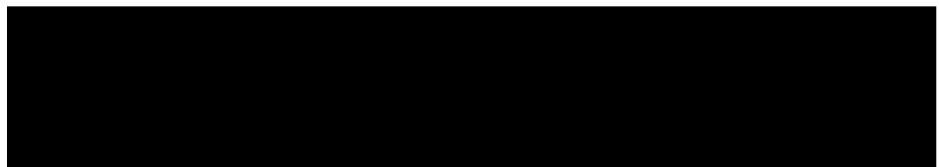
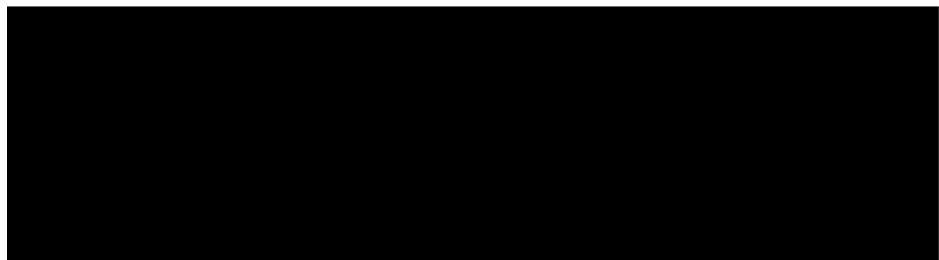
Jones, P. J., and Needham, J., concurred.

On August 17, 2016, the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied November 22, 2016, S237479.

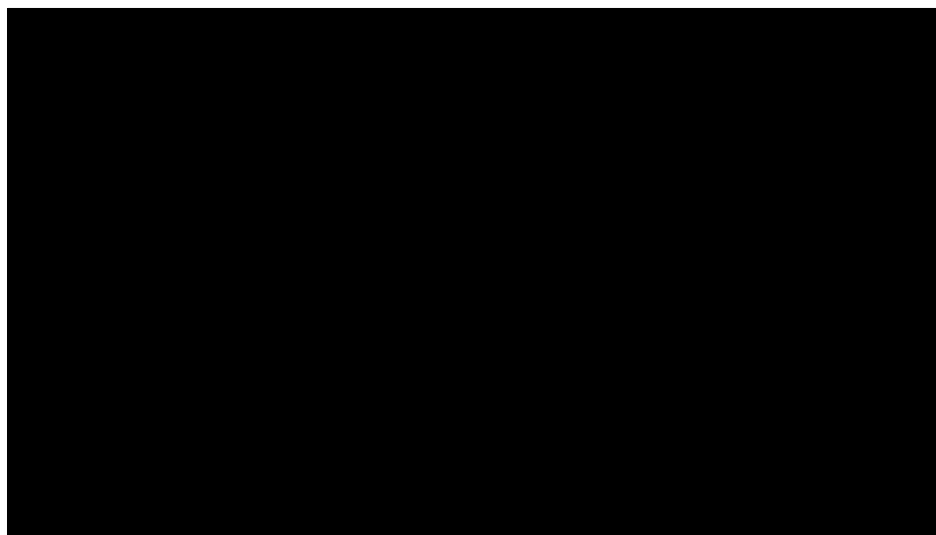
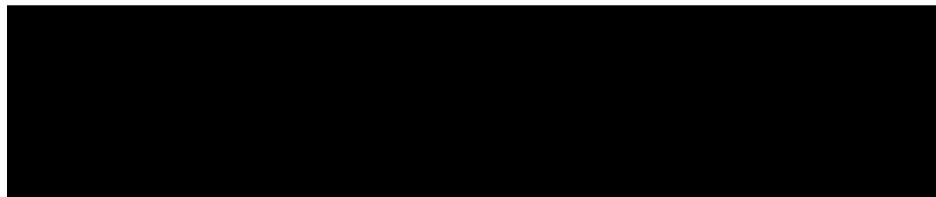
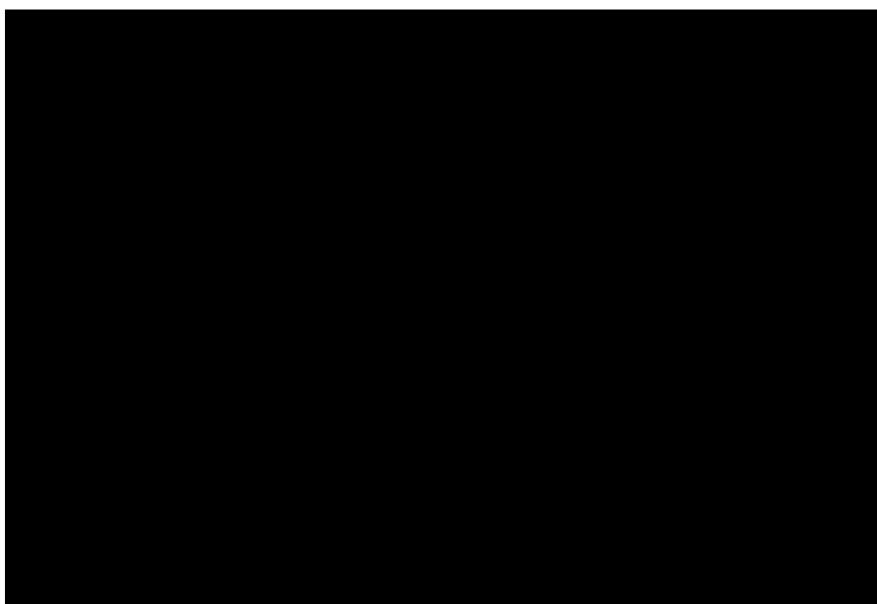
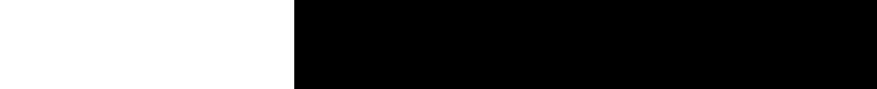
[No. B265488. Second Dist., Div. Four. Aug. 17, 2016.]

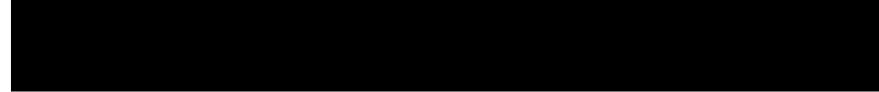
ST. JOHN OF GOD RETIREMENT & CARE CENTER, Plaintiff and
Appellant, v.
STATE DEPARTMENT OF HEALTH CARE SERVICES, Defendant and
Respondent;
GLORIA GLOVER-WOODS, Intervener and Respondent.





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COUNSEL

Foley & Mansfield, Noelle M. Natoli-Duffy, M. Amadea Groseclose and Melanie A. Ayerh for Plaintiff and Appellant.

Kevin P. Kane & Associates, Kevin P. Kane; BraunHagey & Borden and Matthew Borden for Intervener and Respondent.

OPINION

WILLHITE, J.—Gloria Glover-Woods was a resident of St. John of God Retirement & Care Center (St. John), a skilled nursing facility in Los Angeles, who elected hospice care through a provider under contract to the facility. When Ms. Woods experienced a psychotic episode, the hospice provider directed that she be transferred from St. John to an acute care hospital for evaluation and treatment. When her treatment was concluded, St. John refused to readmit her to the first available bed under 42 Code of Federal Regulations, part 483.12 (2015) (part 483.12), which governs the requirements for a skilled nursing facility’s involuntary transfer or discharge of a resident. After an administrative hearing, the State Department of Health Care Services (DHCS) ordered St. John to readmit Ms. Woods. The superior court denied St. John’s petition for writ of administrative mandate seeking to vacate the order, and St. John appeals.

We conclude that in light of developments during the pendency of the appeal, the order requiring Ms. Woods’s readmission is now moot. However, because there is a separate civil lawsuit between the parties in which the issue is likely to arise again, we exercise our discretion to decide whether part 483.12 exempts a skilled nursing facility from the readmission requirement (§ 483.12(b)(3)) when the transfer to an acute care hospital from which the resident is returning was ordered by the resident’s hospice care provider rather than the facility itself. We conclude that part 483.12 contains no such exemption. Thus, to the extent St. John contends that its refusal to readmit Ms. Woods did not constitute an involuntary transfer because she was returning from an acute hospitalization ordered by her hospice care provider,

and that therefore St. John was not bound by the involuntary transfer requirements of part 483.12(a)(2) (identification of a justifying circumstance), (a)(3) (documentation of the justifying circumstance), and (a)(7) (preparation and orientation for a safe and orderly transfer, including giving notice of the effective date of the transfer or discharge and the new resident location (§ 483.12(a)(6)(ii) & (iii)), St. John is mistaken. We also reject St. John's contention that readmitting Ms. Woods and thereafter discharging her after complying with part 483.12's requirements would have subjected St. John to liability under Health and Safety Code section 1432.

We decline to resolve any other issues raised by the parties, as the resolution of those issues (to the extent they might arise again) is better suited to the separate civil litigation. Because the DHCS order directing readmission is moot, we reverse the trial court's order denying the writ of administrative mandate solely for purpose of remanding the case with directions to dismiss the administrative mandate proceeding as moot.¹

BACKGROUND

We summarize the proceedings prior to the filing of the notice of appeal. We leave to our discussion part later developments regarding the issue of mootness.

Admission to St. John

On September 19, 2013, Ms. Woods (then 72) was admitted to St. John. Based on records from her former hospice facility in Georgia, St. John admitted her with a diagnosis of amyloidosis, hypertension, anxiety, hypothyroidism, and psychosis.

Ms. Woods's daughter, Mikko Boutte-Evans, informed St. John that Ms. Woods was terminally ill and wanted to be with her mother, who also was a resident at St. John. According to Norma Bullen, director of nursing at St. John, she admitted Ms. Woods, despite the diagnosis of psychosis, because she saw no records suggesting that Ms. Woods manifested psychotic behavior, and because "when you are dying, you're dying, and how much more can she be a potential danger to staff and to the other residents." Ms. Bullen placed Ms. Woods in the same room with her mother.

¹ " ‘ ‘Where an appeal is disposed of upon the ground of mootness and without reaching the merits, in order to avoid ambiguity, the preferable procedure is to reverse the judgment with directions to the trial court to dismiss the action for having become moot prior to its final determination on appeal.’ ’" (*Giles v. Horn* (2002) 100 Cal.App.4th 206, 229 [123 Cal.Rptr.2d 735] (*Giles*).)

Hospice Care

On December 10, 2013, St. Liz Hospice, Inc. (St. Liz), evaluated Ms. Woods. Pursuant to her authority as holder of Ms. Woods's durable power of attorney, Ms. Boutte-Evans executed documents consenting to Ms. Woods receiving hospice care from St. Liz while residing at St. John, including an acknowledgement that "Inpatient Care will be provided by St. Liz Hospice, Inc. for pain control, symptom management, and management of psycho-social problems related to my terminal illness. I understand that this care will be provided at a facility contracted with St. Liz Hospice, Inc. [referring to St. John]." She also acknowledged that St. Liz would arrange any hospital outpatient treatment that might be required, and that "[h]ospitalization may be required for certain procedures or care, and these will be arranged through a contracted facility of the hospice."

Hospitalization

Until March 2014, Ms. Woods was cooperative while residing at St. John, though at times she seemed confused. However, beginning in March 2014, she began displaying threatening and disruptive behavior, which included (according to Ms. Bullen) choking two nurses, trying to strike another, and throwing a snow globe at yet another (it broke against the wall). For the safety of other residents, Ms. Woods was transferred to a single room.

In April 2014, an evaluator from the State Department of Health Care Services performed a mental health evaluation on Ms. Woods—a level II preadmission screening and resident review (PASRR). In the course of the evaluation, Ms. Woods reported that she had been raped at St. John. When St. John asked Ms. Boutte-Evans about the report, she said that she had heard about it from Ms. Woods's mother (Ms. Boutte-Evans's grandmother), and that Ms. Woods was hallucinating.

On April 10, 2014, based on Ms. Woods's behavior and rape report, the St. Liz attending physician ordered Ms. Woods transferred to Brotman Medical Center (Hospital) for a psychiatric evaluation and management of her condition.

Refusal of Readmission

On April 21, 2014, St. John received an inquiry from the Hospital about readmitting Ms. Woods. St. John refused readmission on the ground that it could not provide the specialized services recommended in Ms. Woods's PASRR level II evaluation, which included a behavior modification program

to reduce incidents of aggression and yelling, individual psychotherapy, and mental health rehabilitation activities.

Ombudsman Appeal

On April 30, 2014, a representative of the Office of California State Long-Term Care Ombudsman (Ombudsman) filed an appeal and complaint on Ms. Woods's behalf with the State Department of Health Care Services, Hearing and Appeals Unit. The complaint alleged that St. John's refusal to readmit Ms. Woods constituted an improper discharge from the facility. The complaint also alleged that St. John failed to honor the seven-day bed hold required by California law.

Administrative Hearing

On May 6, 2014, the Ombudsman's appeal went to an administrative hearing before a DHCS hearing officer with the Office of Administrative Hearings and Appeals Transfer/Discharge and Refusal to Readmit Unit. Present at the hearing on behalf of Ms. Woods were Ms. Woods herself, the Ombudsman, and Ms. Boutte-Evans. Present on behalf of St. John were J.P. Cosico (St. John's administrator), Norma Bullen (director of nursing), Catherine Penlocky (RN supervisor), and Dao Truong (the caseworker). Also present was Dr. Pontaya Fahardee (Ms. Woods's treating psychiatrist at the Hospital).

Neither side was represented by counsel, and the hearing was informal. Although the participants' testimony was given under oath and subject to cross-examination, the hearing officer conducted much of the questioning and the testimony was elicited in conversational form.² The hearing officer also received documentary evidence.

² The applicable rules of procedure for such a hearing are set forth in 34 Code of Federal Regulations part 222.156 (2015):

“Administrative hearings under this subpart are conducted as follows:

“(a) The administrative hearing is conducted by an ALJ appointed under 5 U.S.C. 3105, who issues rules of procedure that are proper and not inconsistent with this subpart.

“(b) The parties may introduce all relevant evidence on the issues stated in the applicant's request for hearing or on other issues determined by the ALJ during the proceeding. The application in question and all amendments and exhibits must be made part of the hearing record.

“(c) Technical rules of evidence, including the Federal Rules of Evidence, do not apply to hearings conducted under this subpart, but the ALJ may apply rules designed to assure production of the most credible evidence available, including allowing the cross-examination of witnesses.

“(d) Each party may examine all documents and other evidence offered or accepted for the record, and may have the opportunity to refute facts and arguments advanced on either side of the issues.

“(e) A transcript must be made of the oral evidence unless the parties agree otherwise.

On May 13, 2014, the hearing officer issued her written decision and order. She reasoned that St. John failed to comply with its duty under part 483.12(b), and California Code of Regulations, title 22, section 72520, subdivision (b) (section 72520), to give written notice of Ms. Woods's right to a seven-day bed hold under California law. Nonetheless, the evidence showed that St. John did, in fact, keep the bed open for that period. Also, the bed hold requirement does not apply if the facility is notified in writing that the patient's stay will exceed seven days. Because Ms. Woods's stay ultimately exceeded seven days, and because St. John held a bed open for seven days, the hearing officer deemed the failure to give notice of the required seven-day bed hold moot.

However, the hearing officer concluded that St. John violated the next-available-bed requirement of federal law. Part 483.12(b)(3) requires a skilled nursing facility to establish and follow a policy that permits a resident whose acute hospitalization exceeds the state bed-hold period to be readmitted to the first available bed if the resident requires the facility's services and is Medicare eligible. The hearing officer concluded that St. John's refusal to readmit Ms. Woods to the first available bed when informed by the Hospital she was ready for transfer constituted an improper, involuntary transfer or discharge under federal law.

The hearing officer reasoned: "In general, a facility should readmit a resident pending the resolution of the transfer/discharge process and initiate a more permanent move after it identifies a more appropriate facility. [¶] While this tribunal is mindful of the challenges that resident's care may present, a SNF [skilled nursing facility] may not use hospitalization as a mechanism to circumvent the aforementioned involuntary transfer/discharge requirements. Hospitalization is for the purpose of evaluation and treatment of an acute condition. Resident is no longer in need of acute psychiatric or medical treatment and return to facility . . . is appropriate, as supported by the federal regulations. [¶] If facility believes that a transfer/discharge is necessary for resident's welfare or that her behavior jeopardizes the safety of herself or others, then the regulations provide a remedy under 42 C.F.R. section 483.12, subdivision (a) et seq., which sets forth a number of requirements, including proper discharge planning. [¶] [F]acility failed to support that it complied with this requirement."

On this reasoning, the hearing officer concluded that St. John improperly refused to readmit Ms. Woods, and ordered that St. John "MUST immediately offer to readmit [her] to the first available female bed in a semi-private room."

"(f) Each party may be represented by counsel.

"(g) The ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid."

Administrative Mandate

St. John filed a petition for writ of administrative mandate in the superior court seeking to overturn the hearing officer's ruling. The State Department of Health Care Services, whose hearing officer conducted the administrative hearing, declined to participate in the matter. The superior court granted Ms. Woods's motion to intervene in the writ proceeding, and also granted permission to file a separate civil complaint in intervention alleging various causes of action, including breach of contract and financial abuse of an elder. In the civil case (*Glover-Woods v. St. John of God Retirement & Care Center* (L.A. Super. Ct., No. BC556147)), among other allegations, Ms. Woods relies in part on St. John's alleged failure to comply with the requirements for an involuntary transfer under part 483.12(a) et seq., and incorporated an attached copy of the hearing officer's decision. The superior court stayed action on the civil complaint in intervention pending determination of the petition for writ of administrative mandate.³

In its briefing in support of its petition for writ of administrative mandate in the trial court, St. John argued that the hearing officer erred in concluding that it violated part 483.12. In relevant part, St. John noted that although Ms. Woods resided at St. John, the order to transfer her to the Hospital was made by St. Liz, thereby, according to St. John, absolving St. John of its duty to readmit. St. John also argued that even if it was responsible for the transfer, the hearing officer abused her discretion in ordering that Ms. Woods be re-admitted, because St. John could not meet her specialized psychiatric needs (see Cal. Code Regs., tit. 22, § 72515, subd. (b) [“The licensee shall: ¶ . . . ¶ [a]ccept and retain only those patients for whom it can provide adequate care”].) Finally, St. John accused the hearing officer of being biased against it.

Following hearing, the trial court issued a lengthy minute order denying St. John's petition, and St. John appeals.

DISCUSSION

I. *Mootness*

St. John contends that events subsequent to the filing of the appeal render the order requiring that Ms. Woods be offered the first available bed moot. The contention depends on facts outside the record on appeal, but which are conceded by Ms. Woods.

³ However, as we explain in our discussion of the mootness issue, based on the parties' representations in their briefs, discovery in that case is ongoing.

In its opening brief, St. John states that “Ms. Woods’ counsel will likely stipulate to” the following facts: there is no evidence that Ms. Woods still lives in California, that she is currently receiving or in need of skilled nursing care, or that she intends to return to St. John. In response, in her respondent’s brief, apparently based on discovery that has occurred in the separate civil lawsuit, Ms. Woods concedes the following facts (we delete the argumentative language of the brief): “In this case . . . , after 40 . . . days in the hospital, respondent found another nursing home in California, where she lived . . . for 14 months. In steadily declining health, . . . respondent chose to move again in late August 2015, this time to her daughter’s home in New Jersey. . . . On October 2, 2015, . . . against medical advice . . . , respondent took an unaccompanied flight from Newark to Los Angeles, went directly to appellant’s nursing home to see her mother, and then went directly to Cedars Sinai with complaints of severe chest pains. Released from the hospital on October 6, 2015, respondent gave her deposition in the related case (BC556147) on October 8, 2015, and then returned directly to her mother’s bedside at appellant’s nursing home. Respondent was still there when her mother passed away on October 10, 2015. Respondent now resides in her daughter’s home in New Jersey.” Ms. Woods concedes that her mother’s death resulted in the “end to [her] desire for re-admittance to” St. John.

■ On these conceded facts, the specific order issued by the hearing officer—that St. John “immediately offer to readmit [Ms. Woods] to the first available female bed in a semi-private room”—is moot. “‘It is well settled that an appellate court will decide only actual controversies and that a live appeal may be rendered moot by events occurring after the notice of appeal was filed. We will not render opinions on moot questions or abstract propositions, or declare principles of law which cannot affect the matter at issue on appeal.’ [Citations.] [¶] The general rule regarding mootness, however, is tempered by the court’s discretionary authority to decide moot issues.” (*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 866–867 [137 Cal.Rptr.3d 622].)

Here, the record demonstrates that Ms. Woods’s motivating reason for wishing to reside at St. John was to be near her mother, who also resided there. As Ms. Woods now concedes, her mother has passed away, and Ms. Woods no longer wishes to return. Ms. Woods no longer lives in California, but rather in New Jersey at her daughter’s home. Given these facts, the order to offer readmittance can provide no effective relief, because Ms. Woods will not accept readmittance.

■ However, even “if an appeal is technically moot, [when] ‘there may be a recurrence of the same controversy between the parties and the parties have fully litigated the issues,’ a reviewing court may in its discretion reach

the merits of the appeal. [Citation.]” (*City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 480 [81 Cal.Rptr.3d 72].) Here, Ms. Woods contends that there is a likelihood that the same controversy regarding St. John’s refusal to readmit her will arise again, because she still has a separate civil complaint for damages against St. John. As we have noted, in the civil case, Ms. Woods relies in part on St. John’s alleged failure to comply with the requirements for an involuntary transfer under part 483.12(a) et seq., and incorporated in her complaint an attached copy of the hearing officer’s decision. In arguing that it did not violate part 483.12, St. John has raised an issue of law, requiring an interpretation of part 483.12. St. John contends that under the plain meaning of part 483.12, it was not bound by the first available bed requirement, because Ms. Woods was under the care of her hospice provider (St. Liz) while residing at St. John, and because a St. Liz physician directed her transfer to the Hospital. We exercise our discretion to review this issue, because it is likely to be a key legal issue in the pending civil case, and because the parties have briefed it both in the trial court and on appeal. We decline to consider any other issues on appeal, which can be better handled through discovery and litigation in the civil case.

II. *First Available Bed Requirement—Right of Return*

A. *Relevant Provisions*

■ In construing the meaning of part 483.12 (a Medicare administrative regulation), we use the same rules applicable to the interpretation of statutes. “Hence, this court should attempt to ascertain the intent of the regulating agency. [Citation.] Further, in construing a regulation, we may consider other regulations which may shed light on the meaning of the regulation at issue. [Citation.] Indeed, similar regulations should be construed in light of one another, and similar phrases in each would be given like meanings. [Citation.]” (*Goleta Valley Community Hospital v. Department of Health Services* (1983) 149 Cal.App.3d 1124, 1129 [197 Cal.Rptr. 294].)

In order to place the issue we shall decide in proper context, we must begin by summarizing the relevant provisions: part 483.12, which governs a skilled nursing facility’s involuntary transfer or discharge of a resident; California Code of Regulations, title 22, section 72520, which governs California’s bed-hold policy; and Health and Safety Code section 1599.1, subdivision (h)(1) and (2), which specify the appeal rights of a long-term care resident who is denied readmission in violation of part 483.12.

1. *Transfer and Discharge*

Part 483.12(a)(1) defines the terms “[t]ransfer and discharge.” It provides: “Transfer and discharge includes movement of a resident to a bed outside of

the certified facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same certified facility.”

2. Resident's Right to Remain in the Facility

Part 483.12(a)(2) governs the requirements for an involuntary transfer or discharge, meaning one in which the facility transfers or discharges a resident under circumstances that overcome the resident's right to remain in the facility. It provides, as here relevant: “The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless—[¶] (i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility; [¶] . . . [or] [¶] (iii) The safety of individuals in the facility is endangered.”⁴

3. Documentation for Transfer or Discharge

Part 483.12(a)(3) specifies the documentary procedure necessary for a facility to implement such a transfer or discharge of a resident: “When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (a)(2)(i) through (v) of this section, the resident's clinical record must be documented. The documentation must be made by—[¶] (i) The resident's physician when transfer or discharge is necessary under paragraph (a)(2)(i) or paragraph (a)(2)(ii) of this section; and [¶] (ii) A physician when transfer or discharge is necessary under paragraph (a)(2)(iv) of this section.”

4. Transfer and Discharge Planning

Part 483.12(a)(7) requires, in substance, that the facility provide a plan for transfer or discharge: “Orientation for transfer or discharge. A facility must

⁴ Part 483.12(a)(2) provides in full:

“Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless—

“(i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;

“(ii) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;

“(iii) The safety of individuals in the facility is endangered;

“(iv) The health of individuals in the facility would otherwise be endangered;

“(v) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or

“(vi) The facility ceases to operate.”

provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.” Further, as mentioned below in conjunction with the notice requirements, the facility must notify the resident of “[t]he effective date of transfer or discharge” (§ 483.12(a)(6)(ii)) and “[t]he location to which the resident is transferred or discharged” (§ 483.12(a)(6)(iii)).

5. Notice of State Bed-hold Policy and Readmission

Part 483.12 has several notice provisions applicable to transfers and discharges. We mention only some as potentially relevant to our issue.

Under part 483.12(a)(4): “Before a facility transfers or discharges a resident, the facility must—[¶] (i) Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. [¶] (ii) Record the reasons in the resident’s clinical record; and [¶] (iii) Include in the notice the items described in paragraph (a)(6) of this section.” The items in subdivision (a)(6) include “[t]he effective date of transfer or discharge” (§ 483.12(a)(6)(ii)) and “[t]he location to which the resident is transferred or discharged” (§ 483.12(a)(6)(iii)).⁵

■ Generally, this notice must be given at least 30 days before the transfer or discharge. (§ 483.12(a)(5).) However, under certain circumstances listed in part 483.12(a)(5)(ii), such as when “the safety of individuals in the facility would be endangered” (§ 483.12(a)(5)(ii)(A)) the notice may be given “as soon as practicable before transfer or discharge. (§ 483.12(a)(5)(ii).)

Part 483.12(b)(1) provides an additional pretransfer notice requirement, applicable when “a nursing facility transfers a resident to a hospital or allows a resident to go on therapeutic leave.” That notice “must provide written

⁵ Subdivision (a)(6) provides in full:

“(6) Contents of the notice. The written notice specified in paragraph (a)(4) of this section must include the following:

- “(i) The reason for transfer or discharge;
- “(ii) The effective date of transfer or discharge;
- “(iii) The location to which the resident is transferred or discharged;
- “(iv) A statement that the resident has the right to appeal the action to the State;
- “(v) The name, address and telephone number of the State long term care ombudsman;
- “(vi) For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and
- “(vii) For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.”

information to the resident and a family member or legal representative that specifies—[¶] (i) The duration of the bed-hold policy under the State plan, if any, during which the resident is permitted to return and resume residence in the nursing facility; and [¶] (ii) The nursing facility's policies regarding bed-hold periods, which must be consistent with paragraph (b)(3) of this section, permitting a resident to return.” (§ 483.12(b)(1).)

Finally for our purposes, when a facility transfers a resident, part 483.12(b)(2) provides the notice requirement that must occur at the time of transfer. It provides: “At the time of transfer of a resident for hospitalization or therapeutic leave, a nursing facility must provide to the resident and a family member or legal representative written notice which specifies the duration of the bed-hold policy described in paragraph (b)(1) of this section.” The reference to “paragraph (b)(1) of this section” refers to subdivision (b)(1)(i), “[t]he duration of the bed-hold policy under the State plan, if any, during which the resident is permitted to return and resume residence in the nursing facility.”

6. California Bed-hold Policy

California’s bed-hold policy is contained in section 72520, which provides, as here relevant: “If a patient of a skilled nursing facility is transferred to a general acute care hospital as defined in Section 1250(a) of the Health and Safety Code, the skilled nursing facility shall afford the patient a bed hold of seven (7) days, which may be exercised by the patient or the patient’s representative.” (§ 72520, subd. (a).)⁶

7. Return After Transfer

When the state bed-hold period has expired, part 483.12(b)(3) provides a transferred resident with a right to return to the facility, to the next available bed. It states: “Permitting resident to return to facility. A nursing facility must establish and follow a written policy under which a resident, whose hospitalization or therapeutic leave exceeds the bed-hold period under the State plan, is readmitted to the facility immediately upon the first availability of a bed in

⁶ Like part 483.12, section 72520 also has a notice provision, which requires that “upon transfer of the patient of a skilled nursing facility to a general acute care hospital, the skilled nursing facility shall inform the patient, or the patient’s representative, in writing of the right to exercise this bed hold provision.” (*Id.*, subd. (b).) A skilled nursing home that “fails to meet these requirements shall offer to the patient the next available bed appropriate for the patient’s needs,” and “[t]his requirement shall be in addition to any other remedies provided by law.” (*Id.*, subd. (c).) However, “[i]f the patient’s attending physician notifies the skilled nursing facility in writing that the patient’s stay in the general acute care hospital is expected to exceed seven (7) days, the skilled nursing facility shall not be required to maintain the bed hold.” (*Id.*, subd. (a)(3).)

a semi-private room if the resident—[¶] (i) Requires the services provided by the facility; and [¶] (ii) Is eligible for Medicaid nursing facility services.”

8. *Refusal to Readmit*

■ After a transfer for treatment in an acute care hospital, if a facility refuses to readmit a resident under part 483.12(b)(3), the refusal is tantamount to an involuntary transfer. Health and Safety Code section 1599.1, subdivision (h) provides in relevant part: “(h)(1) If a resident of a long-term health care facility has been hospitalized in an acute care hospital and asserts his or her rights to readmission pursuant to bed hold provisions, or readmission rights of either state or federal law, and the facility refuses to readmit him or her, the resident may appeal the facility’s refusal. [¶] (2) The refusal of the facility as described in this subdivision shall be treated as if it were an involuntary transfer under federal law, and the rights and procedures that apply to appeals of transfers and discharges of nursing facility residents shall apply to the resident’s appeal under this subdivision.”

9. *Summary*

■ As relevant to the issue we are deciding, the plain meaning of these provisions makes clear that when a skilled nursing facility involuntarily transfers or discharges a resident because of circumstances described in part 483.12(a)(2)(i) (for the resident’s welfare and whose needs the facility cannot meet) or part 483.12(a)(2)(iii) (for the safety of persons at the facility), the following requirements apply. First, the facility must identify the appropriate reason for transfer or discharge as specified in part 483.12(a)(2). Second, it must comply with the documentation requirements of part 483.12(a)(3). Third, as applicable to the case, it must comply with the notice provisions of part 483.12(a)(4), (a)(5), (a)(6), (b)(1), and (b)(2). Fourth, it must provide the resident with “sufficient preparation and orientation . . . to ensure a safe and orderly transfer or discharge from the facility” as required by part 483.12(a)(7), including giving notice of the effective date of the transfer or discharge and the location to which the resident will be transferred or discharged (§ 483.12(a)(6)(ii) & (iii)). Fifth, it must follow a written policy consistent with part 483.12(b)(3), under which a resident who was transferred for “hospitalization or therapeutic leave” is readmitted to the first available bed if the state bed-hold period (in California, a seven-day bed-hold period (§ 72520)) has expired, and if the resident requires the services provided by the facility and is Medicaid eligible. ■ Finally, a refusal to readmit is “treated as if it were an involuntary transfer under federal law” (Health & Saf. Code, § 1599.1, subd. (h)(2)), meaning that absent compliance with the applicable involuntary transfer requirements under part 483.12, the refusal to readmit is improper.



B. *St. John's Contention*

St. John contends that it was not bound by part 483.12 (in particular, the requirements of notice before or at the time of that transfer, the bed-hold period, readmission after the state bed-hold period expired, and transfer planning). The reason: Ms. Woods's hospice care provider, St. Liz, ordered her transfer to the Hospital, rather than St. John.

As best we understand it, St. John's logic is as follows. The language of part 483.12 provides that the justification for an involuntary transfer under part 483.12(a)(2) and the documentation required under part 483.12(a)(3) apply only if the facility "transfers" the resident.⁷ Thus, St. John asserts, the other part 483.12 requirements also apply only if the facility "transfers" the resident. Although Ms. Woods resided at St. John, she had elected St. Liz as her hospice provider under 42 Code of Federal Regulations part 418.24(a).⁸ Further, as required by 42 Code of Federal Regulations part 418.112(b), St. Liz had "assume[d] responsibility for professional management of the resident's hospice services provided, in accordance with the hospice plan of care and the hospice conditions of participation." As such, it was Ms. Woods's attending physician, acting for St. Liz (as opposed to St. John), who determined that Ms. Woods should be transferred from St. John to the Hospital for a psychiatric evaluation and treatment. Therefore, St. John argues, it did not "transfer" Ms. Woods. Rather, St. Liz did. Further, according to St. John, it was not obligated to comply with part 483.12, including the duty to readmit her.

We disagree. There is no doubt that Ms. Woods's relocation from St. John to the Hospital was a transfer under part 483.12(a)(1)—it was a "movement of a resident to a bed outside of the certified facility." St. John asserts that St. Liz was responsible for the transfer, but St. John does not state, or even imply, that St. Liz was responsible for complying with the requirements of part 483.12. The reason is obvious. St. Liz was not the skilled nursing facility where Ms. Woods resided, and thus St. Liz was not covered by part 483.12. Under St. John's logic, part 483.12 simply did not apply.

⁷ See part 483.12(a)(2) ("[t]he facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless" one or more of the listed circumstances are met; § 483.12(a)(3) [documentation of the reason for transfer or discharge must be made "[w]hen the facility transfers or discharges a resident" under circumstances described in § 483.12(a)(2)].)

⁸ 42 Code of Federal Regulations part 418.24(a)(1) (2015) provides: "An individual who meets the eligibility requirement of § 418.20 may file an election statement with a particular hospice. If the individual is physically or mentally incapacitated, his or her representative (as defined in § 418.3) may file the election statement." An individual is qualified to file a hospice election if the person is entitled to Medicare Part A and is certified as being terminally ill. (42 C.F.R. § 418.20(a) & (b) (2015).)

■ But that result violates the plain meaning of part 483.12 as a whole and common sense. Part 483.12 expressly refers to the obligations the facility bears to a “resident,” and does not contain any suggestion that if the resident is under the care of a hospice provider, the involuntary transfer provisions do not apply. Indeed, that result makes no sense. Surely, given that a terminally ill resident at a skilled nursing facility is authorized to elect hospice care, and that the skilled nursing facility is authorized to contract with hospice care providers to provide such care at the facility, federal regulations would not deprive such a resident of the protections of part 483.12 simply based on whose employee—the hospice’s or the facility’s—determines the need for a transfer. And if that were the intent, we presume that the regulations would so state. Thus, we decline to read into part 483.12 any exemption that applies solely because a resident’s hospice care provider determines the need for an acute care hospitalization rather than the long-term care facility.

St. John summarily asserts, without explanation, that if it had prepared a discharge plan in connection with its refusal to readmit Ms. Woods, it would have violated both its contract with St. Liz and 42 Code of Federal Regulations part 418.112(c)(3) (2015), which provides that a skilled nursing facility such as St. John “must have a written agreement that specifies the provision of hospice services in the facility” including “[a] provision stating that the hospice assumes responsibility for determining the appropriate course of hospice care, including the determination to change the level of services provided.”

■ But St. John fails to explain the purported conflict. Part 483.12 required St. John to identify a justifying circumstance for refusing to readmit Ms. Woods under part 483.12(a)(2), to document it under subdivision (a)(3), and to provide preparation and orientation for a safe and orderly transfer under part 483.12(a)(7), including determining the effective date of transfer or discharge and the location to which Ms. Woods would be sent (§ 483.12(a)(6)(i) & (ii)). Certainly St. John, as the facility in which Ms. Woods resided, could comply with these duties in consultation with St. Liz, without purporting to dictate the appropriate course of hospice care or level of service provided. Indeed, several provisions of 42 Code of Federal Regulations part 418.112 (2015) contemplate such cooperation. (See 42 C.F.R. § 418.112(c)(1) [skilled nursing facility’s written agreement with hospice service must explain “[t]he manner in which the SNF/NF [skilled nursing facility or nursing facility] and the hospice are to communicate with each other and document such communications to ensure that the needs of patients are addressed and met 24 hours a day”]; *id.*, § 483.12(c)(2) [agreement must require the skilled nursing facility to “immediately notif[y] the hospice if—[¶] (i) A significant change in a patient’s physical, mental, social, or emotional status occurs; [¶] (ii) Clinical complications appear that suggest a need to alter the plan of care; [or] [¶] (iii) A need to transfer a patient from the SNF/NF . . . , and the hospice makes

arrangements for, and remains responsible for, any necessary continuous care or inpatient care necessary related to the terminal illness and related conditions”]; *id.*, § 483.12(c)(4) [agreement must require the skilled nursing facility “to continue to furnish 24 hour room and board care, meeting the personal care and nursing needs that would have been provided by the primary caregiver at home at the same level of care provided before hospice care was elected”].) Thus, we see no conflict between, on the one hand, St. John’s duty to perform discharge planning under part 483.12, and, on the other hand, either the requirements of 42 Code of Federal Regulations part 418.112(c)(4) (2015), or St. John’s contract with St. Liz.

St. John also contends that if it readmitted Ms. Woods, and then complied with the requirements of part 483.12 to transfer or discharge her, including preparation of a discharge plan, it would have violated Health and Safety Code section 1432. That statute prohibits a long-term care facility from discriminating or retaliating against any “complainant . . . or . . . patient . . . on the basis or for the reason that the complainant, patient, . . . or any other person has presented a grievance or complaint, or has initiated or cooperated in any investigation or proceeding of any governmental entity relating to care, services, or conditions at that facility. A licensee who violates this section is subject to a civil penalty of no more than ten thousand dollars (\$10,000), to be assessed by the director and collected in the manner provided in Section 1430.” (Health & Saf. Code, § 1432, subd. (a).)

St. John’s contention that it would violate Health and Safety Code section 1432, subdivision (a) by readmitting Ms. Woods and planning her discharge is based on the presumption created by Health and Safety Code section 1432, subdivision (b), which provides: “Any attempt to expel a patient from a long-term health care facility, or any type of discriminatory treatment of a patient by whom, or upon whose behalf, a grievance or complaint has been submitted, directly or indirectly, to any governmental entity or received by a long-term health care facility administrator or any proceeding instituted under or related to this chapter *within 180 days of the filing of the complaint or the institution of the action*, shall raise a *rebuttable presumption* that the action was taken by the licensee in retaliation for the filing of the complaint.” (Italics added.)

■ Although St. John does not fully develop the argument, it appears that St. John is contending that if it had readmitted Ms. Woods, complied with the discharge requirements of part 483.12, and then discharged Ms. Woods, all within 180 days of the Ombudsman’s complaint, it would be presumed to be in violation of Health and Safety Code section 1432, subdivision (a). However, the presumption of Health and Safety Code section 1432, subdivision (b) is one “affecting the burden of

producing evidence as provided in Section 603 of the Evidence Code.” (*Id.*, subd. (d).) The effect of such a presumption is that “when the party against whom such a presumption operates produces some quantum of evidence casting doubt on the truth of the presumed fact, the other party is no longer aided by the presumption. The presumption disappears, leaving it to the party in whose favor it initially worked to prove the fact in question.” (*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 882 [268 Cal.Rptr. 505].)

■ Thus, St. John’s concern about being found in violation of Health and Safety Code section 1432 is unfounded. Obviously, if St. John complied with the requirements of a discharge under part 483.12, and thereafter discharged Ms. Woods, that evidence would show that St. John was not discriminating or retaliating against her, but rather complying with the nondiscriminatory and non-retaliatory discharge requirements of part 483.12. Thus, the presumption affecting the burden of proof under Health and Safety Code section 1432, subdivision (b) would disappear. In short, it is inconceivable that that St. John would have been in violation of section 1432 had it readmitted Ms. Woods and validly complied with part 483.12 in later discharging her.

Thus, for all of the foregoing reasons, we conclude that part 483.12 does not exempt a skilled nursing facility from the readmission requirement (§ 483.12(b)(3)) solely because the transfer to an acute care hospital from which the resident is returning was ordered by the resident’s hospice care provider rather than the facility itself. To the extent St. John contends that its refusal to readmit Ms. Woods did not constitute an involuntary transfer because she was returning from an acute hospitalization ordered by St. Liz, St. John is mistaken. Further, that St. Liz ordered the acute hospitalization also did not exempt St. John from complying with the involuntary transfer provisions of part 483.12(a)(2) (requiring identification of a justifying circumstance), (a)(3) (requiring documentation of the justifying circumstance) and (a)(7) (requiring preparation and orientation for a safe and orderly transfer), including giving notice of the effective date of the transfer or discharge and the new resident location (§ 483.12(a)(6)(ii) & (iii)), before terminating Ms. Woods’s residency. Finally, there was no risk that readmitting Ms. Woods and later discharging her in compliance with part 483.12 would have placed St. John in violation of Health and Safety Code section 1432.

DISPOSITION

The order denying the petition for writ of administrative mandate is reversed solely on the ground that the DHCS order for Ms. Woods’s readmission to St. John is moot. (See *Giles, supra*, 100 Cal.App.4th at

p. 229.) We remand the matter to the superior court, with directions to dismiss the petition for writ of administrative mandate as moot. Each side shall bear its own costs on appeal.

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

[No. B262429. Second Dist., Div. Six. Aug. 17, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
ANGEL ANTONIO MEDELEZ, Defendant and Appellant.

[REDACTED]

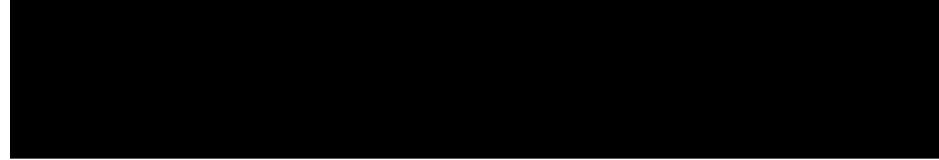
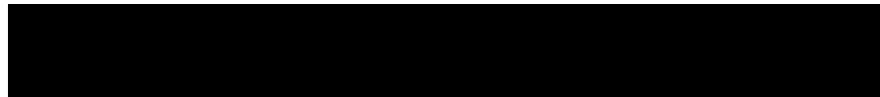
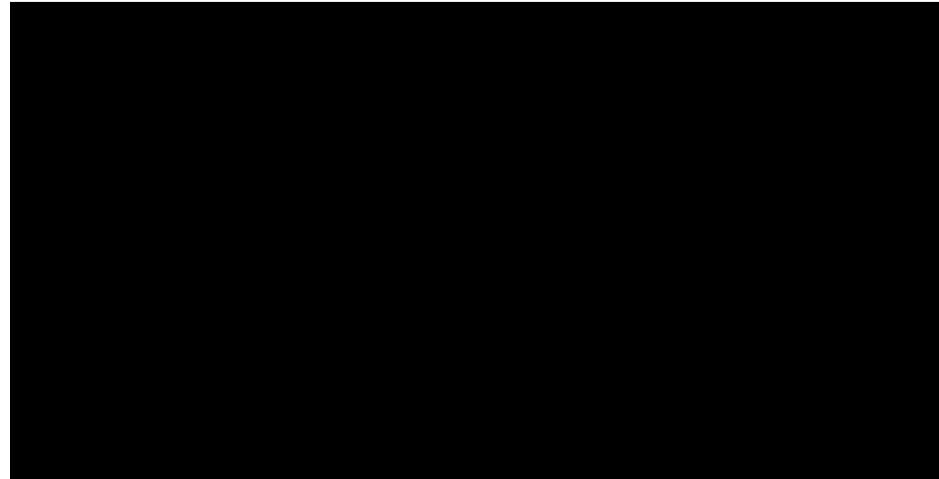
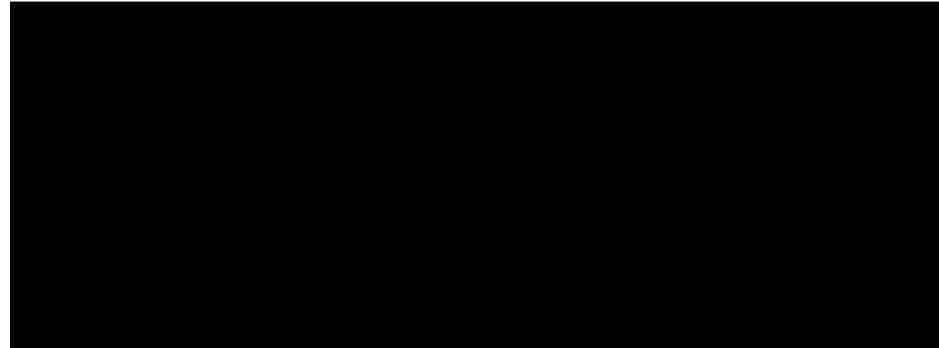
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COUNSEL

Waldemar D. Halka, 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 David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

TANGEMAN, J.—Angel Antonio Medelez contacted a minor with intent to engage in oral sex (Pen. Code,¹ § 288.3; *luring*), and then took a direct but ineffectual act toward his goal (§§ 664, 288a, subd. (b)(1); *attempt*). Here we decide he may be convicted of both crimes because *luring* is not a special statute intended to preclude prosecution for attempt, and neither crime is the lesser included offense of the other.

Medelez appeals the judgment after conviction by a jury of three sex offenses against his adult roommate and two sex offenses against a minor. (§§ 288a, subds. (f) & (i), 243.4, subd. (e)(1), 288.3, subd. (a), 664, 288a, subd. (b)(1).) The trial court sentenced Medelez to six years eight months in prison, including two consecutive sentences of four months each for attempt to orally copulate a minor (§§ 664, 288a, subd. (b)(1)) and *luring* the minor with intent to orally copulate him (§ 288.3, subd. (a)).

We stay the four-month sentence for attempted oral copulation (§ 664), correct the abstract of judgment to delete a dismissed count, and otherwise affirm.

In the unpublished portion of the opinion, we consider and reject Medelez's contention that all his convictions must be reversed because the trial court dismissed a juror during trial without good cause. (§ 1089.)

BACKGROUND

In August 2013, Medelez drugged and orally copulated his unconscious adult male roommate. (§§ 288a, subds. (f) & (i), 243.4, subd. (e)(1).)

¹ All further statutory references are to the Penal Code.

Two months later, he tried to orally copulate a minor. Medelez met 16-year-old A.P. at work. Medelez offered him a job, and A.P. returned that evening to learn more about it. Medelez drove A.P. to a remote place and offered him money in exchange for oral sex. When A.P. refused, Medelez told A.P. to take off his pants. A.P. did so because he was afraid. Medelez showed A.P. pornographic pictures. Medelez “was about to lean in,” but A.P. pulled up his pants and stopped Medelez.

[II]*

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DISCUSSION

Special Versus General Doctrine

Medelez contends he cannot be convicted of both attempted oral copulation of a minor (§§ 664, 288a, subd. (b)(1)) and luring a minor with intent to orally copulate (§ 288.3) because the Legislature intended the luring statute to supplant attempted oral copulation with a minor. (*In re Williamson* (1954) 43 Cal.2d 651, 654 [276 P.2d 593] (*Williamson*).) His argument lacks merit because the statutes cover different conduct.

■ If a general statute covers the same conduct as a specific (special) statute, courts generally infer that the Legislature intended the conduct to be prosecuted only under the special statute. (*People v. Murphy* (2011) 52 Cal.4th 81, 86 [127 Cal.Rptr.3d 78, 253 P.3d 1216]; *Williamson*, *supra*, 43 Cal.2d at p. 654.) This rule applies if “(1) ‘each element of the general statute corresponds to an element on the face of the special statute’ or (2) . . . ‘it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute.’ [Citation.]” (*People v. Murphy*, at p. 86.) It does not apply “if the more general statute contains an element that is not contained in the special statute and that element would not commonly occur in the context of a violation of the special statute.” (*Id.* at p. 87.)

■ Here, the general statute (attempt) contains an element that is not contained on the face of the more recently enacted special statute (luring). Attempt requires a direct but ineffectual act that goes beyond mere preparation. (§ 21a; *People v. Clark* (2011) 52 Cal.4th 856, 948 [131 Cal.Rptr.3d 225, 261 P.3d 243].) Luring does not.

*See footnote, *ante*, page 659.

Luring may be committed by a “contact or communication” that is preparatory or indirect. (§ 288.3, subd. (b) [“communication” includes “indirect contact or communication . . . by use of an agent or agency”]; see, e.g., *People v. Sigur* (2015) 238 Cal.App.4th 656, 659 [189 Cal.Rptr.3d 460] [luring by means of Internet chat]; *People v. Keister* (2011) 198 Cal.App.4th 442, 445 [129 Cal.Rptr.3d 566] [luring by means of sexually explicit notes].) In contrast, an “attempt” must be more than preparatory; the defendant must unequivocally put his plan into action so that it will be carried out if it is not interrupted. (*People v. Clark*, *supra*, 52 Cal.4th at p. 948.) The Legislature did not intend luring to supplant prosecutions for attempt; it was casting a wider net. (Voter Information Guide, Gen. Elec. (Nov. 7, 2006) text of Prop. 83, p. 138 [purpose of Prop. 83 is “to strengthen and improve the laws that punish and control sexual offenders”].) Medelez engaged in preparatory communication and a direct act. He is guilty of both crimes.

Lesser Included Offense

Medelez’s multiple convictions for luring with intent to orally copulate a minor and attempt to orally copulate a minor are authorized because neither crime is a necessarily included offense of the other.

■ Multiple convictions based on necessarily included offenses are prohibited. (*People v. Sanders* (2012) 55 Cal.4th 731, 736 [149 Cal.Rptr.3d 26, 288 P.3d 83].) An offense is necessarily included if the statutory elements of one crime include all the statutory elements of another, such that the first cannot be committed without necessarily committing the second. (*Id.* at p. 737.)

■ Attempt is not a necessarily included offense of luring, because luring can be committed without a “direct . . . act,” as we have explained. (Cf. §§ 21a, 288.3.)

Luring is not a lesser included offense of attempted oral copulation, because attempt can be committed without contacting or communicating with the victim. (See, e.g., *People v. Bonner* (2000) 80 Cal.App.4th 759, 763 [95 Cal.Rptr.2d 642] [sufficient evidence of attempt to rob where defendant never came near to, or spoke to, his victims but lay in wait with a pistol].)

Multiple Punishments

Medelez cannot be punished for both attempted oral copulation and luring because the crimes were based on a single intent and objective, as the People concede. (§ 654.) We modify the sentence to stay imposition of the attempted

oral copulation conviction, because the sentences for attempt and luring are of equal duration. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248 [51 Cal.Rptr.2d 150].)

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Abstract of Judgment—Dismissed Count

The abstract of judgment incorrectly states Medelez was convicted of exhibiting harmful material to a minor under section 288.2, subdivision (a)(2) (count 4 of the information). We correct it to reflect that this charge was dismissed after the jury was unable to reach a verdict on it. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [109 Cal.Rptr.2d 303, 26 P.3d 1040].)

DISPOSITION

The verdict is modified to stay the four-month sentence for attempted oral copulation of a minor (count 5; Pen. Code, §§ 664, 288a, subd. (b)(1)) pending service of the sentence for luring (count 3; Pen. Code, § 288.3, subd. (a)). The superior court is directed to amend the abstract of judgment to reflect the modification and to reflect dismissal of count 4 (Pen. Code, § 288.2, subd. (a)(2)), and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

Gilbert, P. J., and Perren, J., concurred.

Appellant's petition for review by the Supreme Court was denied November 9, 2016, S237290.

*See footnote, *ante*, page 659.

[No. C081228. Third Dist. Aug. 17, 2016.]

In re S.N., a Person Coming Under the Juvenile Court Law.
TRINITY COUNTY HEALTH AND HUMAN SERVICES, Plaintiff and
Respondent, v.
C.N., Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Michele Anne Cella, under appointment by the Court of Appeal, for Defendant and Appellant.

Prentice, Long & Epperson and Margaret E. Long for Plaintiff and Respondent.

OPINION

DUARTE, J.—C.N., mother of minor S.N., appeals from the juvenile court’s orders taking jurisdiction and later terminating jurisdiction after awarding custody to father at disposition. She contends the court failed to obtain a valid waiver of her right to a contested jurisdictional hearing. Mother further contends that trial counsel rendered ineffective assistance of counsel at the jurisdictional hearing.

In the published portion of our opinion, we conclude the court failed to obtain a valid waiver. Because we find the juvenile court’s error harmless beyond a reasonable doubt, we shall affirm the juvenile court’s orders.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2015, the Trinity County Department of Health and Human Services (Department) filed a juvenile dependency petition (Welf. & Inst. Code, § 300)¹ as to then eight-year-old S.N. The petition alleged that mother “failed to protect [S.N.] in that she drove under the influence of alcohol with [S.N.] in the vehicle, resulting in a single car collision into the embankment, causing [S.N.] to suffer serious physical and emotional harm.” The petition further alleged that mother “failed to provide [S.N.] with adequate medical care in that [S.N.] had ligature marks and abrasions on her chest as a result of a vehicle accident which were not immediately treated due to the mother telling [S.N.] she was not ‘hurt enough’ to require medical care.” According to the Department, “mother’s failure to provide adequate medical care placed [S.N.] at substantial risk of suffering serious physical and emotional harm.” The petition also asserted that mother’s conduct was due, in part, to her substance abuse, and that mother had a history of substance abuse.

The detention report recommended that S.N. be detained and remain outside the home pending a jurisdiction hearing because S.N. could not be safely maintained in mother’s care. The report alleged that a “confidential reporting party (RP) stated that on [August 27, 2015], [mother] was driving erratically on Highway 3 towards Coffee Creek Elementary School. A resident of Coffee Creek, Greg Amos, was behind her and took photos of her car crossing the yellow line on multiple occasions. [Amos] became concerned and followed the driver to Coffee Creek Elementary School, where he

¹ Further undesignated statutory references are to the Welfare and Institutions Code.

approached the driver and asked if she was ok. He stated the driver appeared disheveled and ‘out of it.’ He asked her if she was under the influence and did not receive a clear response, so he called 911. He asked dispatchers to call the school because he believed the driver was picking up a child from the school.”²

The report continued that “[t]he RP stated that dispatch never called, and the driver, [mother], picked up her daughter and began driving towards Weaverville, when she wrecked her vehicle near Cedar Stock Marina on Highway 3. An oncoming car stopped to help the family and reported [S.N.] jumping out of the car stating, ‘My mom says we don’t have any injuries, so no EMT is needed. My mom says if the EMT comes then law enforcement will come.’ The man gave the two a ride home, and hours later when authorities discovered the wreck, they made contact with [mother] and [S.N.] at their home . . .”³

The detention report further alleged that the RP observed bruises and ligature marks across S.N.’s chest during physical education class at a swimming pool. S.N. spoke to the social worker and confirmed that the bruises and marks on her chest were from the car accident, and said that “[m]om gets in accidents all the time.” S.N. also confirmed that mother had told her not to tell bystanders she needed an ambulance because the police would come. According to S.N., she lied to the police when she said there was a deer in the road so her mother would not get arrested.⁴ When S.N. was asked by the social worker why she thought her mother would get arrested, S.N. said that her mother had told her she was drunk prior to the accident. S.N. asked the social worker not to tell her mother that she had told the truth because she was afraid that her mother would “kill her.”

² Amos, a firefighter, reported to the social worker that he observed mother tailgating two vehicles, driving erratically, crossing the double yellow line, and swerving into the dirt. According to Amos, mother was clearly under the influence of methamphetamine. In support of this assertion, Amos noted that he was well aware of the signs and symptoms of methamphetamine use, as he had fired many employees that displayed the same signs and symptoms and subsequently tested positive for methamphetamine. Amos stated that he attempted to talk to mother but she was too “spun” to speak with him.

³ Nick Watkins spoke with the social worker and reported witnessing the mother driving recklessly immediately before the accident, including crossing the double yellow line on blind corners. He stated that he observed the accident and stopped to assist mother and S.N. Watkins reported that S.N. jumped out of the car and begged him not to call an ambulance because “‘mommy says I’m not hurt enough to need an ambulance, cause if the ambulance comes, other people will come,’” meaning “‘cops and stuff.’” According to Watkins, mother got out of the car and yelled, “‘I’m not supposed to be driving, I wish someone here would say they were driving the car.’” He further stated that mother told him, “‘Please don’t call 911, just call a tow truck, we just need to move the car.’”

⁴ Mother denied being drunk or under the influence of any drug at the time of the accident. She claimed that there was a deer in the road that caused the wreck.

At the detention hearing, the juvenile court found it appropriate to temporarily detain S.N. The court then continued the hearing to allow mother an opportunity to appear with her retained counsel. However, because mother did not appear at the next hearing with retained counsel, the juvenile court appointed counsel to represent her. At mother's request, a contested jurisdictional hearing was scheduled. The juvenile court advised mother that she could challenge the allegations in the petition at the jurisdictional hearing. The court also explained that she would have the right to testify, call witnesses, and cross-examine witnesses. In response to mother's suggestion that she had evidence demonstrating that the allegations in the petition were not true, including traffic collision reports saying she was not drinking on the date of the accident and "ambulance reports," the court advised mother that she could give these reports to her attorney and present them at the jurisdictional hearing. At the conclusion of the hearing, the court ordered S.N. detained with visitation for mother and the presumed father, and scheduled a combined jurisdictional and dispositional hearing.

The jurisdiction/disposition report, which was based on the same allegations set forth in the detention report and the additional allegations that mother had tested positive for marijuana seven times and alcohol three times since the date of S.N.'s detention, recommended that the petition be sustained, S.N. be found to come within section 300, subdivision (b), and S.N. be declared a dependent. It also recommended that jurisdiction be terminated and joint legal custody awarded to both parents, with primary physical custody to the father. In making these recommendations, the report stated that the Department was gravely concerned for S.N.'s safety with mother due to the extreme risk mother took with S.N.'s life in driving under the influence and in encouraging S.N. to lie to law enforcement to conceal her crime. The report further stated that mother lacked insight into her complete lack of judgment and care for S.N.'s safety, as demonstrated by her actions, her failure to admit wrongdoing, and her continued consumption of alcohol. The report also noted that father had demonstrated a willingness to safely and adequately care for S.N., and that there was no indication that S.N. was in need of further protection from the juvenile court.

At the outset of the jurisdictional/dispositional hearing, the juvenile court asked mother and father whether they had received a copy of the current report, and whether counsel had an opportunity to go over it with their clients. In response, mother's counsel stated, "No, not adequately . . . This was just e-mailed to me yesterday. I haven't had a chance to talk to the mother about it. It's a recommendation that I had no previous knowledge or reason to expect, and it is something I need to talk to the mother about. The initial indication today is that mother's primary issue may be her contact if [S.N.] is placed with dad. So it may not be contested, but I'm not comfortable making a[] final decision on that today until I've had a chance to sit down

with mom in my office [¶] . . . [¶] and go over the recommendation, as well as the meaning of that, and put in place, if mother does end up submitting, some form of ongoing contact." Mother's counsel further stated that he did not have a waiver form but would be willing to submit on jurisdiction if the issue of placement and dismissal of the case was "put out," because "[t]hat's the issue I'm concerned about."

Following a reading of the allegations in the petition, the juvenile court stated that it believed that all parties were prepared to submit on jurisdiction. The attorneys for the Department and father confirmed that they were prepared to submit on jurisdiction, while mother's counsel stated, "[W]ithout admitting the truthfulness of the allegation, I will be submitting." The juvenile court then sustained the petition based on the facts in the jurisdiction/disposition report, and found, among other things, that "notice of the jurisdiction hearing was in accordance with the law . . . and that the parents were previously advised regarding their constitutional rights, including the privilege against self-incrimination, the rights to cross-examine and confront witnesses and to present evidence." The court also found that there would be a substantial risk of detriment if S.N. were returned to the mother's care. The dispositional hearing was continued, and mother agreed to allow S.N. to be temporarily placed with father until that hearing.

Prior to the dispositional hearing, mother filed a substitution of attorney, a motion to disqualify the juvenile court judge, and a written response to the jurisdiction/disposition report. In her response to the report, mother argued that the Department could not prove that she drove under the influence of alcohol, failed to provide S.N. adequate medical care, had a substance abuse problem, or S.N. had suffered, or there was a substantial risk that S.N. would suffer, serious physical harm or illness from her inability to provide regular care for S.N. due to her alleged substance abuse problem. In support of her written response, mother filed a traffic collision report and a prehospital care report prepared by Trinity County Life Support (ambulance report).

At the contested dispositional hearing, the juvenile court denied mother's motion to disqualify as untimely, denied mother's request to reconsider the jurisdictional findings in light of the collision and ambulance reports, and denied mother's request for a continuance. In denying mother's request for reconsideration, the juvenile court stated that the reports could have been submitted at the jurisdictional hearing, and that "plenty of information" was submitted to support the granting of the petition. Aside from the jurisdiction/disposition report, no other evidence was admitted at the hearing, and there was no testimony.

At the conclusion of the hearing, the juvenile court adjudged S.N. a person described under section 300, subdivision (b) and a dependent of the court and

found that the circumstances justifying removal from mother were based on clear and convincing evidence as described in the jurisdiction/disposition report; removal from the mother was appropriate under section 361, subdivision (c)(1); reasonable efforts were made to prevent or eliminate the need for S.N.'s removal as documented in the jurisdiction/disposition report; a continuance in the home was contrary to S.N.'s welfare as set forth in the jurisdiction/disposition report, including the handling of the accident, the covering up of S.N.'s physical condition, and the delay in obtaining medical care for S.N.; termination of jurisdiction was warranted because it was in the best interests of S.N. to be placed with father; and joint legal custody was appropriate, with primary physical custody to father.

Mother filed a timely notice of appeal.

DISCUSSION

I

The Failure to Obtain an Explicit Waiver of Rights

Mother contends the juvenile court violated her due process rights when it failed to obtain a valid waiver of her right to a contested jurisdictional hearing. We agree. Although the court advised mother at the *detention* hearing of the rights she would have at the upcoming jurisdictional hearing, the court did not properly advise mother at the jurisdictional hearing itself before accepting the parties' submission.

■ If a parent denies the allegations in a section 300 petition, the juvenile court must hold a contested hearing on them. (Cal. Rules of Court, rule 5.684(a).)⁵ But even if the parent does not contest the allegations, the court must advise the parent of the parent's rights to receive a hearing on the issues raised by the petition, to assert any privilege against self-incrimination, to confront and cross-examine witnesses, to compel witnesses' attendance, and to have the child returned if the court finds that the child does not come within the jurisdiction of the juvenile court under section 300. (Rule 5.682(b).) If, after being so advised, the parent wishes to admit the allegations or enter a plea of no contest (see rule 5.682(e)), the court must find and state on the record that it is satisfied that the parent understands the nature of the allegations and the direct consequences of the admission, and understands and knowingly and intelligently waives the rights in rule 5.682(b). (Rule 5.682(c), (f).) Here, the court did not follow these procedures.

⁵ Further undesignated references to rules are to the California Rules of Court.

Because the due process rights protected by these rules implicate a parent's fundamental right to care for and have custody of his or her child, it is error of constitutional dimension to accept a waiver of the right to a contested jurisdictional hearing based only on counsel's representations. (*In re Monique T.* (1992) 2 Cal.App.4th 1372, 1377 [4 Cal.Rptr.2d 198]; see *In re Patricia T.* (2001) 91 Cal.App.4th 400, 404 [109 Cal.Rptr.2d 904].) Where such error occurred, we may affirm only if the error is harmless beyond a reasonable doubt. (*In re Monique T.*, at p. 1377, citing *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710–711, 87 S.Ct. 824].)

■ Here, we conclude the juvenile court's failure to obtain a personal waiver from mother was harmless beyond a reasonable doubt. The evidence supporting a finding of jurisdiction was overwhelming. There were two eyewitnesses to mother's reckless driving and odd behavior, one of whom photographed her poor driving. Further, S.N. informed the social worker that mother had admitted to being drunk prior to the accident, and that mother had told her not to tell anyone she needed an ambulance because the police would come. S.N. also informed the social worker that she had lied to the police so that mother would not get arrested. In addition, the record discloses that mother and S.N. left the scene of the accident without seeking medical care despite the visible injuries to S.N. The record also discloses that mother has a history of substance abuse, and that she tested positive for marijuana and alcohol numerous times after S.N. was detained. We are convinced that the outcome of the jurisdictional hearing would have been the same regardless of the error. Under all the circumstances, the juvenile court's error was harmless.

Contrary to mother's contention, the traffic collision and ambulance reports do not demonstrate that she could have successfully contested jurisdiction. The collision report states that the vehicle mother was driving sustained major front end damage, including a crushed front bumper, crushed front fenders, a shattered windshield, and a crumpled hood. The ambulance report indicates that both front air bags were deployed. According to mother, she was driving approximately 65 miles per hour before she lost control of her vehicle and crashed into the embankment.

The collision report indicates that the investigating officer spoke with mother at her residence shortly after the accident and checked the box on the report indicating that mother had *not* been drinking alcohol. But the record does not disclose how the officer reached that conclusion. There is no evidence in the record suggesting that any test was conducted to confirm whether mother was intoxicated or under the influence of any drug at the time of the accident. Moreover, the evidence in the record, including S.N.'s report to the social worker and eyewitness reports, support a finding that mother was

under the influence of alcohol and/or drugs at the time of the accident. Further, the ambulance report confirms that mother did not seek immediate medical attention for S.N.'s injuries. The ambulance did not respond to S.N.'s residence based on a phone call from mother. Instead, the ambulance responded to the residence based on an investigation by the police. In short, there is nothing in the reports that demonstrate that the facts before the juvenile court were insufficient to justify a jurisdiction finding.

II

*Ineffective Assistance of Counsel**

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DISPOSITION

The orders of the juvenile court are affirmed.

Butz, Acting P. J., and Murray, J., concurred

*See footnote, *ante*, page 665.

[No. A139610. First Dist., Div. Two. Aug. 17, 2016.]

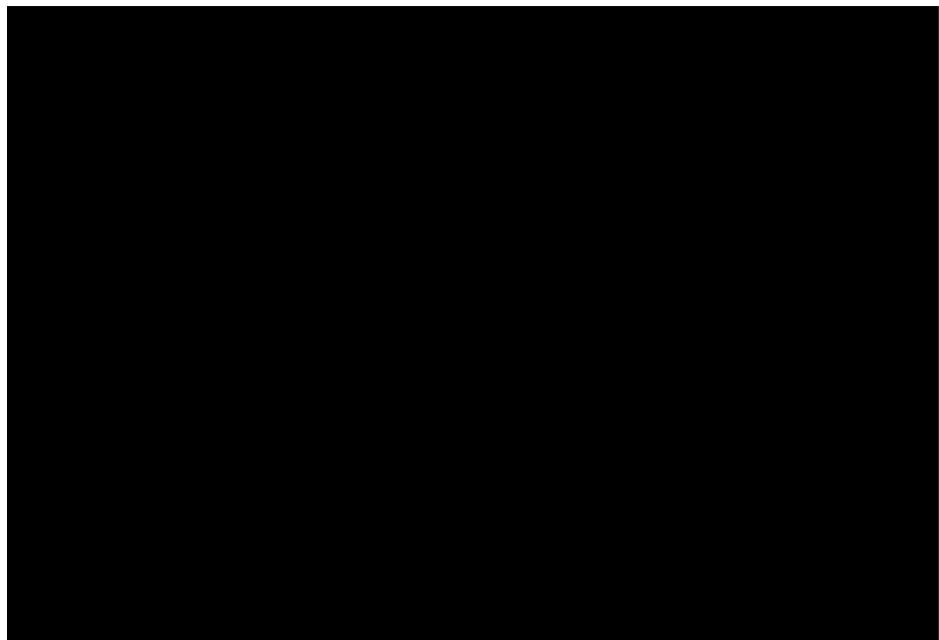
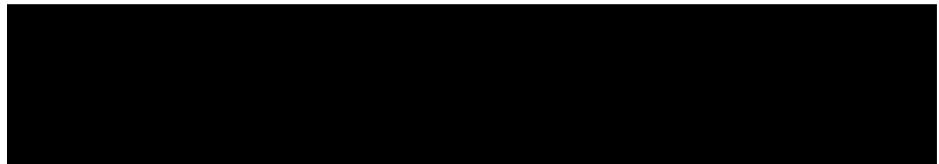
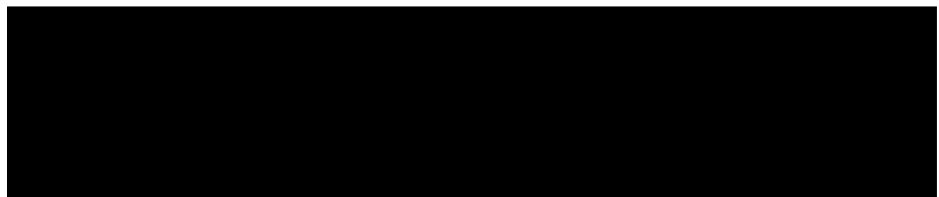
MARIN ASSOCIATION OF PUBLIC EMPLOYEES et al., Plaintiffs and Appellants, v.
MARIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION et al., Defendants and Respondents;
THE STATE OF CALIFORNIA, Intervener and Respondent.

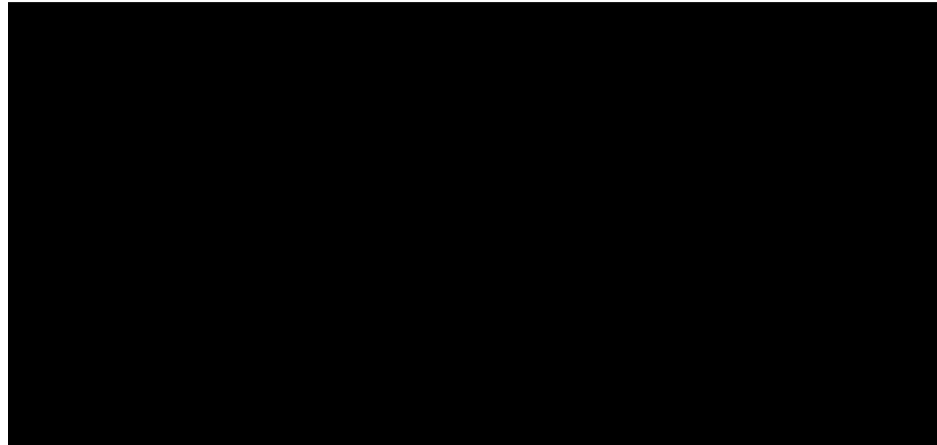
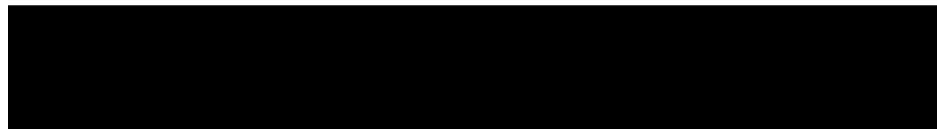
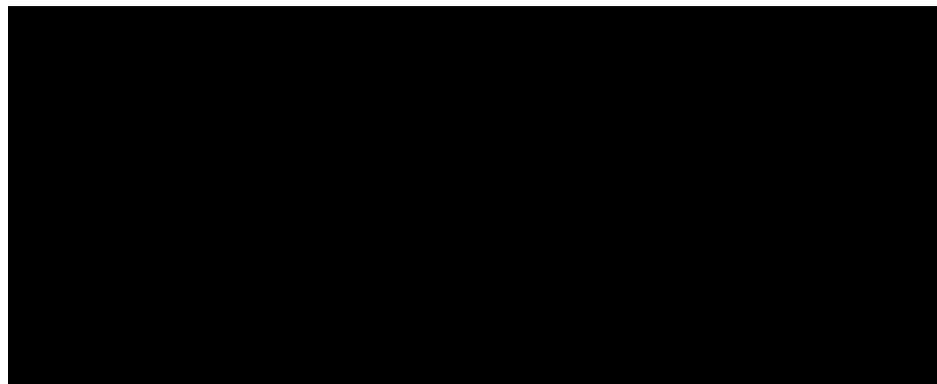
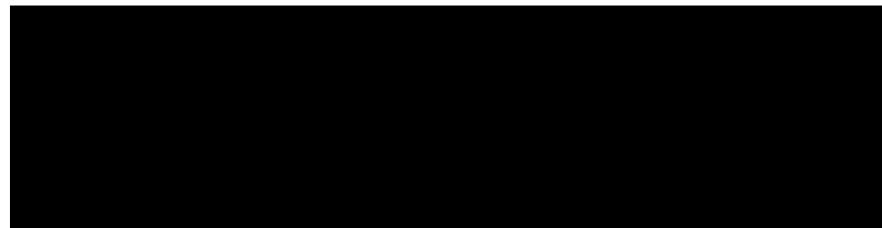
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) November 22, 2016, S237460.

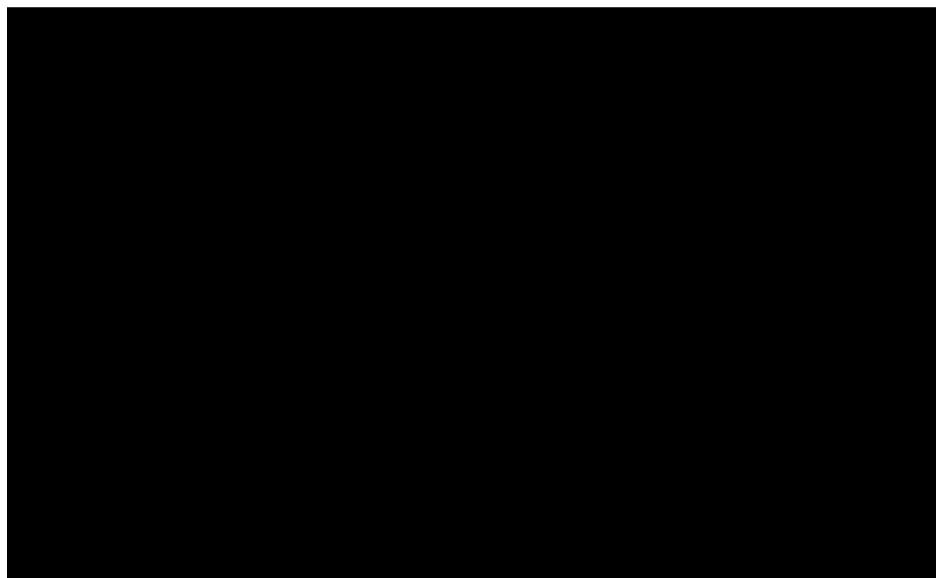
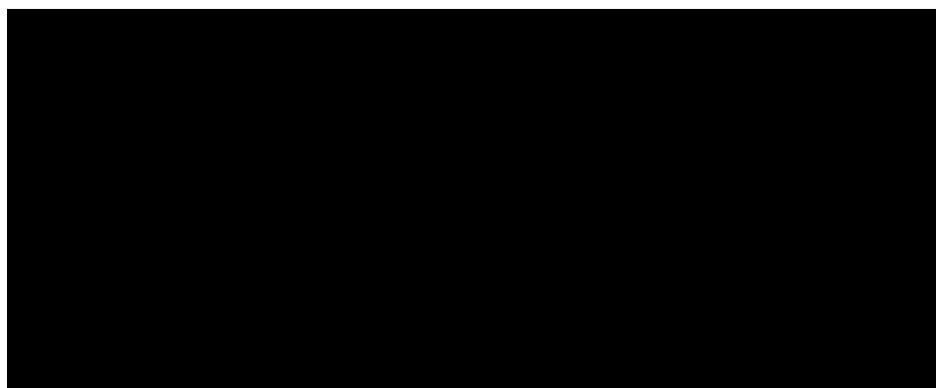
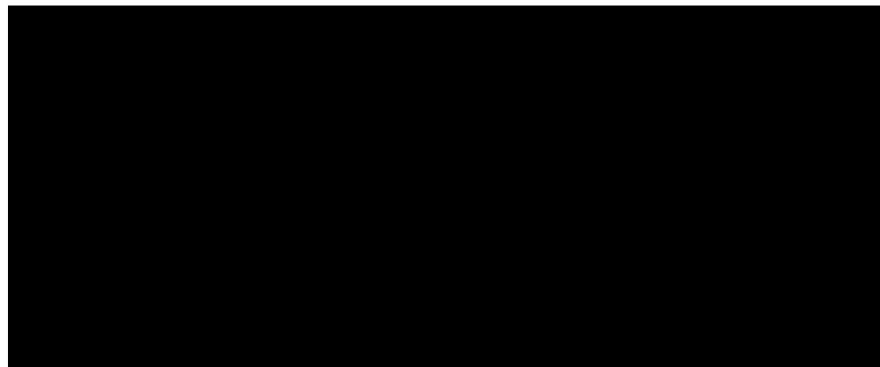
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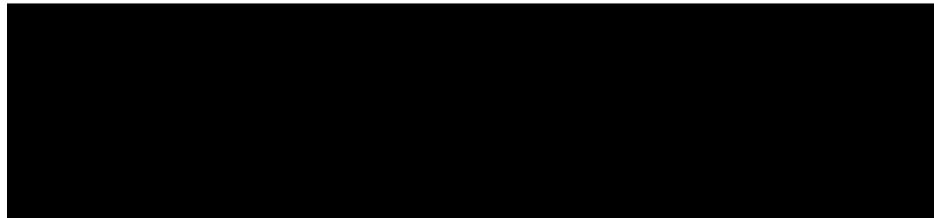
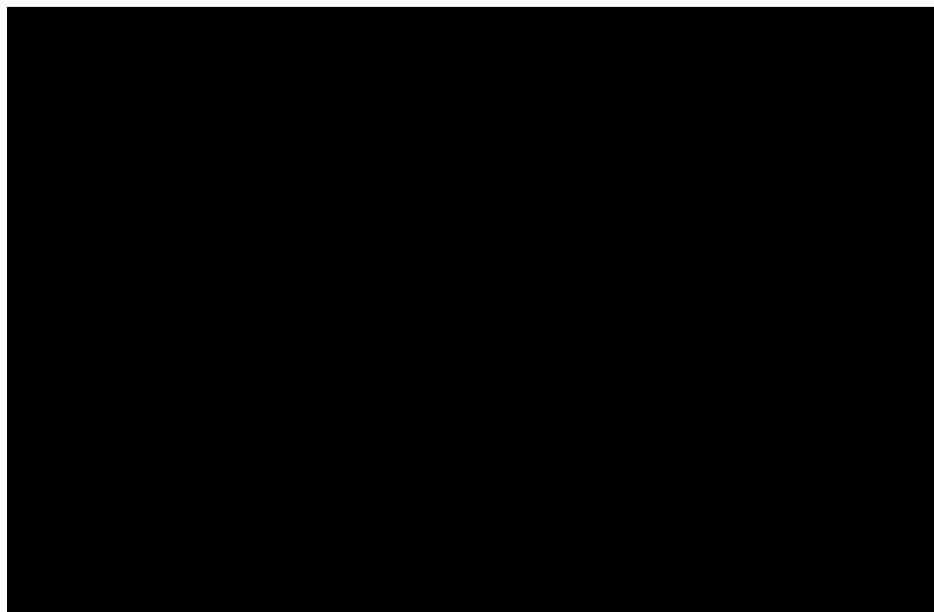
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COUNSEL

Leonard Carder, Peter Warren Saltzman and Arthur Wei-Wei Liou for Plaintiffs and Appellants Marin Association of Public Employees and Catherine Hall.

Weinberg, Roger & Rosenfeld, Vincent A. Harrington, Jr., Kerianne Ruth Steele, Anne I. Yen, Sean Daniel Graham and Caren Pamela Spencer for Plaintiff and Appellant Service Employees International Union Local 1021.

Carroll, Burdick & McDonough, Gregg McLean Adam, Amber Lynn Griffiths; Messing Adam & Jasmine, Gregg McLean Adam and Jonathan Dennis Yank for Plaintiffs and Appellants Marin County Fire Department Firefighters' Association, Marin County Management Employees Association, Joel Chandler and Angelo Sacheli.

Manatt, Phelps & Phillips, Ashley Kathleen Dunning, Kelly L. Knudson, Benjamin G. Shatz, Michael V. Toumanoff; Nossaman, Ashley Kathleen Dunning and Michael V. Toumanoff for Defendants and Respondents.

Kamala D. Harris, Attorney General, Douglas J. Woods, Assistant Attorney General, Constance L. LeLouis, Rei R. Onishi and Anthony P. O'Brien, Deputy Attorneys General, for Intervener and Respondent.

OPINION

RICHMAN, J.—The practice known as “pension spiking,” by which public employees use various stratagems and ploys to inflate their income and retirement benefits, has long drawn public ire and legislative chagrin. Effective January 1, 2013, the Legislature amended Government Code¹ section 31461, a provision of the County Employees Retirement Law of 1937, with the aim of curtailing pension spiking by excluding specified items from the calculation of retirement income. A number of individuals currently employed by various governmental entities in the County of Marin, together with a number of organizations representing current county employees, brought suit to halt implementation of the revised formula. The trial court concluded application of the new formula to current employees did not amount to an unconstitutional impairment of the employees’ contracts, and sustained the pension authority’s general demurrer without leave to amend.

After an extensive independent review, we reach the same conclusion and affirm, holding that the Legislature did not act impermissibly by amending

¹ Statutory references are to the Government Code unless otherwise indicated.

section 31461 to exclude specified items and categories of compensation from the calculation of pensions for current employees. As will be shown, while a public employee does have a “vested right” to a pension, that right is only to a “reasonable” pension—not an immutable entitlement to the most optimal formula of calculating the pension. And the Legislature may, prior to the employee’s retirement, alter the formula, thereby reducing the anticipated pension. So long as the Legislature’s modifications do not deprive the employee of a “reasonable” pension, there is no constitutional violation. Here, the Legislature did not forbid the employer from providing the specified items to an employee as compensation, only the purely prospective inclusion of those items in the computation of the employee’s pension. Neither the statutory change, nor the implementation of that change by the county pension agency, amounts to an impairment of the employee’s receipt of a “reasonable” pension upon retirement.

BACKGROUND

The Statutory Framework and the Emergence of the Unfunded Pension Liability Crisis

The County Employees Retirement Law of 1937 (CERL; see Stats. 1937, ch. 677, p. 1898), as codified in 1947 (§ 31450 et seq.) allows, but does not require, a county to establish and operate a retirement plan for its employees. Twenty of the state’s 58 counties have elected to do so. Each county plan is administered by a retirement board, which, as we previously characterized it, is “required to determine whether items of remuneration paid to employees qualify as ‘compensation’ under section 31460 and ‘compensation earnable’ pursuant to section 31461, and therefore must be included as part of a retiring employee’s ‘final compensation’ (§ 31462 or § 31462.1) for purposes of calculating the amount of a pension.” (*In re Retirement Cases* (2003) 110 Cal.App.4th 426 [433, 1 Cal.Rptr.3d 790].)

In the aftermath of the severe economic downturn of 2008 and 2009, public attention across the nation began to focus on the alarming state of unfunded public pension liabilities. (E.g., Cong. Budget Off., U.S. Cong., The Underfunding of State and Local Pension Plans (May 2011) p. 1 [estimating unfunded liabilities as of 2009 at “between \$2 trillion and \$3 trillion”]; State Budget Crisis Task Force, Rep. of the State Budget Crisis Task Force, Full Rep. (2012) p. 2 [“Pension funds for state and local government workers are underfunded by approximately a trillion dollars according to their actuaries and by as much as \$3 trillion or more if more conservative investment assumptions are used”]; Novy-Marx & Rauh, *Public Pension Promises: How Big Are They and What Are They Worth?* (2011) 66 J. Fin. 1206, 1211 [estimating “state employee pension liabilities as of June

2009” at between \$3.2 trillion to \$4.43 trillion].) One legal commentator characterized unfunded pension obligations as the “ticking fiscal time bomb for state and local governments.” (Beermann, *The Public Pension Crisis* (2013) 70 Wash. & Lee L.Rev. 3, 13; cf. Rauh, *The Pension Bomb*, Milken Inst. Rev. (2011) 28 [“Many pension systems are rapidly approaching a day of reckoning.”].)

As so often occurs, California was in first place: “The state with the biggest absolute level of underfunding is California, with underfunding of approximately \$475 billion.” (Novy-Marx & Rauh, *The Liabilities and Risks of State-Sponsored Pension Plans* (2009) 23 J. Econ. Persp. 191, 197–199.) In 2010, the Stanford Institute for Economic Policy Research, studying only the Public Employees’ Retirement System, the State Teachers’ Retirement System, and the University of California Retirement System, estimated “the current shortfall at more than half a trillion dollars.” (Bornstein et al., *Going for Broke: Reforming California’s Public Employee Pension Systems*, Stanford Institute for Economic Policy Research Policy Brief (April 2010) p. 2; see also Nation, *The Funding Status of Independent Public Employee Pension Systems in California*, Stanford Institute for Economic Policy Research Policy Brief (Nov. 2010) pp. 1, 13 [examining 24 systems operating under CERL which “account for approximately 91 percent of the total assets and liabilities for independent systems” and estimating their “aggregate unfunded liability . . . at nearly \$200 billion in June 2008”].) “The magnitude of the problem in California . . . is staggering” and “is without peer.” (Hylton, *Combating Moral Hazard: The Case for Rationalizing Public Employee Benefits* (2012) 45 Ind. L.Rev. 413, 444.)

In 2011, the Little Hoover Commission advised the Governor and the Legislature: “California’s pension plans are dangerously underfunded, the result of overly generous benefit promises, wishful thinking and an unwillingness to plan prudently. Unless aggressive reforms are implemented now, the problem will get far worse, forcing counties and cities to severely reduce services and layoff employees to meet pension obligations.” (Little Hoover Com., *Public Pensions for Retirement Security* (Feb. 2011) [cover letter of Chairman Daniel Hancock].) The commission urged a number of “structural changes that realign pension costs and expectations of employees, employers and taxpayers.” (*Ibid.*) The situation was described as “dire,” “unmanageable,” a “crisis” that “will take a generation to untangle,” and “a harsh reality” that could no longer be ignored: “The money coming in is nowhere near enough to keep up with the money that will need to go out.” (*Id.*, at pp. v, 38, 12, 21, 25.)

“The state must exercise its authority—and establish the legal authority—to reset overly generous and unsustainable pension formulas for both

current and future workers.” (Little Hoover Com., Public Pensions for Retirement Security, *supra*, at p. 53.) And because “State and local governments have made a promise to workers they can no longer afford,” the commission recommended: “To provide *immediate savings of the scope needed*, state and local governments must have the flexibility to alter future, unacrued retirement benefits for current workers.” (*Id.*, at p. 42, italics added.)

One feature of the system that drew the commission’s critical attention was “pension spiking,” which the commission defined as follows: “The practice of increasing [an employee’s] retirement allowance by increasing final compensation or including various non-salary items (such as unused vacation pay) in the final compensation figure used in the [employee’s] retirement benefit calculations, and which has not been considered in prefunding of the benefits.” (Little Hoover Com., Public Pensions for Retirement Security, *supra*, at p. 73.) The commission found the practice had become “widespread throughout local government,” and had generated “public outrage [that] . . . cannot continue to be ignored.”² (Little Hoover Com., Public Pensions for Retirement Security, *supra*, at pp. 36, vi.) “The spiking games must end. Pensions must be based only on actual base salary . . . not padded with other pay for clothing, equipment or vehicle use, or enhanced by adding service credit for unused sick time vacation time or other leave time.” (Little Hoover Com., Public Pensions for Retirement Security, *supra*, at p. 46.)

The Pension Reform Act

The Legislature heard, and agreed.³ The following year, it passed Assembly Bill No. 340 (2011–2012 Reg. Sess.) (Assembly Bill 340), enacting the

² One commentator correlated public anger to timing and perception: “Public employee pensions are usually based on the employee’s pay at the end of the career, often the average of the employee’s last three or five years of government employment. Employees make efforts to increase their pay at the end of their careers to ‘spike’ their pensions. Even if the methods employees use . . . are within the rules of the pension system, *they seem illegitimate*” because of the appearance that the pension system is being “manipulated” just as the employee’s working career for the public concludes. (Beermann, *The Public Pension Crisis*, *supra*, 70 Wash. & Lee L.Rev. at p. 21, italics added.)

The Legislature’s amendment of section 31461 had similar motivations: “According to the author, ‘California’s public pension systems’ ” “have been tainted by a few individuals who have taken advantage of the system. This is in part due to the ’37 Act’s very broad and general definition of ‘compensation earnable’ [¶] . . . [¶]” The author concludes, ‘This measure will address these abusive practices’ [¶] Supporters state, ‘AB 340 would eliminate the current . . . ability for employees to manipulate their final compensation calculations’” (Assem. Com. on Public Employees, Retirement and Social Security, Analysis of Assem. Bill No. 340 (2011–2012 Reg. Sess.) as amended Apr. 25, 2011, p. 2; see Sen. Com. on Public Employment & Retirement, Analysis of Assem. Bill No. 340 (2011–2012 Reg. Sess.) as amended June 22, 2011, pp. 4–5 [same].)

³ The Legislature was already aware of abuse, having repeatedly attempted to limit how “compensation earnable” was being defined in Los Angeles. (See Stats. 1993, ch. 396, § 4,

California Public Employees' Pension Reform Act of 2013 (Pension Reform Act), which made fundamental alterations in the manner in which public pensions are calculated. (§ 7522 et seq.; Stats. 2012, ch. 296.) Concurrent with that effort, the Legislature enacted Assembly Bill No. 197 (2011–2012 Reg. Sess.) (Assembly Bill 197), with the declared purpose to “exclude from the definition of compensation earnable any compensation determined by the [county retirement] board to have been paid to enhance a member’s retirement benefit.”⁴ (Legis. Counsel’s Dig., Assem. Bill No. 197 (2011–2012 Reg. Sess.); Stats. 2012, ch. 297.) To this end, both Assembly Bill 340 and Assembly Bill 197 amended section 31461 by adding subdivision (b):

“(b) ‘Compensation earnable’ does not include, in any case, the following:

“(1) Any compensation determined by the board to have been paid to enhance a member’s retirement benefit under that system. That compensation may include:

“(A) Compensation that had previously been provided in kind to the member by the employer or paid directly by the employer to a third party other than the retirement system for the benefit of the member, and which was converted to and received by the member in the form of a cash payment in the final average salary period.

“(B) Any one-time or ad hoc payment made to a member, but not to all similarly situated members in the member’s grade or class.

p. 2238, adding Gov. Code, § 31461.1, subd. (b) [allowing exclusion of “cafeteria or flexible benefit plan contributions, transportation allowances, car allowances, or security allowances”]; Stats. 1999, ch. 7, § 1, p. 22, adding Gov. Code, § 31461.4, subd. (b) [excluding, as an urgency measure, “any increase, made on or after January 1, 1996, in cafeteria or flexible benefit plan contributions for any member represented by a certified employee organization, nor shall they include any increase in cafeteria or flexible benefit plan contributions made on or after January 1, 1995, for any member not represented by a certified employee organization, provided that the nonrepresented member waives the applicability of Sections 31460 and 31461 in writing prior to receiving any cash payment based on the increase”]; Stats. 2001, ch. 778, § 1, p. 6432, adding Gov. Code, § 31461.45, subd. (b) [“‘Compensation earnable’ in a county of the first class shall include only those items of remuneration specifically included as a result of the court-approved settlement in . . . Judicial Council Coordination Proceeding No. 4049 . . . Those items of remuneration . . . shall include only the following [111 specified bonuses, allowances, and differentials].”].) The Legislature had also imposed other statewide exclusions for county employees. (See Stats. 1998, ch. 129, § 1, p. 829, adding Gov. Code, § 31461.5 [“salary bonuses or any other compensation incentive payments for regular duties or for additional services outside regular duties”]; Stats. 2000, ch. 966, § 3, p. 7065, adding Gov. Code, § 31461.6, subd. (a) [“overtime premium pay”].)

⁴ “‘Member’ means any person included in the membership of the retirement association” (§ 31470), which in turn “means an association of all persons who may qualify as annuitants or beneficiaries” under CERL (§ 31474). In plain English, and excluding survivor beneficiaries, a “member” is a past or present “employee” (§ 31469, subd. (d)) of a “public agency” (§ 31478) who did or is rendering “public service” for compensation to that public agency (§ 31479).

“(C) Any payment that is made solely due to the termination of the member’s employment, but is received by the member while employed, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period regardless of when reported or paid.

“(2) Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.

“(3) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.

“(4) Payments made at the termination of employment, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.”⁵

There is no dispute that the purpose of this change was to curtail pension spiking.⁶

⁵ There was one exception: “Compensation that a member was entitled to receive pursuant to a collective bargaining agreement that was subsequently deferred or otherwise modified as a result of a negotiated amendment of that agreement shall be considered compensation earnable and shall not be deemed to have been paid to enhance a member’s retirement benefit.” (§ 31542, subd. (c).) None of the parties discusses application of this provision.

With respect to section 31461, the only difference between Assembly Bill 340 and Assembly Bill 197—both of which were enacted by the Legislature on August 31, 2012, and then signed together by the Governor on September 12, 2012—is that Assembly Bill 197 also added section 31461, subdivision (c) to codify the caveat noted by the Senate Rules Committee: “The terms of subdivision (b) are intended to be consistent with and not in conflict with the holdings in *Salus v. San Diego County Employees Retirement Association* (2004) 117 Cal.App.4th 734 [12 Cal.Rptr.3d 86] and *In re Retirement Cases* (2003) 110 Cal.App.4th 426 [1 Cal.Rptr.3d 790].” (Stats. 2012, ch. 297, § 2.)

Although there is no material difference between the versions of section 31461, subdivision (b) in Assembly Bill 340 and Assembly Bill 197, in the interests of simplicity for this appeal, we will adopt the parties’ practice of referring to both measures as Assembly Bill 197, and that designation and the Pension Reform Act will be used interchangeably.

⁶ According to the Senate Rules Committee discussion of this language in Assembly Bill 197: “This section implies [sic: applies] to current members in the 1937 Act County Retirement System who have not yet retired. The intent of this section is to reign [sic: rein] in pension spiking by current members of the system to the extent allowable by court cases that have governed compensation earnable in that system since 2003. These cases allow certain cash payments to be included in compensation for the purpose of determining a benefit, but only to the extent that the cash payments were limited to what the employee earned in a year. [¶] A concern has been raised that, as written, the conference report [on Assembly Bill 340]

Marin County, which was already wrestling with its own pension difficulties,⁷ was one of the first to act to implement the Pension Reform Act. On December 18, 2012, the board of directors of the Marin County Employees'

would increase the ability of some current employees to spike their pensions rather than achieving the intended outcome of reduction [*sic*: reducing] spiking opportunities. [¶] . . . [¶] This bill will be transmitted to the Governor with the request that it be signed after AB 340." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill 197, as amended Aug. 31, 2012, p. 2; see Assem. Com. on Public Employees, Retirement and Social Security, Analysis of Assem. Bill 340, as amended Apr. 25, 2011, p. 4, quoted in fn. 3, *ante*.)

The Pension Reform Act included a similar provision concerning the "pensionable compensation" of members in the Public Employees' Retirement System (PERS). (Stats. 2012, ch. 296, § 15, adding Gov. Code, § 7522.34.) Later in the 2012 session the Legislature adopted a comparable provision for the "creditable compensation" of teachers. (Stats. 2012, ch. 864, § 1, amending Ed. Code, § 22119.2.) As is the case with Government Code section 31461, both of these measures vested the boards administering the respective retirement systems with the authority to exclude "Any other form of compensation" (§ 7522.34, subd. (c)(11) & (12)) and "Any other payments" (Ed. Code, § 22119.2, subd. (c)(9)) from pension calculations. Government Code section 7522.34 is especially noteworthy because, like subdivision (b)(1) of section 31461, it expressly excludes "Any compensation determined by the board to have been paid to increase a member's retirement benefit . . ." (§ 7522.34, subd. (c)(1).)

⁷ As far back as 2005, calling for concerted and comprehensive action, the Marin County Civil Grand Jury had warned: "Marin County . . . and its cities and towns . . . provide pension plans to their employees that are many times more generous than similar plans found in the private sector. The volatility of the cost of these pensions has caused extreme stress on the budgets of many of these entities." (Marin County Civil Grand Jury, The Bloated Retirement Plans of Marin County, Its Cities and Towns (May 9, 2005) p. 1.)

Six years later, the grand jury reported that the chickens were coming home to roost, and were in part responsible for current financial difficulties: "During the financial fiasco of 2008 and 2009, the Marin County Employees' Retirement Association's (MCERA) net assets . . . declined by . . . 25.5% . . . due to investment losses. Employer pension costs have increased dramatically . . . [¶] . . . Although it is tempting to suggest that the cause of the budget problem is high total employee compensation, that is not the acute problem. . . . [T]he acute problem is unpredictable, rapid variation in compensation—caused at this time by increasing pension costs." (Marin County Civil Grand Jury, Public Sector Pensions: A Perspective (May 31, 2011) p. 1.)

The grand jury noted the county's long-term restructuring plan: "At current levels, public pension systems are not financially sustainable without reform. . . . Under current actuarial assumptions, it is projected that the County of Marin will experience an approximately 40% increase in employer pension contribution rates in FY 2010-11 This represents an increased General Fund cost of approximately \$11.4 million next fiscal year, the most significant component of the County's estimated \$15 million structural gap for FY 2010-11. Employer costs will continue to rise in subsequent years barring a significant rebound in investment earnings." (Marin County Civil Grand Jury, Public Sector Pensions: A Perspective, *supra*, at p. 7.) The grand jury also noted the county's "Annual Financial Report," which had concluded that employee compensation and pension costs were likely to endure beyond stock market fluctuations: "'Public pensions are . . . a significant factor contributing to the projected budget shortfall. . . . Even with recent stock market gains, pension contributions are expected to increase in the next several years as asset gains and losses are typically smoothed to control rate volatility.' " (*Id.* at p. 6 & fn. 19.) The grand jury concluded: "The pension plans of all MCERA's Sponsors [i.e., member organizations] are significantly underfunded, primarily due

Retirement Association and its directors (collectively MCERA)⁸ adopted a “Policy Regarding Compensation Earnable and Pensionable Compensation Determinations” implementing Assembly Bill 197 with “the new rules set forth herein regarding the definition of Compensation Earnable,” that would comply with the “new . . . section 31461.” Commencing on January 1, 2013, specified items would be excluded from the new definition.⁹

to investment losses. MCERA currently has reserves with a market value of only \$1.21 billion The present value of benefits for members is \$1.93 billion.” (*Id.* at p. 18.)

In a 2015 report, the grand jury noted that the granting of largely unpublicized “pension enhancements . . . contributed to the increase of the unfunded pension liability of MCERA; this unfunded liability increased from a surplus of \$26.5 million in 2000 to a deficit of \$536.8 million in 2013. This increase may expose the citizens of Marin County to additional tax burdens to cover the unfunded costs and may place the future financial viability of the pension plans at significant risk. Additionally, such an impact may impair the governments’ ability to provide the broad range of essential services that citizens are expecting; instead those funds may be used to pay for employee pensions.” (Marin County Civil Grand Jury, Pension Enhancements: A Case of Government Code Violations and A Lack of Transparency (2015) p. 2.) The report closed with an ominous warning: “Action on this issue should not be delayed, as the effects of . . . improperly enhanced pensions grow each year” and “are increasing the payroll” of the governmental entities involved. (*Id.* at p. 7.)

⁸ Formed in 1950 by Marin voters, MCERA is an independent governmental entity separate and distinct from the County of Marin. MCERA is described in the petition as “funded by actuarially calculated contributions from its members and their employers, and it calculates and then distributes pension benefits to its members once they retire.” The grand jury’s 2011 report stated: “Despite its economic importance and its impact on public budgets with resultant loss of jobs and reduction in services, the public seems to have little interest in what MCERA does MCERA’s Board of Retirement and staff labor, for the most part, in obscurity.” (Marin County Civil Grand Jury, Public Sector Pensions: A Perspective, *supra*, at p. 17.)

⁹ The pertinent language of the revised policy reads:

“As a result of new subdivision (b)(3) of section 31461, which requires that, on and after January 1, 2013, all payments for ‘additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise’ be excluded from compensation earnable, effective on and after that date, MCERA will no longer collect retirement contributions on, and will exclude from retirement calculation, standby pay, administrative response pay, and any form of call-back even if not paid at overtime rates.

“As a result of new subdivision (b)(1)(A) of section 31461, which permits in-kind conversions in the final compensation period to be excluded from final compensation, on and after January 1, 2013, effective on and after that date, MCERA will no longer collect retirement contributions on, and will exclude from retirement calculations, in-kind benefits converted to cash, such as waiver for health insurance cash back and 125 plan revision.” (Underscoring omitted.)

An attachment to the policy specified the “general pay items that are . . . excluded from . . . Compensation Earnable by MCERA effective on and after January 1, 2013”: “In-kind Benefits Converted to Cash (e.g., Waiver for Health Insurance Cash Back, 125 Plan Revision” (see fn. 11 and accompanying text, *post*); “Payments for Additional Services Rendered Outside of Normal Working Hours (e.g., Standby, Administrative Response, and Call Back, whether overtime or not); “Reimbursements (e.g., Tool, Meal, Boot, Cell Phone, License),” “Overtime, Unless FLSA Premium Pay”; “Severance Payments”; “Leave Cash Outs Paid Only at Termination (e.g., Annual, Sick, Floating Holiday, Personal, Comp Time); “Lump Sum

The Lawsuit

Reaction to the change in policy was almost immediate. On January 18, 2013, less than three weeks after the Pension Reform Act took effect, five recognized employee organizations and four individuals (collectively plaintiffs) commenced this action against MCERA.¹⁰ Plaintiffs alleged that on December 18, 2012: “[T]he MCERA BOARD voted to implement AB 197 effective January 1, 2013 and announced a new policy for the calculation of retirement benefits. Under the policy, MCERA would begin excluding standby pay, administrative response pay, callback pay, cash payments for waiving health insurance, and other pay items from the calculation of members’ final compensation for all compensation earned after January 1.”

Plaintiffs further alleged:

“Since at least 1997, . . . if not before then, MCERA, the County, and other MCERA-participating employers agreed to include certain elements of compensation, in addition to base pay, as compensation earnable for purposes of calculating retirees’ final compensation, and thus, pension benefits. . . .

“Among other elements of compensation that have long been included in pension calculations are standby pay, administrative response pay, call-back

Payment of Comp Time At Promotion”; “Payments (Not Remuneration for Service or Skills) paid in a Lump Sum or Other Form”; “Executive Bonuses”; “Employer Contributions to Deferred Compensation or Defined Contribution Plans.”

MCERA’s Board also specified the scope of its action: “[T]he new rules set forth herein regarding the definition of Compensation Earnable shall apply only to MCERA members who retire from MCERA on and after January 1, 2013, and only then as to the portion of their final average compensation periods that occur on or after the effective date of the new statutory exclusions, January 1, 2013.”

¹⁰ The plaintiff organizations were the Marin Association of Public Employees, Local 1021 of the Service Employees International Union, Local 856 of the International Brotherhood of Teamsters, the Marin County Fire Department Firefighters’ Association, and the Marin County Management Employees Association, which collectively represent approximately 2,100 county employees who are members of MCERA. The four individuals named as plaintiffs previously received a specified type of benefit terminated by Assembly Bill 197, to wit: “an eligibility worker . . . for approximately 31 years” who “receives cash in lieu of fringe benefits that MCERA has previously included as compensation earnable for purposes of calculating her pension benefits”; “a deputy district attorney . . . for approximately 23 years” who “receives on-call pay that MCERA has previously included as compensation earnable for purposes of calculating his pension benefits”; “a fire captain . . . for approximately 27 years” who “receives so-called ‘hold harmless’ payments . . . which MCERA has previously included as compensation earnable for purposes of calculating his pension benefits”; and “a Program Manager . . . employed by the County . . . since 1977” and who also “receives so-called ‘hold harmless’ payments . . . which MCERA has previously included as compensation earnable for purposes of calculating his pension benefits.” The teamsters local and the deputy district attorney are not parties to this appeal.

pay, and cash payments made to employees who waive health insurance coverage. More recently, the County negotiated changes to its Internal Revenue Code Section 125 cafeteria plan^[11] . . . resulting in payments in cash in lieu of fringe benefits, which the County and MCERA agreed would be treated as compensation earnable (so-called ‘hold harmless’ payments). . . .

“Over the years, MCERA and employers who participate in MCERA, such as the County, have repeatedly communicated and committed to MCERA members that these and other elements of compensation would be included in the calculation of members’ final compensation and encouraged MCERA members to plan their retirement based on the idea that these pay items would be included in the determination of their pension benefits. MCERA and participating employers made these representations and commitments to members in MOUs, plan documents, newsletters, bulletins, handbooks, hand-outs, official policy statements, and other publications and correspondence with MCERA members. . . .

“Because MCERA has included these various pay items in the calculation of retirement benefits, the cost of these benefits has been actuarially factored into contribution rates and has been paid for by both member and employer contributions. Additionally, the value and associated costs of these benefits have also been a factor in determining the wage and benefit packages offered to MCERA members through collective bargaining . . . and in some instances has led to employees accepting lower wages or other benefits.”

Plaintiffs also complained about the generalized way in which MCERA had changed its policy: “In addition to impairing MCERA members’ vested rights,” MCERA “also decided to exclude certain pay items from compensation earnable without making a determination that such compensation has been paid to enhance MCERA members’ retirement benefits, as required by AB 197. To the extent any determination has been made that these pay items have been paid to enhance retirement benefits, such determinations are incorrect and constitute an abuse of discretion.”

Plaintiffs further alleged that they “relied on MCERA and participating employers’ commitment to include these pay items in the calculation of final compensation, and they agreed to accept employment and remain employees of their respective employers based on the promised pension benefit”; and that “[t]he elimination of these various pay items from the calculation of

¹¹ Title 26 United States Code section 125(d)(1) provides: “The term ‘cafeteria plan’ means a written plan under which—[¶] (A) all participants are employees, and [¶] (B) the participants may choose among 2 or more benefits consisting of cash and qualified benefits.” “The term ‘qualified benefit’ means any benefit which . . . is not includable in the gross income of the employee” (*Id.*, 125(f)(1).)

MCERA members' final compensation will result in a reduction in members' pension benefits below what they had previously been promised," and "the value of the benefits . . . are a form of deferred compensation for work already performed," and "protected by Article I, section 9 of the California Constitution and Article I, section 10, clause 1 of the United States Constitution."¹² And plaintiffs concluded: "By excluding items from the final compensation calculation that MCERA had previously committed to provide, AB 197 unconstitutionally impairs MCERA members' vested rights."

Plaintiffs prayed for declaratory and injunctive relief that Assembly Bill 197 and MCERA's "actions are unconstitutional impairments of vested rights and therefore unenforceable." Plaintiffs also prayed for issuance of a writ of mandate "to compel [MCERA] to continue to calculate the pensions of its members in a manner consistent with its policies in effect before December 18, 2012 and in a manner consistent with binding promises made to MCERA members."

The State of California was granted leave to intervene, as expressly directed by the Governor, in order that it could defend the constitutionality of Assembly Bill 197. Shortly thereafter, MCERA interposed a general demurrer on the sole ground that, because "AB 197 . . . [is] constitutional," and MCERA was "required by law to implement . . . AB 197," plaintiffs had failed to state a cause of action. Plaintiffs filed opposition vigorously disputing both of these points.

In June 2013, after hearing extensive argument, the trial court sustained MCERA's demurrer without leave to amend and entered judgment against plaintiffs.

DISCUSSION

The crux of this appeal is whether MCERA may eliminate benefits previously treated as compensation earnable from the calculation of the

¹² Because the issue comes to us following the sustaining of a general demurrer, "we accept, and liberally construe, the truth of the complaint's properly pleaded factual allegations, but not contentions, deductions, or conclusions of fact or law." (*Caldera Pharmaceuticals, Inc. v. Regents of University of California* (2012) 205 Cal.App.4th 338, 350 [140 Cal.Rptr.3d 543].) There is no genuine disagreement between plaintiffs and MCERA concerning historical events. Only the causally connected allegations of representations and reliance might be problematic. However, because they center around how plaintiffs responded to representations made by MCERA—representations MCERA has never denied making—we accept them as proper allegations of ultimate fact, not law. (See, e.g., *Estate of Bixler* (1924) 194 Cal. 585, 589–590 [229 P. 704]; *Winn v. McCulloch Corp.* (1976) 60 Cal.App.3d 663, 670 [131 Cal.Rptr. 597]; 5 Witkin, *Cal. Procedure* (5th ed. 2008) *Pleading*, § 730, p. 148.) These allegations relate to the common law estoppel cause of action plaintiffs claim they should have been allowed to plead, a claim we reject. (See fn. 24, *post*.)

pension formula for what plaintiffs term “legacy members”—employees who were hired prior to January 1, 2013—because Assembly Bill 197 modified that formula. In legal terms, did the narrowing achieved by Assembly Bill 197 impair plaintiffs’ vested pension rights? Because there is no genuine factual dispute presented (see fn. 12, *ante*), the issue is purely one of law for our independent review. (*Teachers’ Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1028 [65 Cal.Rptr.3d 326], and decisions cited.)

However, before we consider the constitutional issue, we are obligated to ascertain if the appeal may be decided on some other, nonconstitutional ground. (E.g., *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 66 [195 P.2d 1]; *Teachers’ Retirement Bd. v. Genest*, *supra*, 154 Cal.App.4th 1012, 1043.) Plaintiffs advance two such claims.

The Order Sustaining MCERA’s Demurrer Is Not Procedurally Defective

Plaintiffs first attack the trial court’s order as procedurally defective because it “does not provide a justification for sustaining the demurrer.” If the attack were to succeed, the judgment can be reversed on a nonconstitutional basis. But the attack will not succeed.

In its entirety, the trial court’s order read: “Respondents’ Demurrer to the Verified Writ Petition is sustained without leave to amend. The court finds the Respondents’ actions implementing Govt. Code § 31461, as amended effective January 1, 2013, are proper and that the Public Employees’ Pension Reform Act of 2013 is constitutional. The Respondent Board of Retirement has the exclusive authority and responsibility to determine its members ‘compensation earnable,’ which is used to calculate members’ retirement allowance, pursuant to Govt. Code § 31461. (See *Howard Jarvis Taxpayers’ Ass’n. v. Bd. of Supervisors of Los Angeles County* (1996) 41 Cal.App.4th 1363, 1373 [49 Cal.Rptr.2d 157], and *In re Retirement Cases*[, *supra*,] 110 Cal.App.4th 426, 453.) A statute, once duly enacted, is presumed to be constitutional. [¶] SO ORDERED.”

This order was filed on June 19, 2013, and mailed to the parties the following day. On June 24, MCERA mailed plaintiffs notice of entry. The ensuing judgment, which quoted almost all of the order, was entered on June 26, the same day plaintiffs unsuccessfully moved for reconsideration of the order, following which they were rebuffed in their request for extraordinary relief from this court. (*Marin Assn. of Public Employees v. Superior Court* (Feb. 25, 2014, A139621) [nonpub. opn.].) At no time during these proceedings did plaintiffs advise the trial court, or attack the order, on the ground now advanced. By reason of this inaction, the claim was forfeited. (E.g., Code

Civ. Proc., § 472d, quoted at fn. 13, *post*; *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 504, fn. 2 [146 Cal.Rptr. 614, 579 P.2d 505]; *Lambert v. Carnegie* (2008) 158 Cal.App.4th 1120, 1128, fn. 4 [70 Cal.Rptr.3d 626].)

Even if the claim had been preserved for review, it would not require reversal. California has a statute governing this precise subject, one not cited in plaintiffs' briefs.¹³ Concerning that statute, this court long ago recognized that it "has been interpreted to require the affirmance of trial court rulings on demurrers if any of the grounds raised by defendant require the sustaining of the demurrer, whether or not the court specifies all the grounds." (*Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, 610 [116 Cal.Rptr. 919].) That is why the ruling is examined *de novo* on the sole legal question of whether the complaint states a claim for relief upon any theory. (E.g., Code Civ. Proc., § 589; *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415 [106 Cal.Rptr.2d 271, 21 P.3d 1189]; cf. *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 787 [176 Cal.Rptr. 104, 632 P.2d 217] ["'a demurrer of course calls for the determination of an issue of law only.' "].)

So it is incorrect to treat the ruling on a demurrer as akin to a statement of decision, which is only required, upon request, "upon the trial of a question of fact." (Code Civ. Proc., § 632.) But this is clearly what plaintiffs believe is missing from the trial court's order. Instead of "rationaliz[ations]," "general proposition[s]," and "platitude[s]," plaintiffs appear to think the trial court should have provided a point-by-point analysis of each of the legal issues raised by the petition. That belief is patently unreasonable and far exceeds the statutory requirement.¹⁴ (See *Mautner v. Peralta* (1989) 215 Cal.App.3d 796, 801–802 [263 Cal.Rptr. 535] ["Code of Civil Procedure section 472d does

¹³ "Whenever a demurrer in any action or proceeding is sustained, the court shall include in its decision or order a statement of the specific ground or grounds upon which the decision or order is based which may be by reference to appropriate pages and paragraphs of the demurrer. [¶] The party against whom a demurrer has been sustained may waive these requirements." (Code Civ. Proc., § 472d.)

¹⁴ That unreasonability is best shown by the consequences of an issue to which the parties devote considerable attention in the briefs, namely, whether the items MCERA would discontinue treating as compensation earnable as of January 1, 2013, qualified as compensation earnable under the version of section 31461 as construed in *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 487 [66 Cal.Rptr.2d 304, 940 P.2d 891] (*Ventura County*) (under CERL "items of 'compensation' paid in cash . . . must be included in the 'compensation earnable' . . . on which an employee's pension is based"), prior to enactment of the Pension Reform Act. Plaintiffs would appear to expect the trial court to have analyzed each of the dozens of specific items and payments that MCERA would no longer treat as compensation earnable (see fn. 9, *ante*) and determined whether each qualified as compensation earnable according to *Ventura County*. The pointlessness of such a time-consuming exercise is that it takes no account of the *Ventura County* approach being altered by the Pension Reform Act's amending the definition of compensation earnable in section 31461, and only begs the core issue of the Legislature's power to make that change. (See fn. 22, *post*.)

not mandate a detailed statement explaining the court's reasons for sustaining the demurrer"]; *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, 943 [143 Cal.Rptr. 255] [trial court is not required to set "forth a memorandum of decision stating in detail its reasons for sustaining the demurrer"].) The decisive issue, as even MCERA and the state concede, is whether MCERA's implementation of Assembly Bill 197 constitutes an unconstitutional impairment of plaintiffs' contracts of employment and concomitant pension benefits. MCERA's general demurrer required the trial court to decide that issue as a matter of law with a yes or a no answer, which would resolve the sole ground for MCERA's demurrer: did plaintiffs fail to state a cause of action? The trial court made that decision, with its reasons given. Plaintiffs may not like the brevity of those reasons, but Code of Civil Procedure section 472d requires no more for our de novo review. (*E. L. White, Inc. v. City of Huntington Beach, supra*, 21 Cal.3d 497, 504, fn. 2; *Berkeley Police Assn. v. City of Berkeley, supra*, at p. 943.)

*The Manner in Which MCERA Implemented Assembly Bill
197 Was Not Improper*

The second nonconstitutional ground for reversal advanced by plaintiffs is that MCERA "did not follow the correct procedural requirements" of Assembly Bill 197 "for excluding payments made to 'enhance a member's retirement benefit.' " Again, plaintiffs are not correct.

The Pension Reform Act added section 31542, the pertinent provisions of which provide:

"(a) The board shall establish a procedure for assessing and determining whether an element of compensation was paid to enhance a member's retirement benefit. If the board determines that compensation was paid to enhance a member's benefit, the member or the employer may present evidence that the compensation was not paid for that purpose. Upon receipt of sufficient evidence to the contrary, a board may reverse its determination that compensation was paid to enhance a member's retirement benefits.

"(b) Upon a final determination by the board that compensation was paid to enhance a member's retirement benefit, the board shall provide notice of that determination to the member and employer. The member or employer may obtain judicial review of the board's action by filing a petition for writ of mandate within 30 days of the mailing of that notice."

Plaintiffs correctly recognize that these provisions are intended to govern individualized determinations. As plaintiffs describe it: "[T]he focus is on

whether compensation was made to enhance a particular member's retirement—hence the instruction that the procedure determine whether 'a member's retirement benefit' has been enhanced. [¶] . . . [I]f the board makes such a determination, the member or the member's employer must be given an opportunity to present evidence to the contrary. This presumes, of course, that the employee and employer must be given some kind of notice of the determination, since otherwise the right to present contrary evidence would be meaningless. The retirement board then has an opportunity to reverse its decision, if the employee or employer presents 'sufficient evidence to the contrary.' [¶] Finally, if the retirement board persists in holding that the compensation was paid to enhance the member's retirement benefit, either the individual member or the member's employer may thereafter seek review of the board's decision by filing a petition for writ of mandate. Again, this is an individualized right and requires an analysis specific to the particular member." But here, plaintiffs conclude, "Marin CERA did not make a determination that payments for in-kind benefits converted to cash were made in order to enhance any particular member's retirement benefit." This analysis of section 31542 is perfectly reasonable, but plaintiffs misapprehend its application here, particularly as the situation is defined by the allegations of plaintiffs' petition.

■ Section 31542 is clearly intended to serve as the mechanism for calculating the pension of an employee about to retire. There is nothing to indicate the statute was intended to govern the situation here—a shift in policy by the retirement board in compliance with a new command from the Legislature, clearly intended to be applied in the future to plaintiffs' so-called "legacy" employees when they put in for retirement. Indeed, if plaintiffs' construction were correct, section 31542 would initiate the calculation process for every employee affected by the change, without regard to whether actual retirement is imminent for him or her. This would entail a massive expenditure of administrative resources devoted to an individualized inquiry that would be pointless for all employees not on the cusp of retirement. ■ We have repeatedly emphasized that statutory language is to be construed to avoid such absurd or outlandish consequences. (See *Pacific Gas & Electric Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 857 [188 Cal.Rptr.3d 374], and decisions cited.) We conclude that MCERA has not, in plaintiffs' words, "failed to follow the required procedure for excluding payments" from the determination of each employee's "compensation earnable."

*The Amendment to Section 31461 Is Not an Unconstitutional
Impairment of Plaintiffs' Vested Pension Rights*

Plaintiffs' essential position is clearly set out in their opening brief: "[P]ublic employees earn a vested right to their pension benefits immediately

upon acceptance of employment and . . . such benefits cannot be reduced without a comparable advantage being provided.” “A corollary of this approach is that public employees are also entitled to any increase in benefits conferred during their employment, beyond the pension benefit in place when they began. . . . [S]ince they are performing work under the improved pension system, the terms of that system become an integral part of their compensation, and they immediately become vested in the improved benefit.” “Because A.B. 197 has resulted only in the exclusion of payments from pension benefits, with no new benefit to offset the decreased pensions, this infringes employees’ vested rights.”

Plaintiffs candidly admit, “[i]n practice, this means that for existing employees, any changes must generally be neutral with regard to the overall benefit provided and cannot represent a net decrease in the pension benefit.”¹⁵ Less ambiguously, they assert “neither Marin CERA nor the Legislature can now curtail those benefits.” Plaintiffs insist that if their position is not vindicated on this appeal, California will have returned to “the view that public employee pensions are mere ‘gratuities’ to be granted or taken away at the whim of the employer.”

A brief review of principles governing public employee pensions will show that much of plaintiffs’ reasoning is not controversial, but their ultimate conclusion cannot be sustained.

Some General Law of Pensions

■ States are prohibited by the United States Constitution from passing a law “impairing the obligation of contracts.” (U.S. Const., art. I, § 10.) Article I, section 9 of the California Constitution states a parallel proscription: “A . . . law impairing the obligation of contracts may not be passed.”

■ “[P]ublic employment gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of salary which has been earned.’” (*Miller v. State of California* (1977) 18 Cal.3d 808, 815 [135 Cal.Rptr. 386, 557 P.2d 970] (*Miller*.)) “Earned” in this context obviously means in exchange for services already performed. (See *White v. Davis* (2003) 30 Cal.4th 528, 566 [133 Cal.Rptr.2d 648, 68 P.3d 74].) Ordinarily, “[p]romised compensation is one such protected right.” (*Olson v. Cory* (1980) 27 Cal.3d 532, 538 [178 Cal.Rptr. 568, 636 P.3d 532].)

¹⁵ It bears emphasis that we construe plaintiffs’ language concerning “a net decrease in the pension benefit” as referring to a reduction of the *anticipated* “pension benefit” of still-working employees. Plaintiffs’ limitation of this action to legacy employees clearly excludes any question of decreasing the pensions to retired employees, and nothing in this opinion addresses the power of either state or local employers to do so. (See fn. 19, *post*.)

In accordance with this view, a pension is treated as a form of deferred salary that the employee earns prior to it being paid following retirement.¹⁶ In *Miller*'s classic formulation: “ ‘It is true that an employee does not earn the right to a full pension until he has completed the prescribed period of service, but he has actually earned some pension rights as soon as he has performed substantial services for his employer.’^[17] [Citations.] He is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made at a future date. While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due.’ [Citation.]

■ “Although vested prior to the time when the obligation to pay matures, pension rights are not immutable. For example, the government entity providing the pension may make reasonable modifications and changes in the pension system. This flexibility is necessary ‘to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy.’” (*Miller, supra*, 18 Cal.3d 808, 815–816, quoting *Kern v. City of Long Beach, supra*, 29 Cal.2d 848, 854–855.)

Miller continued in its restatement of pension principles: “In *Wallace [v. City of Fresno]* (1954) 42 Cal.2d 180, 183 [265 P.2d 884]], referring to *Kern*, we again emphasized ‘that a public pension system is subject to the implied qualification that the governing body may make reasonable modifications and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits but only to a substantial or reasonable pension.’” (*Miller, supra*, 18 Cal.3d 808, 816; see

¹⁶ Which means it can never be the mere gratuity hyperbolically feared by plaintiffs. (See *Riggs v. District Retirement Board* (1942) 21 Cal.2d 382, 385 [132 P.2d 1] [“ ‘A pension is a gratuity *only* where it is granted for services previously rendered which at the time they were rendered gave rise to no legal obligation . . . But where, as here, services are rendered under a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself.’ ”].)

¹⁷ Thus it is commonly said that a public employee has pension rights that “vest” on the first day of employment (e.g., *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852, 855 [179 P.2d 799], and decisions cited), or in the less precise phrasing used by plaintiffs, “upon acceptance of employment” (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863 [148 Cal.Rptr. 158, 582 P.2d 614]). We say less precise because, unlike professional sports, there are no signing bonuses in public service. The actual moment of vesting comes with the commencement of work, which gives rise to “‘the right to the payment of salary which *has been earned.*’” (*Miller, supra*, 18 Cal.3d 808, 815, italics added.)

Betts v. Board of Administration, *supra*, 21 Cal.3d 859, 863 [“The employee does not obtain, prior to retirement, any absolute right to fixed or specific benefits, but only to a ‘substantial or reasonable pension.’ ”]; *Packer v. Board of Retirement* (1950) 35 Cal.2d 212, 218 [217 P.2d 660] [“any one or more of the various benefits offered . . . may be wholly eliminated prior to the time they become payable, provided . . . the employee retains the right to a substantial pension”]; cf. *Terry v. City of Berkeley* (1953) 41 Cal.2d 698, 702 [263 P.2d 833] [citing *Packer* as “authority for the proposition that reasonable changes detrimental to [public employees] may be made” prior to retirement].)

■ What the Supreme Court stated in *Kern* deserves more than the excerpt quoted in *Miller*: “The rule permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy. . . . [¶] Thus it appears . . . that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered.”¹⁸ (*Kern v. City of Long Beach*, *supra*, 29 Cal.2d 848, 854–855.)

Our Supreme Court has repeatedly stated that while pension rights may not be “destroyed,” they may be modified prior to the employee’s retirement.

¹⁸ Immediately before this excerpt, the court cited *Casserly v. City of Oakland* (1936) 6 Cal.2d 64 [56 P.2d 237] as one of the authorities for the proposition that “[i]t has also been held that a pension could be reduced prior to retirement from two-thirds to one-half of the employee’s salary, and modifications have been approved in some cases when made after the happening of the contingencies upon which the payments were to commence.” (*Kern v. City of Long Beach*, *supra*, 29 Cal.2d 848, 854.) *Casserly* involved a Depression-era ordinance that by reducing the pay of serving employees achieved a corresponding reduction of pension payments to retirees who had held the same pay grade. In the course of upholding the reduction, the Supreme Court quoted with approval the decision of this court in *Aitken v. Roche* (1920) 48 Cal.App. 753, 755 [192 P. 464], where we characterized as “fallacious” the argument that “‘the amount of [a] prospective pension is fixed’ ” in perpetuity. (*Casserly v. City of Oakland*, *supra*, at p. 68.) This is especially true with so-called “fluctuating” pension systems where retirement benefits are pegged to current salaries. (See, e.g., *Eichelberger v. City of Berkeley* (1956) 46 Cal.2d 182, 185 [293 P.2d 1] [“It is settled that where the pension statute states . . . that the pension shall be a percentage of the average salary attached to the rank held by the employee before retirement, it is construed as providing for a fluctuating pension which increases or decreases as the salaries paid to active employees increase or decrease,” citing *Casserly* and *Aitken*].)

(E.g., *International Assn. of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 300–301 [193 Cal.Rptr. 871, 667 P.2d 675]; *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 120 [192 Cal.Rptr. 762, 665 P.2d 534]; *Miller, supra*, 18 Cal.3d 808, 815; *Kern v. City of Long Beach, supra*, 29 Cal.2d 848, 853–855.) The right to modify inheres in the inalienable rights of government.

*There Is No Absolute Requirement That Elimination or
Reduction of an Anticipated Retirement Benefit “Must” Be
Counterbalanced by a “Comparable New Benefit”*

In one of the decisions cited in *Miller*, the Supreme Court stated: “To be sustained as reasonable, alterations of employees’ pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.” (*Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131 [287 P.2d 765].) It is a onetime variation of this last sentence that is a foundation of plaintiffs’ appeal on the constitutional issue.

In 1983, our Supreme Court stated: “A constitutional bar against the destruction of such vested contractual pension rights, however, does not absolutely prohibit their modification. With respect to *active* employees, we have held that any modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and, when resulting in disadvantage to employees, *must* be accompanied by comparable new advantages. [Citations.]”¹⁹ (*Allen v. Board of*

¹⁹ The likelihood of a change amounting to an impermissible impairment is greater when the change applies to retired employees. Retirees receive an extra measure of judicial solicitude because their part of the contract has already been fully performed. (See *Allen v. Board of Administration, supra*, 34 Cal.3d 114, 120 [“As to retired employees, the scope of continuing governmental power may be more restricted, the retiree being entitled to the fulfillment . . . of the contract which he already has performed”]; *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 455 [326 P.2d 484] [municipality must meet “its contractual obligations, the consideration for which has already been received by it”]; *Terry v. City of Berkeley, supra*, 41 Cal.2d 698, 702–703 [principle that “the right to a pension is a vested right . . . is a right to a fair pension . . . the terms of which may be altered within reason without an impairment of the contract” not applicable to retirees; “the plaintiff had been retired; he had rendered the called-for performance; he had done everything possible to entitle him to the payment of his pension”].) The patent unfairness of diminishing the benefits a pensioner earned prior to ceasing employment needs no belaboring. That possibility is not presented here, as the only issue is the application of Assembly Bill 197 to persons still working. (See fn. 15, *ante*.) For that reason, decisions upon which plaintiffs rely such as *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619 [185 Cal.Rptr.3d 410] and *United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095 [259 Cal.Rptr. 65], are inapposite.

Administration, supra, 34 Cal.3d 114, 120, italics added.) The single word we have italicized, and the thought it seemingly expresses, permeates plaintiffs' opening brief. However, we do not believe the word "must" was intended to be given the literal and inflexible meaning attributed to it by plaintiffs.

The Supreme Court in the 1983 *Allen* opinion cited three decisions as support for the quoted proposition. The two Supreme Court decisions cited employed the word "should." (*Allen v. City of Long Beach, supra*, 45 Cal.2d 128, 131 ["To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages"]; see *Abbott v. City of Los Angeles, supra*, 50 Cal.2d 438, 449 [quoting this sentence from *Allen*.]) It is only a 1969 Court of Appeal decision, which cites the same two Supreme Court decisions, that uses "must." (*Lyon v. Flournoy* (1969) 271 Cal.App.2d 774, 782 [76 Cal.Rptr. 869] (*Flournoy*) ["In brief, modifications affecting the earned pension rights of active employees must be reasonable, related to the theory of a sound pension system, and changes detrimental to the individual must be offset by comparable new advantages. (*Abbott v. City of Los Angeles, supra*, 50 Cal.2d at pp. 447, 449; *Allen v. City of Long Beach, supra*, 45 Cal.2d at pp. 131–133.)"].)

There is, of course, no bar to the Supreme Court adopting a Court of Appeal's reasoning as its own. Yet there is legitimate reason to question whether that was what the Supreme Court intended in 1983. First, as just shown, only the least authoritative of the three sources cited actually supports the word "must," while the two Supreme Court decisions employ "should." Second, barely a month later, the Supreme Court—speaking though the same justice—filed another decision, which used the "should" formulation from the 1955 *Allen* decision as quoted in *Abbott*.²⁰ Third, the 1983 *Allen* decision involved retirees (and *Flournoy* the widow of a retiree), who historically receive a heightened degree of judicial protection. (See fn. 19, *ante*.) Fourth, and most significantly, the "must" formulation has never been reiterated by the Supreme Court, which has instead uniformly employed the "should"

²⁰ "Of course, we have repeatedly observed that even such 'vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. [Citations]' (*Allen v. City of Long Beach, supra*, 45 Cal.2d at p. 131.) Nonetheless, '[s]uch modifications must be reasonable,' and to be sustained as such, 'alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. [Citations.]' (*Ibid.*) . . . (*Abbott v. City of Los Angeles[, supra]*, 50 Cal.2d 438, 449.)" (*International Assn. of Firefighters v. City of San Diego, supra*, 34 Cal.3d 292, 300–301.)

language from the 1955 *Allen* decision. (*Olson v. Cory, supra*, 27 Cal.3d 532, 541 [“Although an employee does not obtain any ‘absolute right to fixed or specific benefits . . . there [are] strict limitation[s] on the conditions which may modify the pension system in effect during employment.’ [Citation.] Such modifications must be reasonable and any ‘‘changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages’’”]; *Legislature v. Eu* (1991) 54 Cal.3d 492, 529–530 [286 Cal.Rptr. 283, 816 P.2d 1309] [quoting *Olson*]; *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 472 [14 Cal.Rptr.2d 514, 841 P.2d 1034] [“changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages”], citing *Allen v. City of Long Beach, supra*, 45 Cal.2d 128, 131.)

■ It thus appears unlikely that the Supreme Court’s use of “must” in the 1983 *Allen* decision was intended to herald a fundamental doctrinal shift. “Should,” not “must,” remains the court’s preferred expression. And “should” does not convey imperative obligation, no more compulsion than “ought.” (*Lashley v. Koerber* (1945) 26 Cal.2d 83, 90 [156 P.2d 441]; see *People v. Webb* (1986) 186 Cal.App.3d 401, 409, fn. 2 [230 Cal.Rptr. 755] [“the word ‘should’ is advisory only and not mandatory”].) In plain effect, “should” is “a recommendation, not . . . a mandate.” (*Cuevas v. Superior Court* (1976) 58 Cal.App.3d 406, 409 [130 Cal.Rptr. 238].)

But the most persuasive evidence against the Supreme Court intending to impose a quid pro quo standard is circumstantial—the bottom line of who won. The issue in *Allen* was whether pension payments to retired legislators could be reduced pursuant to new statutory and constitutional language. The trial court had concluded that reduction would be contrary to the contract clauses of both state and federal Constitutions. (*Allen v. Board of Administration, supra*, 34 Cal.3d 114, 118–119.) The Supreme Court reversed, holding that the reduction was not constitutionally improper. There is nothing in the opinion linking the reduction to provision of some new compensating benefit. If the court intended “must” to have a literal meaning, the retirees would have won. They lost.

In light of the foregoing, we cannot conclude that *Allen v. Board of Administration* in 1983 was meant to introduce an inflexible hardening of the traditional formula for public employee pension modification. Consequently, we do not deem ourselves bound by expressions in Court of Appeal opinions—including our own in *In re Retirement Cases, supra*, 110 Cal.App.4th 426, 448—reiterating the *Allen* language.

In any event, we think there is a “new benefit” provided by the Pension Reform Act. That measure made no change to the definition of “compensation” in CERL, namely section 31460. The change in policy adopted by

MCERA—which is not an employer of any individual plaintiff or of persons employed by other governmental entities—is not alleged to have changed in the way compensation is calculated by any of those entities. Thus, for all we know, employees who prior to MCERA changing its policy in December 2012 collected any of the items or payments at issue (see fn. 9, *ante*) continued to have those items or payments included in their monthly compensation. However, due to MCERA’s change in policy, each of those employees’ paychecks is no longer being reduced by deductions to cover those sums in funding the employee’s retirement. Put simply, the new benefit is an increase in the employee’s net monthly compensation. Put even more simply, it is more cash in hand every month.

Plaintiffs Do Not Establish That Their Vested Right to a Reasonable Pension Has Been Substantially Impaired

Plaintiffs’ initial premise, and the centerpiece of their oral argument, is that the moment each individual plaintiff commenced working for a public agency in Marin County, that person acceded to a “vested right” to a pension. To a large extent, that premise is correct. As already established by *Miller*, the “right” to a pension “vests” when the first portion of wages or salary already earned is deferred by being withheld for a future pension. (See fn. 17 and accompanying text, *ante*.) But to call a pension right “vested” is to state a truism. As one Court of Appeal sensibly noted, “ALL pension rights are vested” in the sense they cannot be destroyed. (*Santin v. Cranston* (1967) 250 Cal.App.2d 438, 443 [59 Cal.Rptr. 1].) Until retirement, an employee’s entitlement to a pension is subject to change short of actual destruction. That same Court of Appeal aptly—and accurately—characterized that entitlement as only “a limited vested right.” (*Id.* at p. 441.) Even plaintiffs concede there is no talismanic significance to “vested rights” that will prevent legislative modification between hiring and retirement. However, what plaintiffs fail to acknowledge is that in the very authority on which their position is based, our Supreme Court explained just how potent is this governmental power.

■ “Not every change in a retirement law constitutes an impairment of the obligations of contracts, however. [Citation.] Nor does every impairment run afoul of the contract clause. The United States Supreme Court has observed, ‘Although the Contract Clause appears literally to proscribe “any” impairment, . . . “the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.”’ [Citation.] Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution.’ [Citation.] An attempt must be made ‘to reconcile the strictures of the Contract Clause with the “essential attributes of sovereign power,” . . .’ [Citation.] For example, ‘[m]inimal alteration of

contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.' [Citations.]

■ "The high court also has expressed the relevant principles another way: 'The constitutional prohibition against contract impairment does not exact a rigidly literal fulfillment; rather, it demands that contracts be enforced according to their "just and reasonable purport"; not only is the existing law read into contracts in order to fix their obligations, but the reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order. [Citations.] The contract clause and the principle of continuing governmental power are construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not prevent laws which restrict a party to the gains "reasonably to be expected from the contract." [Citation.] Constitutional decisions "have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.'" (Allen v. Board of Administration, *supra*, 34 Cal.3d 114, 119–120, quoting *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1 [52 L.Ed.2d 92, 97 S.Ct. 1505] and *El Paso v. Simmons* (1965) 379 U.S. 497 [13 L.Ed.2d 446, 85 S.Ct. 577].)

■ To return to *Miller*: "The scope of permissible modifications of vested pension rights was established in *Allen v. City of Long Beach*[, *supra*.] 45 Cal.2d 128 . . . : 'Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.' (*Allen*, *supra*, at p. 131.)" (*Miller*, *supra*, 18 Cal.3d 808, 816.)

Implicit in the formula, however expressed, is that alterations, changes, and modifications do not invariably work to the employee's benefit. In large measure, the judicial history of examining pensions is largely given over to broken promises and changed circumstances. Nevertheless, the basic limits are established.

■ When the Supreme Court says that vested pension rights may not be "destroyed," it means a pension system cannot be abolished on the eve of retirement (see *Kern v. City of Long Beach*, *supra*, 29 Cal.2d 848 [municipal pension plan repealed 32 days before employee completed 20-years' service needed for retirement]); or not after substantial service has been provided (see *Legislature v. Eu*, *supra*, 54 Cal.3d 492 [initiative measure abolishing legislative pension system valid only as to persons subsequently elected]); or not by

effectively abolishing a pension plan the legislative authority refuses to fund (see *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 352 [71 Cal.Rptr. 135, 444 P.2d 711]; *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 787 [189 Cal.Rptr. 212]; *Klench v. Board of Pension Fd. Commrs.* (1926) 79 Cal.App. 171, 182 [249 P. 46]).

But there are acceptable changes aplenty that fall short of “destroying” an employee’s anticipated pension. “Reasonable” modifications can encompass reductions in promised benefits. (E.g., *Miller, supra*, 18 Cal.3d 808 [change of retirement age with reduction of maximum possible pension]; *Claypool v. Wilson* (1992) 4 Cal.App.4th 646 [6 Cal.Rptr.2d 77] [repeal of cost of living adjustments]; *Brooks v. Pension Board* (1938) 30 Cal.App.2d 118 [85 P.2d 956] [pension reduced prior to retirement from two-thirds to one-half of employee’s salary].) Or changes in the number of years service required. (*Miller, supra*, at p. 818 [“Upon being required by law to retire at age 67 rather than age 70, plaintiff suffered no impairment of vested pension rights since he had no constitutionally protected right to remain in employment until he had earned a larger pension at age 70”]; *Amundsen v. Public Employees’ Retirement System* (1973) 30 Cal.App.3d 856 [106 Cal.Rptr. 759] [change in minimum service requirement].) Or a reasonable increase in the employee’s contributions. (§ 31454; *International Assn. of Firefighters v. City of San Diego, supra*, 34 Cal.3d 292, 300–301; *City of Downey v. Board of Administration* (1975) 47 Cal.App.3d 621, 632 [121 Cal.Rptr. 295]; cf. *Allen v. City of Long Beach, supra*, 45 Cal.2d 128, 131 [invalidating “provision raising the rate of an employee’s contribution . . . from 2 per cent of his salary to 10 per cent”].)

Thus, short of actual abolition, a radical reduction of benefits, or a fiscally unjustifiable increase in employee contributions, the guiding principle is still the one identified by *Miller* in 1977: “‘the governing body may make *reasonable* modifications and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits but only to a substantial or *reasonable* pension.’” (*Miller, supra*, 18 Cal.3d 808, 816, italics added.) As made clear by the 1947 decision quoted in *Miller*: “an employee may acquire a vested contractual right to a pension but . . . this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period [the employee] serves,” and “the amount, terms and conditions of the benefits may be altered.” (*Kern v. City of Long Beach, supra*, 29 Cal.2d 848, 855.) Hence the reiteration of reserved legislative power: “[A] public pension system is subject to the implied qualification that the governing body may make reasonable modifications and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits but only to a substantial or *reasonable* pension.” (*Miller, supra*, 18 Cal.3d 808, 816.)

The ordinary progression of analysis for an alleged contract clause violation goes as follows: Is there a valid contract to be impaired? If there is a valid contract, has it been impaired? Lastly, is the impairment substantial, meaning was a substantial right secured by the contract extinguished, made invalid, or significantly altered? (E.g., *General Motors Corp. v. Romein* (1992) 503 U.S. 181, 186 [117 L.Ed.2d 328, 112 S.Ct. 1105]; *Home Bldg. & L. Assn. v. Blaisdell* (1934) 290 U.S. 398, 430–431 [78 L.Ed. 413, 54 S.Ct. 231].) “Analysis of a contract clause claim requires inquiry into: ‘“(1) the nature and extent of any contractual obligation . . . and (2) the scope of the Legislature’s power to modify any such obligation.”’ [Citations.] The party asserting a contract clause claim has the burden of ‘mak[ing] out a clear case, free from all reasonable ambiguity,’ [that] a constitutional violation occurred. [Citation.]” (*Deputy Sheriffs’ Assn. of San Diego County v. County of San Diego* (2015) 233 Cal.App.4th 573, 578 [182 Cal.Rptr.3d 759].)

The contract clauses do not foreclose government action which reflects changing concepts of public policy, concomitantly granting government the power to make illegal that which was previously legal. That power has been exercised over a myriad of products and practices, and has not been stymied simply because a contract was in existence when the ban took effect. (E.g., *Stone v. Mississippi* (1879) 101 U.S. 814 [25 L.Ed. 1079] [prohibition of existing state lottery]; *Beer Co. v. Massachusetts* (1877) 97 U.S. 25 [24 L.Ed. 989] [state license to produce liquor invalidated by adoption of state prohibition law].) Such a contract might provide for a rate of interest which a statute later makes usurious and invalid, yet there is no contract clause violation. (*Griffith v. Connecticut* (1910) 218 U.S. 563, 571 [54 L.Ed. 1151, 31 S.Ct. 132].) Or it might be a contract for transporting freight on public highways at a cost below that fixed by a subsequently established utility commission which is statutorily authorized to fix minimum rates. Abrogation or modification of the contract presents no constitutional violation. (*Stephenson v. Binford* (1932) 287 U.S. 251, 276 [77 L.Ed. 288, 53 S.Ct. 181].) Enacting a new tax or increasing an existing one does not require exemption of existing contracts. (*National Ice etc. Co. v. Pacific F. Exp. Co.* (1938) 11 Cal.2d 283, 293–295 [79 P.2d 380]; *Western Contracting Corp. v. State Bd. of Equalization* (1974) 39 Cal.App.3d 341, 350–351 [114 Cal.Rptr. 227].)

Additional examples could be produced only at the risk of unduly prolonging this opinion. The following is a useful summary: “‘The contract clause does not protect expectations that are based upon contracts that are invalid, illegal, [or] unenforceable Nor does the contract clause protect expectations which are based upon legal theories other than contract, such as

quasi-contract or estoppel.’ ”²¹ (*Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 871 [5 Cal.Rptr.3d 634].)

■ It is without dispute that (1) up to January 1, 2013, there was a contract between MCERA and certain public employees concerning how those employees would be compensated, and (2) that after January 1, 2013, under compulsion of the Pension Reform Act, the agreement was unilaterally altered by MCERA to reduce the scope of compensation that had been accounted as “compensation earnable.” The issue here is whether the amendment of section 31461—the only part of Assembly Bill 197 challenged by plaintiffs and addressed here—qualifies as an “unreasonable” change, a “substantial” impairment, and thus a violation of the state and federal Constitutions. There being no factual dispute, the issue is properly resolved as one of law. (See *Teachers’ Retirement Bd. v. Genest*, *supra*, 154 Cal.App.4th 1012, 1028, and decisions cited.) We conclude the dual answer is no: MCERA’s implementation of the amended version of section 31461 does not qualify as a substantial impairment of plaintiffs’ contracts of employment with its right to a “reasonable” and “substantial” pension. Thus there is no violation of the state and federal Constitutions.

■ Plaintiffs do not—indeed could not—dispute that the Legislature possesses broad power to regulate the conditions of employment and the terms of compensation of those employed in public service. It has already been established that plaintiffs cannot rely on the “must be accompanied by comparable new advantages” language in *Allen v. Board of Administration*, *supra*, 34 Cal.3d 114, 120, to frustrate the application to them of the Pension Reform Act’s redefinition of “compensation earnable.” It has also been shown that plaintiffs adopt an unrealistic notion of the immutability of employees’ “vested” rights. Plaintiffs obviously do not assert that the entirety of their contracts of employment have been extinguished. Although plaintiffs do not develop the point, they implicitly assert that their contracts of employment were substantially impaired by (1) the amendment of section 31461 by the Pension Reform Act, and (2) the December 18, 2012 policy change by MCERA. They challenge only one aspect of how they have been compensated, insisting they have a constitutionally protected right to continue using the old definition of “compensation earnable” when their pension benefits are calculated, and that right will be substantially impaired if the current version of section 31461 is enforced.

The dispositive issue is one of degree only. The extent of the new rule of section 31461 is quite modest, as is the scope of the parties’ disagreement. The parties accept that the catalyst for the Pension Reform Act was dire

²¹ Plaintiffs’ attempt to raise a nonconstitutional estoppel claim is examined at footnote 24, *post*.

financial predictions necessitating urgent and fundamental changes to improve the solvency of various pension systems, including CERL. They do not dispute that the Legislature's intent in amending section 31461 was to make it illegal after January 1, 2013, for the enumerated items and payments to figure in compensation earnable and the calculation of final compensation. And plaintiffs concede in their opening brief that MCERA's change of policy is purely prospective: MCERA "is applying its policy only to compensation earned after January 1, 2013, meaning that if a member's final compensation period includes pay periods before 2013, the excluded pay items would be included in pension calculations for those pay periods."²² Moreover, all the parties agree the Pension Reform Act does not prohibit public employees

²² Because the parties do not make an issue of it, we express no opinion on whether MCERA was constitutionally obligated to take this position.

However, we do note that plaintiffs have an unusual notion of the discretion MCERA may exercise. Based on the Supreme Court's discussion of compensation earnable under section 31461 as it read in 1997 (*Ventura County, supra*, 16 Cal.4th 483), plaintiffs assert: "CERL retirement boards do not have complete discretion over what can [be] considered compensation earnable. *Ventura* makes clear that before A.B. 197, compensation paid in cash and which was not overtime was required to be included as compensation earnable. And while it is true that the retirement boards have some discretion to interpret and apply CERL—for example, they have the discretion to include as compensation earnable items not required to be included by CERL [citation]—this discretion is limited by the contours of the statute and the constitution, including the Contracts Clause. Even if it were a discretionary decision for Marin CERA to include these various payments as compensation earnable—which Appellants maintain it was not, because CERL required these payments to be considered compensation earnable—once Marin CERA established their inclusion as part of the pension system, members earned a vested right to the continuation of that benefit."

The Supreme Court's discussion of compensation earnable in *Ventura County*, as plaintiffs note, antedated enactment of the Pension Reform Act. Given that "[a]n opinion is not authority for a point not raised, considered, or resolved therein" (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57 [109 Cal.Rptr.2d 14, 26 P.3d 343]), *Ventura County* would appear to have little, if any, relevance to the scope and meaning of the subsequently amended language of section 31461 we are considering here. The utility of *Ventura County* is also weakened because none of the words "constitution," "contract," or "impair" were used in the opinion, so it is no authority for an unchanging constitutional dimension to a statute as substantially amended as was section 31461. The permanence plaintiffs attribute to MCERA's exercise of discretion in allowing certain payments to be included in compensation earnable is troubling because it seems to deny MCERA the discretion to change that decision. Plaintiffs also seem to believe that discretion once granted by a statute cannot thereafter be withdrawn. But that is indisputably what the Legislature accomplished with the addition of subdivision (b) to section 31461 and the command that "'Compensation earnable' does not include, *in any case*" (italics added). At that point—subject to section 31542, subdivision (c), quoted at footnote 5, *ante*—MCERA's discretion disappeared because, as we have held, there is no discretion to act "contrary to specific statutory command" (*Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330, 363, fn. 25 [108 Cal.Rptr.3d 40]), and because "the determination of what items were to be included in 'compensation earnable . . . ' . . . is not subject to a contract right." (*In re Retirement Cases, supra*, 110 Cal.App.4th 426, 453.)

from receiving “compensation” from items and payments enumerated in subdivision (b) of section 31461.

So, whatever moral opprobrium it attached to “pension spiking,”²³ the Legislature’s “reform” was hardly one-sided. The amendment of section 31461 had no immediate adverse financial impact on employees (save those planning imminent retirement, a group from which plaintiffs exclude themselves) because the items and payments listed in subdivision (b) could still be pocketed as compensation. Those years where employees had received the now prohibited payments would not be erased but would still be included by MCERA in the employees’ compensation earnable and final compensation, the basic units of pension computation. In light of the unquestioned need for change, we conclude this one was reasonable.

The very careful examination we have given to the parties’ extensive briefing convinces us that plaintiffs are unable to overcome too many fundamental and established principles. Understandably, they focused on what they have lost. This has caused them to lose focus on the essential bilateral nature of the problem. Plaintiffs’ insistence on retaining their claimed “vested rights” measured by the former version of section 31461 and *Ventura County* (see fns. 14 & 22, *ante*) has hindered their appreciation of how that right is only to a “reasonable” pension, that the public employee “does not have a right to any fixed or definite benefits” that may be “fixed by the specific terms of the legislation during any particular period.” Plaintiffs’ unbending resistance to the new section 31461 betrays an inability to accept that “statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system.” (*Kern v. City of Long Beach, supra*, 29 Cal.2d 848, 855.) The qualification “is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system.” (*Id.* at pp. 854–855; accord, *International Assn. of Firefighters v. City of San Diego, supra*, 34 Cal.3d 292, 300–301; *Miller, supra*, 18 Cal.3d 808, 816.)

■ Restricting their unyielding focus to only their “vested rights” has led plaintiffs to pay insufficient attention to the ever-present possibility of legislative involvement, one of the “essential attributes of sovereign power” that is always to be consulted. (*Home Bldg. & L. Assn. v. Blaisdell, supra*, 290 U.S. 398, 435; see *Allen v. Board of Administration, supra*, 34 Cal.3d 114, 119.) The Legislature’s involvement would obviously take statutory form,

²³ See footnotes 2, 6, *ante*. At oral argument, plaintiffs’ counsel vehemently insisted this term should be confined to those employees looking only to artificially inflate their pensions on the eve of retirement and had no application to his clients. The plain implication is that none of the individual plaintiffs plan to stop working in the immediate future.

which is relevant because “[t]he terms and conditions of [public] employment are fixed by statute and not by contract. . . . The statutory provisions controlling the terms and conditions of [public] employment cannot be circumvented by purported contracts in conflict therewith.’” (*Martin v. Henderson* (1953) 40 Cal.2d 583, 590–591 [255 P.2d 416].) Thirteen years ago this court made the same point in connection with the enforced downward adjustment of anticipated pension benefits: “‘The contractual basis of a pension right is the exchange of an employee’s services for the pension right offered by . . . statute.’” (*In re Retirement Cases, supra*, 110 Cal.App.4th 426, 447, italics added.) We also left no doubt that private agreement could not substitute: “the determination of what items were to be included in ‘compensation earnable,’ . . . is not subject to a contract right.” (*Id.* at p. 453.)

Plaintiffs make no real effort to demonstrate why the Pension Reform Act’s modification of the definition of compensation earnable does not “bear some material relation to the theory of a pension system and its successful operation” (*Allen v. City of Long Beach, supra*, 45 Cal.2d 128, 131), or is not a “reasonable modification” of the pension system projected to plunge into a fiscal and actuarial abyss. (See *Miller, supra*, 18 Cal.3d 808, 816.) Plaintiffs make numerous references to *In re Retirement Cases*, but they ignore our statement that statutory changes to “the determination of what items were to be included in ‘compensation earnable . . .’ . . . is not subject to a contract right.” (*In re Retirement Cases, supra*, 110 Cal.App.4th 426, 453.) Perhaps because they believe the 1983 *Allen* decision requires that there must first be a quid pro quo, plaintiffs do not mention the economic storm clouds that attended enactment of the Pension Reform Act, or how their presence was perceived by the Legislature as a spur to fundamental change. Repeated invocation of the inviolability of their “vested rights” cannot substitute for analysis of just how the change to section 31461 demonstrates that employees will not retire with a “substantial” or “reasonable” pension. (See *Betts v. Board of Administration, supra*, 21 Cal.3d 859, 863; *Miller, supra*, 18 Cal.3d 808, 816; *Wallace v. City of Fresno, supra*, 42 Cal.2d 180, 183; *Kern v. City of Long Beach, supra*, 29 Cal.2d 848, 855.) Unfortunately, the exercise of that power can be a harsh reminder to employees that “‘a public pension system is subject to the implied qualification that the governing body may make reasonable modifications and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits’” (*Miller, supra*, at p. 816), which can mean that “any one or more of the various benefits . . . may be wholly eliminated prior to the time they become payable,” so long as “the employee retains the right to a substantial pension” (*Packer v. Board of Retirement, supra*, 35 Cal.2d 212, 218).

In the circumstances presented, plaintiffs have failed “to make out a clear case, free from all reasonable ambiguity” and “reasonable doubt[],” that they

are the victims of a constitutional violation. (*Floyd v. Blanding* (1879) 54 Cal. 41, 43; see *Deputy Sheriffs' Assn. of San Diego County v. County of San Diego*, *supra*, 233 Cal.App.4th 573, 578.) Put another way, after January 1, 2013, payment of any of the items specified in section 31461, subdivision (b), could not be deemed salary already earned pursuant to a contract that enjoyed constitutional protection. (See, e.g., *White v. Davis*, *supra*, 30 Cal.4th 528, 566, 571; *Miller*, *supra*, 18 Cal.3d 808, 815; *Kern v. City of Long Beach*, *supra*, 29 Cal.2d 848, 853.)

We emphasize the limited nature of our holding. The Legislature's change to the definition of "compensation earnable" was expressly made purely prospective by the Pension Reform Act. MCERA's responsive implementation was also explicitly made prospective only. (See fn. 9 and accompanying text, *ante*.) Neither altered the status of compensation or payments accrued prior to January 1, 2013; what had previously met the old definition of compensation earnable would still be included by MCERA in calculating worker pensions. Nothing in Assembly Bill 197 prevents employers from compensating employees with any of the items or payments specified in subdivision (b) of section 31461, a point on which the parties are unanimous.

Given that this case never cleared the pleading stage, we are in effect deciding an odd hybrid—whether the Pension Reform Act is unconstitutional on its face as it applies to the claimed vested contractual rights of MCERA employees. That is a limited issue of legislative power considered in an undisputed factual context.²⁴ Because we conclude plaintiffs had no such

²⁴ In the final two pages of their brief, and without providing much detail, plaintiffs maintain the allegations of their petition can be "fleshed out" to "establish a right to the continued calculation of their pension benefits under equitable estoppel theories," which forms the basis for their conclusion that the trial court "abused its discretion by refusing to grant leave to amend." Plaintiffs are defeated by three firmly established and interlocking principles, all of which are found in a 1979 decision by our Supreme Court, a decision unusually apposite because it involved a county employee's rejected claim for overtime pay that was initially allowed by statute, but thereafter cancelled by statute prior to the employee's retirement: *Longshore v. County of Ventura* (1979) 25 Cal.3d 14 [157 Cal.Rptr. 706, 598 P.2d 866]. The first principle is "[a] public employee is entitled only to such compensation as is expressly and specifically provided by law." (*Id.* at pp. 22–23.) The second, "[t]he statutory compensation rights of public employees are strictly limited and cannot be altered or enlarged by conflicting agreements between the public agency and its employee." (*Id.* at p. 23.) And the third, "no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations." (*Id.* at p. 28.) The employee's attempt to recover compensation failed because "[a]pplication of estoppel to enlarge [the employee's] . . . retroactive compensation . . . would effectively purport to enforce an employment contract in contravention of law." (*Id.* at p. 29.)

Any promises or representations made to plaintiffs could have no validity if contrary to plain statutory language forbidding what plaintiffs wish to have recognized. As we said in 1959, "there is no estoppel to prove illegality." (*Holland v. Morgan & Peacock Properties* (1959) 168 Cal.App.2d 206, 211 [335 P.2d 769].) Indeed, even if the agreements and understandings had

rights after January 1, 2013, we have no occasion to consider whether any other modification effected by Assembly Bill 197 qualifies as a reasonable alteration of employee contractual or pension rights.

DISPOSITION

The judgment is affirmed.

Kline, P. J., and Miller, J., concurred.

Appellants' petition for review by the Supreme Court was granted November 22, 2016, S237460.

been reduced to writing, this court has recognized that they could not displace clear statutory language or delay its implementation. (See *In re Retirement Cases, supra*, 110 Cal.App.4th 426, 453 [“the determination of what items [are] to be included in ‘compensation earnable’ . . . is not subject to a contract right”]; *id.* at p. 447 [“The contractual basis of a pension right is the exchange of an employee’s services for the pension right *offered by . . . statute*” (italics added)].) In these circumstances, MCERA could never have the authority to create a right to receive pension benefits. (E.g., *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 495 [143 Cal.Rptr.3d 438] [“only the [legislative body] has the power to grant employee benefits, and [the retirement association] exceeds its authority when it attempts to ‘expand pension benefits’ beyond those the [legislative body] has granted” (italics omitted)]; cf. *Miller, supra*, 18 Cal.3d 808, 814 [Legislature’s power to control “‘the terms and conditions of civil service employment cannot be circumvented by purported contracts in conflict therewith’”]; *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1176 [134 Cal.Rptr.3d 779, 266 P.3d 287] [“a county may be bound by an implied contract . . . if there is no legislative prohibition against such arrangements, such as a statute or ordinance”], 1183 [“as long as there is no statutory prohibition against such an agreement”].) Plaintiffs would have this court elevate private agreement over public policy, frustrating lawfully enacted legislation that in plain effect declared such agreement illegal.

In sum, even if plaintiffs could present allegations establishing a factual basis for a nonconstitutional estoppel (see *Medina v. Board of Retirement, supra*, 112 Cal.App.4th 864, 871), the legal hurdles for success are insurmountable. This is a situation where the nature of plaintiffs’ claim is clear, but there can be no liability on that claim as a matter of law. Accordingly, there could be no prejudicial error in denying plaintiffs an opportunity to amend their complaint to set up an estoppel that would prevent MCERA from implementing and enforcing the new definition of compensation earnable set out in subdivision (b) of section 31461. (See *Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1465 [72 Cal.Rptr.2d 464] [“If there is no liability as a matter of law, leave to amend should not be granted”].)

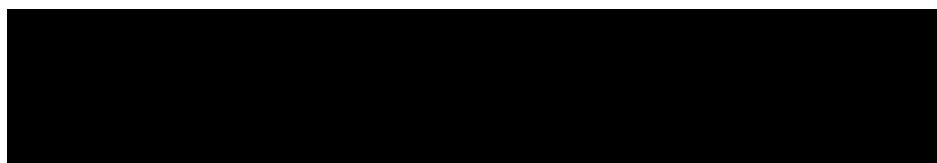
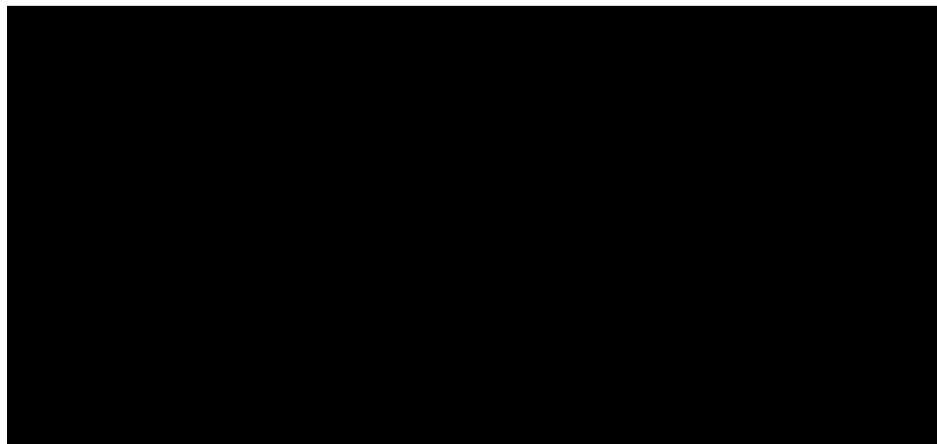
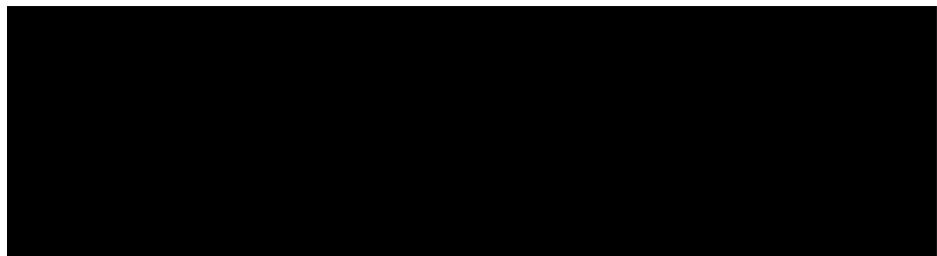
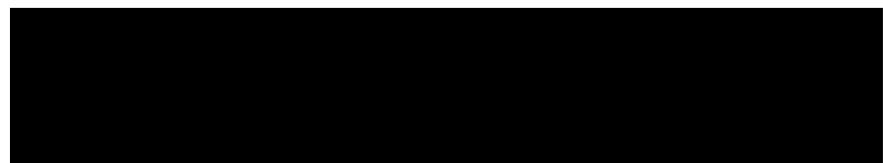
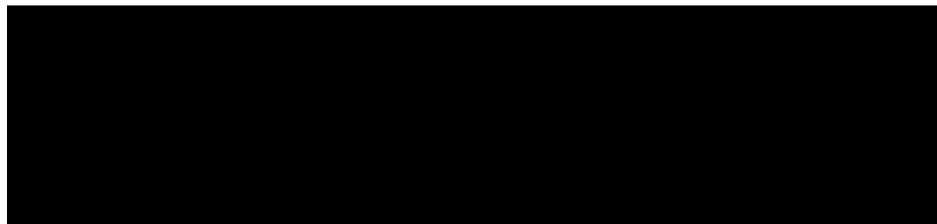
[No. C074663. Third Dist. July 22, 2016.]

DANILO SESE, Plaintiff and Appellant, v.
WELLS FARGO BANK N.A., Defendant and Respondent.

[REDACTED]

[REDACTED]

[REDACTED]



COUNSEL

Aldon L. Bolanos for Plaintiff and Appellant.

Anglin Flewelling Rasmussen Campbell & Trytten, Robert Collings Little and Robin C. Campbell for Defendant and Respondent.

OPINION

HOCH, J.—Appellant Danilo Sese seeks to challenge an order denying his motion for interim attorney fees under Civil Code section 2924.12, a provision in the California Homeowner Bill of Rights.¹ Subdivision (i) of section 2924.12 provides that “[a] court may award a prevailing borrower reasonable attorney’s fees and costs in an action brought pursuant to this section. A borrower shall be deemed to have prevailed for purposes of this subdivision if the borrower obtained injunctive relief or was awarded damages pursuant to this section.” Having secured a preliminary injunction to enjoin the foreclosure sale of his residential real property, Sese moved for attorney fees of \$100,865. The trial court denied the motion on grounds section 2924.12, subdivision (i), does not provide for *interim* attorney fees.

Sese contends the order must be reversed because section 2924.12 provides attorney fees to a borrower immediately after successfully obtaining a preliminary injunction. Respondent Wells Fargo Bank N.A. (Wells Fargo) asserts the appeal must be dismissed because the trial court’s order is interlocutory in nature and nonappealable under the one final judgment rule. After the completion of briefing, we asked the parties to address the effect, if any, of this court’s decision in *Monterossa v. Superior Court* (2015) 237 Cal.App.4th 747, 751 [188 Cal.Rptr.3d 453] (*Monterossa*) on the present appeal. Sese did not file a supplemental brief. However, we have received and considered a supplemental brief from Wells Fargo.

■ We conclude the trial court’s order is nonappealable because it is interlocutory in nature. Accordingly, we dismiss the appeal.

FACTUAL AND PROCEDURAL HISTORY

In 2007, Sese received a \$472,000 residential property loan from Wells Fargo’s predecessor. Starting in 2009, Sese started missing regular monthly payments on the loan and failed to pay taxes on the residential property. In 2012, Wells Fargo and Sese agreed to modify the loan under the Home

¹ Undesignated statutory references are to the Civil Code.

Affordable Modification Program. However, Sese defaulted on the agreement shortly after it was executed.

The California Homeowner Bill of Rights became effective on January 1, 2013. (See *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 86, fn. 14 [163 Cal.Rptr.3d 804] [noting name and effective date of legislation at issue in this case].) Also in January 2013, Wells Fargo recorded a notice of default with the Sacramento County Recorder. Sese requested another modification of the loan, but did not submit the financial documentation necessary for a modification. In May 2013, Wells Fargo recorded a notice of trustee's sale and the property was scheduled for sale on June 4, 2013.

On May 28, 2013, Sese filed a complaint against Wells Fargo that alleged violations of the California Homeowner Bill of Rights. At the same time, Sese filed an ex parte application for a temporary restraining order. The trial court granted the temporary restraining order.

On June 3, 2013, Sese filed an application for a preliminary injunction to enjoin the sale of the property. Wells Fargo opposed the application for preliminary injunction. The trial court granted the preliminary injunction based on its findings Sese "met his burden to demonstrate a likelihood of prevailing on the merits of his claims" and that he "will undoubtedly suffer great injury if his residence is sold." The trial court ordered that, "[p]ursuant to . . . § 2924(a)(2), the injunction shall remain in place until the court determines that Wells Fargo has corrected and remedied the dual tracking allegations" advanced by Sese.

As the trial court explained, Sese's dual-tracking allegations were that "[section] 2923.6(c) prohibits a lender from recording a notice of default or notice of sale, or conducting a trustee's sale while a loan modification is pending. A lender must make a written determination that the borrower is not eligible for a loan modification before it may proceed with the foreclosure process. (. . . §2923.6(c)(1).) [Sese's] evidence indicates that Wells Fargo issued the Notice of Trustee's Sale before it issued any determination of his eligibility for a loan modification. This is sufficient to demonstrate Wells Fargo's failure to comply with . . . §2923.6 and shift the burden to Wells Fargo to refute [Sese's] showing."

With the preliminary injunction in place, Sese moved for attorney fees as the prevailing party. Wells Fargo opposed the motion. During a hearing on the motion, the trial court raised a question about the implication of Sese's argument fees should be awarded immediately after the granting of a preliminary injunction: "THE COURT: So a minute ago in the last motion

you were talking about how the greedy banks are trying to take over the situation by imposing too high a bond [to secure the preliminary injunction]. But here if the court's granting of the preliminary injunction was improvident, and so found at trial, hypothetically, what happens to that money [awarded as attorney fees]?" Sese's attorney responded Wells Fargo would be entitled to recoup the fees. The trial court noted the "absurd" consequence the attorney fee money would "keep[] floating back and forth." The trial court denied the request for interim attorney fees in an order issued on August 30, 2013. Shortly thereafter, Sese filed a notice of appeal from the order.

DISCUSSION

I

Appeal from Order Denying Interim Attorney Fees Under Section 2924.12

Wells Fargo contends the order denying Sese's motion for interim attorney fees under section 2924.12 is not an appealable order. We agree.

A.

The One Final Judgment Rule

■ The existence of an appealable order or judgment is a jurisdictional prerequisite for appellate review. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126 [32 Cal.Rptr.2d 275, 876 P.2d 1074].) As the California Supreme Court has explained, "Under California's 'one final judgment' rule, a judgment that fails to dispose of all the causes of action pending between the parties is generally not appealable. (Code Civ. Proc., § 904.1, subd. (a); *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 740–741 [29 Cal.Rptr.2d 804, 872 P.2d 143] (*Morehart*).)" (*Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1100 [162 Cal.Rptr.3d 516, 309 P.3d 838], fn. omitted.) A final judgment "'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.' " (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304 [63 Cal.Rptr.2d 74, 935 P.2d 781], quoting *Doudell v. Shoo* (1911) 159 Cal. 448, 453 [114 P. 579].)

■ In some instances, an order itself may be appealable. However, "[g]enerally an order is not a final order until the final judgment in the matter has been entered. 'Unless otherwise provided by statute, an appeal lies only from a judgment that terminates the proceedings in the lower court by

completely disposing of the matter in controversy [citations].’ (*Henneberque v. City of Culver City* (1985) 172 Cal.App.3d 837, 841 [218 Cal.Rptr. 704].) [¶] [When] there is no final judgment . . . , the issue is whether the order from which the appeal has been taken fits within an exception to the one final judgment rule codified in [Code of Civil Procedure] section 904.1. (See *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 962–963 [231 Cal.Rptr. 241].) A recognized exception to the ‘one final judgment’ rule is that an interim order is appealable if: [¶] 1. The order is collateral to the subject matter of the litigation, [¶] 2. The order is final as to the collateral matter, *and* [¶] 3. The order directs the payment of money by the appellant or the performance of an act by or against appellant.” (*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 297–298 [50 Cal.Rptr.2d 493], italics added.)

B.

Appeal from the Denial of Interim Attorney Fees

Sese’s notice of appeal was filed before a final judgment. As the trial court noted, a trial on the merits of the complaint might reveal the preliminary injunction was improvidently granted. Consequently, we consider whether the order denying the motion of interim attorney fees is itself appealable. Sese contends the order is appealable under subdivision (a)(6), (8), (11), and (12) of Code of Civil Procedure section 904.1. We disagree.

In pertinent part, Code of Civil Procedure section 904.1 provides that “(a) . . . An appeal . . . may be taken from any of the following: [¶] . . . [¶] (6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction. [¶] . . . [¶] (8) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting. [¶] . . . [¶] (11) From an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000). [¶] (12) From an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000).” Each of these subdivisions is inapplicable.

■ Subdivision (a)(6) of Code of Civil Procedure section 904.1 is not applicable because Sese is not challenging the granting or denial of an injunction. He is not arguing the preliminary injunction should be dissolved. Instead, he contends only that attorney fees should be awarded. Subdivision (a)(8) of section 904.1 does not help Sese either. Sese’s complaint does not seek redemption of the residential property. Instead, his only cause of action seeks relief under the California Homeowner Bill of Rights. He is not seeking

to redeem the property by paying the full amount owed on the property. (E.g., *Peterson v. State of California* (1982) 138 Cal.App.3d 110, 112 [187 Cal.Rptr. 672].) Subdivision (a)(11) and (12) of Code of Civil Procedure section 904.1 do not apply because the order does not direct payment of sanctions. In short, an order denying interim attorney fees under section 2924.12 is not included among appealable orders in Code of Civil Procedure section 904.1.

The order denying interim attorney fees is also not appealable as a collateral order. The order does not direct the payment of any money. Neither does it compel an act by or against Sese. Instead, the order represents a denial of fees that is not appealable as a collateral order. (*Marsh v. Mountain Zephyr, Inc.*, *supra*, 43 Cal.App.4th at pp. 297–298.)

We reject Sese's reliance on the Second Appellate District's decision in *Moore v. Shaw* (2004) 116 Cal.App.4th 182 [10 Cal.Rptr.3d 154]. In *Doe v. Luster* (2006) 145 Cal.App.4th 139 [51 Cal.Rptr.3d 403], the Second District considered its earlier decision in *Moore* and held *Moore* should not be construed to allow an appeal from an interim attorney fee award. As the *Doe* court explained, “[I]n *Moore v. Shaw*, *supra*, 116 Cal.App.4th 182, Division Three of this Court considered on the merits an appeal from the trial court's denial of the defendant's special motion to strike under section 425.16 and the prevailing plaintiff's cross-appeal from the trial court's order, made concurrently with the order denying the motion, denying his request for attorney fees. (*Moore*, at p. 186.) Although the court specifically noted that the order denying a special motion to strike itself is appealable, citing both the relevant subdivision of [Code of Civil Procedure] section 425.16 and section 904.1 (*Moore*, at p. 186, fn. 3), it did not address whether the order denying the request for attorney fees, which was the subject of the cross-appeal, was also appealable. Because the opinion does not suggest either that the parties raised the jurisdictional issue or that the court considered it, *Moore* is not authority for [the] position that an interlocutory order denying a request for attorney fees under [Code of Civil Procedure] section 425.16, subdivision (c), is immediately appealable.” (*Doe*, *supra*, at pp. 149–150.) Thus, *Moore* does not provide authority for holding an order granting interim attorney fees is appealable.

We reject Sese's reliance on *Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265 [117 Cal.Rptr.3d 153]. *Baharian-Mehr* involved an appeal from a denial of a special motion to strike. Because the merits of the special motion to strike were subject to review on appeal, the *Baharian-Mehr* court also considered the propriety of the attorney fees granted to the party that had opposed the motion. (*Id.* at pp. 274–275.) *Baharian-Mehr* did not consider whether an attorney fee order is appealable by itself. (*Ibid.*) Thus, *Baharian-Mehr* does not undermine our conclusion that the order denying interim attorney fees in this case does not constitute an appealable order.

In another case involving the statutory interpretation of section 2924.12, this court held a borrower who obtains only a preliminary, rather than permanent, injunction may nonetheless be entitled to attorney fees. (*Monterossa, supra*, 237 Cal.App.4th at p. 751, citing § 2924.12, subd. (i).) Because *Monterossa* came before us by writ petition, we “expressly decline[d] to determine whether an order denying attorney fees and costs under section 2924.12 is immediately appealable or is reviewable upon appeal from a final judgment in the case.” (*Monterossa*, at p. 751, fn. 3.) Thus, *Monterossa* left open the issue we decide in this appeal. And as we have explained, the order denying interim attorney fees under section 2924.12 is not an appealable order.

DISPOSITION

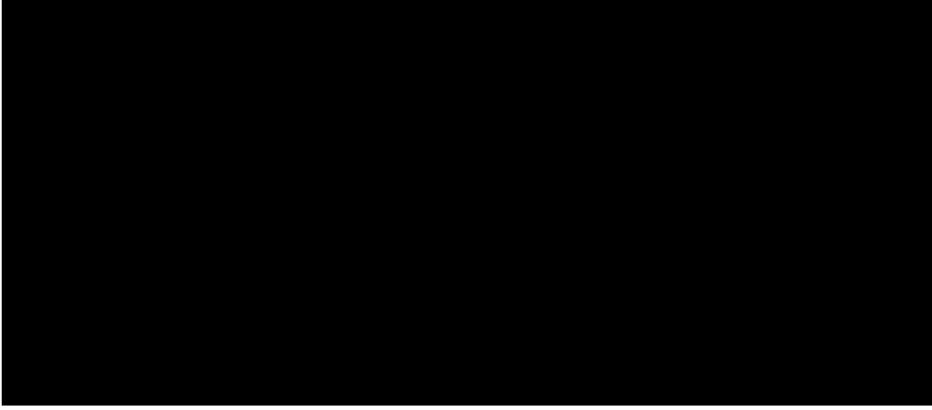
The appeal is dismissed. Wells Fargo Bank N.A. shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

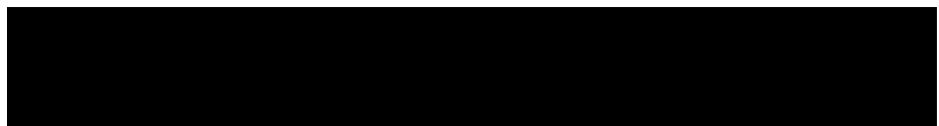
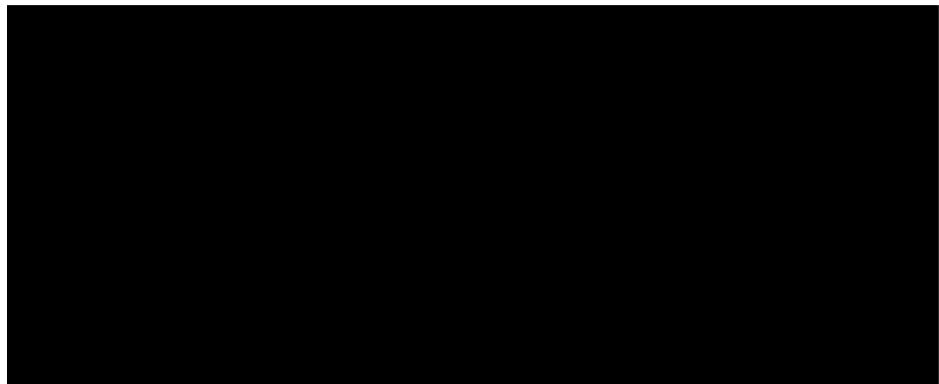
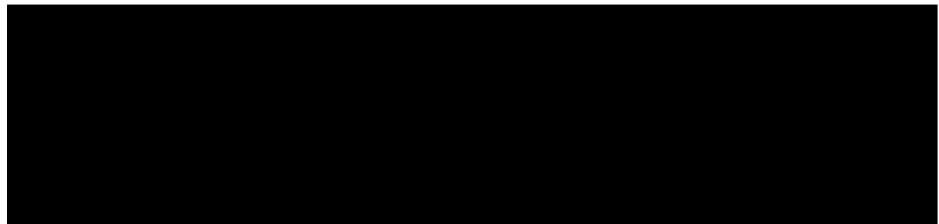
Robie, Acting P. J., and Butz, J., concurred.

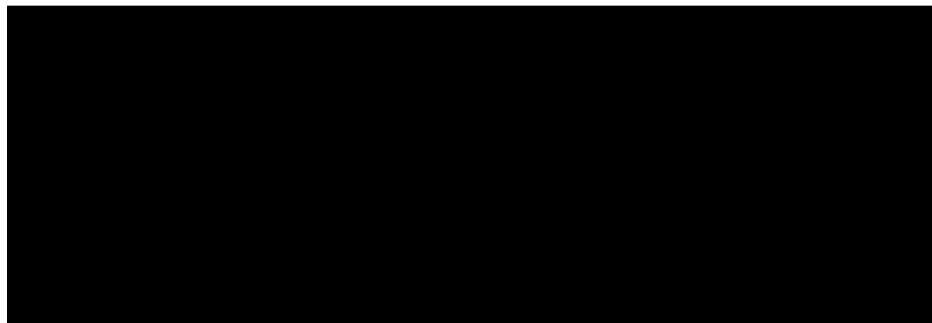
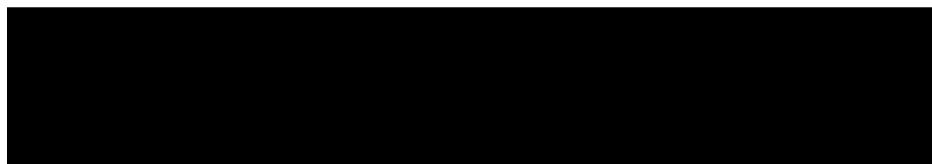
[No. B266704. Second Dist., Div. Two. Aug. 18, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
DAVID NEWMAN, 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 22, 2016, S237491.







COUNSEL

Cheryl Lutz, 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, Noah P. Hill and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

BOREN, P. J.—David Newman appeals from the postjudgment order denying his petition for recall of his sentence on his conviction for assault by

means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1))¹ and for resentencing pursuant to section 1170.126, which was added by Proposition 36 (or Act).² He contends the court (Proposition 36 court) erred in determining he was ineligible for resentencing based on its finding he intended to inflict great bodily injury, because although the “court was permitted to examine the entire record of conviction, it could not rely on that record to make new findings that went beyond the ‘nature or basis’ of the conviction.” He further contends that the court erred by applying an incorrect standard of proof, namely, preponderance of the evidence, rather than beyond a reasonable doubt.

We affirm the order. The Proposition 36 court found that defendant intended to cause great bodily injury, which is an expressly enumerated factor for disqualifying, or rendering ineligible, a defendant for resentencing under Proposition 36 (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)).³ Contrary to defendant’s claim, the court was not foreclosed from making this factual finding of intent, which he characterizes as “a brand new factual finding of intent” prohibited by *People v. Guerrero* (1988) 44 Cal.3d 343 [243 Cal.Rptr. 688, 748 P.2d 1150]. In determining eligibility for Proposition 36 relief, a court is empowered to consider the record of conviction and to make factual findings by a preponderance of the evidence, even if those findings were not made by the jury or the trial court in convicting a defendant of the current offense.

BACKGROUND⁴

On the evening of December 28, 2000, defendant called a Long Beach Pizza Hut restaurant and ordered a pizza. He became very angry, because he believed he had been placed on hold for “too fucking long.” Five minutes after his order, he went to the restaurant and demanded his pizza. He yelled and cursed at the employees and stated he had been “waiting [all] this time

¹ All further section references are to the Penal Code unless otherwise indicated.

² “On November 6, 2012, the electorate passed Proposition 36, the Three Strikes Reform Act of 2012 Proposition 36 reduced the punishment to be imposed with respect to some third strike offenses that are neither serious nor violent, and provided for discretionary resentencing in some cases in which third strike sentences were imposed with respect to felonies that are neither serious nor violent.” (*People v. Johnson* (2015) 61 Cal.4th 674, 679 [189 Cal.Rptr.3d 794, 352 P.3d 366].) Proposition 36 became effective on November 7, 2012. (*Johnson*, at p. 680.)

³ Under these circumstances, it was not incumbent on the trial court to make a determination whether resentencing would pose an unreasonable risk of danger to public safety (§1170.126). (See *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167–168 [151 Cal.Rptr.3d 901] [finding of unreasonable risk of danger required where inmate “not disqualified” from Prop. 36 relief].)

⁴ The following background is based on this court’s unpublished opinion filed October 22, 2002, arising from defendant’s earlier appeal from the judgment.

and [he was] hungry” and wanted his pizza immediately. Although offered two free pizzas if he would calm down, defendant continued yelling before walking out, stating, “You know[] what? I don’t need your fucking pizza.”

As he walked out, Jose Alvarez Avalos, a uniformed delivery driver, was entering the restaurant. Defendant struck Alvarez in the jaw although Alvarez, who did not speak English, had not exchanged any words with him. Alvarez fell to the ground and briefly lost consciousness. Upon regaining consciousness, he saw defendant walking to a car and went to his own car to write down defendant’s license plate number. Defendant approached from behind, began to choke Alvarez, and demanded his money. He took about \$50 from Alvarez’s pocket.

Alvarez sustained a hairline fracture of the jaw and was in a great deal of pain. As a precautionary measure, an oral surgeon performed surgery to wire Alvarez’s jaw shut.

At trial, defendant admitted he swung his fist at Alvarez’s face, hitting him in the jaw but denied using any other force or taking money from Alvarez.

The jury convicted defendant of assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)) but found not true the allegation he inflicted great bodily injury on Alvarez during the assault (§ 12022.7). The jury found defendant not guilty of the charged robbery. The trial court found defendant had suffered five prior felony convictions under the “Three Strikes” law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), four of which also were prior serious felony convictions (§ 667, subd. (a)). He was sentenced to prison for 25 years to life for his assault conviction, plus four 5-year prior serious felony enhancements (§ 667, subd. (a)).

In view of respondent’s concessions, this court modified the judgment by striking the four prior serious felony conviction enhancements; reversing the finding that the prior assault conviction under section 245, subdivision (a)(1) constituted a strike; and reducing defendant’s sentence to 25 years to life in prison for his assault conviction. In all other respects, the judgment was affirmed.

On June 26, 2013, defendant filed a Proposition 36 petition for recall of sentence and resentencing. The court issued an order to show cause why the petition should not be granted. The People filed opposition, and defendant filed a reply.

On August 17, 2015, at the conclusion of the hearing, the Proposition 36 court denied the petition.⁵ The court found “in the commission of the [current assault] offense [defendant] intended to cause great bodily injury to another person.” The court explained: “I think you can infer what his intentions were from the force he used in the blow coupled with being livid over being put on hold, which is a ridiculous thing to become livid over. Just call somebody else. And going down there and getting into a confrontation. And they tried to placate him and he wouldn’t be placated. And then he took out his rage on Mr. Alvarez, causing injuries and hitting him so hard that he broke his jaw and knocked him unconscious. I think that’s enough to show intent to inflict great bodily injury.”

DISCUSSION

1. *Nature of Factual Findings Underlying Ineligibility Determination*

Defendant asserts the nature or basis of his assault conviction did not involve an intent to inflict bodily injury. He contends the Proposition 36 court was not permitted “to make a brand new factual finding of intent” and could not “make new findings that went beyond the ‘nature or basis’ of the conviction.” The gist of his claim of error is unless the disqualifying factor, e.g., “intent to cause great bodily injury,” is an element of the current crime or a sentence enhancement allegation found true by the jury, the court is not empowered to find such factor exists. We are not persuaded.

a. *Offense or Enhancement Elements Irrelevant to Disqualifying Factor Finding*

Proposition 36 does not require the disqualifying factor that renders a defendant ineligible for resentencing to be an element of the offense or a sentence enhancement.

■ Proposition 36 expressly renders *eligible* for resentencing a defendant whose “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.” (§ 1170.126, subd. (e)(2).) When these statutory provisions are considered in context, it becomes clear that a defendant is *ineligible* for, or disqualified from, resentencing if any one of the following triad of disqualifying factors

⁵ Los Angeles Superior Court Judge James B. Pierce presided over the trial that resulted in the judgment against defendant in his current crime. Judge William C. Ryan of the same court ruled on defendant’s Proposition 36 petition.

exists: “During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

Unless a defendant waives his constitutional right to trial by jury (U.S. Const., 6th Amend.), it is for the jury, as the trier of fact, to determine the defendant’s guilt or innocence of the charged current offense and the truth or falsity of a sentence enhancement allegation that increases the penalty for the crime beyond the statutory maximum. If he waives his right to a jury trial, the trial court acts as the trier of fact. In contrast, we conclude the existence of a disqualifying factor that would render a defendant ineligible for resentencing under Proposition 36, which would lessen his punishment if he were eligible, is a determination solely within the province of the Proposition 36 court to make without regard to any factual finding by the trier of fact.

Proposition 36, on its face, does not dictate that any of the triad of disqualifying factors must be an element of the current offense or a sentence enhancement or that such disqualifying factors must be pled and proved as such to the trier of fact. Its plain and clear language reflects a contrary intent. Subdivision (f) of section 1170.126 expressly provides: “Upon receiving a petition for recall of sentence under this section, *the court shall determine* whether the petitioner satisfies the criteria in subdivision (e).” (Italics added.)

Further, these disqualifying factors are not a subject for a jury to determine, because they do not cause an *increase* in punishment beyond the statutory punishment for the current offense. Proposition 36 operates to *decrease* a defendant’s punishment and therefore is “‘an act of lenity.’” (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1335 [174 Cal.Rptr.3d 499] (*Bradford*).) The Sixth Amendment right to jury trial therefore is not implicated. (Cf. *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 120 S.Ct. 2348] (*Apprendi*); *People v. Towne* (2008) 44 Cal.4th 63, 86 [78 Cal.Rptr.3d 530, 186 P.3d 10] (*Towne*)).

Additionally, the plain purpose of these disqualifying factors is to serve as a prophylactic measure to further the goal of the Three Strikes law to protect society against recidivist criminals who commit violent and/or serious crimes. In enacting Proposition 36, the voters intended a third strike defendant who committed a current, nonviolent and nonserious crime would not be punished as severely as a third strike defendant whose current crime was violent and/or serious. Nonetheless, the voters also intended to exclude those defendants who committed the current nonviolent and nonserious crime in a manner that potentially could result in violent and/or serious consequences, which intent is manifest in the triad of disqualifying factors. As the court cogently

reasoned in *People v. Blakely* (2014) 225 Cal.App.4th 1042 [171 Cal.Rptr.3d 70] (*Blakely*): “It is clear the electorate’s intent was not to throw open the prison doors for *all* third strike offenders whose current convictions were not for serious or violent felonies, but only for those who were perceived as nondangerous or posing little or no risk to the public.” (*Id.* at p. 1057.)

To this end, Proposition 36 disqualifies from resentencing those defendants whose current crime is nonviolent and nonserious but, during its commission, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to inflict great bodily injury on another. Assuredly, it would fly in the face of such intent to read into a disqualifying factor a requirement that such factor be an element of the current crime or attendant sentence enhancement. Such requirement would be contrary to the Act’s plain language and impermissibly amount to a loophole allowing all other defendants who “used a firearm, [were] armed with a firearm or deadly weapon, or intended to inflict great bodily injury on another” to be eligible for resentencing.

■ Moreover, the elements of a criminal offense and any attendant sentence enhancement, which increases a defendant’s sentence beyond the maximum prescribed for that offense, must be pled and proved by the prosecution. (*People v. Wims* (1995) 10 Cal.4th 293, 323–324 [41 Cal.Rptr.2d 241, 895 P.2d 77].) In contrast, no requirement exists that the disqualifying factors as to *resentencing* eligibility be pled and proved as an element of the current offense or attendant sentence enhancement. (Cf. §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) In *Blakely*, the court explained: “That voters did not intend disqualification under Proposition 36 to require pleading and proof of a formal offense or enhancement is readily apparent from their inclusion, as a disqualifying factor, of an inmate’s intent, during commission of the current offense, to cause great bodily injury to another person. We are aware of no provision criminalizing, or permitting imposition of an additional sentence for, the mere intent to cause great bodily injury to another person. The drafters of the initiative knew how to require a separate offense or enhancement if desired. (See §§ 667, subd. (e)(2)(C)(i) [disqualifying inmate if current offense is controlled substance charge in which enumerated enhancement allegation was admitted or found true], 1170.12, subd. (c)(2)(C)(i) [same].)” (*Blakely, supra*, 225 Cal.App.4th at p. 1059; see also *People v. Arevalo* (2016) 244 Cal.App.4th 836, 847 [198 Cal.Rptr.3d 343] (*Arevalo*)).

■ Finally, as defendant concedes, the Proposition 36 court is authorized to make its factual findings regarding a disqualifying factor based on the record of conviction. In *Blakely*, the court reasoned: “Like facts invoked to limit the ability to earn conduct credits, facts invoked to render an inmate

ineligible for downward resentencing do not increase the penalty for a crime beyond the statutory maximum, and so need not be pled or proved. [Citation.] [¶] It follows that a . . . court determining eligibility for resentencing under the Act is not limited to a consideration of the elements of the current offense and the evidence that was presented at the trial (or plea proceedings) at which the defendant was convicted. Rather, the court may examine relevant, reliable, admissible portions of the record of conviction to determine the existence or nonexistence of disqualifying factors. [Citation.] This is consistent with voters' intent.”⁶ (*Blakely, supra*, 225 Cal.App.4th at p. 1063, fn. omitted.)

■ To conclude otherwise would lead to an absurd result by rendering meaningless Proposition 36 in the situation where neither the charged offense nor an attendant sentence enhancement allegation requires a factual finding that the defendant used a firearm, was armed with one or a deadly weapon, or intended to cause great bodily injury to another person. Accordingly, a Proposition 36 court may determine whether one or more of these disqualifying factors exists independent of the elements of the current offense and any attendant sentence enhancement allegation.

Defendant's reliance on *People v. Guerrero, supra*, 44 Cal.3d 343, which is factually inapposite, for a contrary conclusion is misplaced. *Guerrero*, which was decided long before enactment of Proposition 36, concerns what evidence a trial court may consider in determining the truth of a *prior conviction* allegation. The court concluded: “To allow the trier of fact to look to the record of the conviction—but no further—is also fair: it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial.” (*Guerrero*, at p. 355.) Similarly, *People v. Wilson* (2013) 219 Cal.App.4th 500 [162 Cal.Rptr.3d 43], upon which he also misrelies, concerns a trial court's determination as to whether a defendant's prior conviction qualifies as a “serious felony” under the Three Strikes law. It is in this context that the court in *Wilson* stated: “[A] sentencing court making this inquiry is limited to examining the record of the prior conviction to determine ‘the nature or basis’ of the prior offense. [Citation.] In doing so, the court must not engage in resolving factual disputes concerning the defendant's conduct. [T]he 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.” [Citation.] ‘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

⁶ We note whether a Proposition 36 court may rely on the facts underlying counts dismissed under a plea agreement is pending before our Supreme Court in *People v. Estrada* (2015) 243 Cal.App.4th 336 [196 Cal.Rptr.3d 418], review granted April 13, 2016, S232114.

prior conduct [citation], 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.’ [Citation.]’ (*Id.* at p. 510, quoting from *People v. McGee* (2006) 38 Cal.4th 682, 691 [42 Cal.Rptr.3d 899, 133 P.3d 1054], italics added & omitted.)

b. *Disqualifying Factual Finding Based on Record of Conviction*

Defendant acknowledges the Proposition 36 court properly may rely on the record of conviction, which includes the transcripts of the trial, citing *People v. Bartow* (1996) 46 Cal.App.4th 1573 [54 Cal.Rptr.2d 482], and he concedes the “court in this case acted properly in relying on those transcripts.”

■ The record contains substantial evidence supporting the court’s factual finding that defendant intended to cause great bodily injury to Alvarez. (See *People v. Robinson* (2010) 47 Cal.4th 1104, 1126 [104 Cal.Rptr.3d 727, 224 P.3d 55] [“uphold any express or implied factual findings of the trial court that are supported by substantial evidence”].) The evidence reported in the trial transcript established that during an unprovoked attack and in a state of extreme rage, defendant lashed out at Alvarez, an innocent bystander, by punching him in the jaw with a closed fist with such force that Alvarez fell to the ground, lost consciousness, and suffered a hairline fracture of his jaw. It is of no moment that an intent to cause great bodily injury to another person, the disqualifying factor at issue, is not an element of his current crime of assault by means likely to cause great bodily injury (§ 245, subd. (a)(1)) or of the sentence enhancement allegation that he caused great bodily injury (§ 12022.7), which the jury found to be untrue.

2. *Standard of Proof: Preponderance of Evidence, Not Beyond Reasonable Doubt*

Defendant contends that beyond a reasonable doubt is the standard of proof applicable to disqualifying factor findings. We conclude the standard of proof is, in fact, preponderance of the evidence.

a. *The Three Standards of Proof*

As the United States Supreme Court has explained, there are generally three standards of proof. “The purpose of a standard of proof is ‘to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’ [Citation.] Three standards of proof are generally recognized, ranging from the ‘preponderance of the evidence’ standard employed in most

civil cases, to the ‘clear and convincing’ standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilt be proved ‘beyond a reasonable doubt’ in a criminal prosecution. [Citation.] . . . [Beyond a reasonable doubt, the] ‘unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the “moral force of the criminal law,” [citation].’” (*California v. Mitchell Bros.’ Santa Ana Theater* (1981) 454 U.S. 90, 92–93 [70 L.Ed.2d 262, 102 S.Ct. 172], fn. omitted.)

■ In short, “[a]t one end of the spectrum is the ‘preponderance of the evidence’ standard, which apportions the risk of error among litigants in roughly equal fashion. [Citation.] At the other end of the spectrum is the ‘beyond a reasonable doubt’ standard applied in criminal cases, in which ‘our society imposes almost the entire risk of error upon itself.’ [Citation.] Between those two standards is the intermediate standard of clear and convincing evidence. [Citation.]” (*People v. Arriaga* (2014) 58 Cal.4th 950, 961 [169 Cal.Rptr.3d 678, 320 P.3d 1141].)

In *Bradford*, the court “conclude[d] the standard of proof is not dispositive in this case; petitioner’s conviction must be reversed even assuming the burden of proof is a preponderance of the evidence. Therefore, because a determination is unnecessary, we express no opinion regarding the appropriate standard of proof.” (*Bradford, supra*, 227 Cal.App.4th 1322, 1343.) In a concurring opinion, however, Presiding Justice Raye discussed the three standards of proof and expressed his view that “a heightened burden of proof by clear and convincing evidence” appeared appropriate. (*Id.* at pp. 1344–1351.)

To date, no reviewing court has embraced the clear and convincing evidence standard as the standard of proof applicable to a Proposition 36 resentencing disability finding. Rather, the battle lines have been drawn with beyond a reasonable doubt, on one side, and preponderance of the evidence, on the other. The published appellate court opinions espousing a standard of proof thus far have all come down on the side of preponderance of the evidence, except for one, *Arevalo, supra*, 244 Cal.App.4th 836, in which the court embraced the beyond a reasonable doubt standard of proof. We decline to follow *Arevalo* and conclude the appropriate standard of proof is preponderance of the evidence.

b. *Preponderance of Evidence—Statutory Standard of Proof*

We begin with the language of the initiative itself. Proposition 36 does not indicate the standard of proof applicable to the subject triad of disqualifying factors, any one of which would render a defendant ineligible for resentencing under the Act. As a *statutory* matter, preponderance of the evidence

therefore is the appropriate standard. Evidence Code section 115 provides in pertinent part: “Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”

c. *Preponderance of Evidence—Constitutional Standard of Proof*

As a constitutional matter, we also conclude preponderance of the evidence is the standard of proof. We are not persuaded that beyond a reasonable doubt, the highest standard of proof, has any bearing on the existence of a disqualifying factor that would render a defendant ineligible for Proposition 36 downward resentencing relief.

■ In *People v. Osuna* (2014) 225 Cal.App.4th 1020 [171 Cal.Rptr.3d 55], the court “conclude[d] disqualifying factors need not be proven to a jury beyond a reasonable doubt where eligibility for resentencing under section 1170.126 is concerned.” (*Id.* at p. 1038.) The court expressly held: “Because a determination of eligibility under section 1170.126 does not implicate the Sixth Amendment, a trial court need only find the existence of a disqualifying factor by a preponderance of the evidence.” (*Id.* at p. 1040.)

In *Blakely*, the court “reject[ed] defendant’s claim that an inmate seeking resentencing pursuant to section 1170.126 has a Sixth Amendment right to a jury determination, beyond a reasonable doubt, on the question of conduct constituting a disqualifying factor.” (*Blakely, supra*, 225 Cal.App.4th 1042, 1059.) The court, however, did not identify or address the appropriate standard of proof.

On the other hand, in *Arevalo*, the court held that beyond a reasonable doubt is the appropriate standard of proof. In a bench trial, the court acquitted the defendant of the possession of a firearm by a felon charge and found untrue the armed with a firearm allegation. In denying the Proposition 36 petition, a different court, applying the preponderance of the evidence standard, found the defendant had been armed with a weapon during the commission of his offenses. In concluding that the Proposition 36 court erred, the court in *Arevalo* agreed with the defendant’s contention that the Proposition 36 court’s ineligibility finding was “based on facts not established beyond a reasonable doubt.” (*Arevalo, supra*, 244 Cal.App.4th 836, 842.) The reviewing court reasoned: “Under a properly applied ‘beyond a reasonable doubt’ standard, Arevalo’s acquittal on the weapon possession charge, and the not-true finding on the allegation of being armed with a firearm, are preclusive of a determination that he is ineligible for resentencing consideration.”⁷ (*Arevalo, supra*, at pp. 841–842; see also *id.*, at pp. 853–854.)

⁷ Review was denied in *Osuna* and *Blakely*. No review petition was filed in *Arevalo*.

In *People v. Frierson* (2016) 1 Cal.App.5th 788, 794 [205 Cal.Rptr.3d 581] (*Frierson*), the court was “not convinced” by the reasoning of *Arevalo*. The court pointed out that *Arevalo* relied on the following concerns in selecting a standard of proof: “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. [Citation.] 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.’ [Citation.]’” (*Frierson*, at pp. 793–794, quoting from *Arevalo, supra*, 244 Cal.App.4th at pp. 852, 853.) In declining to follow *Arevalo*, the court in *Frierson* concluded: “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.” (*Frierson*, at p. 794.)

We also find *Arevalo* unconvincing for additional reasons and concur in *Frierson*’s conclusion that preponderance of the evidence is the appropriate standard of proof. Although citing to and quoting from *Blakely*, the court in *Arevalo* omitted the above quoted language regarding the claim of a Sixth Amendment right to a jury trial and did not address that court’s rejection of the beyond a reasonable doubt standard.

Further, *Arevalo* is inconsistent. The court ordered “[t]he matter . . . remanded for a hearing to determine whether, under a preponderance of the evidence standard, Arevalo would pose an unreasonable risk of danger to public safety such that he should not be resentenced.” (*Arevalo, supra*, 244 Cal.App.4th at p. 854.) In so doing, the court relied on its earlier decision in *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279 [155 Cal.Rptr.3d 856], in which that court held the People bore the burden of establishing dangerousness by a preponderance of the evidence, because no Sixth Amendment issues were implicated, and thus the beyond a reasonable doubt standard was not warranted.⁸ (*Kaulick*, at pp. 1301–1305; see also *Arevalo*, at pp. 842, fn. 3, 849, fn. 10; *Osuna, supra*, 225 Cal.App.4th 1020, 1040.)

In *Arevalo*, however, the court did not identify, discuss, or find any Sixth Amendment issues necessitating the beyond a reasonable doubt standard as to

⁸ No petition for review was filed in *Kaulick*.

a resentencing disqualifying factor. Accordingly, the absence of such issues should have compelled the conclusion that the preponderance of the evidence standard applies also to a disqualifying factor finding, but this was not the conclusion reached. As *Blakely* clarified, no Sixth Amendment right to a jury determination of a disqualifying factor exists.⁹

Further, we point out whether the trier of fact is the jury or the trial court, *as a matter of due process*, the standard of proof applicable to the charged offense and a sentence enhancement is the same: beyond a reasonable doubt. Beyond a reasonable doubt is the standard of proof the trier of fact must employ to overcome the presumption of a defendant's innocence. (§ 1096.) As the United States Supreme Court explained: "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."¹⁰ (*In re Winship, supra*, 397 U.S. 358, 364 [25 L.Ed.2d 368, 90 S.Ct. 1068].)

As a general matter, beyond a reasonable doubt, the highest standard of proof, implicates issues regarding guilt or innocence of a charged crime but not sentencing. The United States Supreme Court in *United States v. Watts*

⁹ The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public *trial, by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." (Italics added.)

¹⁰ The Court reasoned: "The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in *Speiser v. Randall* [(1958) 357 U.S. 513,] 525–526 [2 L.Ed.2d 1460, 78 S.Ct. 1332]: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.' " (*In re Winship* (1970) 397 U.S. 358, 363–364 [25 L.Ed.2d 368, 90 S.Ct. 1068].)

This rationale for the beyond a reasonable doubt standard applies equally to the adjudicatory stage of a delinquency proceeding in which a juvenile is charged with the commission of a crime. (*In re Winship, supra*, 397 U.S. at p. 368.)

(1997) 519 U.S. 148 [136 L.Ed.2d 554, 117 S.Ct. 633] acknowledged that it has “held that application of the preponderance standard at sentencing generally satisfies due process. [Citations.]” (*Id.* at p. 156, italics added.) In *Towne, supra*, 44 Cal.4th 63, our Supreme Court cited *Watts*, in concluding that generally, “[f]acts relevant to sentencing need be proved only by a preponderance of the evidence.” (*Towne*, at p. 86.) The court elaborated: “Nothing in the applicable statute or rules [in *Towne*] suggests that a trial court must ignore evidence related to the offense of which the defendant was convicted, merely because that evidence did not convince a jury that the defendant was guilty beyond a reasonable doubt of related offenses. [¶] . . . [¶] Nor did the sentencing judge’s consideration of conduct underlying acquitted charges violate defendant’s Sixth Amendment right to a jury trial. We previously have explained that ‘the constitutional requirement of a jury trial and proof beyond a reasonable doubt applies only to a fact that is “legally essential to the punishment” [citation], that is, to “any fact that exposes a defendant to a greater potential sentence” than is authorized by the jury’s verdict alone.’ ” (*Id.* at pp. 85–86.)

In *Apprendi*, the United States Supreme Court held that under the United States Constitution: “Other 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. 466, 490.)

Apprendi’s mandate of a beyond a reasonable doubt standard of proof is factually inapplicable. Proposition 36 operates to decrease a defendant’s punishment, not to increase the “penalty for a crime beyond the prescribed statutory maximum.” (*Apprendi, supra*, 530 U.S. at p. 490.)

CONCLUSION

Proposition 36 renders ineligible for resentencing a defendant who, during the commission of the current crime, used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury. None of these triad of disqualifying factors is required to be an element of that crime or attendant sentence enhancement allegation. The existence of a disqualifying factor is a matter solely within the province of the Proposition 36 court to determine. The statutory standard of proof is preponderance of the evidence. Preponderance of the evidence is also the constitutional standard, because Proposition 36 is an ameliorative act, not one that operates to increase the defendant’s “penalty for a crime beyond the prescribed statutory maximum.”

DISPOSITION

The order appealed from is affirmed.

Ashmann-Gerst, J., and Hoffstadt, J., concurred.

A petition for a rehearing was denied September 16, 2016, and appellant's petition for review by the Supreme Court was granted November 22, 2016, S237491.

[Nos. A141625, A142154. First Dist., Div. One. Aug. 18, 2016.]

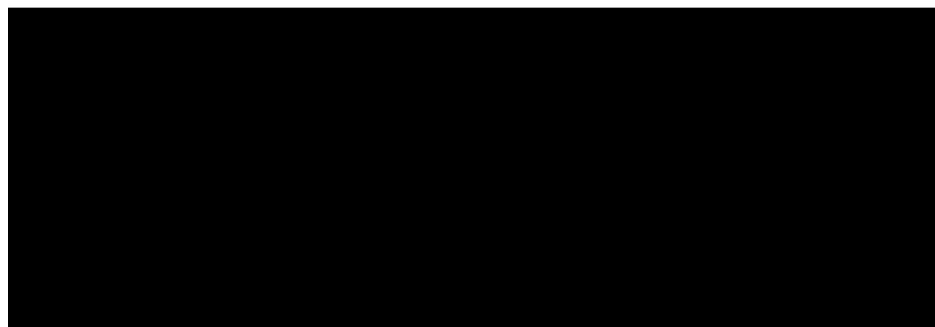
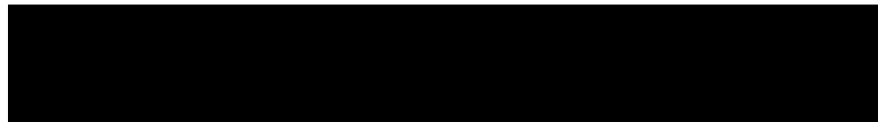
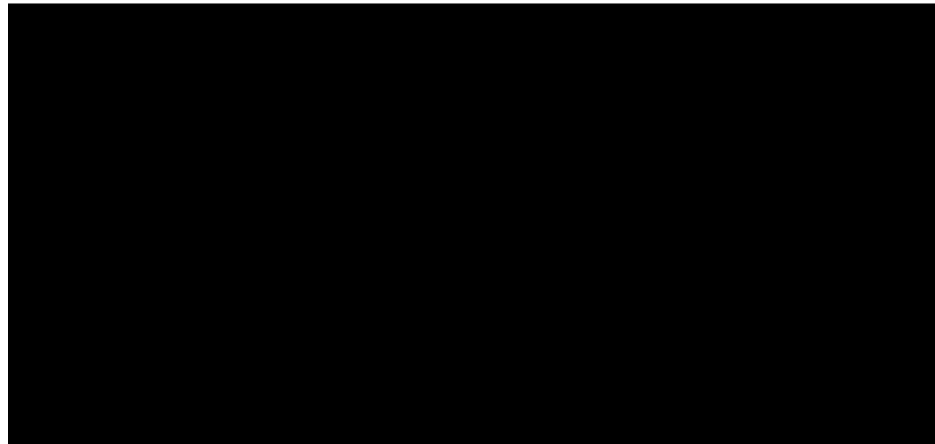
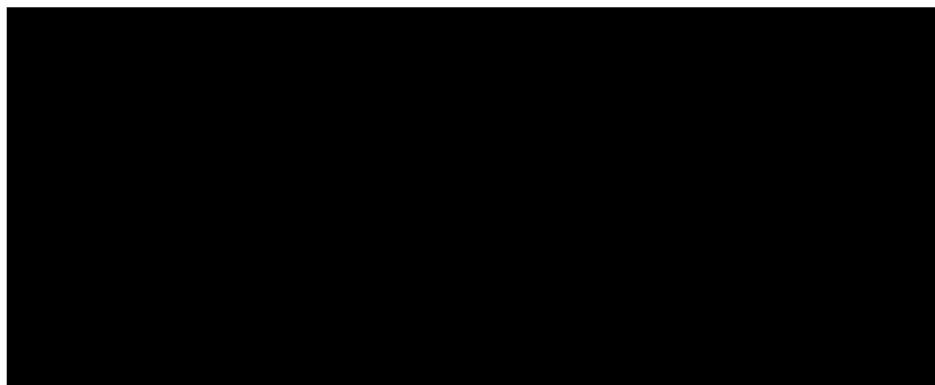
EAST BAY REGIONAL PARK DISTRICT, Plaintiff and Respondent, v.
GEOFFREY M. GRIFFIN, as Trustee, etc., Defendant;
SIDNEY CORRIE, JR., et al., Objectors and Appellants.

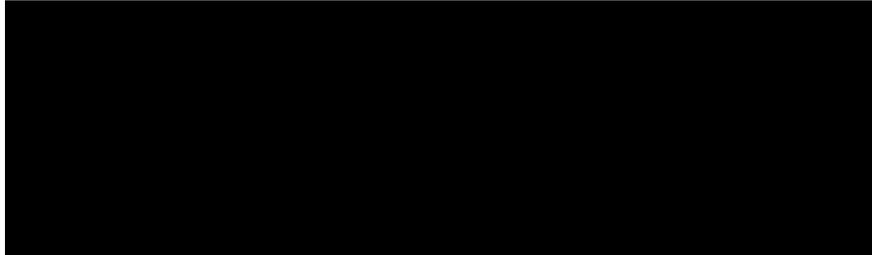
[No. A143688. First Dist., Div. One. Aug. 18, 2016.]

SIDNEY CORRIE, JR., et al., Plaintiffs and Appellants, v.
GEOFFREY M. GRIFFIN, as Trustee, etc., Defendant;
EAST BAY REGIONAL PARK DISTRICT, Objector and Respondent.









COUNSEL

Gagen, McCoy, McMahon, Koss, Markowitz & Raines, Gregory L. McCoy and Lauren E. Dodge for Plaintiffs and Appellants.

Wendel, Rosen, Black & Dean, David Goldman and Thiele R. Dunaway for Defendant and Respondent.

OPINION

MARGULIES, J.—These consolidated appeals arise out of a dispute concerning the trust of Armand Borel. The trust states that, upon Borel’s death, a parcel of the trust’s real property is to be distributed to the East Bay Regional Park District (the District) for the purposes of establishing an agricultural park. A portion of that same property is also the subject of an option agreement between Borel and Sidney Corrie, Jr.

After Borel’s death, Corrie filed a petition for an order instructing the trustee to convey a portion of the property to him pursuant to the option agreement. The District opposed that petition, and also filed a competing petition pursuant to Probate Code¹ section 17200. The District’s section 17200 petition sought an order authorizing the trustee to distribute the property to the District and to receive an \$800,000 loan on behalf of the trust. The probate court granted the District’s petition, and Corrie appealed.² The District subsequently petitioned the probate court pursuant to section 1310, subdivision (b) to authorize the immediate distribution of the land and acceptance of the loan notwithstanding the pending appeal. The order granting that motion is also on appeal. While the first two appeals were pending,

¹ All statutory references are to the Probate Code unless otherwise specified.

² Lynette Arbios Cleland and Peter Arbios, Borel’s heirs, also opposed the District’s petition and joined in Corrie’s appeal. We refer to Corrie, Cleland, and Arbios collectively as appellants.

the probate court held a trial on the validity of Corrie's option rights and issued a statement of decision finding Corrie's option was unenforceable. Judgment was entered in favor of the District, and a third and final appeal followed.

We find appellants are not entitled to relief in connection with their first two appeals, because under section 1310, subdivision (b), the actions taken by the trustee are valid, regardless of the outcome on appeal. Accordingly, those appeals are dismissed. As to the third appeal, we affirm, as we agree with the probate court that the option agreement is void and unenforceable.

I. BACKGROUND

A. *The Trust*

Armand Borel was the settlor and trustee of the Armand Borel Trust dated June 20, 1994. The trust's estate consists of various real and personal property, including a 16.65-acre parcel of real property located in Danville (the Danville property).

Borel executed a revised trust instrument on July 14, 2008 (the Trust). During his lifetime, Borel was to act as the trustee and could distribute proceeds from the Trust to himself. On Borel's death, the Trust was to become irrevocable, Noelle Flanagan was to be appointed as the successor trustee, and various distributions were to be made. Specifically, the successor trustee was to distribute \$300,000 to Dana Vasquez, give all of Borel's firearms and ammunition to Carl J. Mast, and pay the estate's death taxes, debts, and expenses.

As to the remaining trust estate, the successor trustee was to distribute the Danville property to the District "for so long as it [is] used as and for an agricultural park." The distribution of the Danville property was further conditioned on the District doing or performing all of the following: "all structures of whatever kind or nature are to remain on the property, and be maintained, and if necessary, restored"; various equipment, including several vintage automobiles, shall be "held, maintained, and exhibited as the beneficiary may desire"; Borel's residence shall be restored and "used as a museum and meeting facility"; and various personal property within the residence shall be restored, including various antique furniture, four deer heads, two ducks, an albino blackbird, and a restored gas pump.

The Trust also states: "If in the trustee['s] sole opinion, which shall be final and incontestable, the [District] cannot meet each and every of the above-described conditions then" the Danville property shall instead be distributed

to the City of San Ramon, first, or to the Town of Danville, second, subject to the same terms and conditions. If none of these beneficiaries take the Danville property, the trustee may lease any or all of the property to them under such terms and conditions the trustee deems appropriate. If the remaining trust property is not completely disposed of by the preceding provisions, it shall be distributed to Borel's heirs.

The Trust also includes a no contest clause, which provides in relevant part: "If any beneficiary under this instrument . . . directly or indirectly contests this instrument, any amendment to this instrument, . . . or the validity of any contract, agreement . . . , declaration of trust, beneficiary designation, or other document executed by the settlor or executed by another for the benefit of the settlor that is part of the settlor's integrated estate plan . . . then the right of that person to take any interest given to him or her by this instrument . . . shall be void, and any gift or other interest in the trust property to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased the settlor without issue."

B. *The Option Agreement*

On June 14, 2004, Borel and Corrie entered into a "Real Property Option and Purchase Agreement" (the Option Agreement) pertaining to the Danville property. The Option Agreement granted Corrie a five-year exclusive and irrevocable option to purchase up to seven acres of the Danville property at a price of \$500,000 per acre. In return for the purchase option, Corrie was required to pay Borel a nonrefundable option fee of \$100,000 up front, plus another \$5,000 per month during the option period. The Option Agreement also gave Corrie a right of first refusal to purchase "the balance of the [Danville property] that is not part of this Option Agreement."

On March 25, 2009, Borel and Corrie amended the Option Agreement to (1) extend the option period by one year to June 14, 2010; (2) increase the option fees from \$5,000 per month to \$10,000 per month; and (3) give Corrie the option to extend the option period to June 14, 2011, by payment of an additional \$100,000 to Borel, which would count toward the purchase price of the property if Corrie exercised the option (Amendment No. 1). Corrie timely made the \$100,000 payment required for extension of the option period until June 14, 2011.

Borel died on April 19, 2009, and Flanagan became the successor trustee of the Trust. On November 16, 2010, Flanagan and Corrie executed a document captioned "Amendment #2 to Real Property Option and Purchase Agreement" (Amendment No. 2). Amendment No. 2 extended the option period to June 14, 2013, in return for Corrie making "advance principal

payments” totaling \$500,000 over the succeeding five months, as well as continuing to pay monthly option fees, not applicable to the purchase price, at the higher rate of \$14,286 per month, instead of \$10,000 per month, until the option was exercised. Amendment No. 2 also gave Corrie an option to purchase “an additional adjacent three acres” at \$500,000 per acre, “thus bringing the total property subject to an option to purchase to ten acres.” Further, Amendment No. 2 stated the parties acknowledged their obligations were conditioned upon the approval and filing of a final subdivision map or parcel map.

C. *District’s Petition to Remove Trustee*

In April 2011, Vasquez and the District filed separate petitions to remove Flanagan as the successor trustee. The court subsequently ordered Flanagan to produce various financial records. According to the District, these records showed Flanagan used significant Trust funds for improper purposes. Among other things, the District asserted Flanagan attempted to frustrate Borel’s plan for creating an agricultural park on the Danville property and entered into Amendment No. 2 to the Option Agreement to obtain funds for her own personal use.

In connection with the petition, the District filed with the probate court a “Preliminary Concept Plan,” dated October 24, 2011, which detailed how the District planned to establish an agricultural park on the Danville property in conformance with the terms and conditions of the Trust. The concept plan states that, given the bequests, liens, and encumbrances on the estate property, it is likely up to 10 acres of the Danville property would be sold, generating up to \$5 million, of which about \$3 million would be used to establish the agricultural park.

On December 8, 2011, before the petition could be adjudicated, Flanagan died. Elizabeth Soloway was appointed as the second successor trustee. Soloway later filed her accounting and report of Trust administration with the court, indicating Flanagan used Trust funds to pay herself \$232,219.64. Soloway’s accounting also identified an additional \$163,633.77 in “miscellaneous expenses” that were not Trust expenses.

D. *Corrie’s Motion to Instruct and Prior Appeal*

On November 22, 2011, Corrie filed a motion for an order instructing the trustee to convey to him the seven acres of the Danville property subject to the Option Agreement. The motion was made on the ground Corrie had contracted to sell his option rights to a third party and that buyer’s due diligence inspection of the property and determination to close must take place prior to December 31, 2011.

Soloway filed an objection to Corrie's petition and requested a separate trial on the issue of whether the Option Agreement was void for failing to condition sale of the property on compliance with the Subdivision Map Act (Gov. Code, § 66410 et seq.). The probate court decided to proceed on that basis and set a trial on "the bifurcated issue of the defense of illegality." Following briefing and argument, the probate court ruled the Option Agreement was void and unenforceable at its inception due to noncompliance with the Subdivision Map Act, and subsequent acts by the parties were ineffective to revive its validity.

Corrie appealed and we reversed and remanded in an opinion dated May 16, 2013. We concluded Amendment No. 2 cured the illegality of the original option agreement. (*Corrie v. Soloway* (2013) 216 Cal.App.4th 436, 449 [156 Cal.Rptr.3d 709].) The District and Soloway had argued Amendment No. 2 constituted a breach of trust that would deprive the District of its bequest. (*Corrie*, at pp. 445–446.) We rejected the argument based on a lack evidence in the record, stating our decision was "[w]ithout prejudice to the District's position in any further proceedings on this point." (*Id.* at p. 446.)

E. District's Section 17200 Petition

The subject of the first appeal now before us is the District's petition for the probate court to instruct the trustee, pursuant to section 17200. The original petition was filed on September 10, 2013, and a new petition was filed on December 3, 2013. Among other things, the new petition sought an order instructing and authorizing the trustee to receive a loan of up to \$800,000 from the District.

The District alleged an order authorizing the loan was necessary because the Trust was nearly insolvent due to Flanagan's malfeasance. According to the District, the Trust lacked sufficient funds to service its debts, pay its estate and property taxes, and cover its operational costs. The District had previously loaned the Trust \$700,000 in July 2012, and \$99,958.90 in July 2013 for various expenses. The July 2012 loan was secured by a third deed of trust against the Danville property, while the July 2013 loan was unsecured. The District, in October 2013, also purchased a \$1.4 million loan to the Trust from Savvy Real Estate Capital (the Savvy loan). The Savvy loan was secured by the Danville property and had gone into default.

In addition to demanding an order authorizing the loan, the District sought to modify the Trust pursuant to the doctrine of *cy près*. Specifically, the District stated it wished to receive the Danville property "without conditions to utilize the entire [parcel]," explaining "the park as described in the Trust is no longer feasible given the changed circumstances during the Trust administration." Further, the District requested an order instructing the Trustee to

distribute an unrestricted and unconditional grant deed to the Danville property. The District represented such a grant deed was necessary for the Trust to take a charitable deduction on its estate tax return.

The Attorney General, who is tasked with regulating charitable trusts, filed a response to the District's section 17200 petition, stating the petition did not appear to establish the need to modify the Trust through *cy près*. The Attorney General asserted that, although the petition did not track the specific conditions contained in the Trust, it did indicate an intention to establish an agricultural park. The Attorney General concluded that if the court was inclined to grant the petition, the specific restrictions in the Trust regarding the use of the property should be included in the court's order.

On April 17, 2014, after a contested hearing on the matter, the probate court issued an order granting the petition (the section 17200 order). The court found it need not decide the applicability of the *cy près* doctrine, as the stated intent of the District did not depart from Borel's wishes. The trustee was instructed to receive an \$800,000 loan from the District, \$300,000 of which was to be held in trust for the bequest to Vasquez. The court also instructed the trustee to distribute the Danville property to the District by unrestricted and unconditional grant deed. Appellants timely appealed the section 17200 order.

F. *District's Section 1310, Subdivision (b) Petition*

The appeal of the section 17200 order stayed the order's enforcement. The District filed a petition pursuant to section 1310, subdivision (b) to lift the stay. Section 1310, subdivision (b) allows a probate court to "direct the exercise of the powers of the fiduciary" for the purpose of "preventing injury or loss to a person or property" while an appeal is pending. The District requested the court direct the trustee to perform the acts previously ordered in the section 17200 order. Absent such an order, the District argued, there was a risk the Trust would default on its existing secured loans and place the Danville property in imminent risk of foreclosure.

On May 20, 2014, after considering the evidence and holding a contested hearing, the probate court issued an order granting the motion (the section 1310(b) order). The court found the Trust was insolvent; due to the insolvency, the beneficiaries and claimants of the trust would suffer harm unless additional revenue was obtained; and the only source currently proposed for such revenue was from the District. The court also found appellants were subject to no risk of harm if the loan was authorized, as the District's ownership interest in the Danville property was subject to Corrie's option rights, to the extent they were enforceable. On the other hand, appellants,

Trust beneficiaries and claimants, and the District would be subject to imminent risk of harm if the proposed loan was not authorized. The court found that, without the loan, the Trust could not maintain insurance on the property; the property could not be safely maintained; an IRS tax lien of over \$3.5 million would continue to accrue interest and penalties; there was a risk of foreclosure due to past due loan balances; and the Trust would be unable to take advantage of a negotiated reduction in legal fees that was contingent upon timely payment.

Appellants timely appealed the section 1310(b) order.

G. *Trial on Validity of Corrie's Option Rights*

The final appeal in this matter arises out of the trial on the validity of Corrie's option rights, which commenced on June 4, 2014. In their pretrial briefing, appellants asserted the trial should be vacated because "there [wa]s no matter pending with respect to the June 4 trial date." The probate court rejected appellants' arguments in a June 4, 2014 order. The court explained there were at least two petitions that may serve as the basis for the pending trial: (1) Corrie's November 22, 2011 petition for instructions, which was the subject of our prior opinion in *Corrie v. Soloway, supra*, 216 Cal.App.4th 436; and (2) Corrie's "Petition for Instructions to Trustee re Right of First Refusal, filed on January 30, 2014." The probate court also rejected Corrie's claim that the first petition became moot, and found Corrie's attempt to withdraw the petition was precluded by Code of Civil Procedure section 581.

The trial proceeded as scheduled. On September 23, 2014, after an 11-day trial, the probate court issued a detailed 37-page statement of decision. The court once again rejected appellants' jurisdictional arguments, as well as their argument the District lacked standing to object to the Option Agreement. The court also rejected appellants' contention the District had violated the Trust's no contest clause, finding the clause did not encompass the Option Agreement, and in any event, the agreement did not constitute a protected instrument within the meaning of the Probate Code.

Turning to the substance of the dispute, the probate court found the original Option Agreement and Amendment No. 1 had expired, and Amendment No. 2 was void and unenforceable since Flanagan acted without authority in entering into it. The court explained: "[O]ne of Borel's clear purposes . . . was to create an agricultural park, after certain specified distributions of personal property were made. By purporting to convey rights in the [Danville property] to Corrie in Amendment #2 on November 16, 2010, more than [1.5] years after Borel's death, Flanagan acted in excess of her express authority. She did so in a manner inconsistent with the purpose of

the trust and in violation of her fiduciary duties owed to the beneficiaries.” The court also found that, “in disregard of the interests of the beneficiaries, Corrie and Flanagan negotiated Amendment #2 for their own personal purposes and gain.” (Fn. omitted.)

The court entered judgment in favor of the trustee and the District and against appellants on October 17, 2014, and appellants timely appealed.

II. DISCUSSION

A. *Section 17200 Order and Section 1310(b) Order*

■ The probate court’s section 17200 order directed the trustee to distribute the Danville property to the District via unconditional grant deed. It also directed the trustee to receive an \$800,000 loan from the District, which was to be secured by a deed of trust. This order was stayed by appellants’ appeal, but that stay was effectively lifted when the court issued the section 1310(b) order, and once again authorized the trustee to accept the loan and deed the property. Because actions taken by the trustee pursuant to section 1310, subdivision (b) are valid, irrespective of the outcome of an appeal, there is no relief we can provide appellants in connection with their appeals of both the section 1310(b) order and the section 17200 order.

■ “Probate Code section 1310, subdivision (a), provides that, subject to listed exceptions, an appeal stays the operation of an order.” (*Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 555 [128 Cal.Rptr.2d 485].) Section 1310, subdivision (b) provides for an exception to the automatic appellate stay, permitting the probate court’s discretionary retention of jurisdiction in limited circumstances, notwithstanding the pendency of an appeal: “Notwithstanding that an appeal is taken from the judgment or order, for the purpose of preventing injury or loss to a person or property, the trial court may direct the exercise of the powers of the fiduciary, or may appoint a temporary guardian or conservator of the person or estate, or both, or a special administrator or temporary trustee, to exercise the powers, from time to time, as if no appeal were pending. *All acts of the fiduciary pursuant to the directions of the court made under this subdivision are valid, irrespective of the result of the appeal.* An appeal of the directions made by the court under this subdivision shall not stay these directions.” (§ 1310, subd. (b), italics added.)

The last sentence of section 1310, subdivision (b) appears to contemplate appeals from orders made pursuant to the statute. However, the second to last sentence—which states the acts of the fiduciary taken pursuant to section 1310, subdivision (b) are valid, regardless of the outcome of appeal—

indicates the relief that may be sought through such appeals is limited. Thus, an appellate court may not reverse an order made pursuant to section 1310, subdivision (b) to the extent doing so would disturb acts of the trustee taken pursuant to statute. Moreover, where a section 1310, subdivision (b) order grants relief identical to that of the underlying order on appeal, the statute effectively deprives an appellant of his or her right to appeal altogether.

We recognize depriving a litigant of his or her right to appeal is an extraordinary measure. But the Legislature appears to have determined that, in certain cases, expeditious resolution of disputes is more important than allowing for a right of review.³ Our Supreme Court reached the same conclusion in *Gold v. Superior Court* (1970) 3 Cal.3d 275, 281 [90 Cal.Rptr. 161, 475 P.2d 193] (*Gold*), in which it considered a statute virtually identical to section 1310, subdivision (b) that applied to guardianship and conservatorship proceedings. That statute stated the trial court had jurisdiction to direct the exercise of the powers of the conservator notwithstanding a pending appeal, but only for the purpose of preventing injury or loss to person or property. (*Gold*, at p. 281.) Like section 1310, subdivision (b), the statute also stated the acts of the conservator shall be valid, irrespective of the results of an appeal. (*Gold*, at p. 281.) The court held the statutory exception to the stay should be narrowly construed: “By specifically conditioning the application of the statute upon the prevention of injury or loss to person or property the Legislature has determined that the exception should be operative only in a limited class of cases. . . . [T]he language of this statute strongly suggests that the exception applies only to the exceptional case involving a risk of imminent injury or loss.” (*Ibid.*)

The Supreme Court explained such a construction was necessary because orders issued pursuant to the statute may not be subject to appellate review: “Where . . . the trial court’s order directs the very act which constitutes the subject matter of the appeal, *the exception operates to effectively deprive the appellant of his appeal*. By validating the conservator’s acts ‘irrespective of the result of the appeal’ and notwithstanding the fact that the appellant ultimately prevails, the Legislature has created an extraordinary procedure. In essence, the Legislature appears to have determined that in some cases the need for speedy disposition of certain matters outweighs the interest in affording the affected parties a right of review.” (*Gold, supra*, 3 Cal.3d at p. 282, italics added; see *Kane v. Superior Court* (1995) 37 Cal.App.4th 1577, 1584–1586 [44 Cal.Rptr.2d 578] [citing *Gold* and adopting the same interpretation of a substantially similar statute].)

More recently, the Second Appellate District addressed the appealability of section 1310, subdivision (b) orders in *Sterling v. Sterling* (2015) 242

³ The legislative history of section 1310 appears to be silent on this issue.

Cal.App.4th 185 [194 Cal.Rptr.3d 867]. That case involved a dispute between Rochelle and Donald Sterling, the settlors and cotrustees of a trust which owned the Los Angeles Clippers basketball team. (*Id.* at p. 188.) After Donald made several racist remarks and the National Basketball Association sought to terminate the Sterlings' ownership of the Clippers, Rochelle filed a section 1310, subdivision (b) petition seeking a court order to confirm the sale of the team for \$2 billion. (*Sterling*, at pp. 190, 192.) The probate court granted the petition over Donald's objections. (*Id.* at pp. 192–193.) On appeal, Donald requested the court reverse the probate court's orders and direct the sale of the Clippers be undone. (*Id.* at p. 195.) The court held Donald failed to show he was entitled to such relief since acts taken pursuant to section 1310, subdivision (b) are valid regardless of the outcome on appeal. (*Sterling*, at p. 195.) The court concluded: “[E]ven if Donald is successful, the sale of the Clippers cannot be ‘undone’ and Donald seeks no other relief and demonstrates no other prejudice.” (*Ibid.*) The court found this issue was dispositive, but nevertheless went on to discuss Donald's other arguments, including his contention there was no imminent risk of injury or loss that justified authorizing the sale under section 1310, subdivision (b). (*Sterling*, at pp. 195, 198–200.)

Likewise, in the instant action, appellants are essentially arguing we should reverse the probate court's section 1310(b) order and undo the District's \$800,000 loan to the Trust, as well as the grant deed of the Danville property to the District. This we cannot do. The trustee accepted the loan and deeded the property pursuant to the section 1310(b) order, and thus the trustee's acts are valid irrespective of the outcome on appeal. And even if the probate court erred, there is no relief we can provide to appellants in connection with their appeal of the section 1310(b) order. Nor is there any relief we can provide appellants in connection with their appeal of the section 17200 order, as that order granted identical relief. Put another way, we cannot reverse the section 17200 order without also invalidating the acts of the trustee taken pursuant to section 1310, subdivision (b), which would be a direct violation of the statute. As this issue is dispositive, we need not and do not consider appellants' contentions that the section 1310(b) order was unwarranted because there was not an extraordinary risk of harm or loss. We also need not and do not consider appellants' contentions that the section 17200 order is inconsistent with the terms of the Trust and the probate court could not modify the Trust's terms through the doctrine of *cy près*.

In response to our request for supplemental briefing, appellants conceded the actions taken by the trustee pursuant to the section 1310(b) order remain valid notwithstanding the outcome of the appeal. They also appear to concede the trustee's actions in accepting the \$800,000 loan cannot be undone, stating they no longer seek to “‘roll back’” the loan. Notwithstanding these concessions, appellants maintain the \$800,000 loan authorized by the probate

court is too large. They assert \$300,000 of the loan that was to be held in trust for beneficiary Vasquez should be returned immediately because Vasquez is now deceased. However, as appellants concede, Vasquez's death is not reflected in the record. Accordingly, we cannot base our decision on that fact. Appellants appear to contend an additional portion of the loan should also be paid back immediately because it is unnecessary to avoid imminent harm. But it is entirely unclear from the record how much of the loan the Trust has already spent, and the Trust cannot pay down the loan with money it does not have.

Appellants assert there are other significant problems with the probate court's section 1310(b) and section 17200 orders which can be addressed on appeal without invalidating the trustee's actions. Specifically, they assert we should address the aspects of the court's orders authorizing the trustee to distribute the Danville property to the District via unconditional grant deed. Their arguments on this point are not the model of clarity. They assert that while section 1310, subdivision (b) validates the trustee's actions, the statute does not "have any impact on the actions of a non-trustee [(the District)]." They further contend the District's section 17200 and 1310, subdivision (b) petitions amounted to an attack on the Trust and an attempt to frustrate the intent of Borel, thereby triggering the Trust's no contest provisions, and resulting in the District's forfeiture of its gift under the Trust.

Setting aside that the District's actions did not trigger the no contest clause (see pt. II.B., *post* [unpub.]), appellants' arguments are unavailing. At bottom, appellants are essentially asserting it was improper for the trustee to convey the Danville property to the District, and the property should be returned to the Trust. Even if they are correct that the probate court erred, pursuant to section 1310, subdivision (b), we cannot now invalidate the actions of the trustee or otherwise undo the transaction. Appellants attempt to get around section 1310, subdivision (b) by shifting the focus from the actions of the trustee to those of the District, asserting the District's actions ran afoul of the no contest clause. But regardless of whether the District violated the no contest clause, we cannot reverse the probate court's orders without also invalidating the trustee's actions in transferring the property. Since a reversal cannot be squared with section 1310, subdivision (b), the appeals of the section 1310(b) and section 17200 orders necessarily fail.⁴

⁴ Though we need not reach the issue, we question appellants' assertion the District could not take the Danville property because it had no intention of creating the agricultural park envisioned by Borel. Contrary to appellants' contentions, the Trust appears to express a general charitable intent. And since Flanagan's actions as successor trustee rendered the Trust insolvent, a modification of the Trust's terms was warranted to carry out Borel's intent.

In sum, we find there is no relief we can grant appellants in connection with their appeals from the section 17200 order and the section 1310(b) order. Accordingly, those appeals are dismissed.

B. *Corrie's Option**

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III. DISPOSITION

The appeals from the section 17200 order (case No. A141625) and the section 1310(b) order (case No. A142154) are dismissed, as there is no relief we can grant appellants in connection with those appeals. As to the appeal from the judgment on the validity of the option (case No. A143688), we affirm. Costs are awarded to the District.

Humes, P. J., and Dondero, J., concurred.

Appellants' petition for review by the Supreme Court was denied October 26, 2016, S237407.

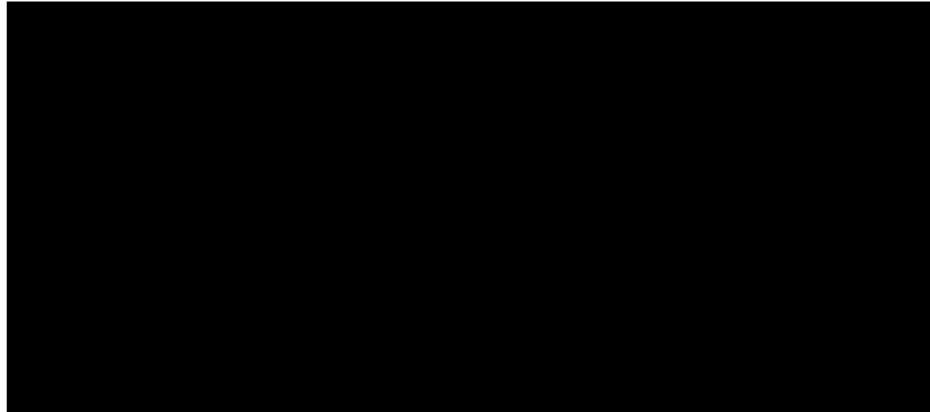
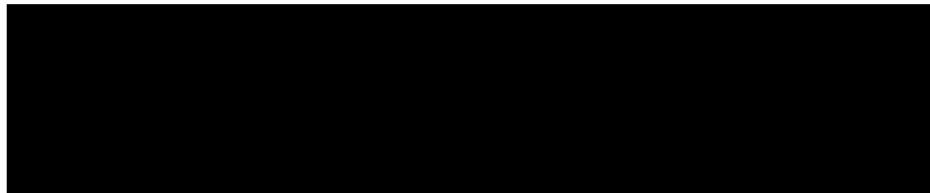
*See footnote, *ante*, page 734.

[No. A145604. First Dist., Div. One. Aug. 18, 2016.]

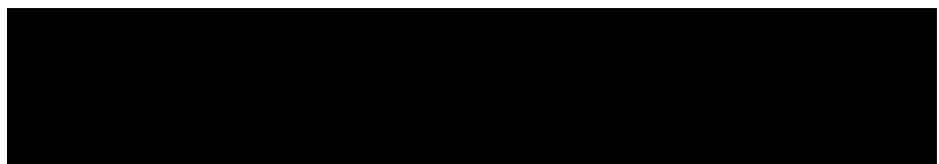
CALIFORNIA-AMERICAN WATER COMPANY, Plaintiff and Respondent,
v.

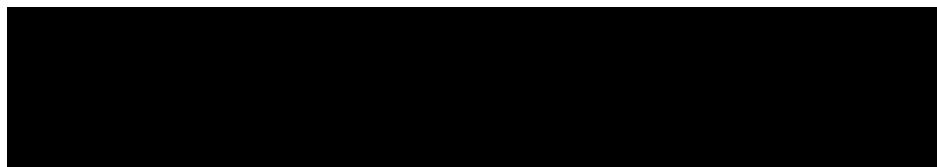
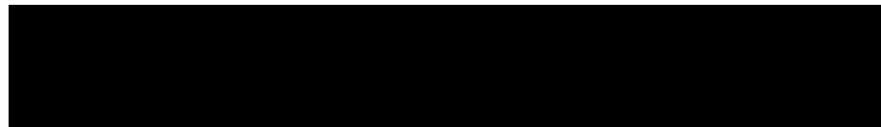
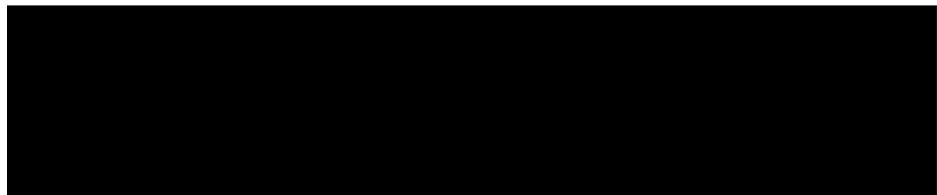
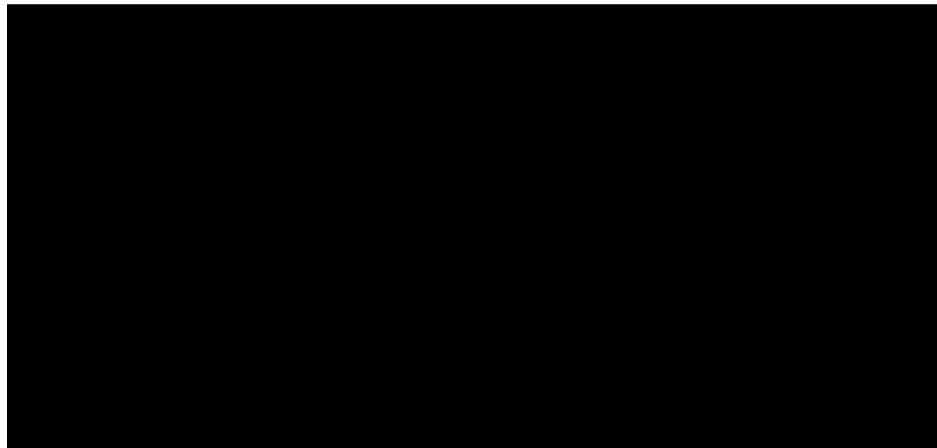
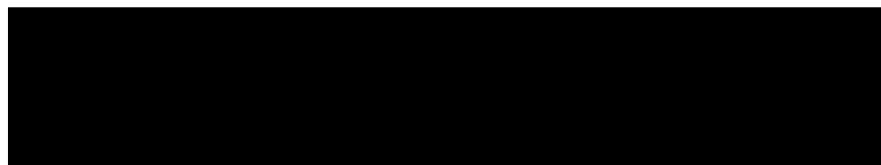
MARINA COAST WATER DISTRICT, Defendant and Appellant;
MONTEREY COUNTY WATER RESOURCES AGENCY, Defendant and
Respondent.

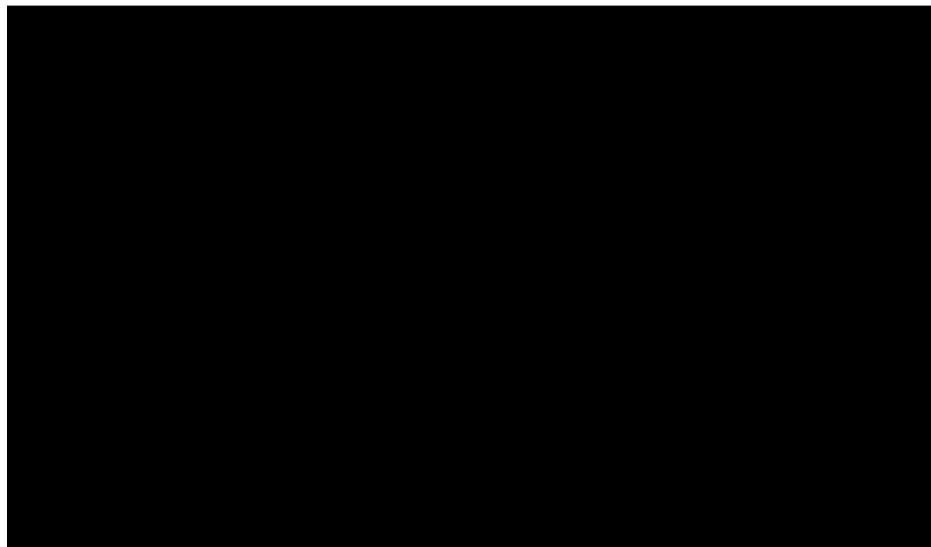












COUNSEL

Richards, Watson & Gershon, James L. Markman, B. Tilden Kim, Kyle H. Brochard; Friedman & Springwater, Mark Fogelman and Ruth S. Muzzin for Defendant and Appellant.

Allen Matkins Leck Gamble Mallory & Natsis, Robert R. Moore, Michael J. Betz and Alexander J. Doherty for Plaintiff and Respondent.

Charles J. McKee, County Counsel, Susan K. Blitch, Deputy County Counsel; Law Offices of Mark A. Wasser and Mark A. Wasser for Defendant and Respondent.

OPINION

HUMES, P. J.—To address Monterey County's water needs, two public agencies and a water company entered into five interrelated agreements to collaborate on a water desalination project. After it was revealed that a board

member of one of the public agencies had a potential conflict of interest, the water company took the position that the agreements were void under Government Code section 1090. In this action for declaratory relief, the trial court agreed that four of the five agreements were void. On appeal, appellant Marina Coast Water District (Marina or district) argues that the claims challenging the parties' agreements were time-barred and that the trial court lacked jurisdiction to consider the parties' dispute. We disagree with both contentions and affirm. In the published portion of our decision, we hold that a public agency is not bound by the 60-day limitation period that governs validation actions when it seeks a judicial determination of the validity of a contract under section 1090.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Parties Agree to Collaborate on a Desalination Project.*

Marina is a public agency formed to provide water for the City of Marina and neighboring communities. Respondent Monterey County Water Resources Agency (Monterey or agency) also is a public water agency. Respondent California-American Water Company (California-American) is a regulated water utility that serves customers in California, including most of the Monterey peninsula.

In 1995, the State Water Resources Control Board ordered California-American to find a new source of water for about two-thirds of the supply it pumped to its customers. In response, California-American entered into agreements with Marina and Monterey to pursue a regional desalination project (RDP or the desalination project). Five of these agreements (the RDP agreements), entered into over the course of a year, are the focus of this case:

—In February and March 2010, the parties entered into a “Reimbursement Agreement,” in which California-American agreed to reimburse Marina and Monterey their costs in pursuing the desalination project, subject to later repayment or forgiveness.

—On April 6, 2010, the parties entered into a “Water Purchase Agreement” (WPA), which provided for the design and construction of various facilities.

—Also on April 6, 2010, the parties entered into a “Settlement Agreement,” which established a process for proposing the desalination project to the Public Utilities Commission (CPUC) for approval.

—On January 11, 2011, the parties entered into a “Project Management Agreement,” under which an entity called RMC Water and Environment (RMC) was selected to be the project manager.

—Also in January 2011, the parties entered into a “Credit-Line Agreement,” which established a line of credit available to the public agencies to manage their project-related finances.

In the midst of these RDP agreements being negotiated and entered into, the CPUC approved the desalination project in December 2010.

B. *The Parties Learn of a Potential Conflict of Interest by a Monterey Board Member.*

Stephen Collins was a member of Monterey’s appointed board of directors when the RDP agreements were being negotiated and, in some cases, entered into. Starting in January 2010, he also was a paid consultant for RMC to advocate for the agreements through a contract he had with Marina. RMC ultimately paid Collins \$160,000 for his work. At a February 2011 meeting of Monterey’s board of directors, Collins exposed his potential conflict of interest by recusing himself from a vote on the selection of RMC as the manager of the desalination project. Local media began reporting on the possible conflict of interest, and an investigation followed. Collins resigned from Monterey’s board of directors on April 1, 2011.

By July 2011, Monterey took the position that the RDP agreements were void due to Collins’s conflict of interest. Collins was eventually convicted of a felony for violating Government Code section 1090, which bars public officers or employees from being “financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”

C. *California-American Initiates These Proceedings.*

California-American filed its complaint for declaratory relief against Marina and Monterey on October 4, 2012.¹ It alleged two causes of action: the first to have the court declare that the RDP agreements were void under Government Code section 1090, and the second to declare that California-American had the right to terminate the agreements, regardless of any conflict of interest, as a result of Monterey’s anticipatory repudiation of them. On

¹ California-American filed its complaint in Monterey County, but the action was transferred to San Francisco under Code of Civil Procedure section 394, which permits a change of venue for certain actions brought against counties. All statutory references are to the Code of Civil Procedure unless otherwise specified.

November 19, 2012, Marina answered and stated as an affirmative defense that California-American's complaint was barred by the statute of limitations. It also filed a cross-complaint against California-American and Monterey seeking a declaration barring any challenges to the RDP agreements. Marina's cross-complaint alleged seven causes of action, three of which were based on the statute of limitations and four of which were based on the Public Utilities Code.

D. *The Parties Dispute the Applicable Statute of Limitations.*

■ Throughout this litigation, Marina has asserted that the claims seeking to have the RDP agreements declared void must be rejected as a result of the statute of limitations. According to Marina, the applicable limitation period is the one governing validation actions under section 860 et seq. (the validation statutes). The validation statutes establish a process for a public agency to obtain a judicial determination on whether an agency action is valid and not subject to attack. "The public agency may validate its action by either active or passive means. It may initiate an action in rem to establish the validity of the matter. (§ 860.) Alternatively, the agency may do nothing, and if no 'interested person' brings suit to determine the validity of the public agency's action within 60 days (§ 863), the action is deemed valid. (§ 869.)" (*Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 19 [49 Cal.Rptr.3d 95].) The statute of limitations for interested persons to bring a validation action is extremely short, just 60 days. (§ 860.)

■ In contrast, California-American and Monterey have asserted that the declaratory-relief claims seeking to have the RDP agreements declared void were timely because actions under Government Code section 1090 may be brought within four years after the plaintiff discovers or reasonably could have discovered a prohibited conflict of interest. (Gov. Code, § 1092, subd. (b).) ■ On the substantive merits of their claims, they contend that the agreements are, and must be recognized as, void because when a contract is made by a public officer or employee who has a financial interest in the contract, "the affected contract is void from its inception . . ." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1073 [103 Cal.Rptr.3d 767, 222 P.3d 214]; see also *Thomson v. Call* (1985) 38 Cal.3d 633, 646 & fn. 15 [214 Cal.Rptr. 139, 699 P.2d 316] [contract in which public officer is interested is void, not merely voidable]; Gov. Code, § 1092, subd. (a).)

E. *Marina Files the First Motion for Summary Judgment or, in the Alternative, Summary Adjudication.*

Marina sought summary judgment or adjudication of (1) the first cause of action in California-American's complaint (seeking a declaration that the

RDP agreements were void under Gov. Code, § 1090) and (2) the seven causes of action in its cross-complaint. Its goal in doing so was to obtain an order that the trial court was precluded from ruling on the agreements' validity. In what we shall refer to as "the first summary judgment order," the court made two important rulings for purposes of this appeal. First, it considered the three statutes that Marina claimed triggered the applicability of the validation statutes to this case. (*City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 345 [85 Cal.Rptr. 149, 466 P.2d 693] [determination of whether validation statutes apply often "presents a 'complex and debatable' issue".]) The court concluded that the validation statutes applied here by virtue of the Monterey County Water Resources Agency Act (the Act). Section 52-39 of the Act provides that "[a]ny judicial action or proceeding to attack, review, set aside, void, annul, or challenge the validity or legality of the formation of a zone, *any contract entered into by the agency* or a zone, any bond or evidence of indebtedness of the agency or a zone, or any assessment, rate, or charge of the agency or a zone shall be commenced within 60 days of the effective date thereof," and such action shall be brought under the validation statutes. (Stats. 1990, ch. 1159, § 39, p. 4851, West's Ann. Wat.—Appen. (1999 ed.) ch. 52, § 52-39, p. 111, italics added.) The court found that all five of the RDP agreements were covered by this broad language, and it therefore granted Marina's motion for summary adjudication to the extent it sought an order rejecting California-American's first cause of action seeking to have the agreements declared void.

Although this ruling rejected California-American's first cause of action, it did not entirely foreclose a judicial consideration of whether the RDP agreements could be declared void. In its second important ruling in the first summary judgment order, the trial court considered Marina's cross-complaint alleging that both cross-defendants were time-barred from bringing a claim and held that the validation statutes do not preclude a *public agency* from seeking to have a contract declared void. (§ 869.) The court thus found that Monterey, as a public agency, could challenge the RDP agreements under Government Code section 1092, and it therefore denied summary adjudication on Marina's claims in its cross-complaint to preclude any such challenge.² Although the court later reversed its position on California-American's ability to seek a declaration under Government Code section 1090, its rulings in the first summary judgment order shaped the proceedings that followed.

² The trial court also rejected Marina's arguments that the Public Utilities Code barred any challenge to the RDP agreements, and it therefore denied summary adjudication in Marina's favor on the causes of action based on that code.

F. *Monterey Files a Cross-complaint and the Second Motion for Summary Judgment or, in the Alternative, Summary Adjudication.*

Monterey responded to the first summary judgment order by filing its own cross-complaint, with a single cause of action seeking “a declaration of the parties’ rights and duties with respect to the RDP Agreements and a declaration the RDP Agreements are void” under Government Code section 1090. Marina answered the cross-complaint by again asserting that such a claim was barred by the statute of limitations governing validation actions, whereas California-American answered by contending that if the RDP agreements were void as to Monterey they were void as to all parties.

Monterey then moved for summary adjudication both on its cause of action in its cross-complaint and on all seven causes of action in Marina’s cross-complaint. In what we shall refer to as the trial court’s “second summary judgment order,” the court first ruled in favor of Monterey as to Marina’s cross-complaint, which meant that Monterey’s claim seeking to have the agreements declared void under Government Code section 1090 could proceed notwithstanding the validation statutes’ limitations period. The court also ruled against Marina on its four causes of action based on various provisions of the Public Utilities Code, which meant that Marina’s causes of action based on those provisions could not proceed. Finally, the court denied summary adjudication on the merits of Monterey’s cross-complaint because it found that whether Collins violated Government Code section 1090 involved a triable issue of fact.

G. *The Case Is Tried.*

A bench trial was held over four days in December 2014. Witnesses testified about the desalination project, the preparation of the RDP agreements, and Collins’s involvement in the venture.

In its statement of decision issued in April 2015, the trial court reiterated its view that the RDP agreements were contracts subject to the validation statutes under section 52-39 of the Act. And it determined that the Reimbursement Agreement, the Water Purchase Agreement, the Project Management Agreement, and the Credit-Line Agreement also were subject to the validation statutes under two additional statutes (Gov. Code, § 53511³ and

³ Subdivision (a) of Government Code section 53511 provides, “A local agency may bring an action to determine the validity of its bonds, warrants, contracts, obligations or evidences of indebtedness pursuant to” the validation statutes. (See Wat. Code, § 30066.)

Wat. Code, § 30066⁴) based on these four agreements' connection with the desalination project's financing. (E.g., *City of Ontario v. Superior Court, supra*, 2 Cal.3d at p. 344 [“The typical validating action seeks a declaratory judgment that the bonds, assessments, etc., of the agency are or are not valid”]; *McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, 1170 [71 Cal.Rptr.3d 109] [validation actions “most commonly used to secure a judicial determination that a local agency’s proposed issuance of bonds is valid”]; *Kaatz v. City of Seaside, supra*, 143 Cal.App.4th at pp. 39, fn. 32, 42 [Wat. Code, § 30066 concerns validation of assessments, and Gov. Code, § 53511 applies to contracts “that are in the nature of, or directly relate to a public agency’s bonds, warrants or other evidences of indebtedness”].) At the same time, it determined that the Settlement Agreement was not subject to the validation statutes under these two additional statutes because it was unconnected with the project’s financing.

Although the court had concluded in its first summary judgment order that California-American’s cause of action under Government Code section 1090 was barred by the short statute of limitations governing validation actions, it revisited and rejected this conclusion in the statement of decision. In the statement of decision, the court held that the longer four-year statute of limitations governing actions under Government Code section 1090 applied to all claims to have the agreements declared void under Government Code section 1090, whether brought by Monterey or California-American, and it found that Collins violated this section by participating in the making of four of the five contracts, but not the Credit-Line Agreement. Accordingly, the court declared void the Reimbursement Agreement, the Settlement Agreement, the Project Management Agreement, and the Water Purchase Agreement.

After the trial court issued its statement of decision, California-American dismissed its second cause of action without prejudice. The court then entered judgment on the three different complaints.

H. *Marina Appeals.*

Marina timely appealed from the judgment, and this court granted the district’s request for calendar preference. Two related appeals from orders regarding attorney fees and costs remain pending and are currently stayed until 30 days after the court’s opinion becomes final in this appeal.

⁴ The statute is similar to Government Code section 53511, subdivision (a), and provides: “An action to determine the validity of an assessment, or of warrants, contracts, obligations, or evidences of indebtedness pursuant to this division may be brought pursuant to” the validation statutes. (Wat. Code, § 30066.)

(*California-American Water Co. v. Marina Coast Water Dist.* (A146166); *California-American Water Co. v. Marina Coast Water Dist.* (A146405).)⁵

Respondents filed a joint motion to dismiss the appeal, arguing that the appeal violates the “one final judgment rule” because there are separate but related complaints for damages pending in the trial court based on the same underlying facts. On November 24, 2015, the court denied the motion. In its respondent’s brief, Monterey again argues that the appeal should be dismissed, but we decline to revisit the court’s previous ruling.

II.

DISCUSSION

A. *The Trial Court Properly Found That the Claims Seeking to Have the RDP Agreements Declared Void Were Not Time-barred.*

As we have discussed, the trial court’s statement of decision ruled on declaratory-relief causes of action that were asserted in three separate complaints, in unique procedural postures, and brought by different types of entities (one water utility and two public agencies). But the upshot of the court’s rulings on all of these causes of action was the same: none of the claims seeking to have the RDP agreements declared void were time-barred, and four of the five agreements were declared void.

On appeal, Marina continues to insist that the challenges to the RDP agreements were time-barred because they were not filed within the validation statutes’ 60-day limitations period. Respondents maintain that Marina’s argument leads to absurd results. We reject Marina’s argument, as did the trial court in the first summary judgment order, for the more basic reason that the limitation period does not apply to public entities, such as Monterey, under the express terms of the validation statutes.

True enough, the broad language of section 52-39 of the Act appears to make the validation statutes applicable to any claim, even one brought under Government Code section 1090, that challenges a contract entered into by Monterey. In sweeping language, that section provides that “[a]ny judicial action or proceeding to attack, review, set aside, void, annul, or challenge the validity of . . . any contract entered into by [Monterey] . . . shall be commenced within 60 days of the effective date thereof” under the validation statutes. (Stats. 1990, ch. 1159, § 39, p. 4851, West’s Ann. Wat.—Appen.,

⁵ On its own motion, the court amends the order staying the two related appeals to clarify that they remain stayed until after the remittitur issues in this appeal.

supra, ch. 52, § 52-39, p. 111, italics added; see also *Kaatz v. City of Seaside*, *supra*, 143 Cal.App.4th at p. 41 [noting in dicta that § 52-39 of the Act “permit[s validation] proceedings to determine the validity of *any* contract”].)

Given the broad language, the trial court concluded in the first summary judgment order that section 52-39 of the Act means that the validation statutes applied to all five RDP agreements. Monterey disagrees with this conclusion and notes that there is no evidence the agency has ever applied such a literal interpretation to the provision, which “would subject Monterey’s employment agreements, vendor contracts and routine agreements for services and supplies to the validation statutes.” We share Monterey’s concerns over such a literal construction of the statute but conclude that we need not reach the issue to resolve this appeal. We will assume, but specifically do not decide, that all the RDP agreements are within the scope of section 52-39’s language.⁶

■ Even with this assumption, we believe for several reasons that it would be imprudent to jump to the conclusion, as Marina urges, that the validation statutes’ 60-day limitations period therefore applies to any claim by a party that seeks to have contracts declared void under Government Code section 1090. First, as the trial court noted, such a conclusion could contravene the principle that a more recent and more specific statute (such as Gov. Code, § 1092) normally prevails over earlier and more-general statutes (such as the validation statutes). Second, such a conclusion would be hard to square with the stated purpose of Government Code section 1090, which is to recognize that a contract made by a public officer or employee who has a financial interest in it is “void from its inception.” (*Lexin v. Superior Court*, *supra*, 47 Cal.4th at p. 1073.) Many instances can be imagined in which an interested party could not reasonably be expected to know of an officer or employee’s financial interest in a contract within 60 days of its adoption.⁷ We are skeptical of the proposition that the Legislature intended for parties to a contract to be categorically barred from seeking to have the contract declared void under Government Code section 1090 simply because the officer or employee’s financial interest was not discovered within 60 days of the contract’s approval.

⁶ In its statement of decision following trial, the trial court addressed whether Government Code section 53511, subdivision (a), and Water Code section 30066, the other two statutes relied upon by Marina, applied to the RDP agreements, a question that required more analysis. In light of our assumption that section 52-39 of the Act applies, we need not address the possible applicability of the other two statutes.

⁷ This case may be such an instance. Although the parties dispute when Collins’s conflict of interest became apparent, we consider the record to be far from clear that either California-American or Monterey knew or should have known of Collins’s conflict of interest until after 60 days had passed following each contract’s adoption.

■ Third, as California-American and Monterey emphasize on appeal, it is questionable whether a claim based on Government Code section 1090 is a type of action subject to the validation statutes. (*Santa Clarita Organization for Planning & the Environment v. Abercrombie* (2015) 240 Cal.App.4th 300, 308 [192 Cal.Rptr.3d 469] [court looked to gravamen of action to determine whether validation statutes apply; claim under Gov. Code, § 1090 did not trigger validation statutes]; see also *Santa Clarita Organization for Planning & the Environment v. Castaic Lake Water Agency* (2016) 1 Cal.App.5th 1084, 1096–1099 [206 Cal.Rptr.3d 33] [not all actions by public agency are subject to validation].)⁸ “The validation statutes do not apply just because a claim or action seeks to challenge—and thereby, in the colloquial sense, to ‘invalidate’—an agency’s action.” (*Santa Clarita Organization for Planning & the Environment v. Abercrombie*, at p. 308.) Suits under Government Code section 1090 may be pursued only by a party to the contract seeking to void it (Gov. Code, § 1092, subd. (a); *San Bernardino County v. Superior Court* (2015) 239 Cal.App.4th 679, 684 [190 Cal.Rptr.3d 876]), whereas validation actions are in rem proceedings meant to quickly test the validity of contracts so that public agencies know whether they may proceed under them (*McLeod v. Vista Unified School Dist.*, *supra*, 158 Cal.App.4th at pp. 1165–1166).

■ Here, we need not decide whether the validation statutes’ 60-day limitation period applies generally to claims brought under Government Code section 1090 challenging contracts otherwise subject to the validation statutes, because claims brought by public entities, such as Monterey, are statutorily exempted under the express language of the validation statutes. Section 52-39 of the Act provides that any judicial action to challenge the validity of any contract entered into by the agency “shall be commenced within 60 days of the effective date thereof” and also provides that “[Monterey] may bring an action pursuant to [the validation statutes] to determine the validity of the matters referred to in this section.” (Stats. 1990, ch. 1559, § 39, p. 4851, West’s Ann. Wat.—Appen., *supra*, ch. 52, § 52-39, p. 111.) Code of Civil Procedure section 869 (part of the validation statutes), in turn, provides, “No contest *except by the public agency . . .* of any thing or matter under this chapter shall be made other than within the time and the manner herein specified. The availability to any public agency . . . of the remedy provided by this chapter, *shall not be construed to preclude the use by such public agency . . . of mandamus or any other remedy to determine the validity of any thing or matter.*” (Italics added.) Thus, when the validation statutes apply, while “an interested person *must* bring such an action within the statutory time limits or be forever barred from contesting the validity of the

⁸ By motion filed on January 20, 2016, Marina asks the court to take judicial notice of seven pleadings filed in the Second District to provide additional context to the court’s 2015 *Santa Clarita* opinion. We deny the request.

agency's action in court, the public agency is not so limited." (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 851 [73 Cal.Rptr.2d 427]; see also *City of Ontario v. Superior Court, supra*, 2 Cal.3d at p. 341 [§ 869 authorizes public agency to disregard 60-day statute of limitations imposed on interested parties].) This gives public agencies three options: bringing a validation action, doing nothing, or waiting past the statutory time limits that apply to interested persons. (*Friedland*, at pp. 850–851.)

Marina ignores this third option and argues that because an agency's action may be validated by doing nothing, the RDP agreements here could not be challenged after 60 days, when they were "validated by operation of law." In making its argument, Marina places undue reliance on *Millbrae School Dist. v. Superior Court* (1989) 209 Cal.App.3d 1494, 1498–1499 [261 Cal.Rptr. 409]. In *Millbrae*, a redevelopment agency and a city council approved a redevelopment project, and various public agencies not connected to the project challenged it under the validation statutes. (*Millbrae School Dist.*, at p. 1496.) The trial court dismissed their action because they failed to properly serve summons under section 863, and they argued in a writ proceeding that they were permitted under section 869 to challenge an action without meeting the requirements for validation proceedings because of their status as public agencies. (*Millbrae School Dist.*, at p. 1498.) Division Three of this court explained that after the validation statutes were expanded to cover more types of local agencies, the second sentence of section 869 (regarding the availability to public agencies of remedies other than the validation statutes) was added to leave no doubt that local agencies would retain previously available means to "validate[] and enforce[] their own decisions," but the statute did not grant to all public agencies "a new right to make third party challenges to each other's actions outside of the validating procedures." (*Millbrae School Dist.*, at p. 1499, italics added.) Here, of course, Monterey was not a third party but was an actual party to the RDP agreements.

Marina claims that *Millbrae*'s focus on agencies retaining procedures to *validate* and *enforce* their actions means that agencies cannot use section 869 to *invalidate* their own actions, but we disagree. Section 869 broadly provides that an agency may "contest . . . any thing or matter under this chapter" and that the validation statutes are not meant to preclude an agency's use "of mandamus or any other remedy *to determine the validity* of any thing or matter." (Italics added.) Monterey's cross-complaint contested the RDP agreements and requested the trial court to recognize their invalidity under Government Code section 1090. (See also *Pajaro Valley Water Management Agency v. Amrhein* (2007) 150 Cal.App.4th 1364, 1377 [59 Cal.Rptr.3d 484] [agency's right to seek declaratory relief reinforced by § 869]; *Moorpark Unified School Dist. v. Superior Court* (1990) 223 Cal.App.3d 954, 960 [273 Cal.Rptr. 18] [use of term "contest" in both §§ 869

and 862 meant “to enable all interested parties to air and to resolve in one suit all the distinct concerns of the various interested parties”].)

Marina further contends that doing nothing within the validation statutes’ 60-day limitations period has the same effect as securing a validation judgment, but we disagree with this contention as well. By statute, validation judgments are “forever binding and conclusive.” (§ 870, subd. (a).) In *San Bernardino County v. Superior Court, supra*, 239 Cal.App.4th at page 684, the court rejected a challenge to a contract under Government Code section 1090 because the challengers were not parties to the contract and thus lacked standing. The same court contemporaneously held in *Colonies Partners, L.P. v. Superior Court* (2015) 239 Cal.App.4th 689, 692–695 [191 Cal.Rptr.3d 45], that even if the challengers could amend their complaint to allege standing, they still could not maintain their action under the Government Code because San Bernardino County previously had obtained a validation judgment concluding that its obligations were valid, legal, and binding. Marina placed great weight on *Colonies Partners* at oral argument, but the discussion in *Colonies Partners* arguably is dicta in light of the court’s conclusion in *San Bernardino*. In any event, we need not and do not decide the effect of such a judgment on the parties’ ability to bring a subsequent action under Government Code section 1090 here, because no validation action was ever initiated and thus no validation judgment was obtained.

In short, even if we set aside our skepticism and accept for the sake of argument Marina’s assertion that the validation statutes’ 60-day limitation period applies generally to claims brought under Government Code section 1090 where a contract implicates the validation statutes, we must still conclude that that limitation period does not control here because Monterey, as a public agency, is exempt from it. (§ 869.) Thus, we agree with the trial court’s rulings that the 60-day limitation period did not preclude Monterey’s challenge. (*Ibid.*)

We next turn to consider whether Monterey’s cause of action was filed within Government Code section 1090’s four-year limitation period, and we conclude that it was because it related back to Marina’s cross-complaint. Marina contends that the limitations period began to run “in or around January 2010” (when Collins started to be paid for his work for RMC),⁹ and that Monterey’s cross-complaint was untimely because it was not filed until April 16, 2014, more than four years later. In rejecting Marina’s argument, the trial court found that Monterey’s claim was timely because it related back

⁹ The parties dispute when the limitations period began to run. We accept, without deciding, that any cause of action under Government Code section 1090 began to accrue in January 2010 because Marina does not argue that California-American and Monterey knew or should have known of Collins’s conflict of interest before then.

to the date that Marina's cross-complaint against Monterey and California-American was filed, November 19, 2012. We agree with the trial court.

■ As a general rule, the filing of a complaint tolls the statute of limitations applicable to a cross-complaint so long as the cross-complaint is related to the original complaint and its causes of action were not barred when the original complaint was filed. (*Trindade v. Superior Court* (1973) 29 Cal.App.3d 857, 860 [106 Cal.Rptr. 48].) "Such a cross-complaint need only be subject-matter related to the plaintiff's complaint—i.e., arise out of the same occurrence . . . —to relate back to the date of filing the complaint for statute of limitations purposes." (*Sidney v. Superior Court* (1988) 198 Cal.App.3d 710, 714 [244 Cal.Rptr. 31], italics added & citations omitted.) "'The principle underlying the rule that a statute of limitations is suspended by the filing of the original complaint is that the plaintiff has thereby waived the claim and permitted the defendant to make all proper defenses to the cause of action pleaded.' " (*Trindade*, at pp. 859–860, quoting *Western etc. Co. v. Tuolumne etc. Corp.* (1944) 63 Cal.App.2d 21, 31 [146 P.2d 61] (*Western Pipe*).) Such waiver principles do not apply, however, where one defendant files a cross-complaint against another defendant, who has taken no action that amounts to a waiver simply by being named in a lawsuit. (*Western Pipe*, at pp. 23, 31–32.)

Here, both Monterey and Marina were named as defendants in California-American's original complaint. Marina argues that this case is thus akin to *Western Pipe*, because Monterey was a defendant who filed a cross-complaint against the original plaintiff (California-American) *and* another defendant (Marina). (*Western Pipe*, *supra*, 63 Cal.App.2d at pp. 31–32.) But this argument overlooks that Marina filed its own cross-complaint naming Monterey as a defendant before Monterey filed its cross-complaint. In its cross-complaint, Marina sought a declaration that challenges to the RDP agreements were time-barred. By doing so, it forfeited any objection to Monterey filing its own cross-complaint for declaratory relief arising out of the identical subject matter. Marina argues it would be unjust for the court to hold that Monterey's cross-complaint related back to Marina's cross-complaint because that would "punish Marina solely for timely asserting affirmative defenses to Cal[ifornia]-Am[erican]'s initial complaint." But Marina did not solely assert affirmative defenses to the original complaint—it also filed a separate cross-complaint. We conclude, as did the trial court, that Monterey's claim under Government Code section 1090 was timely filed because it related back to Marina's earlier cross-complaint filed on November 19, 2012, and that date was well within the four-year statute of limitations for claims that Marina argues began to accrue in January 2010.

■ Thus, neither the validation statutes' 60-day limitation period nor Government Code section 1090's four-year limitation period barred Monterey's request to have the agreements declared void. And since the trial court could properly consider Monterey's request to have the agreements declared void, we need not decide the timeliness of California-American's original complaint that sought the same relief.

B. *The Trial Court Properly Declared the RDP Agreements Void.*

Having concluded that the trial court was not time-barred from considering Monterey's request to have the agreements declared void, we turn to consider whether the court properly found on the merits that four of the five agreements were void. Marina argues that the court erred in declaring them void because Collins lacked a sufficient "financial interest" in the RDP agreements to constitute a violation Government Code section 1090. We again agree with the trial court.

■ "To determine whether section 1090 has been violated, a court must identify (1) whether the defendant government officials or employees participated in the making of a contract in their official capacities, (2) whether the defendants had a cognizable financial interest in that contract, and (3) (if raised as an affirmative defense) whether the cognizable interest falls within any of [the statutory] exceptions for remote or minimal interests." (*Lexin v. Superior Court, supra*, 47 Cal.4th at p. 1074.) Here, Marina does not argue the first or third elements. It neither challenges the trial court's finding that Collins participated in his official capacity in the making of four of the five RDP agreements, nor does it claim that any financial interest on Collins's part fell within a statutory exemption. Instead, the district argues only the second element: that Collins lacked a cognizable financial interest in the four RDP agreements in which he was found to have participated.

■ "'[T]he term "financially interested" in section 1090 cannot be interpreted in a restricted and technical manner.' [Citation.] The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official's loyalties and compromise the undivided representation of the public interests the official is charged with protecting. [Citation.] Thus, that the interest 'might be small or indirect is immaterial so long as it is such as deprives the [people] of his overriding fidelity to [them] and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good.' " (*Lexin v. Superior Court, supra*, 47 Cal.4th at p. 1075.) "[Government Code section] 1090 is triggered when a public official has a direct financial interest in a contract. Even when a public official's financial interest is indirect, section 1090 will still apply unless the interest is too

remote and speculative.” (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1330 [44 Cal.Rptr.3d 881].) “The sweep of section 1090 is broad; within its reach comes any interest that might deter a public official from the most righteous and noble path of civil service possible.” (*Id.* at p. 1333.)

The trial court concluded that Collins had a financial interest in the Reimbursement Agreement, Settlement Agreement, and WPA, because the evidence showed that RMC increased his pay while he was participating in making these contracts and working to gain their approval. The court considered Collins’s interest in the Project Management Agreement a closer question because Collins’s contract with RMC ended the day the CPUC approved the desalination project and there was no direct evidence showing that Collins expected a benefit from the contract’s execution. The court nonetheless concluded that Collins had a cognizable interest in the agreement because he had been paid for his work and could have reasonably expected to receive more work.

Marina argues, without discussing the evidence relied upon by the trial court, that the court failed to follow this court’s opinion in *Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4th 208 [135 Cal.Rptr.3d 802]. In *Eden Township*, this court affirmed summary judgment in a lawsuit claiming that agreements to purchase a hospital and to change its service role were void due to a conflict of interest by two of the people who played a role in negotiating the agreements. (*Id.* at pp. 212–213.) The court held that neither of these people had a financial interest in the contracts because no evidence showed that they would benefit directly or indirectly from them. (*Id.* at pp. 220–222, 228–229.) Although one of the two served as an unpaid chief executive officer (CEO) of a health care district and received a salary as CEO of a nonprofit that operated a hospital for the district, the court concluded that no nexus had been shown between the contracts and the person’s compensation. (*Id.* at pp. 213–214, 221–222.)

Marina claims this case is analogous to *Eden Township* because Collins’s contract with RMC ended on December 2, 2010, “well before the asserted final approval date” of the Project Management Agreement and the Credit-Line Agreement on January 11, 2011. But Marina’s comparison to *Eden Township* is inapt because that case turned on the lack of nexus between the contracts and the relevant officials’ compensation, not the timing of the contracts. (*Eden Township Healthcare Dist. v. Sutter Health, supra*, 202 Cal.App.4th at pp. 220–222, 228–229.) Here, as the trial court explained, the evidence revealed that Collins entered a contract with RMC under which he was to receive \$220 per hour, up to a maximum of \$25,000 in compensation, to provide consulting services for the desalination project. Over the next year,

his contract with RMC was amended three times to ultimately increase his maximum compensation up to \$160,000, at which point the contract ended. The trial court found that his contract meant that he stood to benefit financially from the Reimbursement Agreement, the Settlement Agreement, and the WPA so long as the project continued moving forward. Marina ignores these findings in simply asserting that Collins did not stand to gain *going forward* after January 11, 2011. We agree with the trial court that “[t]he contracts were not made in a day. Whether or not Collins’[s] financial interest continued until the contracts were finally executed, Collins had a financial interest in the contracts when he ‘made’ them. This is sufficient.”

Marina's reliance on dicta in *People v. Vallerga* (1977) 67 Cal.App.3d 847 [136 Cal.Rptr. 429] is also misplaced because that portion of the opinion addressed the hypothetical situation of whether a defendant, who was to be paid as a consultant regardless whether the relevant contract was executed, would violate Government Code section 1090 if he or she did nothing other than to provide consulting services before the contract's execution. (*Vallerga*, at pp. 867–868, fn. 5.) Again, we agree with the trial court when it pointed out that, unlike the defendant in *Vallerga*, Collins had a financial interest in the Reimbursement Agreement, Settlement Agreement, and WPA “when he participated in making the contracts and obtaining that approval, whether or not subsequent final approval was required.”

C. The Trial Court Did Not Review, Reverse, or Suspend the Operation of a CPUC Decision.*

III.

DISPOSITION

Marina's request for judicial notice, filed on January 20, 2016, is denied.

California-American's request for judicial notice, filed on February 9, 2016, is granted.

The judgment is affirmed.

*See footnote, *ante*, page 748.

Appeal Nos. A146166 and A146405 shall remain stayed until 30 days after the issuance of the remittitur in this case. The opening briefs in those stayed cases shall be due 40 days after the issuance of the remittitur in this appeal.

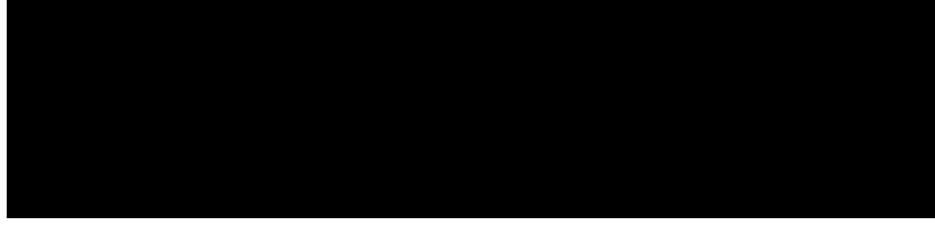
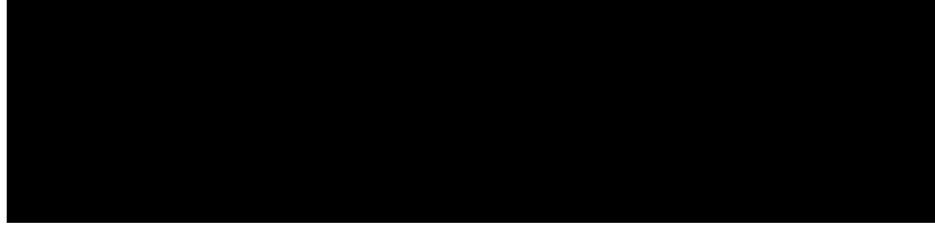
Margulies, J., and Banke, J., concurred.

A petition for a rehearing was denied September 8, 2016, and appellant's petition for review by the Supreme Court was denied November 9, 2016, S237534. Werdegar, J., did not participate therein.

[No. B266881. Second Dist., Div. Four. Aug. 19, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
APRIL GARNER, 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 26, 2016, S237279.



OPINION**MANELLA, J.—****INTRODUCTION**

This case presents an issue currently pending before the California Supreme Court: whether a felony conviction for second degree commercial burglary (Pen. Code, § 459)¹ is reducible to misdemeanor shoplifting (§ 459.5) if the defendant entered the commercial establishment with intent to commit theft by false pretenses. (See *People v. Gonzalez*, review granted Feb. 17, 2016, S231171.) Here, the trial court found that appellant April Garner entered a grocery store with intent to commit theft by false pretenses, and determined that appellant was statutorily ineligible to have her felony burglary conviction reduced to a misdemeanor. For the reasons set forth below, we conclude that appellant was eligible for resentencing. Accordingly, we reverse and remand for further proceedings.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On November 8, 2006, appellant entered a grocery store and attempted to purchase items with a forged \$100 traveler's check. A store employee recognized the check as counterfeit, and refused to accept it. Subsequently, appellant was arrested. On March 25, 2014, appellant pled no contest to two felony counts of forgery (§§ 470, subd. (d), 475, subd. (a)) and one felony count of second degree commercial burglary (§ 459). The trial court suspended imposition of sentence and granted appellant five years of formal probation.

Following the passage of Proposition 47—which reduced certain theft-related offenses to misdemeanors—appellant filed a petition to recall her sentence with respect to the felony forgery counts. The trial court granted appellant's motion to reclassify her felony forgery counts to misdemeanors, and resentenced appellant to summary probation as to those offenses.

On May 19, 2015, appellant filed a petition for resentencing with respect to her felony burglary count. She argued that it was reducible to misdemeanor shoplifting. The district attorney objected, arguing that the felony burglary count was not reducible, as appellant had entered the grocery store with intent to commit theft by false pretenses, not intent to commit larceny. The trial court agreed. It found that appellant had entered the grocery store with intent to commit theft by false pretenses and accordingly, the felony burglary conviction was not reducible. Appellant filed a timely appeal from the court's order denying her petition.

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

DISCUSSION

On November 4, 2014, California voters approved Proposition 47, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 [183 Cal.Rptr.3d 362] (*Rivera*).) Proposition 47 was intended to “ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K–12 schools, victim services, and mental health and drug treatment.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.) It reclassified certain drug- and theft-related offenses as misdemeanors, unless the offenses were committed by ineligible defendants. (*Rivera, supra*, at p. 1091; *People v. Contreras* (2015) 237 Cal.App.4th 868, 889–890 [188 Cal.Rptr.3d 698].) It also included a provision that allows a defendant currently serving a sentence for a felony that would have been a misdemeanor had Proposition 47 been in effect at the time of the offense to file a petition for recall of sentence and resentencing. (§ 1170.18.)

Proposition 47 added section 459.5, which provides: “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.” The voter information guide for Proposition 47 explained that “[u]nder 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, *supra*, analysis of Prop. 47, p. 35.)

Here, the trial court determined that appellant’s second degree commercial burglary conviction was not reducible to shoplifting pursuant to section 1170.18, as appellant had entered the commercial establishment with intent to commit theft by false pretenses, not larceny. Appellant contends that “larceny,” as used in section 459.5, includes “theft by false pretenses,” and that her burglary conviction thus qualifies for reclassification under Proposition 47. We agree.

■ In interpreting Proposition 47, “we 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]), and “our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure. [Citations.]” (*In re Littlefield* (1993) 5 Cal.4th 122, 130 [19 Cal.Rptr.2d 248,

851 P.2d 42].) “‘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.” (*Rivera, supra*, 233 Cal.App.4th at p. 1100, quoting *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192 [96 Cal.Rptr.2d 463, 999 P.2d 686].) If there is no ambiguity in the language of the statute, then the plain meaning of the language governs. If the statutory language is ambiguous, we may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. (*Rivera*, at p. 1100.) In construing a statute, we must also consider “‘the object to be achieved and the evil to be prevented by the legislation.’” (*Ibid.*, quoting *People v. Superior Court (Zamudio)*, *supra*, at p. 193.)

■ We presume the electorate was aware of existing law when it enacted Proposition 47 (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 171 [14 Cal.Rptr.3d 261, 91 P.3d 205]; *People v. Weidert* (1985) 39 Cal.3d 836, 844 [218 Cal.Rptr. 57, 705 P.2d 380]). As enacted by the voters, section 459.5 provides that “shoplifting” is committed when, inter alia, a defendant enters a commercial establishment with “intent to commit larceny.” The phrase “intent to commit larceny” in section 459.5 is similar to the phrase “intent to commit grand or petit larceny” used in the burglary statute (§ 459). Our Supreme Court has held that an “intent to commit theft by a false pretense” can support a burglary conviction. (*People v. Parson* (2008) 44 Cal.4th 332, 354 [79 Cal.Rptr.3d 269, 187 P.3d 1].) *Parson* cited *People v. Nguyen* (1995) 40 Cal.App.4th 28 [46 Cal.Rptr.2d 840], which specifically held that the “intent to commit grand or petit larceny” element of burglary may be satisfied by entering a victim’s house with the intent to pass worthless checks, which constituted “petit” theft by false pretenses. (*Nguyen, supra*, at p. 30.) In reaching its conclusion, the *Nguyen* court explained: “[I]n 1927, the Legislature amended the larceny statute to define theft as including the crimes of larceny, embezzlement and obtaining property by false pretense. (Stats. 1927, ch. 619, § 1, p. 1046.) At the same time, the Legislature also enacted section 490a stating, ‘[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.’ (Stats. 1927, ch. 619, § 7, p. 1047.) Thus, 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.) For the same reasons, we conclude the voters intended “larceny” as used in section 459.5 to include all forms of “theft,” including “theft by false pretenses.”

Our conclusion is consistent with the voters’ intent. As noted, Proposition 47 was designed, inter alia, to “ensure that prison spending is focused on violent and serious offenses” (Voter Information Guide, *supra*, text of

Prop. 47, § 2, p. 70.) Appellant's second degree commercial burglary conviction based on using a forged \$100 traveler's check is a nonviolent offense, not demonstrably more serious than classic shoplifting, viz., entering a store and filching \$100 worth of items. Reclassifying it as a misdemeanor is thus consistent with the articulated purposes behind Proposition 47. In short, we conclude appellant is eligible to have her felony burglary conviction reclassified to misdemeanor shoplifting.

DISPOSITION

The order is reversed, and the matter remanded for further proceedings in light of this opinion.

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

Respondent's petition for review by the Supreme Court was granted October 26, 2016, S237279.

[No. D068228. Fourth Dist., Div. One. Aug. 19, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
JESSE WAGNER, Defendant and Appellant.

[REDACTED]

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For more information about the study, please contact Dr. John D. Cawley at (609) 258-4626 or via email at jdcawley@princeton.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; 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, and it is the only one which can be decided at present. The latter question is of great interest, but it is not of such importance as to require our attention at present.

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.

ANSWER The answer is 1000. The first two digits of the number 1000 are 10.

COUNSEL

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

BENKE, Acting P. J.—On a petition by the People, the trial court revoked defendant and appellant Jesse Wagner’s parole, ordered that he serve 120 days of local custody, and reinstated his parole. After the time to appeal from the order revoking his parole had passed and after Wagner completed his term of custody, Wagner discovered what he believes is evidence which shows that in pursuing revocation of his parole, a parole officer acted in retaliation for litigation Wagner initiated against another law enforcement officer and testified falsely at the revocation hearing. Upon discovering this evidence, Wagner filed, and the trial court denied, a motion for relief under Penal Code¹ section 1473.6.

The trial court did not reach the merits of Wagner’s motion but instead found that it did not have jurisdiction under section 1473.6 to consider Wagner’s claims. Wagner filed a timely notice of appeal. Contrary to the trial court’s determination, section 1473.6 did give it jurisdiction over its earlier order revoking Wagner’s parole. Accordingly, we reverse the trial court’s order and remand for a hearing on the merits of Wagner’s motion.

FACTUAL AND PROCEDURAL BACKGROUND**1. *Underlying Conviction***

In 2006, Wagner was convicted of impersonating a public officer, false imprisonment, robbery, being a former convict in a custodial facility, and being a felon in possession of a weapon. These convictions grew in part out of Wagner’s work as a bounty hunter for a bail bond agency. Acting as a bail bondsman, Wagner would wear clothes that resembled police uniforms and drive refurbished police vehicles. When Wagner arrested bail jumpers, although a felon, he would take them to custodial facilities; Wagner also detained Hispanic residents and threatened them with deportation, and, on at least one occasion, Wagner stole the contents of a detainee’s wallet.

Wagner was sentenced to nine years four months in prison. However, Wagner was paroled in 2011.

2. *Revocation*

In late 2013, Wagner was arrested in Murrieta, California, and police recovered and seized a number of items, including a ballistic vest, a spring knife, a replica handgun and holster, a plastic badge, surveillance equipment, video equipment, binoculars and a police citation book. Following his arrest,

¹ All further statutory references are to the Penal Code.

[REDACTED]

Wagner filed a civil complaint against the officers involved in his arrest and obtained an order requiring that the seized items be returned to him.

In June 2014, the San Diego County District Attorney filed a petition to revoke Wagner's parole. At a hearing on the petition, a parole officer testified Wagner had been seen driving a black Ford Crown Victoria that resembled a police cruiser. The parole officer further testified that because of Wagner's underlying conviction, on May 13, 2014, as a condition of parole, he instructed Wagner to cease driving the Crown Victoria. The parole officer testified that thereafter, on May 28, 2014, Wagner was observed driving the Crown Victoria and again arrested. Following Wagner's arrest, his home and office were searched and badges, cards and other paraphernalia suggesting that Wagner was impersonating a law enforcement officer were seized.

At the revocation hearing, Wagner and his girlfriend, who was also present on May 13, 2014, when Wagner met with the parole officer, testified. They both stated the parole officer did not give Wagner any instructions with respect to the Crown Victoria. The trial court found that Wagner had violated his parole and, as we indicated, revoked his parole, imposed 120 days of local custody, and reinstated his parole.

3. *Section 1473.6 Petition*

Following his release from custody, Wagner obtained copies of e-mails to and from the parole officer who testified at the revocation hearing. In one e-mail sent to a law enforcement officer before the parole officer met with Wagner and his girlfriend, the parole officer stated that he did *not* plan to speak to Wagner about his use of the Crown Victoria at the May 13, 2014 meeting.

Based on the e-mails he obtained, Wagner filed a motion under section 1473.6 in which he asked that the order finding that he violated the terms of his parole be vacated. Without reaching the merits of Wagner's petition, the trial court denied the petition on the grounds that section 1473.6 did not give it any power to disturb its order revoking Wagner's parole. Wagner filed a timely notice of appeal.²

DISCUSSION

I

The People's petition to revoke Wagner's parole was governed by section 3000.08, under which, as of July 1, 2013, revocation of parole is determined

² On appeal, Wagner's counsel filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 [158 Cal.Rptr. 839, 600 P.2d 1071]; Wagner filed his own supplemental brief, and we directed the Attorney General to file a respondent's brief. Wagner then filed a reply brief.

in the first instance by the trial court in the county in which a parolee is released or resides in, or in which a parole violation occurred. A trial court's order revoking parole "is a postjudgment order affecting the substantial rights of the party, and is therefore appealable." (*People v. Osorio* (2015) 235 Cal.App.4th 1408, 1412 [185 Cal.Rptr.3d 881] (*Osorio*).

Section 1473.6, subdivision (a) states: "(a) Any person no longer unlawfully imprisoned or restrained may prosecute a motion to vacate a judgment for any of the following reasons: [¶] (1) Newly discovered evidence of fraud by a government official that completely undermines the prosecution's case, is conclusive, and points unerringly to his or her innocence. [¶] (2) Newly discovered evidence that a government official testified falsely at the trial that resulted in the conviction and that the testimony of the government official was substantially probative on the issue of guilt or punishment. [¶] (3) Newly discovered evidence of misconduct by a government official committed in the underlying case that resulted in fabrication of evidence that was substantially material and probative on the issue of guilt or punishment. Evidence of misconduct in other cases is not sufficient to warrant relief under this paragraph."

■ A section 1473.6 motion must be based on evidence that "could not have been discovered with reasonable diligence prior to judgment" (§ 1473.6, subd. (b)), and it must be filed within one year after such evidence is discovered (*id.*, subd. (d)). The procedure for bringing and adjudicating a section 1473.6 motion is "the same as for prosecuting a writ of habeas corpus." (§ 1473.6, subd. (c).)

"The legislative history of section 1473.6 reflects the belief that at the time of the introduction of the legislation, 'Currently, other than a pardon, no remedy exists for those no longer in the system to challenge their judgment when they learn that their conviction was obtained in part because of fraud or false evidence by a government official.' (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1391 (2001–2002 Reg. Sess.) as amended Apr. 10, 2002, p. 5.) The legislation was originally introduced to address a problem illustrated by the so-called Rampart scandal [citation] in which it was discovered that certain Los Angeles Police Department officers had engaged in misconduct, including planting evidence, filing false police reports, committing perjury, and creating nonexistent confessions. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1391 (2001–2002 Reg. Sess.) as amended Apr. 10, 2002, p. 6; Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1391 (2001–2002 Reg. Sess.) as amended Apr. 10, 2002, pp. 3–4.) Because the misconduct was discovered many years after it occurred, those who were no longer in custody at the time of the discovery of the misconduct would not be able to set aside their convictions. (Sen. Com. on Public Safety,

Analysis of Sen. Bill No. 1391 (2001–2002 Reg. Sess.) as amended Apr. 10, 2002, p. 6; Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1391 (2001–2002 Reg. Sess.) as amended Apr. 10, 2002, pp. 3–4; [citation].)’ (*People v. Germany* (2005) 133 Cal.App.4th 784, 791 [35 Cal.Rptr.3d 110], fns. omitted.)

II

Because the trial court did not reach the merits of Wagner’s contentions but instead dismissed his section 1473.6 motion on the grounds it had no jurisdiction to hear the motion, we must determine whether, as Wagner contends, the order revoking his parole and imposing a term of custody was subject to section 1473.6. As we indicated at the outset, we agree with Wagner: the trial court’s order revoking his parole was subject to section 1473.6.

■ As the People point out, by its terms, section 1473.6 permits a challenge to a “judgment.” Although the order revoking Wagner’s parole does not state it is a “judgment,” nonetheless for purposes of applying section 1473.6 we have little doubt it should be treated as a judgment. Under Code of Civil Procedure section 577, “[a] judgment is the final determination of the rights of the parties in an action or proceeding.” In this regard, cases have consistently held that whether a trial court determination is to be treated as a judgment depends not on what form or style the determination takes but on what impact it has on the parties’ rights. “[A] judgment, no matter how designated, is the final determination of the rights of the parties in an action. Thus, an ‘order’ which is the final determination in the action is the judgment.” (*Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1606 [275 Cal.Rptr. 887].) By the same token, “[a] paper filed in an action does not become a judgment merely because it is so entitled; it is a judgment only if it satisfies the criteria of a judgment.” (*City of Shasta Lake v. County of Shasta* (1999) 75 Cal.App.4th 1, 10 [88 Cal.Rptr.2d 863]; accord, *Baker v. Castaldi* (2015) 235 Cal.App.4th 218, 224 [185 Cal.Rptr.3d 17].)

In considering whether relief is available under section 1473.6, we must also recognize that because it is a determination that a parolee has violated the terms of his or her parole, a revocation order may have a substantial and enduring impact on the parolee. “Under California’s penal system, any future interactions between defendant and the justice system will likely bring to light defendant’s parole revocation. Should defendant suffer a further criminal conviction, the parole revocation may be used as part of his sentencing determination. The parole revocation also may be used against defendant in other noncriminal arenas, such as employment decisions or child custody matters.” (*Osorio, supra*, 235 Cal.App.4th at p. 1412.) These circumstances

support the conclusion that an order revoking parole is not only appealable, as the court in *Osorio* found, but subject to relief under section 1473.6.

We also note the well-established principle that parole is itself a form of custody that will support postjudgment habeas corpus relief. (*In re Jones* (1962) 57 Cal.2d 860, 861, fn. 1 [22 Cal.Rptr. 478, 372 P.2d 310] [“Actual detention in prison is not an indispensable condition precedent to the issuance of habeas corpus, and persons on parole or on trial are, in a proper case, entitled to its issuance.”].) This suggests that making parole revocation determinations subject to postjudgment review under section 1473.6, as well as habeas corpus review, is in no sense novel or unexpected by the Legislature. Indeed, by express reference, section 1473.6 incorporates the procedure that governs habeas corpus relief (§ 1473.6, subd. (c)), and, as we have discussed, section 1473.6 was adopted as a means of providing relief when, because an applicant is no longer held in custody, relief by way of habeas corpus is unavailable. (See *People v. Germany*, *supra*, 133 Cal.App.4th at p. 791.)

■ In sum then, a parole revocation order (1) is a final determination by a trial court that a violation of parole has occurred; (2) is appealable; (3) has substantial impact on a parolee, including not only incarceration but also significant postrevocation ramifications; and (4) falls within what, in a civil context, has been recognized as a “judgment” since Code of Civil Procedure section 577 was enacted 1872. Thus, it is a judgment within the meaning of Penal Code section 1473.6, and, accordingly, the trial court did have jurisdiction to hear Wagner’s motion.

DISPOSITION

The trial court’s order denying Wagner’s motion for relief under section 1473.6 is reversed and remanded for consideration of the merits of Wagner’s motion.

Huffman, J., and McDonald, J., concurred.

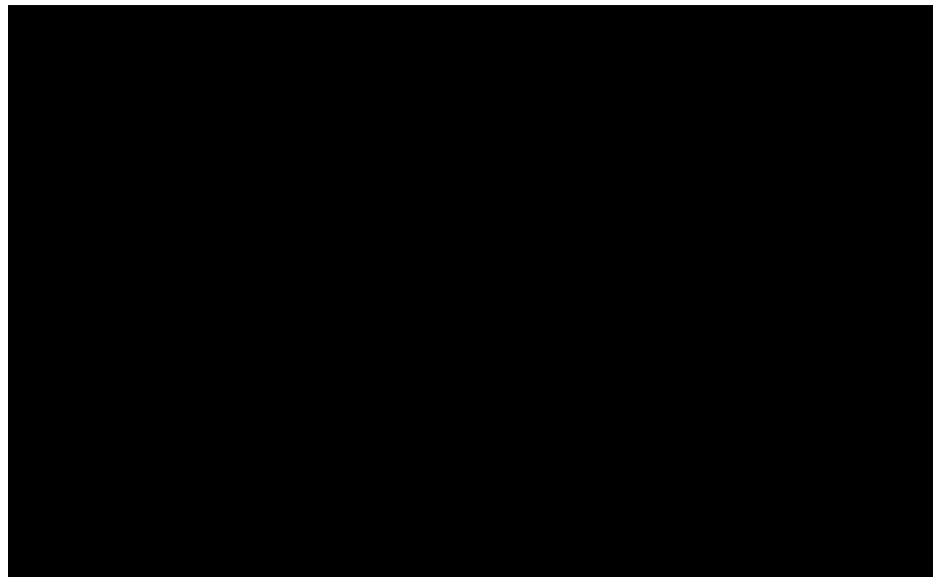
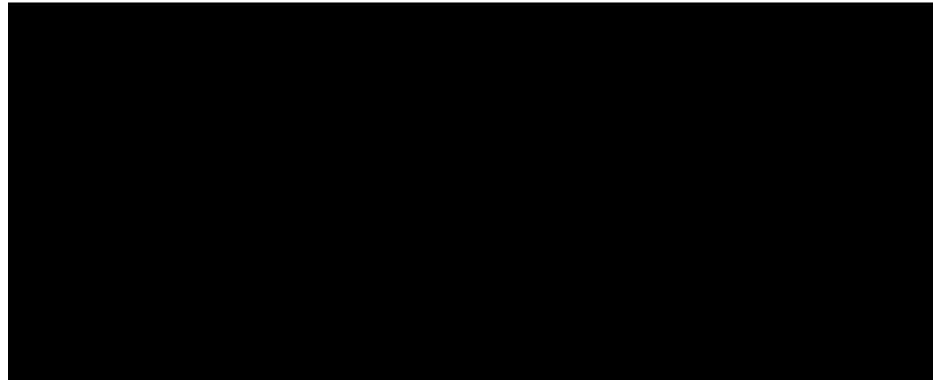
[No. B268420. Second Dist., Div. Four. Aug. 22, 2016.]

JANUARY ESPARZA, Plaintiff and Respondent, v.
SAND & SEA, INC., et al., Defendants and Appellants.

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Greenberg Traurig, Mark D. Kemple, Karin L. Bohmholdt and Nicholas A. Insogna for Defendants and Appellants.

Telep Law, Desiree Telep and Tina Dao for Plaintiff and Respondent.

OPINION

COLLINS, J.—

INTRODUCTION

The question in this case is whether an arbitration provision in an employee handbook is legally enforceable. The employee handbook containing the arbitration provision included a welcome letter as the first page, which stated, “[T]his handbook is not intended to be a contract (express or implied), nor is it intended to otherwise create any legally enforceable obligations on the part of the Company or its employees.” The employee signed a form acknowledging she had received the handbook, which mentioned the arbitration provision as one of the “policies, practices, and procedures” of the company. The acknowledgement form did not state that the employee agreed to the arbitration provision, and expressly recognized that the employee had not read the handbook at the time she signed the form. Under these circumstances, we find that the arbitration provision in the employee handbook did not create an enforceable agreement to arbitrate. We therefore affirm the trial court’s denial of the employer’s petition to compel arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and respondent January Esparza began employment at Shore Hotel on November 19, 2012. On her first day of work, Esparza was given an employee handbook. The first page of the handbook stated:

“Welcome to Shore Hotel!

“We are excited to have you as a member of our team. At Shore Hotel, every team member plays a vital role in the success of our organization and we look forward to your many contributions.

* * *

“This handbook will give you both an overview and a better understanding of Shore Hotel and the core policies by which we operate. . . . You should never hesitate to ask questions or speak directly to your supervisor or the Human Resources department.

“This handbook replaces and supersedes all prior verbal descriptions, written policies and other written materials and memorandum [*sic*] that may have been distributed; unless otherwise notes [*sic*]. *Employees should understand, however, that this handbook is not intended to be a contract (express or implied), nor is it intended to otherwise create any legally enforceable obligations on the part of the Company or its employees.* [Italics added.] The Company reserves the right to revise, modify, delete, or add to any and all policies, procedures, work rules, or benefits stated in this handbook or in any other document at any time (except as to its at-will employment policy) without prior notice. . . .

“Welcome aboard!”

We will refer to this page of the employee handbook as the “welcome letter.”

A section titled “Agreement to Arbitrate” spanned pages 3 and 4 of the employee handbook. Unlike the rest of the employee handbook, this section was printed in all capital letters, and it was written in the first person from the employee’s perspective. The section began, “I further agree and acknowledge that the company and I will utilize binding arbitration to resolve all disputes that may arise out of the employment context. Both the company and I agree that any claim, dispute, and/or controversy that either I may have against the company . . . or the company may have against me . . . shall be submitted to and determined exclusively by binding arbitration under the

Federal Arbitration Act. . . ." The section discussed the scope of disputes under the agreement, the qualifications for an arbitrator, and other procedural issues relating to arbitration. It continued, "I understand and agree to this binding arbitration provision, and both I and the company give up our right to trial by jury of any claim I or the company may have against each other."

The handbook then explained employment basics such as the company anti-harassment policy, the attendance policy, the dress code, and payroll. The last two pages of the 52-page employee handbook consisted of identical copies of a "policy acknowledgement," one labeled as the employer copy, and one labeled as the employee copy. The policy acknowledgement stated:

"This handbook is designed to provide information to employees of Sand & Sea, Inc. (Shore Hotel) regarding various policies, practices and procedures that apply to them including our Arbitration Agreement. Shore Hotel and its employees acknowledge that their relationship is 'at will' and that either party can terminate that relationship at any time for any reason. Shore Hotel reserves the right to modify, alter or eliminate any and all of the policies and procedures set forth herein at any time, for any reason, with or without notice. *Neither this manual nor its contents constitute, in whole or in part, either an express or implied contract of employment with Shore Hotel or any employee.* [Italics added.]

"While this handbook is not intended to state all of the conditions of employment and all of the principles which help to guide our people in the performance of their duties, it will give you general information in regard to certain policies and benefits related to your employment.

* * *

"I acknowledge that I have received Sand & Sea Inc.'s (Shore Hotel) Employee Handbook. *I also acknowledge that I am expected to have read the Employee Handbook in its entirety no longer after one week after receiving it,* and that I have been given ample opportunity to ask any questions I have pertaining to the contents of the employee handbook. I also understand that this Handbook is Company property and that it must be returned upon termination of my employment. I understand that failure to abide by these provisions may result in disciplinary action up to and including the termination of my employment."

Esparza signed the policy acknowledgement on November 19, 2012, her first day of work. Esparza's employment with Shore Hotel ended on August 2, 2013. On July 8, 2014, Esparza filed a complaint against Shore Hotel; she later added Steve Farzam, identified as the owner of the hotel, as a defendant.

In her first amended complaint, which was the operative complaint below, Esparza alleged causes of action for sexual harassment, sex discrimination, wrongful termination, and intentional infliction of emotional distress.

On July 28, 2015, more than a year after Esparza first filed her complaint, defendants filed a petition to compel arbitration. Defendants argued that Esparza's claims arose from her employment at Shore Hotel, and "because Plaintiff signed her assent to a conspicuous and unambiguous agreement to arbitrate claims of the very type at issue here, arbitration is mandatory." Defendants acknowledged that both parties had served discovery requests, and defendants' demurrer to the first amended complaint was pending before the court. With their motion, defendants submitted the entire employee handbook, including the welcome letter and the policy agreement signed by Esparza.

Esparza opposed defendants' petition to compel arbitration. She argued, "Ms. Esparza did not assent or agree to arbitration . . . Ms. Esparza simply acknowledged that she received Shore Hotel's Employee Handbook, and she also acknowledged that she was to have read the Employee Handbook one week after receiving it." Esparza also argued that the arbitration provision was procedurally and substantively unconscionable, and that defendants forfeited their right to demand arbitration by engaging in litigation for a year before seeking to enforce the arbitration provision.

In their reply, defendants argued that Esparza "freely agreed to arbitrate all disputes arising from her employment." They argued that the policy acknowledgement Esparza signed "expressly incorporated the employment terms and conditions of employment [sic] set forth in the preceding pages." Because Esparza had a week to review the handbook, defendants argued, she had the opportunity to "accept employment subject to [the handbook's] terms, or to seek employment elsewhere." Defendants also argued that the terms of the employment agreement were not unconscionable, and that defendants' participation in the very early stages of litigation should not be deemed a forfeiture of their right to arbitrate.

The trial court denied defendants' petition. It held, in full, "Defendants' motion to compel arbitration is denied. [¶] There is no agreement to arbitrate. [¶] The Policy Acknowledgement signed by plaintiff does not impose an obligation to arbitrate nor is the arbitration provision in the handbook incorporated by reference. To the contrary, the acknowledgement states that the handbook is not an employment agreement."

Defendants timely appealed.

STANDARD OF REVIEW

■ There is a strong public policy favoring contractual arbitration, but that policy does not extend to parties who have not agreed to arbitrate. (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 704 [111 Cal.Rptr.3d 876] (*Molecular Analytical Systems*).) To establish a valid agreement to arbitrate disputes, “[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by [a] preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense.” (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972 [64 Cal.Rptr.2d 843, 938 P.2d 903].) California law governs the determination as to whether an agreement was reached. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 409–410 [58 Cal.Rptr.2d 875, 926 P.2d 1061] (*Rosenthal*).) “[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable.” (*Id.* at p. 413; see also Code Civ. Proc., § 1281.2 [“the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists”].)

An order denying a petition to compel arbitration is an appealable order. (Code Civ. Proc., § 1294, subd. (a).) “When ‘the language of an arbitration provision is not in dispute, the trial court’s decision as to arbitrability is subject to de novo review.’ [Citation.] Thus, in cases where ‘no conflicting extrinsic evidence is introduced to aid the interpretation of an agreement to arbitrate, the Court of Appeal reviews de novo a trial court’s ruling on a petition to compel arbitration.’ [Citation.]” (*Molecular Analytical Systems, supra*, 186 Cal.App.4th at p. 707.) Here, the evidence is not in dispute, and therefore we review the trial court’s decision de novo.

DISCUSSION

Defendants argue that Esparza’s signature on the policy acknowledgement indicates that “Plaintiff expressly acknowledged that the terms and conditions in the Employee Handbook would bind her should she accept employment with Shore Hotel.” As a result, defendants argue, they presented prima facie evidence of an agreement to arbitrate, and the trial court erred by concluding that there was no agreement. The language of the policy acknowledgement does not support defendants’ conclusion.

■ “In California, “[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate.” [Citations.]’ (*Pinnacle . . . Museum Tower Assn. v. Pinnacle Market Development*

(*US*, LLC (2012) 55 Cal.4th 223, 236 [145 Cal.Rptr.3d 514, 282 P.3d 1217].) ‘An essential element of any contract is the consent of the parties, or mutual assent.’ (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 270 [109 Cal.Rptr.2d 807, 27 P.3d 702].) Further, the consent of the parties to a contract must be communicated by each party to the other. (Civ. Code, § 1565, subd. 3.) ‘Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.’ (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141 [127 Cal.Rptr.2d 145], disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 524 [113 Cal.Rptr.3d 327, 235 P.3d 988].)” (*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 173 [185 Cal.Rptr.3d 151] (*Serafin*)).

The issue here is whether the employee handbook created a mutual agreement to arbitrate. *Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164 [69 Cal.Rptr.3d 223] (*Mitri*), which neither party cites, is on point in two respects. In that case, the defendant employer supported its petition to compel arbitration with documents showing that its employee handbook contained a section titled “Arbitration Agreement,” and that the plaintiff employees acknowledged receiving the employee handbook. (*Id.* at pp. 1167–1168.) The arbitration agreement in the handbook said, “As a condition of employment, all employees are required to sign an arbitration agreement,” and “Employees will be provided a copy of their signed arbitration agreement.” (*Ibid.*) However, the employer did not produce evidence of any signed arbitration agreements. (*Ibid.*) The trial court denied the employer’s petition, and the defendants appealed.

The Court of Appeal held that the employer failed to establish the existence of an agreement to arbitrate, citing two separate bases relevant here. The employer argued, as defendants do here, that the employees’ acknowledgement that they received the handbook, coupled with the fact that the handbook contained an arbitration provision, was sufficient to show that the employees agreed to the arbitration provision. The *Mitri* court rejected that argument because the handbook’s reference to a separate arbitration agreement that the employees were required to sign “completely undermines any argument by defendants [that] the provision in the handbook itself was intended to constitute an arbitration agreement between [the employer] and its employees.” (*Mitri, supra*, 157 Cal.App.4th at pp. 1170–1171.) In addition, the handbook’s statement that employees would be provided with a copy of their signed arbitration agreement “reinforc[ed] an intent to have employees sign a separate arbitration agreement to effectuate [the employer’s] policy of arbitrating employment claims.” (*Id.* at p. 1171.) The language of the handbook itself therefore suggested that the handbook did not create an agreement between the parties.

■ Here, the handbook also indicated to the reader that it was not intended to establish an agreement.¹ The welcome letter at the beginning of the handbook explicitly stated that “this handbook is not intended to be a contract (express or implied), nor is it intended to otherwise create any legally enforceable obligations on the part of the Company or its employees.” This statement undermines defendants’ argument that the handbook and its arbitration provision actually *was* intended to create a legally enforceable obligation to arbitrate.

Defendants argue that welcome letter’s statement that the handbook did not create a contract “was intended only to disclaim that the Employee Handbook creates an *employment* contract” and that the policy acknowledgement “clarifies” this by stating that the handbook is not a “contract of employment.” However, the language of the welcome letter was extremely broad, stating that the handbook “is not intended to . . . create any legally enforceable obligations.” Defendants now ask us to find that the arbitration provision *did* create a legally enforceable obligation, despite the express language to the contrary. We decline to do so. Mutual assent is determined by the reasonable meaning of the parties’ words and acts. (*Serafin, supra*, 235 Cal.App.4th at p. 173.) When language in a contract is clear and explicit, that language governs interpretation. (Civ. Code, § 1638.) To the extent there is any ambiguity in this language we construe it against defendants, the drafters of the language. (*Rebolledo v. Tilly's, Inc.* (2014) 228 Cal.App.4th 900, 913 [175 Cal.Rptr.3d 612].) “If a party can show that it did not know it was signing a contract, or that it did not enter into a contract at all, both the contract and its arbitration clause are void for lack of mutual assent.” (*Saint Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1200 [8 Cal.Rptr.3d 517, 82 P.3d 727].) Here, the reasonable interpretation of the welcome letter is that it meant exactly what it said—that the handbook was not intended to create “any legally enforceable obligations,” including a legally enforceable obligation to arbitrate.

The second basis for the *Mitri* court’s holding focused on the language of the acknowledgement form. The acknowledgement form in *Mitri* stated that the handbook was intended to be “ ‘an excellent resource for employees with questions about the Company,’ ” and “ ‘[e]mployees are encouraged to carefully review the Employee Handbook and become familiar with the contents and periodic updates.’ ” (*Mitri, supra*, 157 Cal.App.4th at p. 1173.) The court noted, “Conspicuously absent from the acknowledgment receipt form is any reference to an *agreement* by the employee to abide by the employee handbook’s arbitration agreement provision.” (*Ibid.*) The court

¹ We note that this case differs from *Mitri* in that defendant asserts that the handbook and policy acknowledgement are “a single integrated document” so that no separate arbitration agreement was required.

concluded, “We cannot and will not create a term of a contract between the parties that the evidence does not show was ever agreed upon by the parties. . . . Taken as a whole, the documents submitted by defendants in support of their motion do not constitute an arbitration agreement.” (*Ibid.*, citation omitted.)

Here, the policy acknowledgement that Esparza signed also did not state that she agreed to abide by the arbitration agreement within the handbook. Instead, the policy acknowledgement stated that the handbook “is designed to provide information to employees . . . regarding various policies, practices and procedures that apply to them including our Arbitration Agreement.” As in *Mitri*, therefore, the policy acknowledgement suggests that it is merely informational. In addition, the policy acknowledgement explicitly recognized that Esparza had not read the handbook yet. Presumably, therefore, Esparza would not know the contents of the handbook or the arbitration provision at the time she signed the form. We have no basis to assume that Esparza agreed to be bound by something she had not read. (See, e.g., *Rosenthal, supra*, 14 Cal.4th at p. 421 [a contract is void where a party, before making the agreement, lacks a reasonable opportunity to learn its terms].)

Defendants argue that because Esparza was expected to read the handbook within a week, and she continued to work at Shore Hotel after that week, she must have impliedly agreed to the arbitration provision. But “[a]bsent a clear agreement to submit disputes to arbitration, courts will not infer that the right to a jury trial has been waived.” [Citations.]” (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 569 [73 Cal.Rptr.3d 17].) Furthermore, this case is unlike *Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373 [203 Cal.Rptr.3d 522] (*Harris*), where the arbitration provision, set apart from the employee handbook as an appendix, stated, “If Employee voluntarily continues his/her employment with TAP [Worldwide, LLC,] after the effective date of this Policy [or January 1, 2010], Employee will be deemed to have knowingly and voluntarily consented to and accepted all of the terms and conditions set forth herein without exception.” (*Harris*, at p. 379.) Based on this language, the court held that “upon commencing employment, the employee was deemed to have consented to the agreement to arbitrate by virtue of acceptance of the Employee Handbook. Plaintiff cannot have it both ways, acceptance of the at-will job offer with all its emoluments and no responsibility to abide by one of its express conditions.” (*Id.* at p. 384.) No such contractual language existed in the employee handbook here. To the contrary, the welcome letter declared that the handbook did not “create any legally enforceable obligations,” the policy acknowledgement said the handbook provided “general information” about employer policies, and there was no stated requirement that the employee

agree to any of these policies. These facts do not support a conclusion that the parties mutually assented to be bound by the arbitration provision in the handbook.

“To support a conclusion that an employee has relinquished his or her right to assert an employment-related claim in court, there must be more than a boilerplate arbitration clause buried in a lengthy employee handbook given to new employees. At a minimum, there should be a specific reference to the duty to arbitrate employment-related disputes in the acknowledgment of receipt form signed by the employee at commencement of employment.” (*Sparks v. Vista Del Mar Child and Family Services* (2012) 207 Cal.App.4th 1511, 1522 [145 Cal.Rptr.3d 318], abrogated on other grounds in *Harris, supra*, 248 Cal.App.4th at p. 390.) Defendants argue that because the policy acknowledgement referenced the arbitration agreement, it was binding on Esparza. However, the policy acknowledgement only referenced the arbitration agreement as one of the “various policies, practices, and procedures that apply” to employees. It did not indicate that Esparza agreed to be bound by it. Rather, the end of that paragraph stated, “Neither this manual nor its contents constitute, in whole or in part, either an express or implied contract of employment,” which, along with the language in the welcome letter discussed above, suggested that nothing in the handbook was legally binding on the parties.

In addition, the policy acknowledgement stated that the handbook was company property that had to be returned when Esparza’s employment terminated. Its last sentence, just above Esparza’s signature, stated that “failure to abide by these provisions may result in disciplinary action up to and including the termination of my employment.” The policy acknowledgement gave Esparza no notice that it created an agreement binding her to any of the handbook provisions *after* her employment at Shore Hotel terminated. Coupled with the language acknowledging that Esparza had not read the handbook yet (and therefore had not read the arbitration provision), the policy acknowledgement does not support defendants’ argument that Esparza agreed to the arbitration provision when she signed the policy acknowledgment.

Defendants argue that the trial court erred when it reasoned that there was no arbitration agreement in part because the policy acknowledgement “is not an employment agreement.” They point out that an employment contract is not necessary to establish an enforceable arbitration agreement, and we agree. (See, e.g., *Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 401–402 [168 Cal.Rptr.3d 473].) But this critique of the court’s reasoning does not affect defendants’ burden to demonstrate the existence of an enforceable arbitration agreement. Moreover, we review the trial court’s ruling, not its reasoning. (*Orcilla v. Big Sur, Inc.* (2016) 244

Cal.App.4th 982, 994 [198 Cal.Rptr.3d 715].) The court's statement about an employment agreement does not undermine its ruling that the handbook and policy acknowledgement do not evidence a mutual agreement to arbitrate.

Defendants urge us to follow *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199 [78 Cal.Rptr.2d 533] and *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695 [155 Cal.Rptr.3d 506], which, according to defendants, demonstrate enforceable arbitration agreements in employee handbooks under similar circumstances. These cases are not on point. In *24 Hour Fitness*, the Court of Appeal considered whether an arbitration agreement between an employee and employer was enforceable against defendants other than the employer, and whether the agreement was unconscionable. In *Serpa*, the court also considered whether an arbitration agreement between an employee and employer was unconscionable. Neither of these cases considered whether the parties had reached an agreement to arbitrate in the first instance, which is the question here. Instead, they only considered the applicability of defenses to the enforceability of existing arbitration agreements. Cases are not authority for propositions not considered. (See *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680 [36 Cal.Rptr.3d 495, 123 P.3d 931].)

In sum, the handbook, including the welcome letter and policy acknowledgement, was insufficient to meet defendants' burden to demonstrate an agreement to arbitrate. The trial court did not err by denying defendants' petition to compel arbitration.

DISPOSITION

The trial court's order denying defendants' petition to compel arbitration is affirmed. Esparza is entitled to costs on appeal.

Epstein, P. J., and Willhite, J., concurred.

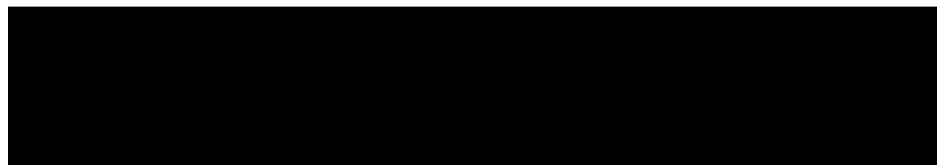
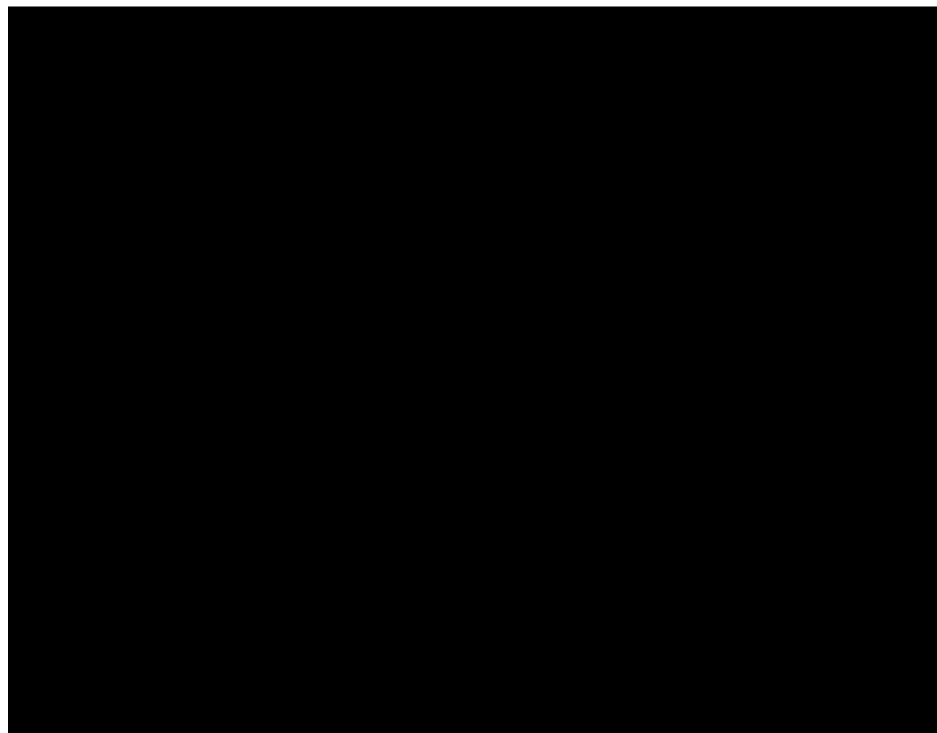
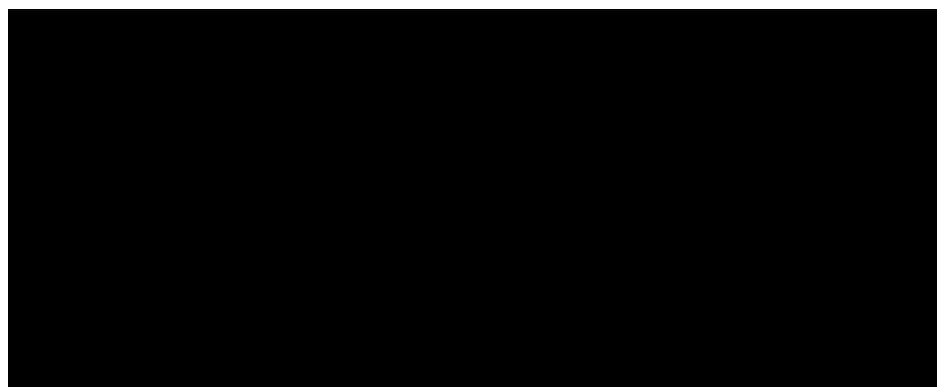
[No. B267941. Second Dist., Div. Seven. Aug. 22, 2016.]

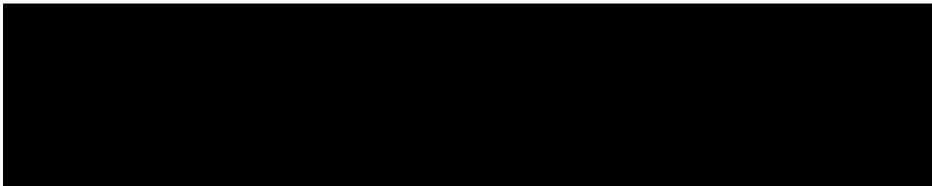
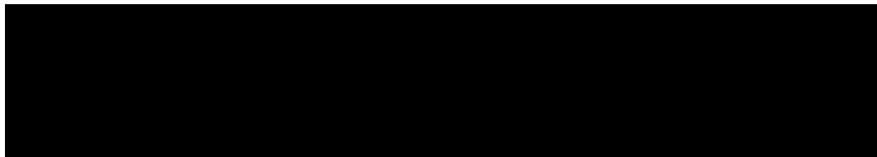
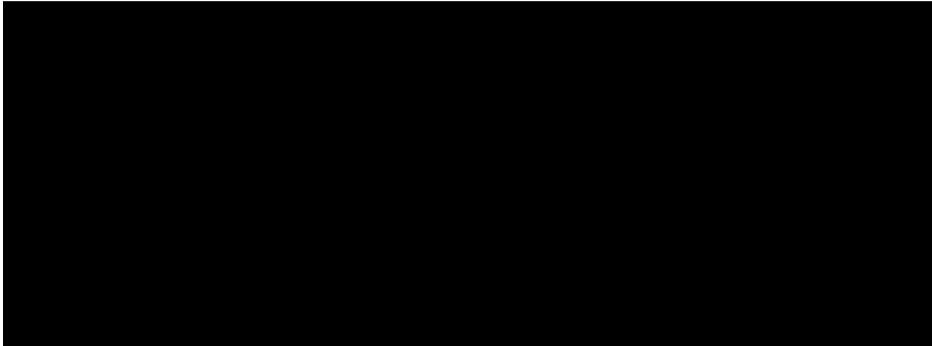
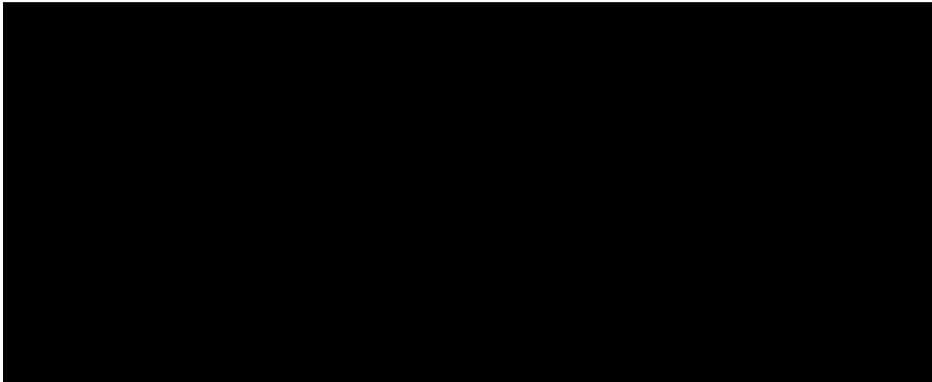
MORRIS B. SILVER M.D., INC., Plaintiff and Appellant, v.
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION-PACIFIC
MARITIME ASSOCIATION WELFARE PLAN, Defendant and Respondent.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Law Offices of Jonathan A. Stieglitz and Jonathan A. Stieglitz for Plaintiff and Appellant.

Seyfarth Shaw, D. Ward Kallstrom, Kevin J. Lesinski, Jonathan A. Braunstein, Eden Anderson; Leonard Carder, Christine S. Hwang and Andrew J. Ziaja for Defendant and Respondent.

OPINION

PERLUSS, P. J.—Morris B. Silver M.D., Inc. (Silver), sued the International Longshore and Warehouse Union-Pacific Maritime Association Welfare Plan (Plan) to recover payment for health care services provided to Plan policyholders. Silver’s action was dismissed on the ground all of its state law causes of action were preempted by the federal Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.) (ERISA). We reverse the order dismissing the lawsuit and remand for further proceedings as set forth in this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On October 8, 2014 Silver filed a complaint and on April 24, 2015 a first amended complaint against the Plan for breach of oral contract, quantum meruit, promissory estoppel and interference with contractual relations. The amended complaint alleged Silver had provided health care services to Plan policyholders for several years.¹ Before rendering services, Silver, an out-of-network provider, called the Plan to determine the amount it would pay.² The information supplied was memorialized in writing by Silver personnel on “an

¹ The Plan is an ERISA-regulated employee welfare benefit plan established by collective bargaining between the International Longshore and Warehouse Union and the Pacific Maritime Association.

² Generally, the Plan agreed to pay 80 percent of the usual and customary rate for the service after the patient had met his or her deductible and until the patient’s “max out of pocket” was

insurance verification sheet.”³ Silver also obtained written agreements from the policyholders ensuring they would pay their portion of the health care services.⁴

Until September 2012 the Plan regularly paid Silver’s invoices. Beginning that month, however, the Plan stopped paying Silver, sending it and its policyholders explanation-of-benefits (EOB) forms indicating that the billed procedures were not covered and that neither the Plan nor the patient had any obligation to make payment to Silver.⁵

In June 2015 the Plan demurred to the amended complaint on the grounds Silver’s claims were preempted by ERISA and the amended complaint failed to state a cause of action. The trial court, on its own motion, dismissed the amended complaint without prejudice on preemption grounds and ruled the demurrer was moot. In finding the claims preempted, the court explained, “‘courts look to whether the state law cause of action would remain “but for” the denial of the claim for benefits’” Because Silver’s claims would not remain if the outstanding balance due Silver had been paid, the court found the claims were essentially denial-of-coverage claims and thus preempted.

DISCUSSION

1. *Notwithstanding the Procedural Irregularities, Silver’s Due Process Rights Were Not Violated*

Rather than rule on the Plan’s demurrer, which raised preemption, the trial court, without explanation or citation to authority, dismissed the action without prejudice on its own motion, finding Silver’s state law causes of action preempted by ERISA. The court then found the Plan’s demurrer was moot. Silver contends this procedural anomaly violated its due process rights because it had no notice of the court’s *sua sponte* motion and no opportunity

met. Once that maximum had been reached, the Plan promised to pay 100 percent of the usual and customary rate for services, an amount that would not be tied to the Medicare schedule for payment.

Although the amended complaint alleged Silver personnel talked with third party administrators for the Plan, for ease of reference we generally refer only to the Plan.

³ Silver personnel also requested Plan documents for patients, but were told the documents “would not and could not be provided to them.”

⁴ The agreements stated, “I fully understand that my financial obligation to the medical provider above is not contingent on any claim, benefits or insurance proceeds which may be paid by any insurance, if there is not a recovery; I fully accept responsibility for the debt that I have incurred.”

⁵ In support of its demurrer, the Plan submitted an exemplar EOB. In addition to sections setting forth “Patient Responsibility” and “Paid by Insurance/Coverage,” there is a box denominated “Total Patient Responsibility.”

to address the arguments upon which the court relied. Silver also argues Code of Civil Procedure section 581, governing dismissals, does not provide any authority for the court's action. (See *In re Marriage of Straczynski* (2010) 189 Cal.App.4th 531, 538–539 [116 Cal.Rptr.3d 938] [trial court erred in dismissing action without providing proper notice to parties and without proper legal basis].)

We agree the trial court's approach was irregular. Nevertheless, Silver's right to due process was not violated, and any error by the trial court was harmless. The legal basis for the trial court's dismissal—ERISA preemption—was addressed by the parties in their briefing in support of and opposition to the Plan's demurrer. Indeed, the court's decision set forth the law governing demurrsers, and its preemption analysis cited several of the cases discussed by the parties. Even though the court considered additional authority not raised by the parties, it is not unusual or improper for a court to engage in its own research and decide an issue in reliance on authority the parties have not cited. For practical purposes, the court's order was equivalent to a ruling sustaining the Plan's demurrer.⁶

2. *Silver's Claims for Breach of Contract, Quantum Meruit and Promissory Estoppel Are Not Preempted by ERISA; Its Claim for Interference with Contractual Relations Is Preempted*

a. *Standard of review*

"The interpretation of ERISA, including whether ERISA preempts state law, is a question of law which we review *de novo*." (*In re Marriage of Padgett* (2009) 172 Cal.App.4th 830, 839 [91 Cal.Rptr.3d 475].)

b. *ERISA preemption generally*

■ "ERISA is a comprehensive federal law designed to promote the interests of employees and their beneficiaries in employee pension and benefit plans. [Citation.] As a part of this integrated regulatory system, Congress enacted various safeguards to preclude abuse and to secure the rights and expectations that ERISA brought into being. [Citations.] Prominent among these safeguards is an expansive preemption provision, found at section 514 of ERISA [29 U.S.C. § 1144]." (*Marshall v. Bankers Life & Casualty Co.*

⁶ We consider the court's order involuntarily dismissing Silver's action to be comparable to an order dismissing a lawsuit after the court has sustained a demurrer with leave to amend and the plaintiff has chosen not to amend. As such, it is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1). (See *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312 [40 Cal.Rptr.3d 313]; see also *Topa Ins. Co. v. Fireman's Fund Ins. Companies* (1995) 39 Cal.App.4th 1331, 1336 [46 Cal.Rptr.2d 516].)

(1992) 2 Cal.4th 1045, 1050–1051 [10 Cal.Rptr.2d 72, 832 P.2d 573] (*Marshall*); see *Aetna Health Inc. v. Davila* (2004) 542 U.S. 200, 208 [159 L.Ed.2d 312, 124 S.Ct. 2488] [“The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive pre-emption provisions, [citation] which are intended to ensure that employee benefit plan regulation would be ‘exclusively a federal concern.’ ”].

■ ERISA has two distinct preemption provisions: Preemption under section 514 (section 514; 29 U.S.C. § 1144), known as conflict or ordinary preemption; and so-called complete preemption under section 502(a) (29 U.S.C. § 1132(a)). Conflict preemption is an affirmative defense to a plaintiff’s state law cause of action that entirely bars the claim; that is, the particular claim involved cannot be pursued in either state or federal court. Complete preemption, in contrast, is a doctrine that recognizes federal jurisdiction over what would otherwise be a state law claim, an issue that typically arises when the defendant has removed the plaintiff’s state court lawsuit to federal court. “Despite the similarity in nomenclature, complete preemption is quite distinct from ordinary preemption. . . . ‘Ordinary preemption’ is an affirmative defense to the allegations in a plaintiff’s complaint asserting a state law claim claiming that a state law conflicts with, and is overridden by, a federal law. On the other hand, complete preemption does not constitute a defense at all. Rather, it is a narrowly drawn jurisdictional rule for assessing federal removal jurisdiction when a complaint purports to raise only state law claims. It looks beyond the complaint to determine if the suit is actually and entirely a matter of federal law, even if the state law would provide a cause of action in the absence of the federal law.” (*Totten v. Hill* (2007) 154 Cal.App.4th 40, 50 [64 Cal.Rptr.3d 357]; see *Marin General Hospital v. Modesto & Empire Traction Co.* (9th Cir. 2009) 581 F.3d 941, 945 [complete preemption “is ‘really a jurisdictional rather than a preemption doctrine, [as it] confers exclusive federal jurisdiction in certain instances where Congress intended the scope of a federal law to be so broad as to entirely replace any state-law claim’ ”].) Despite this difference, case authority discussing ERISA preemption often conflates the two doctrines. (See *Marin General Hospital*, at p. 945 [acknowledging the Ninth Circuit may have contributed to the confusion between the two doctrines by using terminology only relevant to conflict preemption to describe complete preemption].) Both parties agree the issue in the instant case concerns conflict preemption, not complete preemption.



c. *Conflict preemption*

i. *State laws*

Section 514(a) provides, “Except as provided in subsection (b) of this section, the provisions of [titles I and IV of ERISA] shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan . . .” (Italics added.) Initially, the Supreme Court interpreted the “relate to” language very broadly, holding, “A law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.” (*Shaw v. Delta Air Lines* (1983) 463 U.S. 85, 96–97 [77 L.Ed.2d 490, 103 S.Ct. 2890]; see *Ingersoll-Rand Co. v. McClendon* (1990) 498 U.S. 133, 139 [112 L.Ed.2d 474, 111 S.Ct. 478] (*Ingersoll-Rand*) [“[u]nder this ‘broad common-sense meaning,’ a state law may ‘relate to’ a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect”].)

Subsequently recognizing the difficulty of reconciling such a broad and potentially limitless definition with the competing presumption that Congress generally does not intend to supplant state law, the Supreme Court concluded it “simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.” (*New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995) 514 U.S. 645, 656 [131 L.Ed.2d 695, 115 S.Ct. 1671] (*Travelers*) [holding New York statute requiring hospitals to collect surcharges from patients covered by a commercial insurer but not from patients insured by a Blue Cross/Blue Shield plan or certain health maintenance organizations was not preempted]; see *Gobeille v. Liberty Mut. Ins. Co.* (2016) 577 U.S. ____ [194 L.Ed.2d 20, 136 S.Ct. 936, 943] (*Gobeille*) [“In *Travelers*, the Court observed that ‘[i]f ‘relate to’ were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course.’ [Citation.] That is a result ‘no sensible person could have intended.’ ”].) Congress’s intent in enacting section 514(a), the *Travelers* Court explained, was “‘to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.’ ” (*Travelers*, at pp. 656–657, quoting *Ingersoll-Rand*, *supra*, 498 U.S. at p. 142; see *Travelers*, at p. 657 [“basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans”].)

In *Gobeille* the Supreme Court recently summarized its ERISA preemption case law by describing two categories of state laws that ERISA preempts: First, a state law that “‘acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law’s operation.’” (*Gobeille, supra*, 577 U.S. at p. ____ [136 S.Ct. at p. 943].) Second, “a state law that has an impermissible ‘connection with’ ERISA plans, meaning a state law that ‘governs . . . a central matter of plan administration’ or ‘interferes with nationally uniform plan administration.’ [Citation.] A state law also might have an impermissible connection with ERISA plans if ‘acute, albeit indirect, economic effects’ of the state law ‘force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers.’” (*Ibid.*)

ii. State law claims

With respect to preemption of state law claims, the Supreme Court has held common law causes of action “based on alleged improper processing of a claim for benefits under an employee benefit plan, undoubtedly meet the criteria for pre-emption under § 514(a).” (*Pilot Life Ins. Co. v. Dedeaux* (1987) 481 U.S. 41, 48 [95 L.Ed.2d 39, 107 S.Ct. 1549] (*Pilot Life*) [action by an employee against his employer’s disability insurance provider]; see *Marshall, supra*, 2 Cal.4th at p. 1049) [action seeking state law remedies for improper denial of benefits preempted]; *Hollingshead v. Matsen* (1995) 34 Cal.App.4th 525, 542 [40 Cal.Rptr.2d 603] [state law claims by plan participants and administrator of estate of plan participant against insurance agency and agent, including negligent and intentional infliction of emotional distress, were “fundamentally a claim for recovery of unreimbursed medical expenses” and thus preempted by ERISA].)

The Supreme Court has also held a claim that an employer wrongfully terminated an employee primarily to avoid contributing to, or paying benefits under, the employee’s pension fund clearly “‘relate[s] to’ an ERISA-covered plan within the meaning of § 514(a), and is therefore pre-empted” because the “cause of action makes specific reference to, and indeed is premised on, the existence of a pension plan.” (*Ingersoll-Rand, supra*, 498 U.S. at p. 140.) The court explained the purpose of section 514(a) supported its conclusion: “Allowing state based actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through § 514(a). Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.” (*Ingersoll-Rand*, at p. 142.)

Even before the Court recognized in *Travelers* its interpretation of the “relate to” language was too broad to provide meaningful limits, it had recognized that “[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law ‘relates to’ the plan.” (*Shaw v. Delta Air Lines, supra*, 463 U.S. at p. 100, fn. 21; accord, *Simon Levi Co. v. Dun & Bradstreet Pension Services, Inc.* (1997) 55 Cal.App.4th 496, 502 [64 Cal.Rptr.2d 159].) Additionally, “relatively commonplace” “lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan” are not preempted even though they “obviously affect[] and involve[] ERISA plans and their trustees.” (*Mackey v. Lanier Collection Agency & Serv.* (1988) 486 U.S. 825, 833 [100 L.Ed.2d 836, 108 S.Ct. 2182].)

d. *Law governing preemption of claims by third party medical providers*

Unlike the case at bar, the decisions discussed, as well as the authority relied on by the Plan, involved claims by a participant, an assignee of the participant (for example, a medical provider that has stepped into the shoes of the participant) or a beneficiary,⁷ not a third party medical provider. Several federal courts of appeals, however, have addressed claims asserted by third parties in circumstances analogous to those in the instant case and held they are not preempted. (See *Memorial Hospital System v. Northbrook Life Ins. Co.* (5th Cir. 1990) 904 F.2d 236, 243–246 (*Memorial Hospital*) [leading case holding hospital’s claim for deceptive and unfair practices arising from representations regarding coverage not preempted and articulating two-factor test]; see also *Access Mediquip LLC v. UnitedHealthcare Ins. Co.* (5th Cir. 2011) 662 F.3d 376, 385 [“The state law underlying Access’s misrepresentation claims does not purport to regulate what benefits United provides to the beneficiaries of its ERISA plans, but rather what representations it makes to third parties about the extent to which it will pay for their services. To prevail on these claims, Access need not show that United breached the duties and standard of conduct for an ERISA plan administrator, because Access’s alleged right to reimbursement does not depend on the terms of the ERISA plans.”];⁸ *The Meadows v. Employers Health Ins.* (9th Cir. 1995) 47 F.3d 1006, 1008 (*The Meadows*) [recognizing test articulated in *Memorial Hospital* and holding ERISA does not preempt “claims by a third-party who sue[s] an

⁷ A “beneficiary” is “a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.” (29 U.S.C. § 1002(8).)

⁸ The Fifth Circuit ordered a rehearing en banc in *Access Mediquip* (see *Access Mediquip LLC v. United Healthcare Ins. Co.* (5th Cir. 2012) 678 F.3d 940) and thereafter in a per curiam opinion reinstated the original panel decision and overruled three earlier Fifth Circuit decisions to the extent inconsistent with *Access Mediquip*’s reasoning (*Access Mediquip LLC v. United Health Care Ins. Co.* (5th Cir. 2012) 698 F.3d 229, 230).

ERISA plan not as an assignee of a purported ERISA beneficiary, but as an *independent entity claiming damages*";⁹ *Hospice of Metro Denver, Inc. v. Group Health Ins., Inc.* (10th Cir. 1991) 944 F.2d 752, 756 ["An action brought by a health care provider to recover promised payment from an insurance carrier is distinct from an action brought by a plan participant against the insurer seeking recovery of benefits due under the terms of the insurance plan. Preemption in this case would stretch the 'connected with or related to' standard too far."]; *Lordmann Enterprises, Inc. v. Equicor, Inc.* (11th Cir. 1994) 32 F.3d 1529, 1534 ["[F]inding the *Memorial Hospital* court's reasoning persuasive, we hold that ERISA does not preempt a health care provider's negligent misrepresentation claim against an insurer under an ERISA plan"]; see generally Wiggins, *Medical Provider Claims: Standing, Assignments, and ERISA Preemption* (2012) 45 J. Marshall L.Rev. 861, 884–888.) These decisions, although not binding on this court, persuasively articulate a valid distinction between claims by a plan participant for additional benefits and claims by third party medical providers.

In *Memorial Hospital* the plaintiff hospital relied on representations by the defendant employer and the employer's health insurer that a new employee's wife was covered by the insurance plan and "would not have extended treatment to her without such an assurance of payment." (*Memorial Hospital, supra*, 904 F.2d at p. 238.) Upon request for payment of \$110,829.40, the health insurer informed Memorial Hospital that the employee's wife was not eligible for benefits on the date of her hospitalization—the employee's 30-day service requirement not yet having been fulfilled—and denied the claim. Memorial Hospital filed a state court action against the employer and insurer asserting several state law claims including breach of contract as an assignee of a plan beneficiary seeking recovery of plan benefits and deceptive and unfair trade practices under the Texas Insurance Code, essentially a codified claim for negligent misrepresentation, in its independent capacity as a third party health care provider. After the lawsuit was removed to federal court, the district court dismissed the claims for breach of contract and deceptive trade practices on preemption grounds and remanded the remaining pendent state

⁹ In *Marin General Hospital v. Modesto & Empire Traction Co.*, *supra*, 581 F.3d at page 946 the Ninth Circuit cited *The Meadows* as one of the cases that had contributed to the confusion between complete preemption and conflict preemption because the court in "dealing with complete preemption under § 502(a) [has] used the terminology 'relate to' even though that terminology is relevant to conflict preemption under § 514(a) rather than complete preemption under § 502(a)." While the court may have erroneously applied the test for conflict preemption to a case involving complete preemption, its articulation and analysis of the conflict preemption test, predicated on *Memorial Hospital*, was sound. Moreover, in *Cedars-Sinai Medical Center v. National League of Postmasters* (9th Cir. 2007) 497 F.3d 972, a case analogous to the instant case, the Ninth Circuit held a hospital's state law claims were not preempted by the Federal Employees National Health Benefits Act of 1959 (5 U.S.C. § 8901 et seq.), citing *Memorial Hospital* and *The Meadows* as support. (*Cedars-Sinai*, at pp. 978–979.)

law claims to state court. (*Id.* at pp. 238–239.) The Court of Appeals for the Fifth Circuit affirmed the portion of the judgment dismissing the breach of contract claim, but vacated that portion of the judgment dismissing the deceptive trade practices claims and remanded it to the state court. (*Id.* at p. 239.)

■ In holding the deceptive trade practices claim was not preempted, the *Memorial Hospital* court, reading “the preemption clause of ERISA . . . in context with the Act as a whole, and with Congress’s goal in creating an exclusive federal enclave for the regulation of benefit plans,”¹⁰ found binding authority on preemption of state law claims under ERISA had “at least two unifying characteristics: (1) the state law claims address areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and (2) the claims directly affect the relationship among the traditional ERISA entities—the employer, the plan and its fiduciaries, and the participants and beneficiaries.” (*Memorial Hospital, supra*, 904 F.2d at pp. 244–245, fn. omitted.) Applying this two-part test, the court concluded “these two factors are not sufficiently implicated in the present case to warrant a finding that Memorial’s state law claim is preempted.” (*Id.* at p. 245.)¹¹

With respect to the first factor the court described the “commercial realities” health care providers face: Health care is expensive, and providers have limited budgets for indigent care and losses due to nonpayment. They understandably need to determine before deciding to treat a patient whether they can reasonably expect payment and must rely on an insurance company or plan administrator’s representations. (*Memorial Hospital, supra*, 904 F.2d at p. 246.)¹² The court explained, “If providers have no recourse under either

¹⁰ Although *Travelers* is often cited as the case in which the Supreme Court recognized the need for more than “uncritical literalism” in construing the “relate to” phrase, in cases decided prior to *Travelers* the court had in fact analyzed not only the language of section 514(a) but also the purpose of the preemption provision and the regulatory scope of ERISA as a whole in deciding preemption cases. (See, e.g., *Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1, 19 [96 L.Ed.2d 1, 107 S.Ct. 2211] [“[t]he argument that ERISA pre-empts state laws relating to certain employee benefits, rather than to employee benefit *plans*, is refuted by the express language of the statute, the purposes of the pre-emption provision, and the regulatory focus of ERISA as a whole”].) Intermediate federal appellate courts, like the Fifth Circuit in *Memorial Hospital*, did as well.

¹¹ Recognizing it was adopting a different analysis for third party claims predicated on misrepresentations from that it had used in evaluating similar claims by plan participants, the *Memorial Hospital* court acknowledged it had held “ERISA preempts state law claims, based on breach of contract, fraud, or negligent misrepresentation, that have the effect of orally modifying the express terms of an ERISA plan and increasing plan benefits for participants or beneficiaries who claim to have been misled.” (*Memorial Hospital, supra*, 904 F.2d at p. 245.)

¹² In the instant matter the amended complaint alleged the Plan refused to provide Silver with policyholders’ documents that would have permitted it to evaluate potential coverage.

ERISA or state law in situations such as the one sub judice (where there is no coverage under the express terms of the plan, but a provider has relied on assurances that there is such coverage), providers will be understandably reluctant to accept the risk of non-payment, and may require up-front payment by beneficiaries—or impose other inconveniences—before treatment will be offered. This does not serve, but rather directly defeats, the purpose of Congress in enacting ERISA.” (*Id.* at pp. 247–248.) Moreover, “[i]f a patient is not covered under an insurance policy, despite the insurance company’s assurances to the contrary, a provider’s subsequent civil recovery against the insurer in no way expands the rights of the patient to receive benefits under the terms of the health care plan. If the patient is not covered under the plan, he or she is individually obligated to pay for the medical services received. The only question is whether the risk of non-payment should remain with the provider or be shifted to the insurance company, which through its agents misrepresented to the provider the patient’s coverage under the plan. A provider’s state law action under these circumstances would not arise due to the patient’s coverage under an ERISA plan, but precisely because there is no ERISA plan coverage.” (*Id.* at p. 246.)¹³

■ With respect to the second factor the court explained it had previously found “the most important factor for a court to consider in deciding whether a state law affects an employee benefit plan ‘in too tenuous, remote, or peripheral a manner to be preempted’ is whether the state law affects relations among ERISA’s named entities. ‘Courts are more likely to find that a state law relates to a benefit plan if it affects relations among the principal ERISA entities—the employer, the plan, the plan fiduciaries, and the beneficiaries—than if it affects relations between one of these entities and an outside party, or between two outside parties with only an incidental effect on the plan.’” (*Memorial Hospital, supra*, 904 F.2d at p 249.) Because third party providers are not parties to the bargain “struck in ERISA” between plaintiffs and employers, the court could not “believe that Congress intended the preemptive scope of ERISA to shield welfare plan fiduciaries from the consequences of their acts toward non-ERISA health care providers when a cause of action based on such conduct would not relate to the terms or conditions of a welfare plan, nor affect—or affect only tangentially—the ongoing administration of the plan.” (*Id.* at pp. 249–250.)

We join those courts that have found the *Memorial Hospital* court’s approach persuasive in analyzing whether claims brought by third parties in their independent capacity are preempted. Although the trial court in the

¹³ Although the issue in *Memorial Hospital* was one of no coverage whatsoever, the Fifth Circuit in *Transitional Hospitals Corp. v. Blue Cross & Blue Shield, Inc.* (5th Cir. 1999) 164 F.3d 952, 955, held the medical provider’s claims for negligent misrepresentation as to the amount of reimbursement for a patient with coverage were not preempted.

instant action cited *The Meadows*, in which the Ninth Circuit recognized the two-part test articulated in *Memorial Hospital*, as well as the Fifth Circuit's decision in *Access Mediquip* applying *Memorial Hospital*, the court failed to appreciate the distinctly different analysis used by these federal courts in considering independent claims asserted by third party medical providers who had been directly misled by plan administrators, as alleged here, and those by plan participants demanding benefits not specified in their plans. Thus, after citing generally to third party cases, rather than use the *Memorial Hospital* test they discuss, the trial court placed primary reliance on the "but for" test articulated in *Dishman v. UNUM Life Ins. Co. of America* (9th Cir. 2001) 269 F.3d 974, as restated in *Rose v. HealthComp, Inc.* (E.D.Cal., Aug. 10, 2015, No. 1:15-cv-00619-SAB) 2015 U.S.Dist. Lexis 104706 to conclude Silver's claims were preempted: "The Ninth Circuit requires that the ERISA plan must be the 'but for' cause of the harm alleged for the cause of action to be preempted by ERISA. Generally in applying the 'but for' test courts look to whether the state law cause of action would remain 'but for' the denial of the claim for benefits . . ." (*Rose*, at pp. *21-*22, citing *Dishman* at p. 984.) Both *Dishman* and *Rose*, however, involved state law tort claims by plan participants (for invasions of privacy),¹⁴ not causes of action arising from misstatements to third party providers as in *Memorial Hospital*, *Meadows* and *Access Mediquip*.¹⁵ Applying the *Memorial Hospital* test, we conclude Silver's contract and quasi-contract claims are not preempted.

e. *The causes of action for breach of oral contract, quantum meruit and promissory estoppel are not preempted*

■ The gravamen of Silver's causes of action for breach of oral contract, quantum meruit and promissory estoppel is that the Plan orally agreed to pay Silver for health care services in the specified amounts, authorized the provision of those services and then failed to pay as agreed. Although Silver has not asserted a cause of action for negligent misrepresentation, its claims are indistinguishable from those found not to be preempted by *Memorial Hospital* and those courts that have applied the two-part *Memorial Hospital* test. Like those cases, Silver's three contract/quasi-contract causes of action do not address an area of exclusive federal concern. Silver is not, as the Plan

¹⁴ *Rose* was not even a conflict preemption case; the issue was whether the defendant—the third party administrator for the health care plan provided by the plaintiff's employer—had properly removed the state law complaint alleging invasion of privacy and unfair business practices to federal court—that is, a question of complete preemption. (*Rose v. Healthcomp, Inc.*, *supra*, 2015 U.S.Dist. Lexis 104706, at p. *6.)

¹⁵ The trial court limited its description of *Access Mediquip* to the portion of the opinion finding the provider's unjust enrichment and quantum meruit claims were preempted. It omitted any reference to the basic holding of the case, applying *Memorial Hospital* and concluding the provider's claims for negligent misrepresentation, promissory estoppel and violations of the Texas Insurance Code were not preempted by ERISA.

argues, seeking compensation for the Plan's decisions to deny coverage under the terms of an ERISA plan; its alleged right to reimbursement does not depend on the Plan's terms. Rather, the claims are predicated on a garden-variety failure to make payment as promised for services rendered. To be sure, the claims would not exist but for an ERISA plan and are predicated on somebody's interpretation of the plan. ■ But the fact an ERISA plan is an initial step in the causation chain, without more, is too remote of a relationship with the covered plan to support a finding of preemption. (Cf. *Dishman v. UNUM Life Ins. Co. of America, supra*, 269 F.3d at p. 984 ["Obviously, at some level Dishman's tort claim relates to the plan. That cannot be denied. But that cannot be the end of the analysis, either, for as we know, '[p]re-emption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.' "].)¹⁶

Primarily citing several district court cases, the Plan argues these courts have found a medical provider's state law contract and quasi-contract claims premised upon an ERISA plan's preauthorization of services preempted because the claims are inextricably intertwined with a plan's terms and denial of benefits. None of these cases is persuasive. Most do not apply the *Memorial Hospital* test, instead superficially relying on *Pilot Life*, which, as discussed, does not address the circumstances unique to third party provider claims. (See, e.g., *Alcalde v. Blue Cross & Blue Shield of Florida, Inc.* (2014) 62 F.Supp.3d 1360; *Miami Children's Hospital, Inc. v. Kaiser Foundation Health Plan, Inc.* (S.D.Fla., May 29, 2009, No. 08-23218-CIV-MORENO) 2009 U.S.Dist. Lexis 51696; *Our Lady of Lourdes Health System v. MHI Hotels, Inc.* (D.N.J., Dec. 1, 2009, No. 09-1875 (JBS/JS)) 2009 U.S.Dist. Lexis 111875.)

One case that does cite *Memorial Hospital* is inapposite. In *Parkside Lutheran Hospital v. R.J. Zeltner & Associates Inc.* (N.D.Ill. 1992)

¹⁶ As the trial court pointed out, the Fifth Circuit in *Access Mediquip LLC v. United Healthcare Ins. Co., supra*, 662 F.3d 376, held the provider's unjust enrichment and quantum meruit claims were preempted (while holding the provider's negligent misrepresentation and promissory estoppel claims were not). Unlike Silver's quantum meruit claim, however, which is based on allegations the Plan directly requested Silver's services and expressly promised to pay for them (and, therefore, is merely an alternate claim for breach of oral contract), the *Access Mediquip* common counts were not premised on misstatements from the plan administrator at all. Instead, they depended on allegations the ERISA plan would have been obliged to reimburse other providers had the plan obtained the services from them. As the court explained, "Access can therefore recover under these claims only to the extent that the patients' ERISA plans confer on their participants and beneficiaries a right to coverage for the services provided." (*Access Mediquip*, at p. 386.) Such claims, the court concluded, are preempted under the test in *Memorial Hospital, supra*, 904 F.2d 236 and *Transitional Hospitals Corp. v. Blue Cross & Blue Shield, Inc., supra*, 164 F.3d 952. (See *Access Mediquip*, at p. 386.)

788 F.Supp. 1002, 1005, the district court acknowledged “courts have recognized that where the plaintiff is a third-party health care provider there are certain situations in which preemption will not occur.” After describing *Memorial Hospital* and the Tenth Circuit decision following it, *Hospice of Metro Denver, Inc. v. Group Health Ins.*, *supra*, 944 F.2d 752, the court in *Parkside Lutheran* limited the breadth of those cases with the caveat, “where the representations made by an insurer to a third-party provider would act to modify the terms of a group insurance plan—e.g., to allow receipt of benefits that were no longer available under the explicit terms of the plan—the third-party’s claim does ‘relate to’ the plan and hence is preempted by ERISA.” (*Parkside Lutheran*, at p. 1006.) We need not decide whether we agree with that caveat; those facts are simply not present in the case at bar.¹⁷

f. *The cause of action for interference with contractual relations is preempted*

Silver’s claim for interference with contractual relations is predicated on the EOB the Plan sent to policyholders stating the “Total Patient Responsibility” for the amount charged by Silver was zero. The amended complaint alleged the Plan knew Silver had separate agreements with policyholders to pay whatever portion of the charges the Plan did not cover, and, “[i]n sending out EOBs to the Patients, [the Plan] could not have any other motive than to prevent completion and performance of the Patient Medical Provider Agreement between Medical Provider and Patient. The EOB provided by [the Plan] to Patient clearly states that Patient should not pay for the services and procedures Patient received from Medical Provider.” The amended complaint further alleged, “Patient relies on [the Plan] as the payor of his/her policy of health insurance and when [the Plan] indicates to Patients[s] that they should not do something related to healthcare payments Patient will rely and did rely on that statement in not paying Medical Provider and has not paid Medical Provider.”

The Plan is required under ERISA to “provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant.” (29 U.S.C. § 1133(1).) Although Silver acknowledges the Plan sent policyholders EOBs in conformity with its obligations under ERISA, it argues its claim is based upon the Plan’s extraneous tortious conduct of improperly directing policyholders in the EOB to disregard their financial obligations to Silver.

¹⁷ The Plan contends we may affirm the trial court’s order on the alternative ground the amended complaint fails to allege facts sufficient to state a cause of action. This is an analysis more appropriately performed by the trial court in the first instance if the Plan refiles its demurrer to the second, third and fourth causes of action on this ground.

■ Silver's argument to the contrary notwithstanding, the Plan's allegedly tortious conduct cannot be separated from the Plan's discharge of its obligations to notify participants of an adverse determination under ERISA. The Code of Federal Regulations "sets forth minimum requirements for employee benefit plan procedures pertaining to claims for benefits by participants and beneficiaries" including requiring the notification of an adverse benefit determination to include "[r]eference to the specific plan provisions on which the determination is based" and "[a] description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary." (29 C.F.R. § 2560.503-1(a), (g) (2016).) The Plan's alleged interference with contractual relations was accomplished not by an individual advising policyholders not to pay Silver, but instead by the manner in which its preprinted EOB was designed, completed and potentially interpreted, that is, by including a "Total Patient Responsibility" designation. Whether use of the form essentially constituted a tort—a question with wide-ranging implications for any plan using a similar form—is precisely the kind of decision that conflict preemption is intended to eliminate: one that could result in inconsistent directives among states and increased administrative and financial costs of complying with ERISA. Applying *Memorial Hospital*, the cause of action addresses an area of exclusive federal concern—the manner in which adverse determinations are communicated to plan participants—and directly affects the relationship between the plan and participants. Accordingly, the cause of action is preempted. On remand the trial court should enter a new order sustaining the Plan's demurrer to Silver's first cause of action as preempted by ERISA.

DISPOSITION

The order dismissing the action is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Silver is to recover its costs on appeal.

Zelon, J., and Segal, J., concurred.

Respondent's petition for review by the Supreme Court was denied November 30, 2016, S237555.

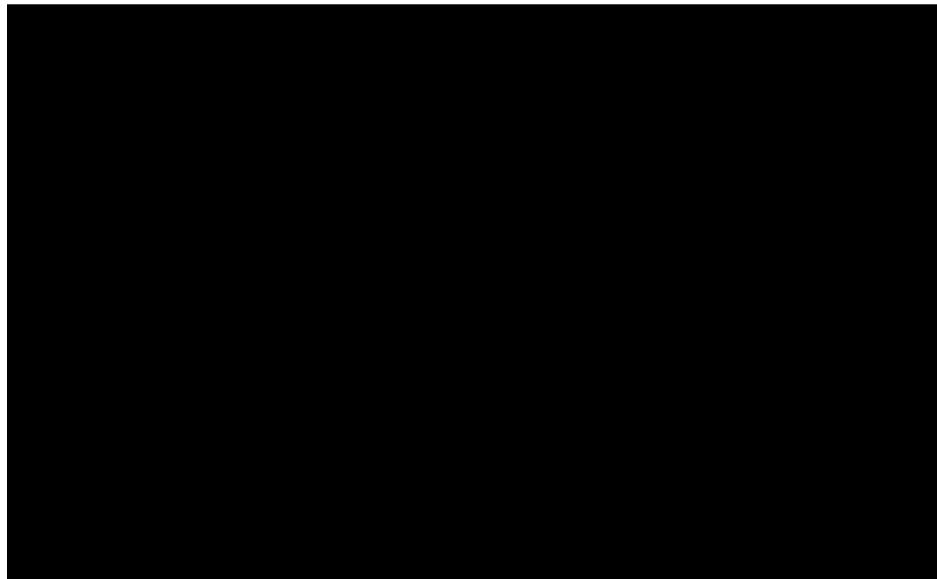
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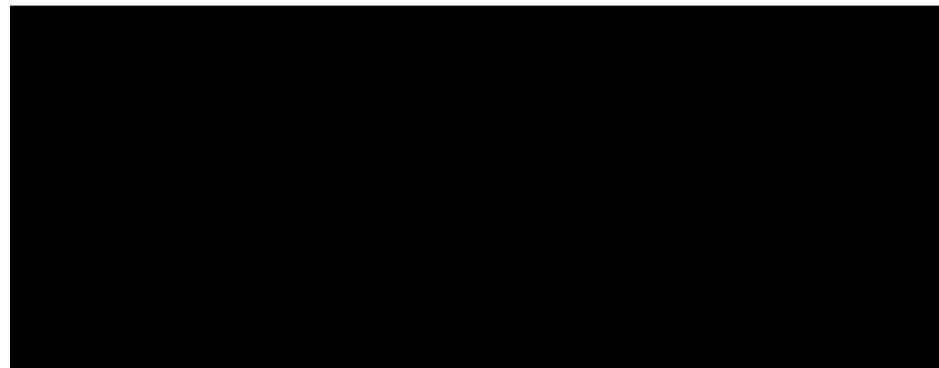
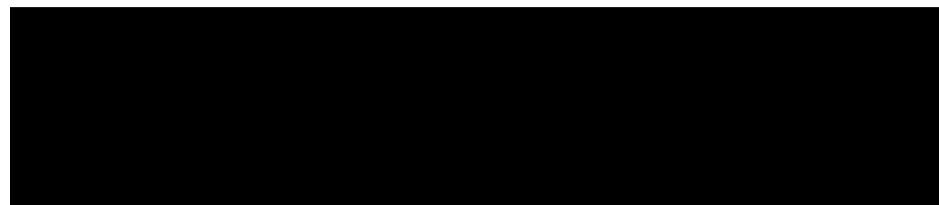
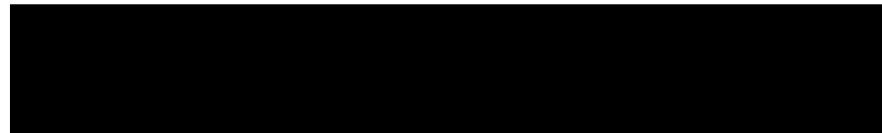
CARA LYN GRECO, Plaintiff and Respondent, v.
CLYDE C. GRECO, JR., Individually and as Trustee, etc., Defendant and
Appellant.

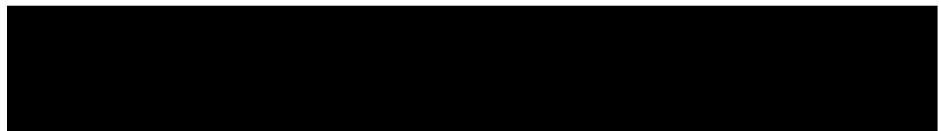
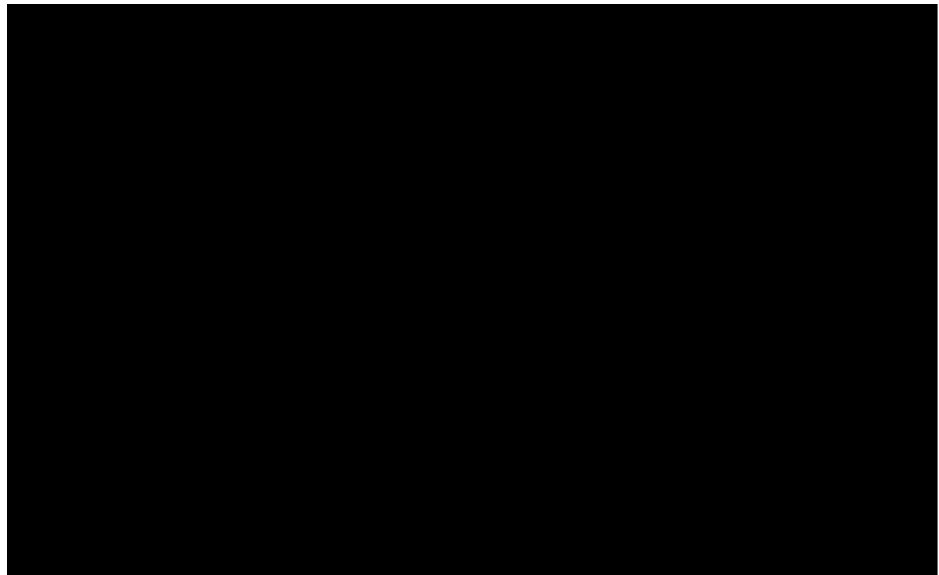
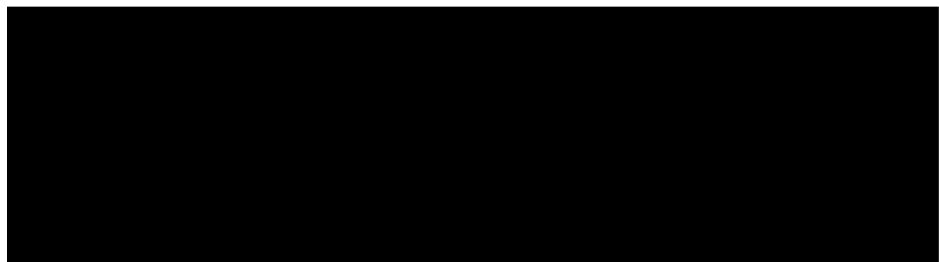
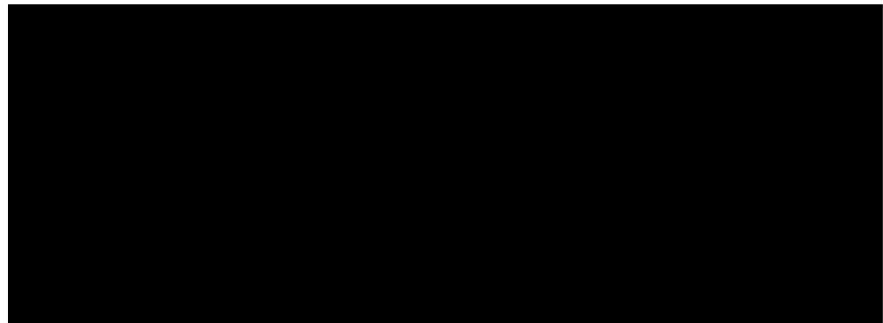
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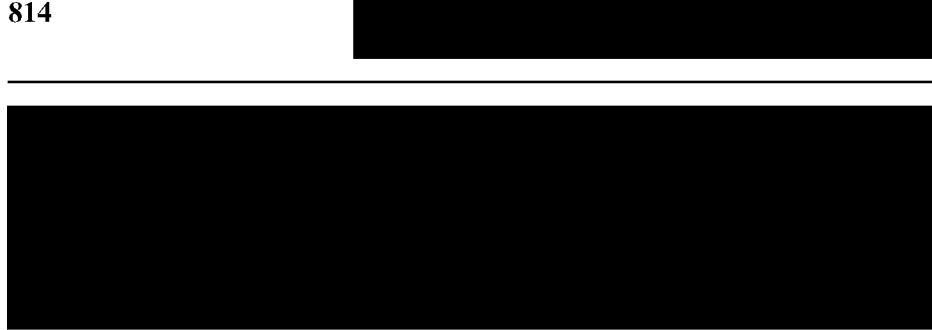
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COUNSEL

Murphy, Pearson, Bradley & Feeney and John Paul Girarde for Defendant and Appellant.

Law Offices of Michael Brook, Michael J. M. Brook; Krankemann Law Offices and Martin Reilley for Plaintiff and Respondent.

OPINION

DUARTE, J.—Defendant Clyde C. Greco, Jr., is the trustee of his parents' trust and the administrator of their estates. He used money from the trust and estates to fund litigation against his sister and others, purportedly to recover money they owed to the trust and estates. After he allegedly spent considerably more money on litigation than he could have possibly recovered, his sister, plaintiff Cara Lyn Greco, brought two lawsuits against him, one in the trial court and one in the probate court, to recover the money he spent, plus penalties. She claimed the prior litigation was a personal vendetta. Clyde Jr.¹ responded to each lawsuit by filing separate special motions to strike pursuant to Code of Civil Procedure section 425.16.² In each case, the special motion to strike was denied.

Denial of a special motion to strike is appealable under section 904.1. (§ 425.16, subd. (i).) On appeal, Clyde Jr. contends he met his burden on the first prong of section 425.16 by establishing that Cara Lyn's claims arose from protected petitioning activity, funding litigation. He further contends that Cara Lyn cannot meet her burden on the second prong of section 425.16 to submit evidence to establish a *prima facie* case of each claim because all her claims are barred by the litigation privilege of Civil Code section 47, subdivision (b).

¹ Because the Greco family members share the same surname and have different roles in the various lawsuits, we use their first names for clarity and convenience. No disrespect is intended.

² Further undesignated statutory references are to the Code of Civil Procedure.

We find the gravamen of most of Cara Lyn's claims is the alleged wrongful taking from the trust and estates and that is not a protected activity under section 425.16. The courts properly denied Clyde Jr.'s special motion to strike as to these claims. The one exception is Cara Lyn's claim for constructive fraud based on Clyde Jr.'s alleged misrepresentations about the underlying litigation. While Clyde Jr.'s statements about the litigation are protected activity, Clyde Jr. has not shown it is covered by the litigation privilege. Therefore, we remand for the probate court to determine whether Cara Lyn met her evidentiary burden under the second step of the section 425.16 analysis.

FACTUAL AND PROCEDURAL BACKGROUND

The Greco Family

Clyde C. Greco, Sr., and Helen Greco had nine children, including Clyde Jr., Cara Lyn, and Carla. Clyde Jr. was appointed conservator of the person for his father in April 2010. Another child, Claudia Greco, was appointed conservator of the person for Helen at the same time. Clyde Sr. passed away March 3, 2011, and Helen passed away the following year on March 31, 2012.

At relevant times, Clyde Jr. was the sole trustee of the Clyde C. Greco and Helen J. Greco 1989 Revocable Trust, as well as administrator of their estates. He also served as Helen's attorney-in-fact before her death.

The Underlying Actions

On July 23, 2010, in his representative capacity, Clyde Jr. brought an action against his sister Carla to obtain an accounting for the Bentley Partnership (the Bentley Partnership Action). The Bentley Partnership was a partnership between Clyde Sr. and his daughter Carla to hold and manage certain property in Sonoma County. The Bentley Partnership Action was dismissed without prejudice on October 10, 2012.

On August 18, 2011, Clyde Jr. filed an action against Carla and her sons Adam and Cody (the Citibank Action). This action concerned \$51,000 that Helen had given to Adam and Cody. The case was tried and the jury returned a verdict in favor of Carla, Adam, and Cody. Clyde Jr. appealed and the matter was settled in February 2015.

Clyde Jr. also brought an action against Cara Lyn (the San Diego Action), alleging Cara Lyn conspired with Carla, Adam, and Cody to obtain the \$51,000. The San Diego Action was consolidated with the Citibank Action and settled in 2013.

Cara Lyn's Civil Lawsuit Against Clyde Jr.

Cara Lyn filed two lawsuits against Clyde Jr. in Sonoma County (the underlying litigation). The first was a civil action to recover amounts Clyde Jr. spent on litigation from April 2011 until Helen's death on March 31, 2012. The second was a petition filed in probate court to recover sums Clyde Jr. spent after Helen's death.

On June 5, 2014, Cara Lyn filed a complaint against Clyde Jr. for elder abuse (case No. 255566). The complaint alleged that from April 2011 through her death on March 31, 2012, Helen lacked capacity (Prob. Code, § 812), and was of unsound mind but not entirely without understanding (Civ. Code, § 39). The complaint further alleged that during that time period Clyde Jr. "took and/or obtained and/or appropriated money that belonged to" Helen and/or the trust, and Clyde Jr. "used and disposed of that money to pursue litigation against his sister," Carla and others, "that was not in the best interest of his principal," Helen or the trust. Using the money for legal fees and other litigation expenses "was for a wrongful use, including, without limitation, to pursue a personal vendetta against" Carla and others. Clyde Jr. did not inform Helen of the litigation or obtain her consent to pursue the litigation. The litigation included the Bentley Partnership Action and the Citibank Action.

The complaint alleged the Bentley Partnership was dissolved and wound up at the end of 2009 and by then Carla had given her parents an accounting and they had told her they were satisfied. Carla offered to give Clyde Jr. an accounting if he would provide bank records and other financial information in his possession. Even after Carla provided an accounting, Clyde Jr. continued the litigation for 18 months. In pursuing this litigation, Clyde Jr. spent many times the amount of Carla's possible liability which was less than \$32,000. In the Citibank Action, Clyde Jr. named Carla as a defendant even though he knew she had not been given any of the money. The complaint alleged that Clyde Jr. spent at least \$190,000 on the Bentley Partnership Action and the Citibank Action and refused to return it despite a demand.

The first cause of action was for elder abuse under Welfare and Institutions Code section 15657.6, which provides for an award of attorney fees and costs for taking property from an elder or dependent adult for a wrongful purpose and failing to return it upon demand. The second cause of action was for elder abuse under Welfare and Institutions Code section 15610.30 and related statutes, taking property from an elder or dependent person for wrongful purpose or with intent to defraud. It was based on the allegation that Clyde Jr. "took, hid, appropriated, obtained, retained and/or assisted in taking, hiding, appropriating and retaining" the personal property of Helen and/or the trust "for a wrongful use and/or with the intent to defraud."

The complaint sought double and treble damages, attorney fees, costs, and punitive damages.

Cara Lyn's Probate Petition Against Clyde Jr.

On June 6, 2014, Cara Lyn filed a petition in probate court against Clyde Jr. (case No. 86786). It alleged that from April 2012, Clyde Jr. "took and/or obtained and/or appropriated money that belonged to the Estate(s) of" Clyde Sr. or Helen, or the trust, and Clyde Jr. "used and disposed of that money to pursue and maintain litigation against his sister, Carla Greco, and others, that was not in the best interest of the Estates nor of the Trust." The petition contained allegations similar to those in the civil action about the Bentley Partnership Action, the Citibank Action, and the San Diego Action. The petition alleged that Clyde Jr. spent at least \$665,653.10 on the three lawsuits from April 2012 through August 2013, and spent substantial additional sums thereafter. The total amount spent on the litigation, including amounts paid to Clyde Jr.'s law firm, "is likely in excess of one million dollars."

The first cause of action was for breach of fiduciary duty. It alleged that Clyde Jr. "engaged in a course of conduct, including without limitation, fomenting litigation and other wrongful acts, against certain beneficiaries of the Trust and/or estate, in an attempt to disinherit them, or any of them, and/or prevent questioning of his actions." It alleged these actions breached "the duty to act with utmost good faith towards beneficiaries of the Trust and the Estate, the duty of loyalty to administer the Trust and the Estates for the sole interest of the beneficiaries, the duty to treat all beneficiaries equally or as required by the trust or estate documents, the duty to act in the interests of his principal as attorney-in-fact, the duty to act according to the Trust and Estates documents, the duty to avoid self-dealing, the duty to provide timely and accurate accountings, and the duty to avoid conflicts of interest." It alleged Clyde Jr. "acted with malice, oppression, recklessness or fraud," entitling Cara Lyn to recover punitive damages.

The second cause of action was for constructive fraud. It alleged Clyde Jr. "breached his duty to the beneficiaries of the Trust and/or Estates by misrepresenting the facts relating to the Actions and his motivations in bringing and maintaining same." It again sought punitive damages.

The third cause of action was for conversion. It alleged that Clyde Jr. "intentionally and substantially interfered with the Trust's and/or Estates' property by taking possession of the money and converting it to his own use and purposes."

Transfer to Shasta County

Clyde Jr.'s motion to transfer the civil action to Shasta County was granted. The parties stipulated to transfer the probate action to Shasta County.

Clyde Jr.'s Special Motions to Strike

Clyde Jr. responded to each of Cara Lyn's lawsuits with a special motion to strike pursuant to section 425.16. He contended that all of Cara Lyn's claims arose from actions and communications in the underlying litigation and therefore were protected activity, and Cara Lyn could not show that she was likely to prevail because all of his conduct was protected by the litigation privilege.

In opposition, Cara Lyn claimed the gravamen of the civil complaint was that Clyde Jr. took money that belonged to Helen to pursue his personal vendetta. She argued the gravamen of the probate petition was that by taking money to pursue his personal vendetta, Clyde Jr. wrongfully took money in breach of his fiduciary duties. In supporting declarations, attorneys involved in the underlying litigation stated that based on a review of bank and financial records, Clyde Jr. took at least \$190,000 from the trust and an additional \$1 million from the trust or estates or both after Helen's death for the underlying litigation. The amount at issue in the Bentley Partnership Action was \$31,493.32 and the amount at issue in the Citibank Action was \$51,000.

Rulings

Both the trial court and the probate court denied Clyde Jr.'s special motion to strike with almost identical reasoning. The trial court found the gravamen of the complaint was that Clyde Jr. converted money from Helen or the trust or both when Helen was an elder of unsound mind. The money was used to fund litigation against family members. The court found the protected activity (litigation) was merely incidental to the challenged conduct, which the court characterized as "disbursement of trust funds without consent." Cara Lyn's lawsuit attacked Clyde Jr.'s noncommunicative conduct of disbursement of funds, which involved only a private matter, and so was not covered by section 425.16.

The probate court found the gravamen of all causes of action in the petition was that Clyde Jr. converted money from the estate or trust and used the money to foment litigation against certain beneficiaries in an attempt to disinherit them and prevent them from questioning his actions. The court found "the clearly protected activity (here the litigation) was merely incidental to the challenged conduct (disbursement of estate and trust funds without

consent).” The probate court also found Clyde’s disbursement of estate and trust funds was noncommunicative conduct and since it involved a private, not public, matter, it was not covered by section 425.16.

DISCUSSION

I

Anti-SLAPP Law

■ The Legislature enacted section 425.16 due to its concern with the “disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances.” (§ 425.16, subd. (a).) Section 425.16 provides for early dismissal of certain lawsuits known as “‘strategic lawsuits against public participation’” through a special motion to strike. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85 [124 Cal.Rptr.2d 530, 52 P.3d 703] (*Navellier*).) Section 425.16 “shall be construed broadly.” (§ 425.16, subd. (a).) “Legislative history materials respecting the origins of section 425.16 indicate the statute was intended broadly to protect, *inter alia*, direct petitioning of the government and petition-related statements and writings—that is, ‘any written or oral statement or writing made before a legislative, executive, or judicial proceeding’ (§ 425.16, subd. (e)(1)) or ‘in connection with an issue under consideration or review’ (*id.*, subd. (e)(2)) by such.” (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1120 [81 Cal.Rptr.2d 471, 969 P.2d 564].)

Determining whether to grant the special motion to strike is a two-step process. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).)” (*Navellier, supra*, 29 Cal.4th at p. 88.) “If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citations.]” (*Ibid.*) “Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—*i.e.*, that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” (*Id.* at p. 89.)

■ Under the first step of the anti-SLAPP analysis, “the critical consideration is whether the cause of action is *based on* the defendant’s protected free speech or petitioning activity.” (*Navellier, supra*, 29 Cal.4th at p. 89.) “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.” (*Id.* at p. 92.)

“As courts applying the anti-SLAPP statute have recognized, the ‘arising from’ requirement is not always easily met. [Citations.]” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66 [124 Cal.Rptr.2d 507, 52 P.3d 685].) The “arising from” requirement requires more than simply some relationship between the cause of action and the protected activity. It is not enough that the cause of action was in response to or triggered by the protected activity. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77–78 [124 Cal.Rptr.2d 519, 52 P.3d 695].) “[A] cause of action arises from protected conduct if the *wrongful, injurious act(s)* alleged by the plaintiff constitute protected conduct. [Citations.]” (*Old Republic Construction Program Group v. The Boccardo Law Firm, Inc.* (2014) 230 Cal.App.4th 859, 868 [179 Cal.Rptr.3d 129] (*Old Republic*).) In deciding if this requirement is met, “the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (§ 425.16, subd. (b).)

In the anti-SLAPP statute, an “‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).)

■ “[I]n order to establish the requisite probability of prevailing (§ 425.16, subd. (b)(1)), the plaintiff need only have ‘“stated and substantiated a legally sufficient claim.”’ [Citations.] ‘Put another way, the plaintiff “must demonstrate that the complaint is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.”’ [Citations.]’ (*Navellier, supra*, 29 Cal.4th at pp. 88–89.)

“The trial court’s ruling on a section 425.16 motion is reviewed de novo. [Citation.] We exercise our independent judgment to determine not only whether the anti-SLAPP statute applies, but whether the complainant has established a reasonable probability of prevailing on the merits. [Citation.]” (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 22 [53 Cal.Rptr.3d 752].)

II

*Arising Out of Protected Activity*A. *Claims of Elder Abuse*

■ Both of Cara Lyn's claims for elder abuse in the civil action allege that Clyde Jr. "took and/or obtained and/or appropriated money that belonged to Helen J. Greco and/or the Trust." "[A] cause of action can only be said to arise from protected conduct if it alleges at least one *wrongful* act—conduct allegedly *breaching a duty and thereby injuring the plaintiff*—that falls within the act's definition of protected conduct." (*Old Republic*, *supra*, 230 Cal.App.4th at p. 869.) The wrongful act that is the basis of the elder abuse claims is the taking of money from the trust and estates.

■ Clyde Jr. argues the gravamen of Cara Lyn's claims of elder abuse is that he "used and disposed of that money to pursue litigation against his sister." Funding civil litigation is communicative conduct for purposes of section 425.16. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 [39 Cal.Rptr.3d 516, 128 P.3d 713].) He contends the alleged motive for the litigation, a personal vendetta, is irrelevant.

Clyde Jr. contends the applicable case is *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257 [131 Cal.Rptr.3d 63] (*Tuszynska*). There, the plaintiff was a female attorney who provided legal services to members of the Riverside Sheriffs' Association (RSA) under the auspices of the Riverside Sheriffs' Association Legal Defense Trust (RSA-LDT). She filed suit against the RSA, RSA-LDT, and its administrator, claiming that she received fewer case referrals because she was a woman. Defendants moved to strike the entire complaint under the anti-SLAPP statute and the trial court denied the motions. (*Id.* at p. 261.) The appellate court found defendants met their burden on the first prong of section 425.16 and remanded for consideration of whether plaintiff met her burden of showing a reasonable probability of prevailing on the merits. (*Tuszynska*, at p. 272.)

The court rejected the argument that the gravamen of plaintiff's claim was gender discrimination. Instead, it found the allegations that defendants discriminated against plaintiff by failing to assign cases to her were based on protected activities. (*Tuszynska*, *supra*, 199 Cal.App.4th at pp. 267–268.) "First, defendants' attorney selection and litigation funding decisions constitute statements or writings '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' (§ 425.16, subd. (e)(2).) As such, the decisions constitute protected speech and petitioning activities, even

though they were made on behalf of RSA members and clients of the RSA-LDT and not on behalf of defendants themselves. [Citations.]” (*Id.* at p. 268.)

The court rejected plaintiff’s argument that “her allegations of gender discrimination are not based on any such communications but are instead based on defendants’ purportedly distinctive ‘conduct’ in failing to assign cases to her ‘because she is a woman.’ ” (*Tuszynska, supra*, 199 Cal.App.4th at p. 268.) The court found a distinction between conduct based on the motive underlying the conduct was “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. [Citations.]” (*Id.* at pp. 268–269.)

Tuszynska does not aid Clyde Jr.’s position; in fact, it undercuts his argument. In *Tuszynska*, the alleged wrongful act was a protected activity, attorney selection and funding decisions. Here the wrongful act is the taking of trust and estate funds. Clyde Jr.’s alleged motive for taking the funds—to fund a personal vendetta by means of litigation—is irrelevant, just as the alleged motive of gender discrimination in *Tuszynska* was irrelevant. Although Cara Lyn alleges the underlying litigation was wrongful because it was a vendetta and cost many times more than the amount of possible recovery, she is not claiming the injurious act was the underlying litigation. Her claim is not for malicious prosecution. Instead, it is for recovery of funds (plus penalties) for monies wrongfully taken.

The case on which the trial court relied, *Old Republic, supra*, 230 Cal.App.4th 859, is more applicable to the situation here. In *Old Republic*, a law firm filed a lawsuit on behalf of a man injured in a motor vehicle accident during the course of his employment. (*Id.* at p. 862.) Old Republic was the worker’s compensation insurer for the man’s employer and paid him benefits. Old Republic filed a complaint in intervention for reimbursement. The law firm settled the personal injury lawsuit, but Old Republic’s claim to reimbursement was not resolved. The settlement proceeds were placed in the law firm’s client account and Old Republic and the injured man’s attorneys agreed the signatures of both parties were necessary to release the funds. (*Id.* at p. 863.) Subsequently, Old Republic withdrew both its complaint in intervention and its motion for apportionment, leaving no pleading before the court that sought affirmative relief. (*Id.* at pp. 863–864.) Taking the position that Old Republic had given up its right to reimbursement, the law firm disbursed the settlement funds to the injured client. (*Id.* at p. 864.) Old

Republic brought suit against the law firm for breach of contract, fraud, negligence, and declaratory relief. The law firm filed a special motion to strike. (*Id.* at p. 865.) The trial court granted it as to the fraud claim, but denied it as to the other claims. (*Id.* at p. 866.)

The appellate court affirmed. (*Old Republic, supra*, 230 Cal.App.4th at p. 878.) Reviewing the law, the court concluded, “a cause of action can only be said to arise from protected conduct if it alleges at least one *wrongful* act—conduct allegedly *breaching a duty and thereby injuring the plaintiff*—that falls within the act’s definition of protected conduct.” (*Id.* at p. 869.) The fraud cause of action arose from the settlement (a protected activity) because “[t]he underlying wrongful conduct was defendants’ alleged *entry into the stipulation* without the intention to be bound by it, thereby inducing Old Republic to do likewise and depriving it of control over the settlement funds.” (*Ibid.*) The same was not true of the breach of contract, negligence, and declaratory relief causes of action. Although those causes of action referred to and may have depended upon the stipulation, “they do not assert that there was anything wrongful about that conduct. . . . With respect to the remaining three claims, however, there was nothing wrongful about the stipulation itself; entry into it is not the injurious conduct alleged. Rather, under those three causes of action Old Republic’s injury arose from defendants’ withdrawal of the funds that were the subject matter of the stipulation.” (*Ibid.*)

Here it was Clyde Jr.’s withdrawal of the funds from the trust and estates that was the alleged wrongful act, just as in *Old Republic*. Although Cara Lyn did allege the underlying lawsuits were wrongful, her claim for recovery was not based on the wrongful act of pursuing meritless or wasteful litigation, but on taking trust and estate funds.

Clyde Jr. argues the gravamen of the complaint cannot be the disbursement of funds because “it is undisputed that Appellant had the power to disburse funds in his representative capacities. [Citations.] Thus, the mere disbursement of Assets, without more, is proper and cannot give rise to a cause of action. Disbursing the Assets only becomes legally actionable when put to an allegedly wrongful use, which, in this case, is funding the Underlying Actions.” Although it is not without surface appeal, upon close examination this argument fails.

■ The *activity* that gave rise to Clyde Jr.’s asserted liability was the taking, just as the disbursement of settlement funds was the gravamen of the claim in *Old Republic*. The activity itself does not have to be wrong or illegal. Funding the litigation solely to pursue a vendetta was the *reason* the activity (i.e., the taking) was allegedly wrongful, just as the failure to obtain

signatures of both parties was the reason the disbursement of settlement funds in *Old Republic* was allegedly wrongful. The test under section 425.16 focuses on the “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.)

■ The taking, whether or not it is actually wrongful and why, does not fall within any of the conduct described in subdivision (e) of section 425.16. The taking was not a “written or oral statement or writing” as required for subdivision (e)(1) through (3) of section 425.16. Only “one of the four categories of protected activity covers conduct (§ 425.16, subd. (e)(4) [‘conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech’]) and that type of protected activity must have taken place ‘in connection with a public issue or an issue of public interest.’” (*PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1226 [102 Cal.Rptr.3d 245].) While the taking of trust and estate funds to fund the underlying litigation may be considered “conduct in furtherance of the exercise of the constitutional right of petition,” it was not “in connection with a public issue or an issue of public interest.” “The most commonly articulated definitions of ‘statements made in connection with a public issue’ focus on whether (1) the subject of the statement or activity precipitating the claim was a person or entity in the public eye; (2) the statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants; and (3) whether the statement or activity precipitating the claim involved a topic of widespread public interest. [Citations.]” (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898 [17 Cal.Rptr.3d 497].) The context of the underlying litigation does not fall within any of these three categories. As a private matter among a small group of people involving a family trust and estates, it did not involve a public issue or an issue of public interest.

The trial court did not err in denying Clyde Jr.’s special motion to strike in the elder abuse case.

B. *Claim for Breaches of Fiduciary Duty*

The cause of action in the probate petition for breach of fiduciary duty contains general allegations, similar to those in the civil action, about Clyde Jr. wrongfully taking money from the trust and estates. It also, however, contains the allegation that Clyde Jr. “engaged in a course of conduct, including, without limitation, fomenting litigation and other wrongful acts, against certain beneficiaries of the Trust and/or estate, in an attempt to disinherit them, or any of them, and/or prevent questioning of his actions.” It alleges that Clyde Jr. breached his fiduciary duties, including “the duty of

loyalty to administer the Trust and the Estates for the sole interest of the beneficiaries, the duty to treat all beneficiaries equally or as required by the trust or estate documents, the duty to act in the interests of his principal as attorney-in-fact, the duty to act according to the Trust and Estates documents, the duty to avoid self-dealing, the duty to provide timely and accurate accountings, and the duty to avoid conflicts of interest.”

While these allegations appear to challenge the bringing of the underlying litigation, a protected activity, the petition limits the act that caused injury to the taking. In seeking damages and penalties, the petition alleges that Clyde Jr. “in bad faith wrongfully took, and/or concealed, and/or disposed of, property belonging to a principal under a power of attorney” and “in bad faith wrongfully took, and/or concealed, and/or disposed of, property belonging to a trust and/or estate(s).” There is no allegation that the “fomenting litigation” or the alleged attempt to disinherit certain beneficiaries *caused any injury*; the only “*wrongful, injurious act(s)* alleged by the plaintiff” (*Old Republic, supra*, 230 Cal.App.4th at p. 868) is the *taking*. Thus, the gravamen of this cause of action for purposes of section 425.16 is the taking itself, not the reason for the taking which is alleged to have made the taking wrongful.

For the same reasons we detailed *ante* in our discussion of the elder abuse claims, the trial court did not err in denying the special motion to dismiss.

C. *Claim for Constructive Fraud*

The cause of action for constructive fraud alleged that Clyde Jr. “breached his duty to the beneficiaries of the Trust and/or the Estates by misrepresenting the facts relating to the Actions and his motivations in bringing and maintaining same.” It further alleges the beneficiaries of both the trust and the estates “have suffered harm and Defendant Clyde Greco, Jr.’s wrongful conduct was a substantial factor in causing this harm.” Unlike the other causes of action, the gravamen of this cause of action is not the taking, but alleged misrepresentations about the underlying litigation.

■ An act is “‘in furtherance of a person’s right of petition’” if it is “any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body.” (§ 425.16, subd. (e)(2).) “[A] statement is ‘in connection with’ litigation under section 425.16, subdivision (e)(2) if it relates to the substantive issues in the litigation and is directed to persons having some interest in the litigation.” (*Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1266 [73 Cal.Rptr.3d 383].) By “misrepresenting the facts relating to the Actions” to the beneficiaries, Clyde allegedly made statements relating “to the substantive issues of the litigation” “to persons having some interest in the litigation.” (*Ibid.*) This cause of action

arises from protected activity. Thus, Clyde Jr. met his burden on the first step of the section 425.16 analysis on the cause of action for constructive fraud.

D. *Claim for Conversion*

The cause of action for conversion alleges that Clyde Jr. “intentionally and substantially interfered with the Trust’s and/or the Estates’ property by taking possession of the money and converting it to his own use and purposes.” Again, the gravamen of this cause of action is the taking and it involves only a private dispute, not an issue of public importance or interest. The trial court did not err in denying Clyde Jr.’s special motion to strike this cause of action.

III

Probability of Prevailing on the Merits

Clyde Jr. contends that Cara Lyn cannot show a probability that she will prevail on the merits because all of her claims are barred by the litigation privilege. We have found Clyde Jr. failed to show that Cara Lyn’s claims arose from a protected activity, except the constructive fraud claim. Accordingly, we limit our consideration of the merits prong of section 425.16 to that claim. Although the probate court did not consider this second step in the section 425.16 analysis, we may do so. (*Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 159 [143 Cal.Rptr.3d 17].) Since application of the litigation privilege presents a question of law, without any factual or evidentiary issues, we will consider whether it defeats the fraud claim.

■ The litigation privilege, found in Civil Code section 47, subdivision (b)(2), “applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.” (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 [266 Cal.Rptr. 638, 786 P.2d 365].) The privilege “immunizes defendants from virtually any tort liability (including claims for fraud), with the sole exception of causes of action for malicious prosecution.” (*Olsen v. Harbison* (2010) 191 Cal.App.4th 325, 333 [119 Cal.Rptr.3d 460].) In the anti-SLAPP context, the litigation privilege presents “a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing.” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323 [46 Cal.Rptr.3d 606, 139 P.3d 2].) “Any doubt as to whether the privilege applies is resolved in favor of applying it. [Citations.]” (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529 [3 Cal.Rptr.2d 49].)

Although there is a relationship between the litigation privilege and section 425.16, “the two statutes are not substantively the same.” (*Flatley v. Mauro*,

supra, 39 Cal.4th at p. 323.) “[T]he litigation privilege is an entirely different type of statute than section 425.16. The former enshrines a substantive rule of law that grants absolute immunity from tort liability for communications made in relation to judicial proceedings [citation]; the latter is a procedural device for screening out meritless claims [citation].” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 737 [3 Cal.Rptr.3d 636, 74 P.3d 737].)

■ Clyde Jr. has failed to show the litigation privilege is applicable to the cause of action for constructive fraud. The petition does not identify to whom Clyde Jr. made the alleged misrepresentations, but presumably he made the statements to some beneficiaries. It is unknown whether such beneficiaries were participants in the underlying litigation, or merely had “some interest in the litigation.” (*Neville v. Chudacoff, supra*, 160 Cal.App.4th 1255, 1266; see § 425.16, subd. (e).) Statements “to nonparticipants in the action are generally not privileged under [Civil Code] section 47(2) [now § 47, subd. (b)], and are thus actionable unless privileged on some other basis.” (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 219.) Further, neither the probate petition nor the declarations offered in support or opposition to the section 425.16 motion reveal what the alleged misrepresentations were or whether the statements were made “to achieve the objects of the litigation” or for another reason, such as to justify Clyde Jr.’s actions. (*Silberg*, at p. 212.)

■ Because the probate court concluded Clyde Jr. failed to meet the first prong of the section 425.16 analysis, it did not address whether Cara Lyn met her evidentiary burden under the merits prong of the statute. Although we have addressed the legal issue of the applicability of the litigation privilege, which was briefed by the parties, we decline to otherwise address the merits and complete the analysis under the second prong of the statute. The court did not rule on the several objections to the admissibility of the parties’ evidence and the parties did not address the issue on appeal. “Under such circumstances, the more prudent course is to remand the matter to the trial court to determine in the first instance whether [Cara Lyn] demonstrated a reasonable probability of prevailing on the merits of [her] cause[] of action. [Citations.]” (*Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1527–1528 [165 Cal.Rptr.3d 123].)

DISPOSITION

In case No. SC RD CV-PO-14-0180682 (appellate case No. C078369), the order denying Clyde Jr.’s special motion to strike is affirmed. Cara Lyn shall recover her costs on appeal. (See Cal. Rules of Court, rule 8.278(a).)

In case No. SC RD CV-PB-14-0028032 (appellate case No. C078805), the order denying Clyde Jr.’s special motion to strike is reversed as to the second

cause of action for constructive fraud. In all other respects, the order is affirmed. The matter is remanded to the trial court with directions to determine whether Cara Lyn met her evidentiary burden of demonstrating a reasonable probability of prevailing on the merits as to her claim for constructive fraud. The parties shall bear their own costs on appeal. (See Cal. Rules of Court, rule 8.278(a).)

Hull, Acting P. J., and Butz, J., concurred.

[No. B257245. Second Dist., Div. Six. Aug. 23, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
HUMBERTO MIRANDA et al., Defendants and Appellants.

[No. B258930. Second Dist., Div. Six. Aug. 23, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
ISAAC RANGEL et al., Defendants and Appellants.

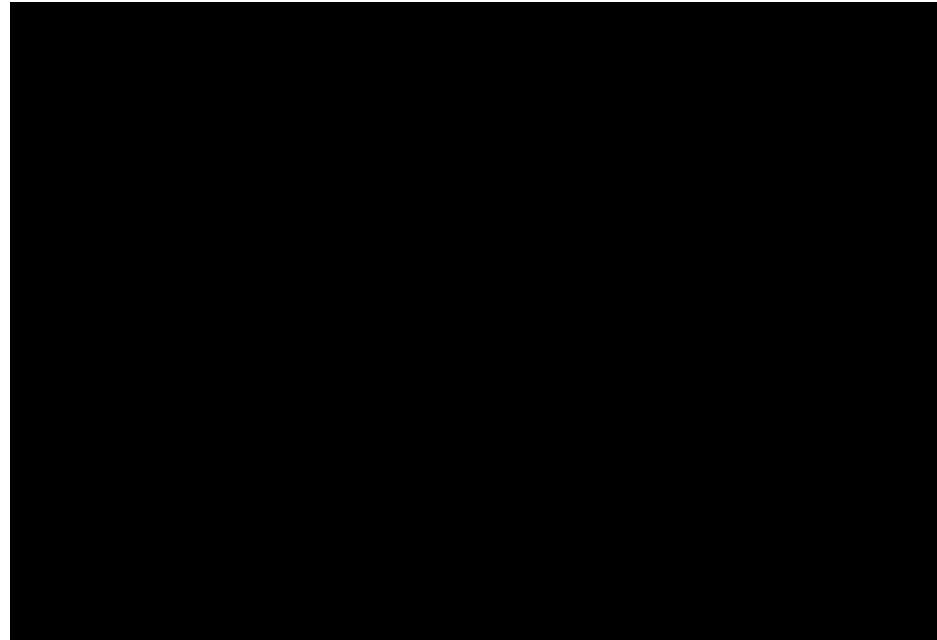
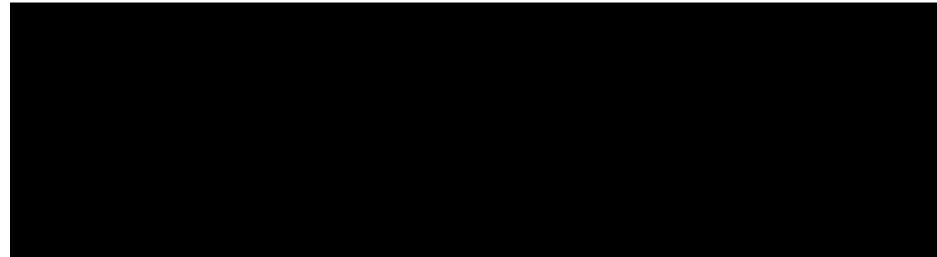
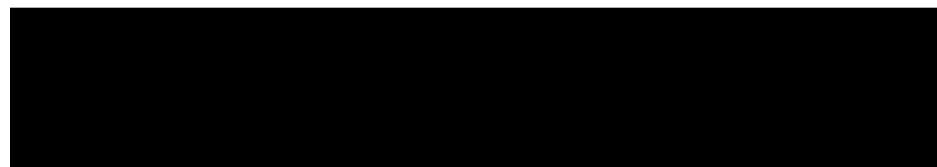
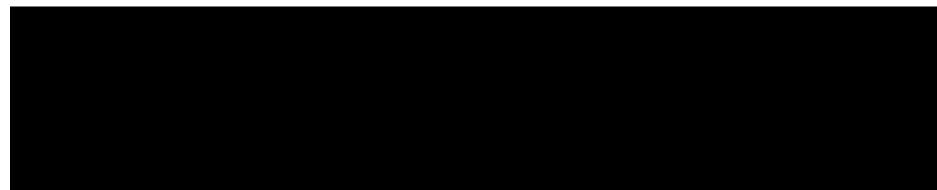
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COUNSEL

James Crawford and Linn Davis, under appointments by the Court of Appeal, for Defendant and Appellant Humberto Miranda.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant Felix Vega.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant Isaac Rangel.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

YEGAN, J.—This case involves a razor-blade-shank attack by “Southside” gang members on a Los Angeles County jail inmate who refused to stab another inmate at the gang’s behest. Humberto Miranda, Felix Vega, and Isaac Rangel appeal from the judgment entered after a jury trial. All were convicted of assault with a deadly weapon (count 1; Pen. Code, § 245, subd. (a)(1));¹ assault by means of force likely to produce great bodily injury (count 2; § 245, former subd. (a)(1), now subd. (a)(4)); and battery with serious bodily injury (count 3; § 243, subd. (d)). Codefendant Chris DeLeon was acquitted. As to each appellant, the jury found true great bodily injury allegations (§ 12022.7, subd. (a)) and gang enhancements (§ 186.22,

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

subd. (b)(1)(A) & (C)). As to Miranda, the jury found true an allegation that, in the commission of battery with serious bodily injury, he had personally used a “knife and razor.” (§ 12022, subd. (b)(1).) Vega and Rangel admitted prior felony convictions.

Miranda was sentenced to prison for 17 years, to be served first before serving life sentences in another case. (See § 669.) Vega was sentenced to prison for 11 years four months, to be served consecutively to a prior sentence in another case of 37 years four months. The aggregate term for both cases was 48 years eight months. Rangel was sentenced to prison for seven years four months, to be served consecutively to a prior sentence in another case of 25 years. The aggregate term for both cases was 32 years four months.

Appellants argue that the evidence is insufficient to support the gang enhancements. In addition, they argue that the trial court erroneously (1) denied their *Wheeler-Batson* motions, (2) instructed the jury during jury selection, and (3) excluded evidence of the guilty pleas of three codefendants. Vega claims that the trial court erroneously limited his closing argument to the jury. Finally, Vega and Rangel contend that the trial court erroneously sentenced them and failed to calculate the custody credits to which they are entitled. Only the final contention has merit. Miranda makes no claim of sentencing error, but his sentence is also erroneous. We vacate appellants’ convictions on count 2 and reverse their sentences on counts 1 and 3. We remand the matter with directions to resentence them and calculate Vega’s and Rangel’s custody credits. In all other respects, we affirm.

Facts

Appellants and DeLeon were members of different Southern California local criminal street gangs. Estuardo Tobias, the victim, claimed that he was not a gang member. In June 2008 Tobias, appellants, and DeLeon were inmates in “Dorm 816” at the North County Correctional Facility (NCCF) of the Los Angeles County jail. The dorm housed approximately 65 inmates, all of whom were Hispanic.

In the presence of Miranda, Rangel, and DeLeon, Vega ordered Tobias to cut another inmate with a knife. Tobias refused. Vega replied, “‘All right. If you don’t do it, you got that coming.’” Later that same day, Vega told Tobias that someone wanted to speak to him upstairs. Tobias understood that he was going to see “Puppet,” “the gang member who was running the jail.” According to Tobias, “Puppet was the one who would give orders about who should get beat up and what should happen among the gang members . . .”

After Tobias walked upstairs, Vega started fighting with him and “tried to take [him] down on the ground.” Miranda, Rangel, DeLeon, and “not less than another five [persons]” ran toward Tobias. The other persons included gang members Edgar Centeno, Skary Paredes, and Ivan Toscano.

Appellants cut Tobias with razor blades attached to toothbrushes. Tobias was punched and kicked. “There were blows, but there were so many of them [that Tobias] couldn’t tell . . . who did what.” Someone said, “‘Cut him, but make sure that you’re getting him on the neck.’” “The last thing [Tobias] remember[ed] was that someone said, ‘Hide. They’re coming.’”

Sheriff’s deputies arrived and stopped the fight. A deputy testified that he “saw five people attacking one person.” The deputy subsequently testified: “There could have been more.” “[I]t looked like there was approximately five or more.” Another deputy testified that he “saw approximately five inmates” surrounding Tobias and “punching him repeatedly in a violent manner.” “It could have been more, but I’m pretty certain that it was at minimum five.” Neither deputy saw the beginning of the fight.

Tobias was “drenched in blood.” Blood was “squirting from his wrist onto the walls.” He had “six or seven different injuries.”

Appellants had blood on their clothing and bodies. The DNA profile of blood found on Vega and Rangel matched the DNA profile of Tobias’s blood.

[[]]*

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Sufficiency of the Evidence to Support the Gang Enhancements

Appellants contend that the evidence is insufficient to support the criminal street gang enhancements. The People were required to prove that the crimes for which appellants were convicted had been “committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . .” (§ 186.22, subd. (b)(1).)

Standard of Review

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the

*See footnote, *ante*, page 829.

judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] 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. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’ [Citation.]’ (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60 [119 Cal.Rptr.3d 415, 244 P.3d 1062].) “A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict. [Citation.]’ (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 [75 Cal.Rptr.3d 289, 181 P.3d 105].)

Gang Evidence

Deputy Francis Hardiman testified for the People as a gang expert. He had qualified “about 60 times” in Los Angeles County Superior Court as an expert on the Mexican Mafia or the Southside criminal street gang. The following summary of the gang evidence is primarily based on his testimony.

Appellants and DeLeon were members of both Southside and different Southern California Hispanic local criminal street gangs. Other inmates who participated in the assault upon Tobias—Edgar Centeno, Skary Paredes, and Ivan Toscano—were also gang members. Centeno was a member of the Pasadena Latin Kings gang and Southside, Paredes was a member of Southside, and Toscano was a member of the North Side Longos’ gang and Southside.³

Dorm 816, where the inmates were housed, was “a Southside dorm.” An inmate was assigned there only if he had identified himself as a Southsider or jail officials had “designated [him as a] possible Southsider.”

Southside was created by the Mexican Mafia in the early 1990s. The Mexican Mafia is a Hispanic prison gang. It and a rival Hispanic prison gang, Nuestra Familia, agreed to divide California into two territories. Hispanic gang members south of Delano are considered to be “Southsiders.” Hispanic gang members north of Delano are considered to be “Nortenos.” Southsiders

³ Centeno, Paredes, and Toscano were appellants’ codefendants. They pleaded guilty before trial. In the unpublished portion of this opinion, we reject appellants’ contention that the trial court erroneously refused their request to take judicial notice, in the jury’s presence, of the guilty pleas.

owe their allegiance to the Mexican Mafia, while Nortenos owe their allegiance to Nuestra Familia.

If you are a Southern California Hispanic gang member, “[w]hen you come in from the street into [Los Angeles County jail], your gang rivalries out on the street end, and you are a member of the Southside” criminal street gang. When Tobias arrived at Dorm 816, Vega told him that, “since they were working for the South, there was no fighting among them.”

A Southern California Hispanic gang member who did not want to be a Southsider always had the option of informing jail authorities that he “can’t do this anymore.” The gang member would then “become a protective custody inmate.” Southsiders have an obligation to attack protective custody inmates if the opportunity arises.

A Mexican Mafia member in the Los Angeles County jail “is in control of all of the Southsiders within the . . . jail.” He is at the top of “a pyramid-like structure of leadership within the jail that controls the actions of the individual Southsiders.” The Los Angeles County jail is divided into seven facilities, and a “Southsider shot caller . . . is in charge” of each facility. “The next step down from the facility shot caller [is] the floor shot caller.” Each floor is divided into modules or dorms, and each module or dorm has a Southside shot caller. If a Southsider wants to use violence against an inmate, he generally must get permission “from the various shot callers above [him].”

Every week, each dorm shot caller collects “taxes” from the Southsiders in his dorm. The taxes are forwarded to the Mexican Mafia. “So each dorm each week . . . generate[s] income” for the Mexican Mafia.

A set of rules called “the Southside rules” applies to all Southsiders in jail. “The rules are designed to strictly control violence by the Southside[rs].” “[E]ach individual member of the Southside is expected to keep an eye on the other members and help enforce those rules.” Hardiman gave several examples of the Southside rules.

Any Hispanic from Southern California, regardless of whether he is a gang member, who “comes into the jail . . . falls under the control of the Southside. And they have to follow the [Southside] rules.” “Paisa,” “Resident,” and “Christian” are “designation[s] by the Southside of a person who is not a member of the Southside but has to follow the rules.” When Tobias arrived at Dorm 816, Vega informed him of the rules.

Vega testified that in June 2008, when the incident involving Tobias occurred, he was the “bar man” for Dorm 816. Deputy Hardiman defined

“bar man” as “a person within the Southside who is designated to be a contact point in a dorm with the staff of the facility.” The bar man also “communicates with the hierarchy of the Southside.” The bar man sometimes “give[s] out the orders about who gets beat up, who gets kicked . . .”

Raymond Cuevas worked for Hardiman as an informant. His gang moniker was “Puppet.” When Vega told Tobias that someone wanted to speak to him upstairs, Tobias understood that he was going to see “Puppet,” “who would give orders about who should get beat up and what should happen among the gang members . . .” Hardiman testified that in about August 2009 Cuevas became “the shot caller for the entire facility . . .” Cuevas said that “Vega had status within the Southside and eventually became the shot caller for the entire facility . . .” Deputy Christian Lopez, who worked at NCCF and had frequent contact with Vega, testified that Vega had “worked his way up from bar man” to “facility shot caller, for a short period of time” between October and December 2009.

Deputy Hardiman saw “roll call lists,” which were generated by Southside and listed its members as well as inmates under its control. Vega’s, Miranda’s, and DeLeon’s names were on the lists. Rangel “appear[ed] on roll calls with [his] name, booking number, and moniker [‘Evil’] and [local street] gang.”

The prosecutor asked Deputy Hardiman a hypothetical question incorporating the facts of the assault committed upon Tobias. Deputy Hardiman opined that the assault “was committed at the direction of, for the benefit [of], and in association with a criminal street gang, to wit, the Southside.” Hardiman explained that the assault benefited Southside because “it tells both other Southsiders, people that aren’t Southsiders but fall under the control of the Southside, and the other groups within the jail—like the black inmates, the white inmates . . .—that the Southside is . . . so strong and so committed that they’re willing to attack their own because their own in this instance wouldn’t follow their rules.” This creates fear and intimidation among other inmates and “causes [Hispanic inmates] to follow the rules.” The fear and intimidation deter “other organizations from trying to influence or stick their nose into the interests of the Southside, such as extortion, money laundering, drug dealing.”

Vega testified that he was a member of a gang called Pacoima Project Boys, not a gang called Southside. “Sureno” or “Southside” means “like saying you’re from Southern California.” Vega claimed that Tobias had said he was a member of the Langdon Street gang in the San Fernando Valley.

Rangel testified that he was a member of a gang called Compton Varrio Tres. He identified himself as a “Sureno,” which means a “gang member from the south” of California.

DeLeon testified that, when he “was younger,” he had been a member of a gang called La Mirada Locos. But DeLeon told Vega that he was a current member of the La Mirada gang. Vega heard other inmates address DeLeon by his gang moniker, “Capone.” DeLeon testified that “Southsiders” means “Hispanic from down south.” He was asked, “[Is] everyone who is Hispanic who is a member of a gang south of Delano, a member of Southside?” DeLeon replied, “Only when you’re in jail.”

Miranda did not testify. Deputy Hardiman opined that Miranda had “a leadership rol[e] within [the] San Fer” criminal street gang in the San Fernando Valley. Miranda told Vega that he was from San Fer.

Expert Gang Testimony

Miranda and Rangel assert that the evidence is insufficient to support the gang enhancements because Deputy Hardiman’s “conclusions were spun out of whole cloth” and “are not worthy of any assignment of value or credibility.” They allege that his “conclusions are based upon matters which are not reasonably relied upon by other experts, and upon factors which are speculative, remote or conjectural.” (Boldface & capitalization omitted.)

Miranda and Rangel impugn Deputy Hardiman’s gang expertise. They claim that he “concluded South Side was a criminal street gang, upon his arrival at the Los Angeles County Sheriff’s Department, without any prior gang experience or training.” They also impugn his motives, accusing him of going over the head of his superior, Sergeant Meade, to “OSJ leader[,] Gregory Thompson, soon to be indicted on corruption then occurring at the jail, to test the waters and in so doing, to advance up the ladder.”⁴ They attempt to tarnish Hardiman’s character by linking him with Thompson: “This self[-]made expert climbed up the ladder after 7 months at OSJ with the blessings of its leader at a time when the FBI was investigating corruption at the jail which led to conviction of its OSJ leader.”

For four reasons, we reject Miranda’s and Rangel’s allegations concerning Deputy Hardiman’s testimony. First, they are not supported by meaningful analysis with record citations to evidence before the jury. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408 [41 Cal.Rptr.3d 453].) Second, by not objecting to

⁴ “OSJ” is an abbreviation for Operation Safe Jails, “an intelligence-gathering unit within the Los Angeles County jail system.”

Hardiman's qualifications as a gang expert, Miranda and Rangel forfeited this issue. (*People v. Bolin* (1998) 18 Cal.4th 297, 321 [75 Cal.Rptr.2d 412, 956 P.2d 374].) Third, Hardiman's credibility was a matter for the jury to decide, and it impliedly found him to be credible. “ ‘Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]’’ [Citation.]” (*People v. Barnes* (1986) 42 Cal.3d 284, 306 [228 Cal.Rptr. 228, 721 P.2d 110].)

Fourth, Hardiman's “conclusions were [not] spun out of whole cloth.” Nor were they based on speculation. Hardiman listened to a recorded “face-to-face conversation” between Miranda and two other inmates “about the conduct and operations of the Southside.” Miranda had a “‘thirst for blood’ tattoo,” which is “an earned tattoo within the Southside.” Hardiman's opinion that Vega was a member of Southside was based on “his actions, his conduct,” his tattoos, “admissions that he made to Deputy Christian Lopez,” and Hardiman's conversations with the informant Raymond Cuevas. Hardiman conversed with Cuevas “at least 30 times.” In addition to having been the Southside “shot caller for the entire facility,” Cuevas was also “a crew chief for a member of the Mexican Mafia.” Hardiman was familiar with the “Southside rules” in force at NCCF. He saw “hundreds” of Southside “roll call lists,” some of which included appellants' and DeLeon's names. He spoke to “hundreds of Southsiders” and to several members of the Mexican Mafia, plus more than 100 “dropouts” from the Mexican Mafia and Southside. He listened to “hundreds of hours of recorded conversations . . . between Southsiders talking to other Southsiders and . . . sometimes members of the Mexican Mafia about their criminal enterprise.” He spoke to police officers who were working in an undercover capacity within the Mexican Mafia or Southside.

Hardiman's conclusions are supported by Tobias's and codefendant DeLeon's testimony. When Tobias arrived at Dorm 816, Vega told him that “they were working for the South” and explained the rules to him. DeLeon testified that Southern California Hispanic local gang members are members of Southside “[o]nly when [they are] in jail.”

Hardiman's conclusions are also supported by the nature of the attack upon Tobias. The attack involved concerted, apparently preplanned action by members of different local street gangs against an inmate who had refused to follow the command of a Southside “shot caller.”

Appellants argue that the Los Angeles County Sheriff's Department's “classification system created a gang it called South Sider making membership mandatory” for “any Hispanic geographically from southern California

regardless of whether or not he was a gang member before incarceration" This constituted "an unlawful classification system which was based on ethnicity." "In the context of whether a finding is supported by substantial evidence, opinion evidence based on ethnic discrimination is not reasonable, credible, and of solid value."

Appellants' argument is not supported by the evidence. Hardiman testified that, upon entry into the Los Angeles County jail, only Southern California Hispanic gang members become members of Southside. Incarcerated Southern California Hispanics who are not gang members are not members of Southside, although they "fall[] under [its] control." "[Y]ou really don't have to be a member of a street gang to be subject to the power [Southside] hold[s] over you"

The sheriff's department did not create Southside. Southside was created by the Mexican Mafia. Hardiman testified: "[T]he Sheriff's Department doesn't designate anybody as a Southsider. That's for the Southside and for the individual."

Elements of Statutory Definition of a Criminal Street Gang

Vega and Rangel claim that the evidence is insufficient to establish the elements of the statutory definition of a criminal street gang. "'[C]riminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of [statutorily enumerated] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

Common Name or Common Identifying Symbol

■ Vega and Rangel assert that "Southside did not have its own unique symbolism. Rather, it used the same iconic Mayan imagery and the number 13 used by the Mexican Mafia." But the gang statute does not require "unique" symbolism. It requires only a "common identifying sign or symbol." (§ 186.22, subd. (f).) Furthermore, the statute provides that a criminal street gang must have "a common name *or* common identifying . . . symbol," not both. (§ 186.22, subd. (f), *italics added.*) Either is sufficient. Deputy Hardiman testified that the Southside gang had a common name: the terms "Sureno, Sur, Southside, [and] Southsider" were all "synonymous" with the gang. "Sur" is Spanish for "south," and "Sureno" is Spanish for "a person who is from the south." Southside also had a "common identifying . . . symbol." (*Ibid.*) It had "a symbol called the Kampol, . . . which is two

horizontal lines with three dots above the horizontal lines which is a Mayan representation of the number 13.” The 13th letter of the alphabet is “M,” which stands for the Mexican Mafia. Hardiman’s testimony constitutes substantial evidence of “‘a common name or common identifying . . . symbol.’” (*People v. Gardeley* (1996) 14 Cal.4th 605, 620 [59 Cal.Rptr.2d 356, 927 P.2d 713] [gang expert’s testimony was sufficient to satisfy most of the elements of definition of a criminal street gang, including that the gang “shares ‘a common name or common identifying . . . symbol’”].)

Primary Activities

■ Vega and Rangel maintain that the evidence is insufficient to show that “one of [Southside’s] primary activities” was “the commission of one or more” of the “criminal acts” enumerated in the gang statute. (§ 186.22, subd. (f).) Deputy Hardiman testified that the “most common” activities of Southside were “extortion, drug dealing, assault with deadly weapons, [and] conspiracies to [commit] murder.” These activities are among the criminal acts enumerated in the statute. (§ 186.22, subd. (e)(1), (3), (4), (19).) Deputy Hardiman’s testimony constitutes substantial evidence of the “primary activities” element of the definition of a criminal street gang. (*People v. Prunty* (2015) 62 Cal.4th 59, 82 [192 Cal.Rptr.3d 309, 355 P.3d 480] [gang expert’s testimony “that ‘the Norteños’ in the area engage in various criminal practices” was “likely sufficient” to establish “primary activities” element]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 [109 Cal.Rptr.2d 851, 27 P.3d 739]; see *People v. Gardeley*, *supra*, 14 Cal.4th at p. 620.)

Pattern of Criminal Gang Activity

■ Finally, Vega and Rangel allege that the evidence is insufficient to show that Southside “members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (§ 186.22, subd. (f).) The prosecution has “the choice of proving the requisite ‘pattern of criminal gang activity’ by evidence of ‘two or more’ predicate offenses committed ‘on separate occasions’ or by evidence of such offenses committed ‘by two or more persons’ on the same occasion.” (*People v. Loeun* (1997) 17 Cal.4th 1, 10 [69 Cal.Rptr.2d 776, 947 P.2d 1313].) The prosecution may “rely on evidence of the defendant’s commission of the charged offense and the contemporaneous commission of a second predicate offense by a fellow gang member.” (*Ibid.*)

The People contend that the predicate offenses were sufficiently proved by Hardiman’s testimony that two other named individuals had been convicted of assault with a deadly weapon and murder and had committed these crimes while they were members of Southside, although they were also members of

different local criminal street gangs. Hardiman was the investigating officer in the assault with a deadly weapon case and testified at the trial in the murder case. The People also contend that the predicate offenses requirement was proved by all of appellants' contemporaneous commission of the charged offenses. (See *People v. Loeun, supra*, 17 Cal.4th at p. 14 [“Through evidence of defendant’s commission of the charged crime of assault with a deadly weapon on Ivan Corral and the separate assault on Corral seconds later by a fellow gang member, the prosecution established the requisite ‘pattern of criminal gang activity’ ”].)

■ But appellants argue that the evidence is insufficient to show that they and the two other named individuals belonged to the same “umbrella” Southside gang. “[I]t is axiomatic that those who commit the predicate acts must belong to the same gang that the defendant acts to benefit.” (*People v. Prunty, supra*, 62 Cal.4th at p. 76.) Where, as here, “the prosecution’s case positing the existence of a single ‘criminal street gang’ [Southside] for purposes of section 186.22(f) turns on the existence and conduct of one or more gang subsets [the different local street gangs at NCCF], then the prosecution must show some associational or organizational connection uniting those subsets. That connection may take the form of evidence of collaboration or organization . . . Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together.” (*Id.* at p. 71.) The associational or organizational connection may be “formal or informal.” (*Id.* at p. 74.) The People acknowledge that the different Southern California Hispanic local criminal street gangs at NCCF “were subsets of South Side.”

“The most straightforward cases [of an associational or organizational connection] might involve subsets connected through formal ways, such as shared bylaws or organizational arrangements. Evidence could be presented, for instance, that such subsets are part of a loose approximation of a hierarchy. Even if the gang subsets do not have a formal relationship or interact with one another . . . the subsets may still be part of the same organization if they are controlled by the same locus or hub. For example, Norteño gang subsets may be treated as a single organization if each subset contains a ‘“shot caller[]”’ who ‘answer[s] to a higher authority’ in the Norteño chain of command. [Citations.]” (*People v. Prunty, supra*, 62 Cal.4th at p. 77.)

■ The evidence here shows that this is one of “[t]he most straightforward cases” of an associational or organizational connection. (*People v. Prunty, supra*, 62 Cal.4th at p. 77.) The Southern California Hispanic gang

subsets at NCCF were “controlled by the same locus or hub.” (*Ibid.*) Deputy Hardiman described in detail the “pyramid-like structure of leadership within the jail that controls the actions of the individual Southsiders,” with a Mexican Mafia member at the top and Southside shot callers at different levels of the pyramid. The subset gang members were governed by “a set of rules” called “the Southside rules.” “[P]roof that different Norteño subsets are governed by the same ‘bylaws’ may suggest that they function . . . within a single hierarchical gang. [Citation.]” (*Ibid.*)

In proving the requisite associational or organizational connection, prosecutors may “show that members of the various subsets collaborate to accomplish shared goals.” (*People v. Prunty, supra*, 62 Cal.4th at p. 78.) The prosecutor in the instant case made such a showing. When Tobias arrived at Dorm 816, Vega told him that, “since they were working for the South, there was no fighting among them.” Prosecutors may establish collaboration by showing “that members of different subsets have ‘work[ed] in concert to commit a crime,’ [citation]” (*Id.* at p. 78, fn. omitted.) Here, the evidence shows that members of different gang subsets worked in concert to commit the aggravated assault upon Tobias. The subsets were “united by their activities.” (*Id.* at p. 75.)

Accordingly, “‘viewing the evidence in the light most favorable to the People’” and “presum[ing] in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27 [82 Cal.Rptr.3d 323, 190 P.3d 664]), we conclude that a reasonable trier of fact could have found beyond a reasonable doubt “that those who commit[ted] the predicate acts . . . belong[ed] to the same gang that [appellants] act[ed] to benefit” (*People v. Prunty, supra*, 62 Cal.4th at p. 76).

[]*

Disposition

The convictions on count 2 are vacated and the sentences on counts 1 and 3 are reversed. The matter is remanded to the trial court with directions to

*See footnote, *ante*, page 829.

resentence appellants on counts 1 and 3 in accordance with this opinion. The court shall calculate Vega's and Rangel's custody credits. In all other respects, the judgments are affirmed.

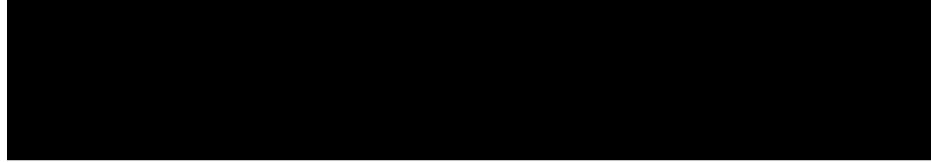
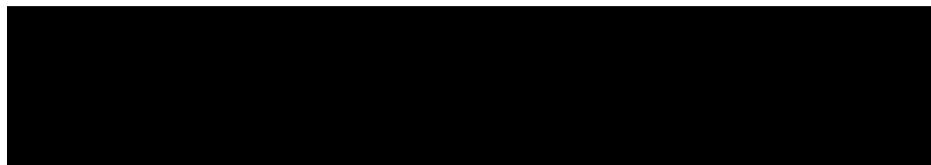
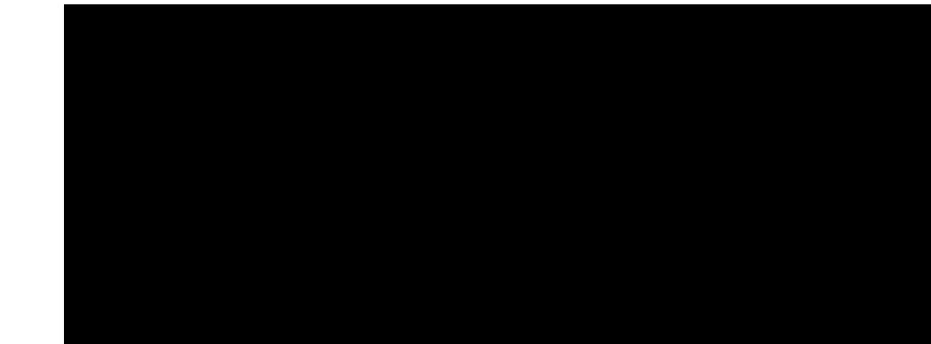
Gilbert, P. J., and Perren, J., concurred.

A petition for a rehearing was denied September 19, 2016, and the petitions of all appellants for review by the Supreme Court were denied November 30, 2016, S237452.

[No. B263353. Second Dist., Div. Six. Aug. 23, 2016.]

AMY LEE PHILLIPS, Plaintiff and Respondent, v.
JAMES EUGENE CAMPBELL, JR., Defendant and Appellant.

[REDACTED]



COUNSEL

James Eugene Campbell, Jr., in pro. per., for Defendant and Appellant.

Lvovich & Szucska, Terry A. Szucska and Hannah R. Salassi for Plaintiff and Respondent.

OPINION

YEGAN, J.—Sitting as trier of fact, a trial court may draw its own inferences and conclusions from the evidence when hearing a matter brought pursuant to the Domestic Violence Prevention Act (DVPA). (Fam. Code, § 6200 et seq.)¹ This includes the power to factually find a “dating relationship” within the meaning of the DVPA even though the parties characterize their relationship as a friendship that does not involve “dating” as that term is

¹ Unless otherwise stated, all statutory references are to the Family Code.

commonly understood. (See, e.g., *Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 696–697 [39 Cal.Rptr. 64] (*Fibreboard*).)

James Eugene Campbell, Jr., appearing in propria persona, appeals from a DVPA restraining order prohibiting him from harassing or contacting respondent and compelling him to stay at least 500 yards away from her person, residence, and workplace. In addition to claiming that the parties did not have a dating relationship, appellant contends that the trial court (1) erroneously denied his motion to dismiss the case, (2) erroneously granted the restraining order because his conduct was nonviolent, and (3) violated his First Amendment rights of freedom of speech and expression.² We affirm.

Factual and Procedural Background

In March 2013 a Tennessee court issued a protective order requiring appellant to stay away from and have no contact with respondent. The order expired in March 2014.

In January 2015 in the County of San Luis Obispo, respondent applied for a domestic violence restraining order against appellant. Respondent, a professional cyclist, declared that she had “met [appellant] 2 1/2 years ago through cycling.” She had been friends with him for several months. Appellant “expressed an interest in moving forward in [the] relationship,” but respondent “informed [him] that [she] was not interested in moving forward . . . , and [she] wanted to just be friends.” “One night, at 3:30 am, [appellant] came to [respondent’s] house, banging on the door and windows.” Thereafter, appellant repeatedly harassed respondent by sending text messages to her, posting her personal information and photos of her on Facebook, posting videos of her on YouTube, and sending “private messages to individuals sharing personal information about [her].” In text messages to respondent, appellant called her a “psycho evil witch” and “a compulsive liar” who had “lied” about him and “destroyed [his] life.”

The matter was set for a hearing on February 19, 2015. On that date, respondent’s counsel appeared in court. Respondent was “on a bicycle Tour in New Zealand.” Appellant, who lived in Florida, appeared in propria persona via the telephone.

² Appellant also argues that respondent “lied on her [Judicial Council form] DV-100 [entitled “Request for Domestic Violence Restraining Order”] and stated she resided in California” Appellant asserts that respondent actually resided in Chattanooga, Tennessee. The argument is forfeited because it is unsupported by citations to the record and meaningful analysis. (*In re S.C.* (2006) 138 Cal.App.4th 396, 406–408 [41 Cal.Rptr.3d 453].)

At the beginning of the hearing, appellant told the court: “[M]y understanding is the [respondent] has chosen to be out of the country, knowing that the court date was today. I would ask that the court dismiss the case.” The court did not rule on the motion. It put the matter over until 3:15 p.m. At that time, the court said, “This case . . . is going to take a lot longer.” The court continued the hearing to February 26, 2015. Appellant did not object.

On February 26, 2015, appellant again appeared in propria persona via the telephone. Respondent was personally present with her counsel. After extensive argument, the trial court found that “there was a relationship [between the parties] that qualifies as a dating relationship and that the communications and interaction from [appellant] to [respondent] qualifies for a domestic violence restraining order protecting [respondent].”

Motion to Dismiss

Appellant contends that, at the hearing on February 19, 2015, the trial court erroneously denied his motion to dismiss. But the court did not deny the motion. It never ruled on the motion, and appellant did not press for a ruling. He did not object to the continuance of the hearing to February 26, 2015. “[H]is failure to press for a ruling [and to object to a continuance] waives the issue on appeal. [Citation.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 984 [108 Cal.Rptr.2d 291, 25 P.3d 519]; see also *In re Richard H.* (1991) 234 Cal.App.3d 1351, 1362 [285 Cal.Rptr. 917] [“Since appellant did not object to any of the continuances, he has waived his right to claim any harm from the delay” (italics omitted)].)

Had the trial court denied the motion to dismiss, we would have upheld its ruling. Appellant’s motion was based on respondent’s failure to be personally present at the hearing, even though her counsel was present. Appellant relies on section 243, former subdivision (a). It provided: “When the matter first comes up for hearing, the petitioner must be ready to proceed.”³ (§ 243, former subd. (a).) Appellant has failed to show that respondent’s counsel was not ready to proceed. The statute does not provide that the petitioner must be personally present.

Dating Relationship

■ Respondent sought a restraining order pursuant to the DVPA. Such an order may be granted where the parties are “having or [have] had a dating . . . relationship.” (§ 6211, subd. (c); see § 6301, subd. (a).)

³ The quoted language was eliminated by a 2015 amendment that became effective on January 1, 2016. (Stats. 2015, ch. 411, § 5.)

The DVPA originally did not define “dating relationship.” In *Oriola v. Thaler* (2000) 84 Cal.App.4th 397, 412 [100 Cal.Rptr.2d 822], the court concluded that “a ‘dating relationship’ refers to serious courtship. It is a social relationship between two individuals who have or have had a reciprocally amorous and increasingly exclusive interest in one another, and shared expectation of the growth of that mutual interest, that has endured for such a length of time and stimulated such frequent interactions that the relationship cannot be deemed to have been casual.” Based on this definition, the *Oriola* court determined that the plaintiff was not entitled to a DVPA restraining order because a dating relationship between the parties had not existed.

The Legislature responded swiftly to *Oriola*’s definition of “dating relationship.” In 2001 it passed Assembly Bill No. 362 (2001–2002 Reg. Sess.), enacting section 6210 which gave the phrase “dating relationship” a technical definition for purposes of the DVPA: “‘Dating relationship’ means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.”⁴ (Stats. 2001, ch. 110, § 1, p. 1146.) The Senate Judiciary Committee analysis of Assembly Bill No. 362 noted: “[T]he *Oriola* decision ‘resulted in the fact that anyone who was involved in a dating relationship short of “serious courtship” is excluded from the protections of California’s excellent Domestic Violence Prevention Act.’ [¶] If enacted, this bill would nullify the definition crafted by the court in *Oriola*” (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 362 (2001–2002 Reg. Sess.) July 3, 2001, pp. 5–6.) In determining legislative intent, we may consider bill analyses prepared by the staff of legislative committees. (*People v. Benson* (1998) 18 Cal.4th 24, 34, fn. 6 [74 Cal.Rptr.2d 294, 954 P.2d 557].)

Appellant claims that the trial court erroneously found that the parties had a dating relationship. He characterizes their former relationship as “BEST FRIENDS.” Appellant says that “[a]ny reference to Appellant’s ‘love’ for [respondent] is . . . a platonic love of caring and concern for his BEST FRIEND.” “[T]he parties engaged in social activities just like [appellant] does with all of his friends.”

We review for substantial evidence the trial court’s finding that a dating relationship existed. (*J.J. v. M.F.* (2014) 223 Cal.App.4th 968, 975 [167 Cal.Rptr.3d 670].) “The ultimate determination is whether a *reasonable* trier of fact could have found [the existence of a dating relationship] based on the *whole* record. [Citation.]” (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 [29 Cal.Rptr.2d 191].) “We resolve all factual

⁴ The same definition of “dating relationship” appears in Penal Code section 243, subdivision (f)(10). Section 243, subdivision (e)(1) applies to a battery committed against “a person with whom the defendant currently has, or has previously had, a dating . . . relationship.”

conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences to support the trial court's order. [Citation.]” (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390 [33 Cal.Rptr.3d 644].) “[T]he substantial evidence standard of review is generally considered the most difficult standard of review to meet. . . . In deciding whether to raise a substantial evidence claim on appeal, appellate counsel should keep in mind that the appellate court ‘accept[s] the evidence most favorable to the order as true and discard[s] the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact.’ [Citation.]” (*In re Michael G.* (2012) 203 Cal.App.4th 580, 595 [137 Cal.Rptr.3d 476].)

■ Substantial evidence supports the trial court's express finding that a dating relationship existed because a reasonable trier of fact could find that the parties had “frequent, intimate associations primarily characterized by the expectation of affection” (§ 6210.) Respondent declared: “We were friends for several months. During that time, we spent time together, dined out on occasion, and [appellant] stayed in my home for several days” Respondent sent a message to appellant stating that he had a strong emotional “hold” on her. She complimented him on a kiss that he had given her. In an e-mail to appellant dated November 22, 2012, respondent said: “[T]hat hug in the doorway and your hand on my lower back felt good.” “[T]he moments we were close (either wrestling on the couch, or when you were laying in bed with me), seemed more platonic, versus romantic.” Respondent referred to “[t]he time we've both invested to build our relationship over the past 7 months, . . . strengthening our love and respect for each other.”

In his communications with respondent after she had rebuffed his advances, appellant made clear that he considered their relationship to have been more than a mere friendship. He accused her of “leading [him] on” while she was dating someone else. Appellant wrote: “What do u call telling me u love me but ur . . . [with] someone else?” “You can combine all those [other] guys . . . , and [they] still did not do for you what I did.” “Didn't you tell me you wld always remember me and what a huge impact I had on your heart and life?” “At least I wont hv to deal with u ever again. How does tht make u feel that [the] only guy [i.e., appellant] u fell in love with ever would rather be dead than hear or see from u again?” “Ppl [people are] probably confused after u lying so much about me but then seeing how much love you had for me.”

Appellant's statements to the trial court also showed that his relationship with respondent was more than just a friendship. At the hearing on February 26, 2015, appellant told the court that he thought “[respondent] was falling in love with me.” Appellant acknowledged that he had said to her, “‘You really

couldn't understand why someone [i.e., appellant] loved you for just you without sex.' ” Although there is no evidence that the parties had sexual relations, appellant admitted that in December 2012 he had sent nude photographs of himself to respondent. The nude photographs are evidence of “intimate associations” and an “expectation of . . . sexual involvement” within the meaning of section 6210. Appellant, however, stated to the court that “[t]here was nothing inappropriate about” the photographs, which had been taken when he “was nude modeling.”

Respondent denied that her relationship with appellant involved “dating” as that term is commonly understood. In her application for a restraining order, she noted that the parties had “discussed [the] possibility of dating.” In her November 22, 2012 e-mail to appellant, respondent said that they were “just remaining friends” and “weren’t dating, whether casually, socially, or non-committed dating.”

The trial court was not required to accept, and did not accept, respondent’s characterization of the parties’ relationship. Respondent never conceded that the parties did not have a “dating relationship” within the meaning of section 6210. Whether a dating relationship existed was a factual question to be decided by the trial court based upon all of the evidence. The trial court stated: “[A]lthough in one portion [of the e-mail respondent] says . . . something about, ‘We don’t have a dating relationship,’ you do have a relationship by this evidence. All of the evidence shows there was an expectation of affection or desire to have affection . . . So although you guys may have called it ‘We are not dating’ or ‘We don’t want to date,’ you certainly have all the attributes, it looks like, [of a dating relationship] under [section] 6210 of the Family Code.” When appellant protested that he had never actually gone on a date with respondent, the court replied: “What I have seen in these papers is that you guys had lots of communication, that you actually stayed at her residence . . . So that’s where I’m seeing there was something more to this than to say, ‘We never went on a date.’ ”

■ The trial court drew reasonable inferences from the evidence in concluding that there was a dating relationship. “[A] finding . . . based upon a reasonable inference . . . will not be set aside by an appellate court unless it appears that the inference was wholly irreconcilable with the evidence. [Citations.]” (*Fibreboard*, *supra*, 227 Cal.App.2d at p. 697.) “[W]hen the evidence gives rise to conflicting reasonable inferences, one of which supports the finding of the trial court, the trial court’s finding is conclusive on appeal. [Citation.]” (*Rubin v. Los Angeles Fed. Sav. & Loan Assn.* (1984) 159 Cal.App.3d 292, 298 [205 Cal.Rptr. 455].) Appellant has not demonstrated, as a matter of law, that the trial court erred in exercising its traditional power to draw reasonable inferences from the evidence.

Claim of Nonviolent Conduct

In his opening brief appellant states: “A record involving an indication of ‘Domestic Violence’ is a serious charge and has irreparable repercussions to a person’s reputation. It is alarming that the [trial] court would rule against a male Appellant in this way when there was never any ‘domestic’ and never an occurrence of any ‘violence’ by Appellant. Domestic violence by definition is violent or aggressive behavior within the home, typically involving the violent abuse of a spouse or partner. . . . [¶] The DVPA was created to protect people . . . who have legitimate fears of physical harm from a domestic partner.”

At oral argument before this court, appellant complained that he is subject to a domestic violence restraining order even though his conduct was nonviolent. Appellant stated, “I can’t get a job with a domestic violence restraining order on my record. If they do a background check, it shows up and everybody thinks I’m a violent monster This isn’t domestic violence. It should be a harassment civil suit”

Except for an incident in Wisconsin, the record contains no evidence of appellant’s use or threatened use of physical force against respondent. The incident occurred in June 2013, when appellant was subject to the Tennessee protective order. Respondent declared that appellant had “approached [her], grabbed [her] arm, and turned [her] around to talk to him.” Respondent claimed that she has “a documented police report for this incident in Wisconsin.”

■ Whether or not respondent is reasonably fearful that appellant will physically harm her, there is no DVPA requirement of a physical threat. Thus, there is no basis for appellant’s claim at oral argument, “This isn’t domestic violence.” Nor is there any basis for the claim in his opening brief, “The DVPA was created to protect people . . . who have legitimate fears of physical harm from a domestic partner.” “Violence,” as that word is commonly defined, is not a prerequisite for obtaining a restraining order under the DVPA. The dictionary definition of “violence” is “the exertion of any physical force so as to injure or abuse.” (Webster’s 3d New Internat. Dict. (1981) p. 2554.) The DVPA, however, defines “domestic violence” as “abuse.” (§ 6211.) “Abuse is not limited to the actual infliction of physical injury or assault.” (§ 6203, subd. (b).) For purposes of the DVPA, “abuse” means, *inter alia*, “[t]o engage in any behavior that has been or could be enjoined pursuant to Section 6320.” (§ 6203, subd. (a)(4).) Section 6320, subdivision (a) permits the court to enjoin a party from “harassing . . . or disturbing the peace of the other party”

“[T]he plain meaning of the phrase “disturbing the peace of the other party” in section 6320 may be properly understood as conduct that destroys the mental or emotional calm of the other party. . . . Therefore, the plain meaning of the phrase “disturbing the peace” in section 6320 may include, as abuse within the meaning of the DVPA, a former husband’s alleged conduct in destroying the mental or emotional calm of his former wife” [Citation.]” (*Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1146 [167 Cal.Rptr.3d 664].) “There was substantial evidence presented at trial to support the trial court’s finding that [appellant] disturbed the peace of [respondent], an act of ‘abuse’ under the DVPA.” (*Id.* at p. 1147.)

First Amendment

The trial court ordered appellant to “not post photographs, videos, or information about [respondent] to any internet site” and to “remove the same from any internet site over which he has access or control.” Appellant argues that the order violated his “First Amendment rights of freedom of speech and expression.” He explains: “Appellant’s pictures and postings are innocuous toward [respondent] None of appellant’s postings or photos are derogatory, threatening, . . . or violate any other item covered under the First Amendment.”

■ Appellant “did not raise [this] constitutional issue[] below and do[es] not explain why [it is] being raised for the first time on appeal. [¶] Points not raised in the trial court will not be considered on appeal. [Citation.] ‘Even a constitutional right must be raised at the trial level to preserve the issue on appeal [citation].’ [Citation.] In civil cases, constitutional questions not raised in the trial court are considered waived. [Citation.]” (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486 [61 Cal.Rptr.2d 341].)

■ Moreover, appellant forfeited the issue because he has failed to present meaningful legal and factual analysis, with supporting citations to pertinent authority and the record, on why his first amendment rights were violated. “Under well-established principles of appellate review, ‘[t]o demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.] [Appellant’s] conclusory assertion[] [that his First Amendment rights were violated] fail[s] to properly tender the issue for appellate review.’” (*Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 587–588 [183 Cal.Rptr.3d 898].)

If the issue were properly before us, we would “reject [appellant’s First Amendment] argument because [his] ability to continue to engage in activity that has been determined after a hearing to constitute abuse [under the

[REDACTED]

DVPA] is not the type of ‘speech’ afforded constitutional protection.” (*In re Marriage of Evilsizer & Sweeney* (2015) 237 Cal.App.4th 1416, 1427 [189 Cal.Rptr.3d 1].)

Disposition

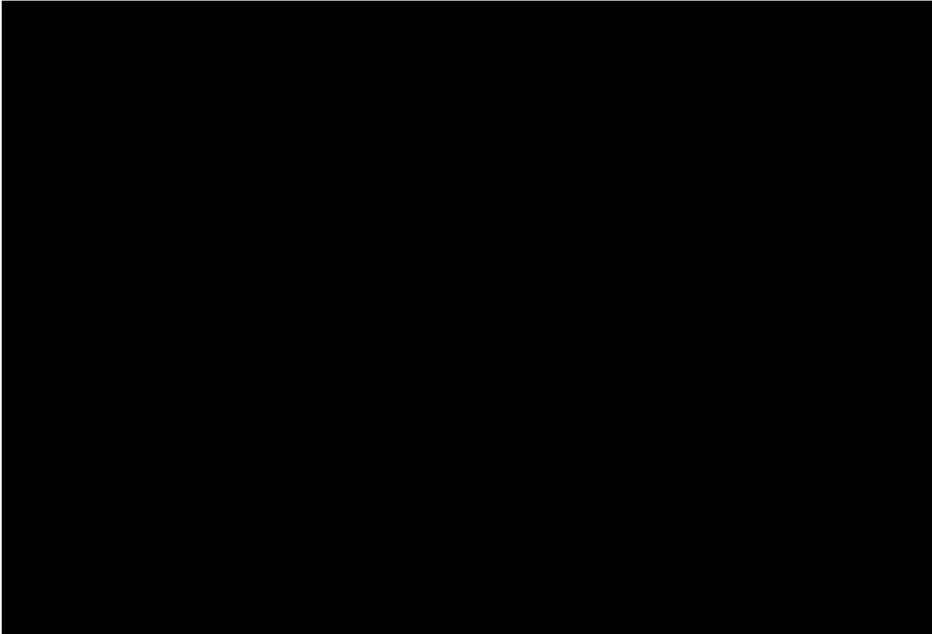
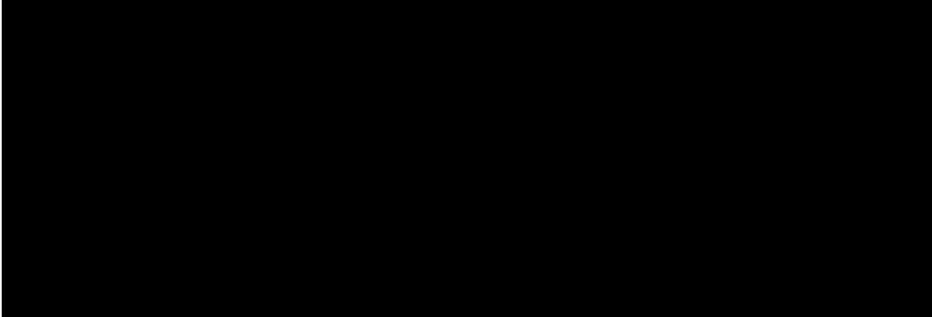
The judgment (DVPA restraining order) is affirmed. Respondent is awarded costs on appeal.

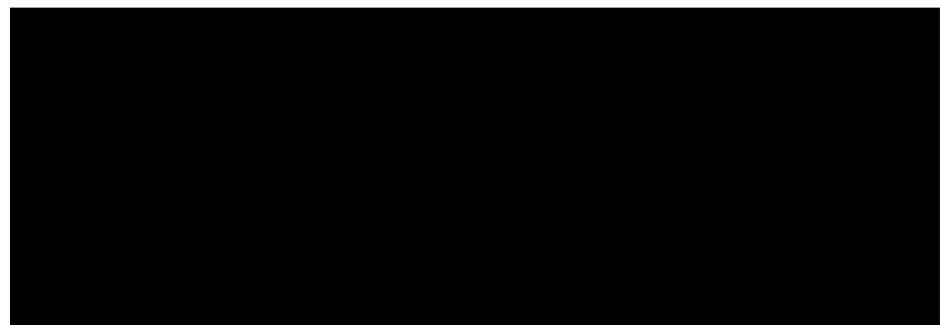
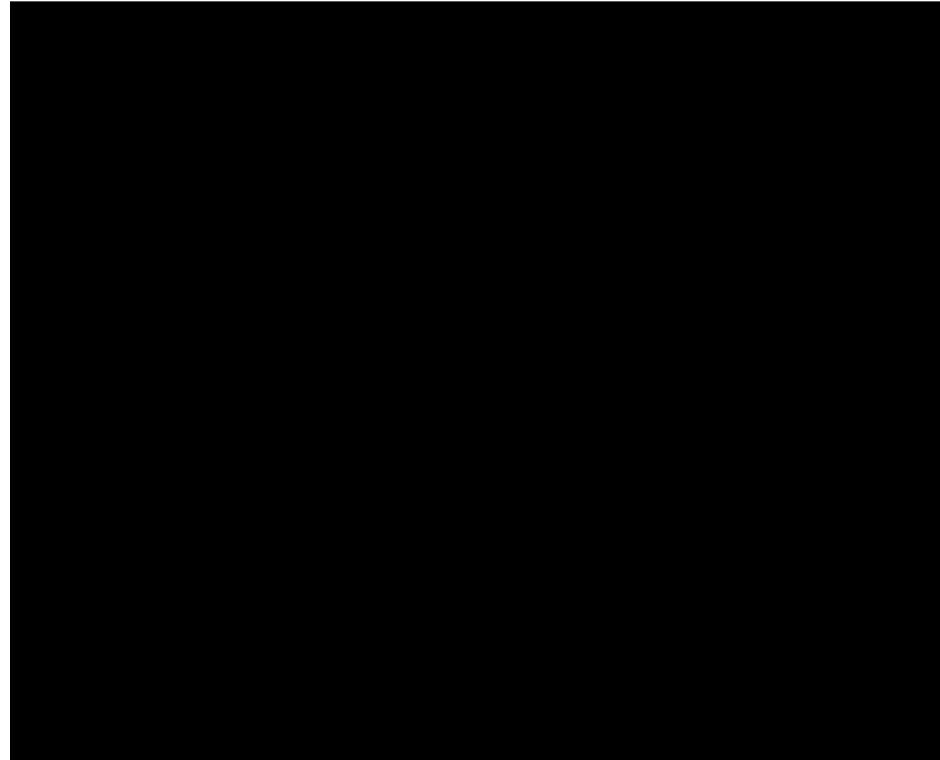
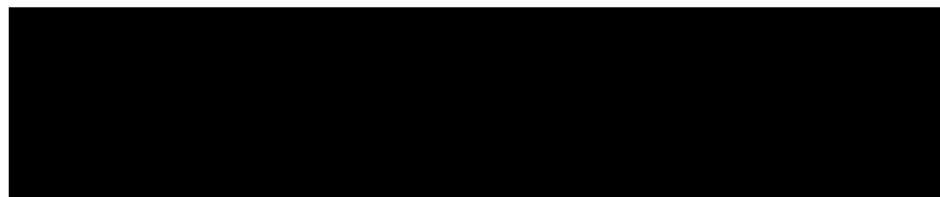
Gilbert, P. J., and Perren, J., concurred.

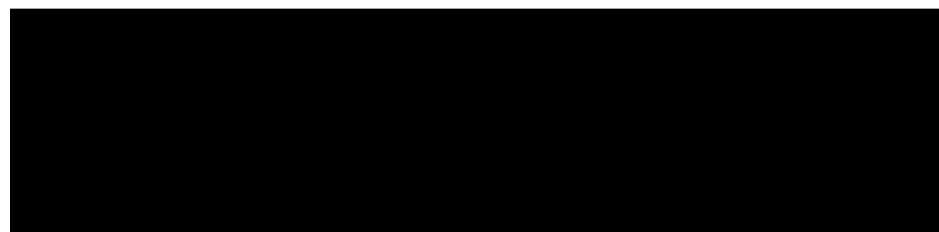
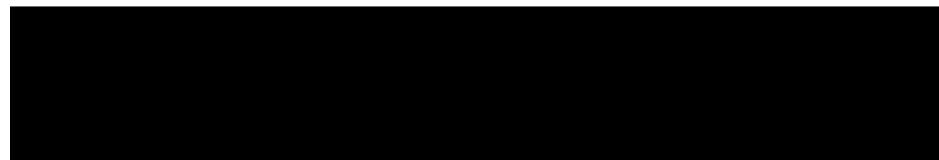
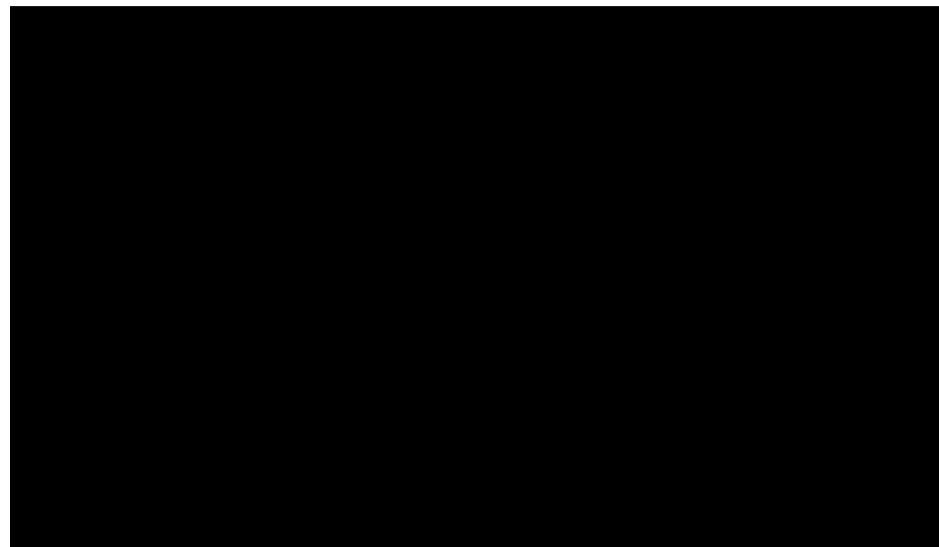
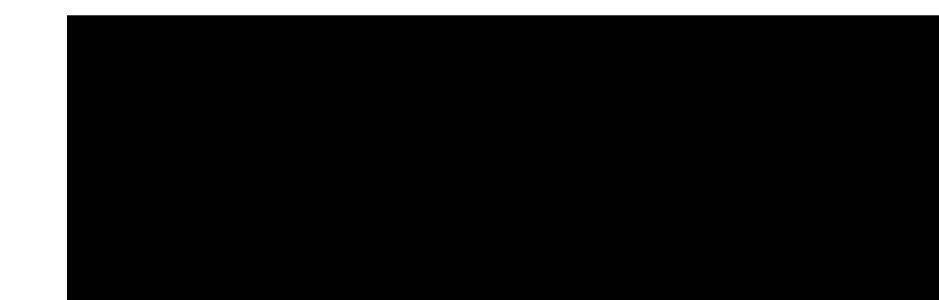
A petition for a rehearing was denied September 19, 2016, and appellant’s petition for review by the Supreme Court was denied November 9, 2016, S237473.

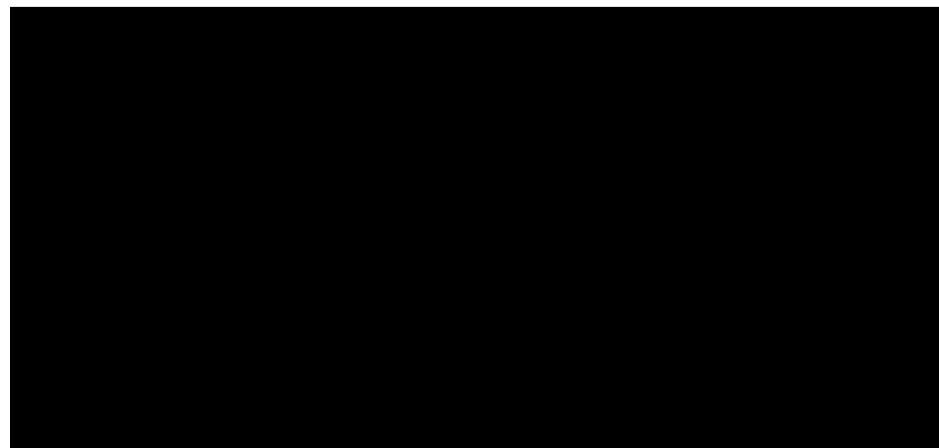
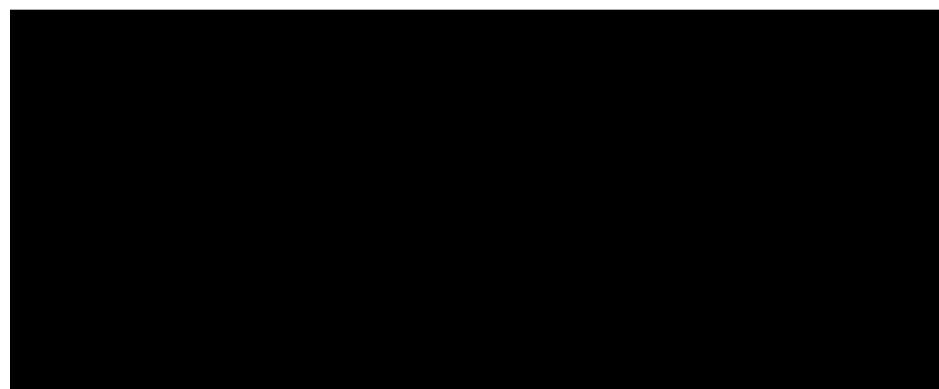
[No. D069899. Fourth Dist., Div. One. July 29, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
ERIK AUSTIN FLORES et al., Defendants and Appellants.









[REDACTED]

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[REDACTED]

COUNSEL

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant Erik Austin Flores.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant Mariah Rita Sugg.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne G. McGinnis and Jennifer B. Truong, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

McDONALD, J.—Defendant Erik Austin Flores is the father of three young children (John Doe 1, John Doe 2, and Jane Doe) who were the victims of the charged offenses. The information alleged that, between April 1, 2011, and June 5, 2014, Flores committed torture (Pen. Code, § 206; count 3)¹ and child abuse (§ 273a, subd. (a); count 4) on Jane Doe. The information further alleged that, during that same period, Flores committed torture (§ 206; count 7) and child abuse (§ 273a, subd. (a); count 8) on John Doe 2. The information further alleged that, during the same period, Flores committed child abuse (§ 273a, subd. (a); count 10) on John Doe 1. Finally, the information specifically alleged that Flores personally inflicted great bodily injury (§ 12022.7, subd. (d)) on the victims in connection with counts 4, 8 and 10.

Defendant Mariah Sugg had an “off-and-on” girlfriend relationship with Flores, and was separately charged with the same set of offenses against the same victims, but with differing windows of commission. The information alleged that, between December 1, 2012, and June 5, 2014, Sugg committed torture (§ 206; count 1) and child abuse (§ 273a, subd. (a); count 2) on Jane Doe. The information further alleged that Sugg committed torture (§ 206; count 5) and child abuse (§ 273a, subd. (a); count 6) on John Doe 2. The information further alleged Sugg committed child abuse (§ 273a, subd. (a); count 9) on John Doe 1. Finally, the information specifically alleged that Sugg personally inflicted great bodily injury (§ 12022.7, subd. (d)) on the victims in connection with counts 2, 6 and 9.

The jury convicted Flores and Sugg on all counts, and found true the allegations Sugg personally inflicted great bodily injury in connection with counts 2 and 6 and that Flores personally inflicted great bodily injury in connection with counts 4 and 8. The court sentenced each defendant to two life terms plus six years, and imposed but stayed the sentence on the remaining convictions and true findings.

On appeal, Flores argues the court prejudicially erred by instructing the jury it could return guilty verdicts on the torture counts as an aider and

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

abettor of Sugg under the natural and probable consequences doctrine. He also asserts the evidence was insufficient to support the torture convictions because there was no evidence either he or Sugg had the specific intent to cause cruel or extreme pain or suffering for the purposes of revenge, persuasion or any sadistic purpose.² In Sugg's separate appeal, she claims section 273a, subdivision (a), is unconstitutional based on vagueness and, alternatively, that the court was sua sponte required to instruct that the jury could not find her guilty of violating section 273a under the "willfully . . . permits" prong of that statute unless the jury found she had a duty to control Flores's conduct.

FACTS³

A. Background

Flores is the father of John Doe 1, John Doe 2, and Jane Doe. The children's biological mother left Flores and took the children with her to Oregon in September 2011, but a few months later she sent the children to live with Flores because she had no money and was unable to care for them. She expected that it would be a temporary placement and that she would take the children back after she found a good job.

Flores was living with Janice N. (his then girlfriend) and Janice's mother (Claudia) when the children were sent to live with him. Because Flores and Janice were homeless but Janice had a job, Flores would drive Janice to work and then take the children to the park, and they would return to Claudia's home after Janice finished work. Claudia noticed the children always returned home hungry, and she asked Flores on several occasions whether the children ate during the day, but Flores responded angrily by telling her, "Don't tell me f— what to do with my kids, what to feed my kids."

² Flores also asserts, in a claim joined in by Sugg, there are clerical errors in the minute order and abstract of judgment that must be corrected, because the court's oral pronouncement of sentence imposed a life term on counts 3 and 7 (as to Flores) and counts 1 and 5 (as to Sugg) but the minute order and abstract of judgment show a term of seven years to life was imposed on each of those counts. Flores and Sugg argue, and the People concede, that because the court's oral pronouncement of sentence controls over the minute order and abstract of judgment (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [121 Cal.Rptr.2d 603, 48 P.3d 1155]), it must be corrected to show life terms on each of the correct counts. We agree and, on remand, the trial court shall correct the minute orders and abstracts of judgment to reflect imposition of life terms on counts 3 and 7 as to Flores and counts 1 and 5 as to Sugg. (*People v. Mitchell* (2001) 26 Cal.4th 181, 186–187 [109 Cal.Rptr.2d 303, 26 P.3d 1040].)

³ Where, as here, a defendant contends the evidence is insufficient to support his conviction, we 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." (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [162 Cal.Rptr. 431, 606 P.2d 738].) We state the facts in the light most favorable to the judgment.

Janice's aunt and uncle, Jose and Erika, also saw that Flores's children were skinny, hungry, dirty and neglected. Jose offered them food every time he saw them, and they would eat over and over again, consuming as much as possible. When Jose offered the children food while Flores was present, the children would ask Flores for permission to eat, which Jose thought was unusual. When he learned Flores, Janice and the children were living out of their car, Jose offered to let the children stay with him and his wife, and Flores accepted. The children lived with Jose and his wife for a couple of months beginning around April 2012. The children were pale and hungry when they came to live with Jose, and ate "a lot" during the months they lived with him. One day, while changing Jane Doe's diaper, Claudia noticed her genital area looked very red and swollen, and they suspected there had been sexual abuse, but made no report of the suspected abuse until later.⁴

Jose wanted to keep the children but ultimately had to return them after Flores called police and claimed Jose had kidnapped them. When police came to Jose's home, Jose did not mention the suspected sexual abuse but did say the children were not ready to go home because Flores had no home, but police told Jose that Flores was the father and could take the children. Jose reported the suspected sexual abuse after Flores removed the children from Jose's home.

B. *Flores's Relationship with Sugg*

By the summer of 2012, after Flores regained custody of his children from Jose, he and his children had moved to Hesperia, California. A social worker, apparently responding to Jose's report of possible abuse, visited the children at Flores's mother's home sometime in May 2012 to investigate the condition of the children. When the social worker visited them, they appeared healthy. After a few follow-up visits that summer, including one after Flores and the children moved in with Sugg, the social worker closed the case.

Flores was involved in an "off-and-on" romantic relationship with Sugg. By August of 2012, Flores and the children had moved in with Sugg, and

⁴ Jose and Erika enrolled the children in preschool and daycare, and the owner of the daycare (Ms. Moran) noticed Jane Doe did not talk (which Moran thought unusual for that age), kept to herself, and her hair was thin. They had to feed Jane Doe, even though she was two years old, and Moran saw Jane Doe's ribs protruded. Moran also noticed Jane Doe would flinch when her diaper was changed and that her "private area looked swollen." Moran ultimately reported her concerns of possible sexual abuse because of the flinching and the swelling around Jane Doe's genital area.

they were living with Sugg when the authorities finally intervened in June 2014 to remove the children from their care.⁵

C. *The 2014 Reports and Actions*

Sonia Jorge worked as a clerk at a grocery store in Hesperia, California. Beginning sometime in the first quarter of 2014, Jorge noticed Sugg (accompanied by a small boy and small girl) frequenting the store on Mondays. Both children were “so skinny” they were “almost bones.” On one occasion, the girl’s forehead was bruised and the boy had a black eye. Another employee asked Sugg if she could give the children some change. When the children lifted their hands to accept the change, they were looking at Sugg and their hands were shaking. Jorge also offered the children a cookie, but Sugg refused the offer, saying they could not have cookies because they would make a mess in the car. Jorge responded she was sure they were good kids, but Sugg said they were only good around other people and told Jorge she could take the children. Jorge telephoned the department of children’s services (DCS) and reported the bruising she had seen and provided DCS with Sugg’s license plate number, but DCS did not follow up on that report.

In May 2014 Sugg and Flores went to a beauty school to enroll Sugg in a program offered at the school. They were accompanied by Jane Doe and John Doe 2. The school director, Ms. Armas, saw the children were so thin their skin hung off their arms and they were able to sit side by side in a normal chair. She tried to talk to the children, but they “had no energy whatsoever.” John Doe’s eyes were dark and sunken, and he had dark circles under his eyes. He also had bruises on his forehead and shins, and his skin had no color.⁶

Armas telephoned the San Bernardino County Department of Children and Family Services and reported Flores and Sugg, and told the authorities the children looked malnourished, emaciated, and looked as though they’d been in a concentration camp. Ms. Jones, a social services worker, went to Sugg’s home on May 22, 2014, to investigate the report, but Sugg told her that Flores was not home and said Jones would need Flores’s permission to have contact with the children. Jones returned a week later, after obtaining Flores’s

⁵ In a statement to police after the children were taken away, Flores said he moved in with Sugg to help with rent and expenses. He said he had moved back in with his mother for a period beginning in October 2013 because she had back surgery and needed his help, but by March 2014 Flores and the children had moved back in with Sugg.

⁶ Other people at the beauty school were equally shocked by the children’s appearance, looking like they had come out of a horror movie. One witness indicated they sat in a chair, holding hands, and did not move or make a sound, and “you could just see and sense the fear . . . of these kids.”

permission, and saw the children in their backyard. John Doe 2 and Jane Doe appeared thin, and Jane Doe (then four years old) was wearing a diaper and not speaking. Sugg told Jones they received food stamps and WIC (Women, Infants, and Children) nutrition money for Jane Doe, and Jones checked and found there was adequate food in the house. Sugg told Jones that Sugg cared for the children during the day while Flores was in school, and claimed she fed the children during the day and typically at night. Jones told Sugg a public health nurse would be coming to their home.

Jones spoke with the nurse on June 5, 2014, who expressed concerns about possible malnourishment. Jones contacted Flores and told him he needed to get the children to a doctor as soon as possible. After several conversations, he told Jones he could not get an appointment until the end of June. Jones was uncomfortable with that timetable but Flores became upset at her insistence that immediate action was required and demanded to talk to a supervisor. That request was accommodated, and Flores then called Jones back and asked if taking the children to an emergency room would "just end this." Jones agreed, and Flores took the children to an emergency room.

The emergency room doctor diagnosed the children with severe malnutrition and neglect and told Jones the children needed to be admitted to a hospital within a week. The next day, Jones obtained a detention warrant and removed the children from Flores and Sugg's home. Jones stopped at a McDonald's with the children and John Doe 2 ate all of his breakfast, part of Jane Doe's breakfast, and said he was still hungry and repeatedly asked for more food. Jane Doe vomited 20 to 30 minutes after eating. Jones also changed Jane Doe's diaper and noticed she was inflamed and red, and flinched when Jones wiped her. Jane Doe's vagina appeared "a lot more open than what a four-year old's vagina . . . should look like, it looked like there was a hemorrhoid and discharge."

Dr. Massi, a forensic pediatrician, examined John Doe 2 and Jane Doe. He concluded their condition resulted from deprivation of adequate nutrition for a long period of time. Jane Doe's condition was "approaching death": she was four years 10 months old but weighed only 22 pounds. John Doe 2, who was five years old but weighed just over 32 pounds, could have died had he not been hospitalized. Both had abnormally low heartbeats that were concerning, had developed lanugo from prolonged malnutrition, and had suffered pancreatic injury. Jane Doe also had scarring and trauma to her genitalia consistent with having been penetrated, and showed behavioral signs of emotional trauma as well. John Doe 2 had scrapes and abrasions on his legs, left shoulder and forehead. Dr. Massi also explained the deleterious consequences of their condition over the remainder of their lives. The social worker who had investigated the condition of the children in mid-2012 saw

them again after they had been detained in June 2014 and described them as “[u]nrecognizable” at that time.

D. *Evidence from John Doe 1 and John Doe 2*

A social worker interviewed John Doe 2, who described Sugg as his “new mom that’s mean.” John Doe 2 told the social worker that Sugg did not feed him or his brother, and John Doe 2 told Flores about that. John Doe 2 told the social worker Sugg made him stay outside and in the garage when Flores was gone, but Flores told John Doe 2 that he did not want to stand up for the children because they were too old and did not behave for him. Sugg beat John Doe 1 and John Doe 2 because she wanted them to go outside. John Doe 2 told the social worker that, in one incident, Sugg beat him with a belt and didn’t care that it made him bleed. Flores saw this and told her to stop, and physically assaulted Sugg, but Flores then left the house and left the children alone with Sugg.

John Doe 1 testified at trial that Sugg was abusive, including making them run around the car in the garage at night until they had to go to bed. He described an occasion when Sugg and Flores punished the children (because John Doe 2 took some cookies while John Doe 1 was supposed to be watching him) by making all three children spend part of the night in the garage without blankets. John Doe 1 testified he was scared because he thought the garage was full of spiders that would bite him, but Flores and Sugg were laughing about it.

Sugg did not feed them enough food,⁷ and Flores was aware the children were not getting enough food. Sugg forced the children to do exercises all day while she watched television or laughed at them. She denied their requests for more food, and even denied requests for water and made them stand in the corner for asking for water. On one occasion, John Doe 1 saw Jane Doe drinking water from the toilet.

Sugg hit all three children, including the use of a belt and a hanger, and did so without explanation. Flores also hit the children. Sugg frequently made the children stand in the corner, from breakfast until lunch, and John Doe 1 often did not know why. When Flores came home, he did not stop it, but made them continue standing in the corner. Sugg assigned John Doe 1 over 30 chores, including cleaning the toilets, which were impossible to complete in a single day. Sometimes he had to stand in the corner all day as punishment for not finishing his chores the previous day, and was only allowed to sit to eat

⁷ For example, John Doe 1 told a detective Sugg would give him a third of a cup of macaroni and cheese for dinner, or would strip off the breading from a single corn dog and give him one half of the remaining meat for his meal while she consumed the rest.

his meals. Sugg also punished the children by forcing them to do exercises, like push-ups, sit-ups, jumping jacks, or running in place, and sometimes required such exercise all day until it was bedtime. Flores was aware of Sugg's methods of punishment and disagreed with them; although Flores occasionally took the children away for a few days, he always returned to Sugg with the children.

E. *The Defense*

When asked if he had ever seen the children mistreated, a neighbor testified he never saw anything out of the ordinary.

II

ANALYSIS OF FLORES'S APPELLATE CLAIMS

A. *The Aider and Abettor Instruction Was Proper*

Flores argues the court's instructions were prejudicially erroneous because this permitted the jury to find Flores guilty of the nontarget offense of torture if it concluded (1) he aided and abetted Sugg in the target offense of felony child abuse and (2) the torture by Sugg was a natural and probable consequence of the felony child abuse he aided and abetted. He argues that, under *People v. Chiu* (2014) 59 Cal.4th 155 [172 Cal.Rptr.3d 438, 325 P.3d 972] (*Chiu*), that instruction was erroneous and the error cannot be deemed harmless.

Aider and Abettor Liability

■ An aider and abettor may be convicted for crimes committed by the direct perpetrator under two alternative theories: under direct aiding and abetting principles and under the so-called "natural and probable consequences doctrine." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117–1118 [108 Cal.Rptr.2d 188, 24 P.3d 1210].) Under direct aiding and abetting principles, the defendant is guilty of the intended (or "target") offense if he or she acted with knowledge of the criminal purpose of the direct perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the target offense. (*Id.* at p. 1118.) However, an aider and abettor can also be guilty of unintended crimes under the "natural and probable consequences" doctrine: when the aider and abettor acts with knowledge of the criminal purpose of the direct perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the target offense, he or she is guilty of both the intended (target) crime and any other offense (the "nontarget offense") committed by his or her

confederate that was a “natural and probable consequence” of the target crime he or she aided and abetted. (See *id.* at p. 1117; accord, *People v. Sattiewhite* (2014) 59 Cal.4th 446, 472 [174 Cal.Rptr.3d 1, 328 P.3d 1] [“ ‘an aider and abettor is guilty not only of the offense he intended to encourage or facilitate, but also of any reasonably foreseeable offense committed by the perpetrator he aids and abets’ ”].) Under the natural and probable consequences doctrine, “[b]ecause the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime. It follows that the aider and abettor will always be ‘equally guilty’ with the direct perpetrator of an unintended crime that is the natural and probable consequence of the intended crime.” (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 852 [128 Cal.Rptr.3d 565].)

Chiu

In *Chiu, supra*, 59 Cal.4th 155, the court addressed whether an aider and abettor who knew of and intended to facilitate a target offense could be convicted of the nontarget offense of *premeditated* murder under the natural and probable consequences doctrine if the direct perpetrator committed premeditated murder and premeditated murder was a natural and probable consequence of the target crime. *Chiu* concluded that, although an aider and abettor may be convicted of premeditated murder under *direct* aiding and abetting principles, an aider and abettor cannot be convicted of the nontarget offense of first degree *premeditated* murder under the natural and probable consequences doctrine, but may only be convicted of second degree murder under that doctrine. (*Id.* at pp. 158–159, 165.)

Chiu, after noting it had not considered aider and abettor liability for first degree premeditated murder under the natural and probable consequences doctrine, articulated its reasons for concluding an aider and abettor cannot be convicted of the nontarget offense of first degree premeditated murder under that doctrine. (*Chiu, supra*, 59 Cal.4th at pp. 163–167.) *Chiu* noted the natural and probable consequences doctrine is a common law doctrine “firmly entrenched in California law” (*id.* at p. 163) but, because it is not part of the statutory scheme, the court “may . . . determine the extent of aiding and abetting liability for a particular offense, keeping in mind the rational function that the doctrine is designed to serve and with the goal of avoiding any unfairness which might redound from too broad an application” (*id.* at p. 164). *Chiu* recognized aider and abettor culpability under the natural and probable consequences doctrine “is vicarious in nature” because it is “‘not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a

natural and probable consequence of the target offense. [Citation.] Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.’” (*Chiu*, at p. 164, quoting *People v. Canizalez*, *supra*, 197 Cal.App.4th at p. 852.)

Chiu explained the natural and probable consequences doctrine is based on the principle that liability extends to reach “‘the actual, rather than the planned or “intended” crime, committed on the *policy* [that] . . . aiders and abettors should be responsible for the criminal *harms* they have naturally, probably, and foreseeably put in motion.’” (*Chiu, supra*, 59 Cal.4th at p. 164, italics added, quoting *People v. Luparello* (1986) 187 Cal.App.3d 410, 439 [231 Cal.Rptr. 832].) *Chiu* concluded that, because the application of the natural and probable consequences doctrine does not depend on the foreseeability of every element of the nontarget offense but instead (at least in the context of murder under the natural and probable consequences doctrine) has focused on the reasonable foreseeability of the *actual resulting harm*, “the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing . . . is served by holding them culpable for the perpetrator’s commission of the nontarget offense of second degree murder.” (*Id.* at p. 165.) *Chiu* declared that limiting aider and abettor liability under the natural and probable consequences doctrine to second degree murder is “consistent with reasonable concepts of culpability. Aider and abettor liability under the natural and probable consequences doctrine does not require assistance with or actual knowledge and intent relating to the nontarget offense, nor subjective foreseeability of either that offense or the perpetrator’s state of mind in committing it. [Citation.] It only requires that under all of the circumstances presented, a reasonable person in the defendant’s position would have or should have known that the nontarget offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant. [Citation.] [¶] However, *this same public policy concern loses its force in the context of a defendant’s liability as an aider and abettor of a first degree premeditated murder*. First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation, which trigger a heightened penalty. [Citation.] That mental state is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death. [Citations.] Additionally, *whether a direct perpetrator commits a nontarget offense of murder with or without premeditation and deliberation has no effect on the resultant harm. The victim has been killed regardless of the*

perpetrator's premeditative mental state. Although we have stated that an aider and abettor's 'punishment need not be finely calibrated to the criminal's mens rea' [citation], the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the above stated public policy concern of deterrence." (*Chiu, supra*, 59 Cal.4th at pp. 165–166, italics added.)

Analysis

Flores, although acknowledging *Chiu* examined only an aider and abettor's liability for first degree murder on a natural and probable consequences theory, asserts the same rationale employed in *Chiu* should apply to an aider and abettor's liability for torture on a natural and probable consequences theory, because torture is also focused on the mental state of the direct perpetrator rather than on the pain inflicted on the victim. (See, e.g., *People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739].)

■ We conclude *Chiu* is limited to an aider and abettor's liability on a natural and probable consequences theory for first degree murder, and the animating concerns of *Chiu* are not sufficiently analogous to extend its application to an aider and abettor's liability on a natural and probable consequences theory for torture. First degree murder, apart from the felony-murder variety, requires both that the direct perpetrator acted with the specific intent to kill and that the direct perpetrator acted willfully, deliberately and with premeditation. (*Chiu, supra*, 59 Cal.4th at p. 166.) Our Supreme Court in *Chiu* held the latter components of that mental state (the willful, deliberate and premeditated aspect) was unique, explaining "[t]hat mental state is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*Ibid.*) However, although our Supreme Court concluded that policy reasons will excuse the aider and abettor from vicarious liability for the enhanced punishments applicable to first degree murder, it also concluded public policy underlying aider and abettor liability does *not* excuse the accomplice entirely, but instead is satisfied by an accomplice's second degree murder conviction: "In the context of murder, the natural and probable consequences doctrine serves the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing. A primary rationale for punishing such aiders and abettors—to deter them from aiding or encouraging the commission of offenses—is served by

holding them culpable for the perpetrator's commission of the nontarget offense of second degree murder. (*People v. Knoller* (2007) 41 Cal.4th 139, 143, 151–152 [59 Cal.Rptr.3d 157, 158 P.3d 731] [second degree murder is the intentional killing without premeditation and deliberation or an unlawful killing proximately caused by an intentional act, the natural consequences of which are dangerous to life, performed with knowledge of the danger and with conscious disregard for human life].)" (*Chiu, supra*, 59 Cal.4th at p. 165.)

■ In contrast, the crime of torture is akin to the crime of second degree murder and imposes punishment when the perpetrator causes a harm and has a specific mental state. Moreover, torture is not divided into degrees in which a uniquely subjective or personal intent element elevates the punishment above that imposed for a lesser form of torture. Finally, the public policy concerns discussed in *Chiu* are satisfied if Flores is held culpable (as an aider and abettor) for Sugg's conduct under the natural and probable consequences doctrine, because he aided and abetted the target offense of felony child abuse and facilitated escalation of that conduct into the nontarget offense.⁸ We conclude that, because *Chiu* approved liability for an aider and abettor for second degree murder under the natural and probable consequences doctrine, and the policy factors that animated *Chiu* to disapprove first degree murder culpability lack sufficient analogues to extend *Chiu* to aider and abettor liability for torture under the natural and probable consequences doctrine, the court did not err in instructing the jury on aider and abettor liability.

B. Substantial Evidence Supports the Convictions for Torture

Flores secondarily argues the evidence was insufficient to support the convictions for torture, because there is no substantial evidence either he or Sugg intended to inflict severe pain and suffering, and there was insufficient evidence they intended to inflict such pain for a purpose proscribed by statute.

Legal Framework

■ The crime of torture, as set forth in section 206, provides: "Every person who, with the intent to cause cruel or extreme pain and suffering for

⁸ Our evaluation of Flores's argument, and our conclusion *Chiu*'s limitations on the natural and probable consequences doctrine should not be extended to the offenses here, proceeds from the unstated assumption the jury found Flores guilty of felony child abuse (and the greater related crime of torture) on aiding and abetting principles rather than as the *direct* perpetrator of the felony child abuse and torture. However, we note the jury found *true* the allegations Flores *personally* inflicted great bodily injury in connection with the felony child abuse of the victims of the torture charged in counts 3 and 7, which undercuts the assumption the jury found him guilty based on aider and abettor principles. (See fn. 15, *post*.)

the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture. [¶] The crime of torture does not require any proof that the victim suffered pain.” Thus, “torture has two elements: (1) a person inflicted great bodily injury upon the person of another, and (2) the person inflicting the injury did so with specific intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose.” (*People v. Baker* (2002) 98 Cal.App.4th 1217, 1223 [120 Cal.Rptr.2d 313].)

When evaluating a challenge to the sufficiency of the evidence, our role is limited. The appellate 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.’” [Citations.] [¶] . . . But it is the *jury*, not the appellate court, which must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the *jury*.’” (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 468 [72 Cal.Rptr.2d 782], quoting *People v. Ceja* (1993) 4 Cal.4th 1134, 1138–1139 [17 Cal.Rptr.2d 375, 847 P.2d 55].) We must “‘presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence’” (*People v. Davis* (1995) 10 Cal.4th 463, 509 [41 Cal.Rptr.2d 826, 896 P.2d 119]), and we may not reweigh the evidence or reevaluate the credibility of witnesses (*People v. Green* (1997) 51 Cal.App.4th 1433, 1437 [59 Cal.Rptr.2d 913]). “Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact’s verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it.” (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1765 [24 Cal.Rptr.2d 321].)

Analysis

■ The first element of torture requires evidence Flores or Sugg *intended* to inflict extreme or severe pain. (*People v. Burton* (2006) 143 Cal.App.4th 447, 452 [49 Cal.Rptr.3d 334].) The courts have recognized that “[i]ntent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense” (*People v. Pre, supra*, 117 Cal.App.4th at p. 420), and “[a]bsent direct evidence of such intent, the circumstances of the offense can establish the intent to inflict extreme or severe pain” (*Burton*, at p. 452). Flores does not dispute that prolonged starvation or excessive corporal punishment can qualify as extreme or severe

pain within the meaning of the torture statute,⁹ and instead asserts only that there was no evidence they *intended* their conduct to inflict severe pain. However, a jury may consider all of the circumstances (*People v. Misa* (2006) 140 Cal.App.4th 837, 843 [44 Cal.Rptr.3d 805]), including the severity of the injuries (*People v. Burton, supra*, 143 Cal.App.4th at p. 452), to determine whether the defendant intended to inflict cruel or extreme pain. Here, two of the victims were so obviously emaciated that a lay witness testified it looked as though they'd been in a concentration camp, and the doctor who examined them testified Jane Doe's condition was "approaching death" and that John Doe 2 could have died had he not been hospitalized. There was substantial evidence from which a jury could infer Flores and Sugg intended to inflict cruel and extreme pain on these victims.

■ Flores alternatively argues there is no substantial evidence to satisfy the second prong of torture because, even assuming the evidence supported a finding that Flores and Sugg intended to cause cruel and extreme pain and suffering, there was no evidence they did so "for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." (§ 206.) However, inflicting cruel and extreme pain and suffering to discipline children appears to be encompassed within the torture statute (see, e.g., *People v. Jennings* (2010) 50 Cal.4th 616, 685 [114 Cal.Rptr.3d 133, 237 P.3d 474] [noting deliberate act of starving a child when employed as a behavior modification technique can qualify as torture]), and there is evidence from which a jury could have concluded Sugg employed beatings and food deprivation to discipline Flores's children, and Flores knew of and acquiesced to Sugg's methods.¹⁰

We conclude there was evidence from which a jury could have inferred Flores and Sugg inflicted great bodily injury on the victims with the intent to cause cruel and extreme pain and suffering for the purpose of persuasion, and therefore we affirm the convictions for torture as alleged in counts 3 and 7 against Flores.

⁹ Both forms of abuse appear to qualify under the torture statute (see *People v. Lewis* (2004) 120 Cal.App.4th 882, 887 [16 Cal.Rptr.3d 498] [stating in dicta that withholding food and water causing starvation can qualify as torture]; *People v. Assad* (2010) 189 Cal.App.4th 187, 196 [116 Cal.Rptr.3d 699] [beating with hose and belt]), and there is ample evidence from which a jury could conclude Flores and Sugg inflicted both forms of physical abuse here.

¹⁰ For example, when Sugg elected to discipline all three children (because one had eaten a cookie without permission) by making them sleep in the garage without blankets, and despite the distress it caused the children, Flores and Sugg were in the house laughing about it. Sugg also disciplined the children by making them stand all day in a corner and, when Flores returned home, he did nothing to relieve the children of that punishment; instead, they continued to have to stand in the corner. Indeed, when John Doe 2 told Flores about Sugg's mistreatment of them, Flores said he would not stand up for the children because they were too old and were not well behaved. On another occasion, when Sugg disciplined John Doe 2 by making him stand outside while everyone else was inside eating dinner, Flores did not countermand that discipline but instead told John Doe 2 to "just roll with it."

III

ANALYSIS OF SUGG'S APPELLATE CLAIMS

Sugg argues section 273a is unconstitutionally vague under the rationale of *People v. Heitzman* (1994) 9 Cal.4th 189 [37 Cal.Rptr.2d 236, 886 P.2d 1229] (*Heitzman*) because it facially permits a defendant to be convicted if he or she “permits” a child to suffer the requisite injury at the hands of another without expressly limiting its reach to defendants who were under an affirmative duty to act to protect the child from such injury. Sugg alternatively asserts that, even assuming the statute can be given the judicial gloss *Heitzman* superimposed on section 368, reversal is still required because the trial court’s instructions did not sua sponte incorporate that narrowing construction, and such omission cannot be deemed harmless under *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824] or even under the lesser standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243], and therefore asserts we should reverse all of the convictions.

A. Legal Framework

Section 273a

Section 273a has been described as “an omnibus statute that proscribes essentially four branches of conduct.” (*People v. Sargent* (1999) 19 Cal.4th 1206, 1215 [81 Cal.Rptr.2d 835, 970 P.2d 409] (*Sargent*).) The court in *People v. Valdez* (2002) 27 Cal.4th 778, 783 [118 Cal.Rptr.2d 3, 42 P.3d 511] (*Valdez*), characterized those four branches of proscribed conduct as follows: “As relevant here, [section 273a] provides: ‘Any person who, under circumstances or conditions likely to produce great bodily harm or death, [1] willfully causes or permits any child to suffer, or [2] inflicts thereon unjustifiable physical pain or mental suffering, or [3] having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or [4] willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.’ [Fn. omitted.]”

The courts have also stated that “a violation of [section 273a] can occur in a wide variety of situations: the definition broadly includes both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect.” (*People v. Smith* (1984) 35 Cal.3d 798, 806 [201 Cal.Rptr. 311, 678 P.2d 886].) In cases in which the defendant directly inflicted the requisite injury, the mens rea for the offense is the general intent to perform the underlying injurious act. (*Sargent, supra*, 19 Cal.4th at

pp. 1219–1224.) However, in examining the so-called “indirect abuse” (*Valdez, supra*, 27 Cal.4th at p. 784) or “‘passive conduct’” (*Sargent*, at p. 1216) context, in which the defendant’s actions or inactions indirectly cause the requisite harm to the child, *Valdez* concluded the mens rea for those aspects of section 273a criminalizing conduct that “‘willfully causes or permits’” the requisite injury is a criminal negligence standard (*Valdez*, at pp. 787–791).

Heitzman

■ In *Heitzman, supra*, 9 Cal.4th 189, our Supreme Court addressed a void-for-vagueness challenge to a section 368 charge, a statute “based almost verbatim on section 273a.” (*Valdez, supra*, 27 Cal.4th at p. 788.) *Heitzman* summarized the void-for-vagueness principles by explaining that a penal statute must “‘define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.’ (*Kolender v. Lawson* (1983) 461 U.S. 352, 357 [75 L.Ed.2d 903, 103 S.Ct. 1855]; [citation].) ¶ It is established that in order for a criminal statute to satisfy the dictates of due process, two requirements must be met. First, the provision must be definite enough to provide a standard of conduct for those whose activities are proscribed. [Citations.] Because we assume that individuals are free to choose between lawful and unlawful conduct, ‘we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly. Vague laws trap the innocent by not providing fair warning.’ (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108 [33 L.Ed.2d 222, 92 S.Ct. 2294]; [citation].) ¶ Second, the statute must provide definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement.” (*Heitzman, supra*, 9 Cal.4th at p. 199.)

The *Heitzman* court evaluated a challenge to a segment of section 368, which facially criminalized passive conduct (resulting in the requisite injury) by a certain category of persons, under these void-for-vagueness principles. (*Heitzman, supra*, 9 Cal.4th at p. 193.) The court began by noting the structure of section 368 “reaches two categories of offenders: (1) *any person* who willfully causes or permits an elder to suffer, or who directly inflicts, unjustifiable pain or mental suffering on any elder, and (2) the elder’s *caretaker or custodian* who willfully causes or permits injury to his or her charge, or who willfully causes or permits the elder to be placed in a dangerous situation.” (*Heitzman*, at p. 197.) The Supreme Court in *Heitzman* examined whether a defendant in the former category, who the prosecutor acknowledged was *not* the victim’s caretaker or custodian prosecutable under “that portion of the statute pertaining to caretakers or custodians” (*id.* at p. 206), could constitutionally be prosecuted as a member of the “any person”

category of potential defendants when her culpability under section 368 rested on her *inaction*. (See *Heitzman*, at pp. 206–214; *Valdez, supra*, 27 Cal.4th at p. 785 [“[i]n [*Heitzman*] . . . we addressed the class of persons who, in addition to caretakers and custodians, had a duty to prevent elder abuse”].)

■ *Heitzman*, after observing the statute “may be applied to a wide range of abusive situations, including within its scope active, assaultive conduct, as well as passive forms of abuse, such as extreme neglect” (*Heitzman, supra*, 9 Cal.4th at p. 197), noted the defendant in that case was charged under section 368, former subdivision (a), with “willfully permitting” her elder father to suffer the requisite injury. (*Heitzman*, at p. 197.) *Heitzman*, concluding “[i]t was thus her *failure to act*, i.e., her failure to prevent the infliction of abuse on her father, that created the potential for her criminal liability under the statute” (*ibid.*), therefore examined the constitutionality of that portion of section 368 imposing criminal liability for the failure to act as applied to “any person who willfully . . . permits” the requisite injury (*Heitzman, supra*, 9 Cal.4th at p. 197). *Heitzman* began with the recognition that, “[u]nlike the imposition of criminal penalties for certain positive acts, which is based on the statutory proscription of such conduct, when an individual’s criminal liability is based on the *failure* to act, it is well established that he or she must first be under an existing legal duty to take positive action.” (*Ibid.*) The duty to take positive action can find its source in the statute itself. (*Id.* at p. 198 [“[a] legal duty to act is often imposed by the express provisions of a criminal statute itself”].) Alternatively, “[w]hen a criminal statute does not set forth a legal duty to act by its express terms, liability for a failure to act must be premised on the existence of a duty found elsewhere” (*ibid.*), such as another criminal or civil statute or “a common law duty based on the legal relationship between the defendant and the victim, such as that imposed on parents to care for and protect their minor children” (*ibid.*). *Heitzman* summarized the “void for vagueness” challenge presented there by stating that, “for criminal liability to attach under section 368[, subdivision] (a) for willfully permitting the infliction of physical pain or mental suffering on an elder, a defendant must first be under a legal duty to act. Whether the statute adequately denotes the class of persons who owe such a duty is the focus of the constitutional question presented here.” (*Id.* at p. 199.)

Heitzman concluded section 368, subdivision (a), insofar as it purported to criminalize the willful failure to *prevent* abuse by the class of potential defendants encompassed by the “any person” language of section 368, would be void for vagueness without a limiting principle that a person falling within that class had an affirmative *duty to act* to prevent the harm to the victim, because neither the statutory language itself nor the case law construing it contained that limitation. (*Heitzman, supra*, 9 Cal.4th at pp. 199–206; see *id.* at p. 207 [“In sum, contrary to constitutional requirements, neither the

language nor subsequent judicial construction of section 368[, subdivision] (a) provides adequate notice to those who may be under a duty to prevent the infliction of abuse on an elder. Moreover, the statute fails to provide a clear standard for those charged with enforcing the law.”].) However, *Heitzman* then explained that, although the court “determined that *the portion* of section 368[, subdivision] (a) purporting to impose on any person the duty to prevent the infliction of pain or suffering on an elder fails to meet the constitutional requirement of certainty[,] [b]efore declaring a statute void for vagueness, . . . we have an obligation to determine whether its validity can be preserved by ‘giv[ing] specific content to terms that might otherwise be unconstitutionally vague.’ (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 598 [135 Cal.Rptr. 41, 557 P.2d 473]; [citations].) Indeed, we cannot invalidate a statute as unconstitutionally vague if ‘“any reasonable and practical construction can be given to its language.”’ (*Walker v. Superior Court* [(1988)] 47 Cal.3d [112,] 143 [253 Cal.Rptr. 1, 763 P.2d 852]; [citation].) ¶¶ As we shall explain, *the constitutionally offensive portion of the statute* is indeed susceptible of a clarifying construction” (*Heitzman*, at p. 209, italics added.)

The *Heitzman* court ultimately concluded the validity of the challenged portion of section 368, subdivision (a), could be preserved by giving the “constitutionally offensive portion of the statute . . . a clarifying construction,” (*Heitzman, supra*, 9 Cal.4th at p. 209) and did so by superimposing on the “any person who willfully . . . permits” (*id.* at p. 197, italics omitted) portion of the statute a judicial gloss that limited its reach to those who had an affirmative duty to exert control over the actor causing or directly inflicting the injury on the victim. (*Id.* at pp. 212–214; *id.* at p. 212 “[A] special relationship between the defendant and the person inflicting pain or suffering on the elder does provide the basis for a reasonable and practical interpretation of the statutory language at issue here. Under such a statutory construction, in order for criminal liability to arise for permitting an elder to suffer unjustifiable pain or suffering, a defendant must stand in a special relationship to the individual inflicting the abuse on the elder such that the defendant is under an existing duty to supervise and control that individual’s conduct.”].) Thus, *Heitzman* preserved the validity of the challenged portion of section 368, former subdivision (a), by judicially construing the “[a]ny person who . . . willfully . . . permits” portion of the statute to limit its reach to those persons who, by statutory or common law principles, had an affirmative duty to exert control over the actor causing or directly inflicting the injury on the victim.

B. *The Due Process Claim*

Sugg argues that, under *Heitzman*, section 273a is unconstitutionally vague. We begin by noting that Sugg raises no challenge to the constitutionality of

those portions of section 273a, subdivision (a), that impose criminal penalties on that class of persons “who . . . willfully causes . . . or inflicts . . . unjustifiable physical pain or mental suffering” on a child, nor does she challenge to the constitutionality of those portions of section 273a, subdivision (a), that impose criminal penalties on the class of persons who “hav[e] the care or custody of any child” and either “willfully cause[] or permit[] the person or health of that child to be injured” or “willfully cause[] or permit[] that child to be placed in a situation [in which] his or her person or health is endangered.”¹¹ Instead, Sugg challenges only the constitutionality of that aspect of section 273a, subdivision (a), which, as in *Heitzman*, imposes criminal penalties on “any person who . . . willfully . . . permits” the requisite injury to be inflicted.

■ We conclude that, because “the legislative history reflects that the language of section 368[, subdivision] (a) derives verbatim from the felony child abuse statute, section 273a” (*Heitzman*, *supra*, 9 Cal.4th at pp. 204–205), the same limiting construction adopted by *Heitzman* can appropriately be adopted as an overlay to “the constitutionally offensive portion of the statute” (*id.* at p. 209), and thereby preserve the constitutionality of section 273a. Accordingly, we follow our Supreme Court’s analysis in *Heitzman* and construe that portion of section 273a, subdivision (a) that imposes criminal penalties on noncaretakers who “willfully . . . permit[]” the requisite injury to be inflicted on a victim is limited to those persons who had an affirmative duty, under statutory or common law principles, to exert control over the actor who caused or directly inflicted the injury on the victim. As so construed, we follow *Heitzman* and conclude section 273a comports with relevant due process principles, and we therefore reject Sugg’s assertion that section 273a is unconstitutional.

C. *The Instructional Claim*

Sugg argues that, even if adopting *Heitzman*’s limiting construction preserves the constitutionality of that portion of section 273a—the section 368 counterpart of which was examined in *Heitzman*, reversal of her convictions

¹¹ Other courts have rejected void-for-vagueness challenges to the liability imposed on persons having the care and custody of the child (see, e.g., *People v. Beaugez* (1965) 232 Cal.App.2d 650, 655–657 [43 Cal.Rptr. 28]), and *Heitzman* (although questioning the statute insofar as it imposed liability on a noncaretaker who “willfully permits” the victim to be injured) expressed no concerns with the “caretaker” aspects of the statute, because *Heitzman* expressly observed that “[b]ased on their status as [victim’s] caretakers, felony criminal liability was properly imposed on Richard, Sr., and Jerry pursuant to section 368[, subdivision] (a) for the role they played in bringing about their father’s demise” (*Heitzman*, *supra*, 9 Cal.4th at pp. 214–215). Indeed, *Heitzman* noted that once a defendant has assumed custody and care over the victim, the duty to affirmatively act to protect a victim is inherent in the statutory scheme. (*Id.* at p. 208 & fn. 16.)

is nevertheless required because there was instructional error in not instructing on the principles embodied in *Heitzman*. Sugg argues the trial court instructed the jury on all possible theories of guilt embodied in section 273a, including the “constitutionally offensive portion of the statute” (*Heitzman, supra*, 9 Cal.4th at p. 209) of being a person who “willfully permit[ted]” the requisite injury to be inflicted. Sugg asserts that, as to *this* aspect of the court’s instructions, the court erred by not sua sponte instructing the jury (under *Heitzman*) it could only convict Sugg as a “person who . . . willfully permit[ted]” the requisite injury to be inflicted if the jury also found Sugg had an affirmative duty, under statutory or common law principles, to exert control over Flores as the person who caused or directly inflicted the injury on the victims. Absent this clarifying instruction, Sugg asserts that (although it is possible the jury convicted Sugg based on one of the other correct theories) it is possible the jury convicted her on all counts under a legally erroneous theory, i.e. that she “willfully permit[ted]” Flores to inflict the injuries without a prefatory finding by the jury that she had a duty to control his actions. She asserts such error requires reversal unless this court can conclude, beyond a reasonable doubt, that the jury based its verdict on a legally accurate theory, and she argues the facts presented here cannot support that conclusion.

*No Sua Sponte Instructional Obligation Arose Under the Evidence
Here*

■ We initially reject Sugg’s claim that, on the facts presented here, the trial court was sua sponte obligated to provide a clarifying instruction that the jury could only convict Sugg if it found she had an affirmative duty to exert control over Flores. Although the sua sponte obligation requires a trial court to “instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury’s understanding of the case . . . [citations] . . . [and instruct] upon every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant’s theory of the case” (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047 [31 Cal.Rptr.2d 128, 874 P.2d 903]), that sua sponte obligation arises only for “an issue ‘closely and openly’ connected with the case” (*id.* at p. 1050). Here, the evidentiary presentation, as well as the prosecution’s theory, was that *both* Sugg and Flores either *directly inflicted or caused* the requisite injuries to the victims (by denying them adequate food and water and punishing them by forcing them to exercise until they were exhausted, or by hitting them or forcing them to sleep in the garage), or at a minimum that both Sugg and Flores had custody and care of the victims and *permitted* the other caretaker to inflict those injuries. On this set of facts, the “constitutionally offensive portion of the statute” (*Heitzman, supra*, 9 Cal.4th at p. 209) had no close and open applicability to this case, because the other statutory grounds were applicable

to Sugg. Because the theories under which Sugg was prosecuted fell squarely within those portions of section 273a that did *not* trigger the application of the “constitutionally offensive portion of the statute” (*Heitzman*, at p. 209), the principles adopted by *Heitzman* pertaining to which bystanders might also be liable for willfully permitting the injury to be inflicted were not so “‘closely and openly’ connected with the case” (*Montoya, supra*, 7 Cal.4th at p. 1050) that the *sua sponte* instructional obligation arose in this case.¹² (Cf. *People v. McKelvey* (1991) 230 Cal.App.3d 399, 404 [281 Cal.Rptr. 359] [court noted portion of statute potentially uncertain because it “does not describe those persons liable for permitting or causing a dependent adult to suffer” but rejected defendant’s vagueness challenge because his conduct was clearly encompassed by a different portion of statute because he had care and custody of victim].)

Any Instructional Defect Was Harmless¹³

We alternatively conclude that, even if the court should have provided a different instructional charge to the jury, any instructional error was harmless

¹² Sugg’s argument appears to be that there was some evidence from which the jury could have concluded Flores was the direct perpetrator of denying the children adequate food (because the children were denied adequate food even before Flores moved in with Sugg), and she merely permitted this pattern of conduct to continue after Flores and the children moved in with her. Although that evidence (even if credited) may have provided an argument for exoneration under the prong of section 273a criminalizing the *direct* infliction of the requisite injury (*Sargent, supra*, 19 Cal.4th at pp. 1219–1224), the evidence was overwhelming that Sugg was a person who was at least a *joint* caretaker of the children, which triggered liability under those prongs in which a *caretaker or custodian* willfully permitted injury to his or her charge (*Heitzman, supra*, 9 Cal.4th at p. 197), and *not* a mere bystander to whom *Heitzman*’s analysis might have sufficient application to trigger *sua sponte* instructional obligations. Under these facts, “the trial court was under no obligation to sift through the evidence to identify an issue that conceivably could have been, but was not, raised by the parties, and to instruct the jury, *sua sponte*, on that issue. (See, e.g., *People v. Wade* (1959) 53 Cal.2d 322, 334–335 [1 Cal.Rptr. 683, 348 P.2d 116] [‘[T]he trial court cannot be required to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly. The judge need not fill in every time a litigant or his counsel fails to discover an abstruse but possible theory of the facts. ¶ . . . ¶ . . . [The defendant’s] theory . . . was not one that the evidence would strongly illuminate and place before the trial court. On the contrary, it was so far under the surface of the facts and theories apparently involved as to remain hidden from even the defendant until the case reached this court on appeal. The trial court need not, therefore, have recognized it and instructed the jury in accordance with it. Omnipotence is not required of our trial courts.’].) The instructions given the jury were adequate in light of the evidence presented, and the trial court was under no obligation further to instruct the jury, *sua sponte*.” (*People v. Montoya, supra*, 7 Cal.4th at p. 1050.)

¹³ It appears the court’s instructions, if the court had merely *omitted* the words “or permitted” from segment 1-B of its instruction, would have been accurate and required no amplification under *Heitzman*. Sugg’s argument regarding *sua sponte* instructional error—that once the court included the “willfully . . . permits” prong it was *also* required to instruct the jury to determine whether the defendant owed a duty to *control* the actions of the actual

beyond a reasonable doubt. The instructions included numerous legally correct theories on which a jury could have relied to convict Sugg of violating section 273a (and of the greater related offenses of torture): that Sugg was “the individual inflicting the abuse” (*Heitzman, supra*, 9 Cal.4th at p. 212) because she “willfully . . . inflict[ed] . . . unjustifiable physical pain or mental suffering” on the victims or “willfully cause[d]” the victims to suffer that injury (§ 273a, subd. (a)), or that Sugg was a caretaker or custodian who *permitted* the victim to be injured or endangered. (*Heitzman*, at p. 214 [“the statutory scheme also provides that a *caretaker* or *custodian* who causes or permits injury or physical endangerment will incur criminal liability”].) However, we agree that, by including the “or permitted” language, when divorced from that aspect of the instruction describing Sugg’s liability in her capacity as a caretaker or custodian for the victims *and* without inclusion of *Heitzman*’s limiting principles, the jury was provided a potentially legally incorrect theory for convicting Sugg.

However, even when a jury *is* provided a potentially legally incorrect theory, a reviewing court may nevertheless affirm when that error can be deemed harmless beyond a reasonable doubt. (*People v. Calderon* (2005) 129 Cal.App.4th 1301, 1306 [29 Cal.Rptr.3d 277] [harmless beyond a reasonable doubt standard applies when prosecutor presents both correct and incorrect theories of guilt to jury].) As explained by the court in *People v. Brown* (2012) 210 Cal.App.4th 1, 12–13 [147 Cal.Rptr.3d 848]: “Although the general rule in cases involving a legally inadequate theory ‘has been to reverse the conviction because the appellate court is “‘unable to determine which of the prosecution’s theories served as the basis for the jury’s verdict’ ” ’ [citation], even this type of error can, in an appropriate case, be harmless: ‘If other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary [with respect to the element of the crime at issue], the erroneous . . . instruction [on that element] was harmless.’ (*People v. Chun* (2009) 45 Cal.4th 1172, 1205 [91 Cal.Rptr.3d 106, 203 P.3d 425]; see *People v. Harris* (1994) 9 Cal.4th 407, 424 [37 Cal.Rptr.2d 200, 886 P.2d 1193] [harmless error test traditionally applied to misinstruction on the elements of an offense is ‘whether it appears “beyond a reasonable doubt

perpetrator—does *not* assert (nor did *Heitzman* suggest) a similar limiting principle with its corresponding instructional obligation applies to *caretakers* who “willfully permit[]” the child to suffer such injury. Indeed, *Heitzman* appears to accept that, unlike the bystander liability on which *Heitzman* was focused, the duty of a child’s caretaker to protect against injury is *not* a duty to control the acts of a third party, but is instead a duty to protect the victim’s well-being. (See *Heitzman, supra*, 9 Cal.4th at p. 198 [noting a “criminal statute may also embody a common law duty based on the legal relationship between the defendant and the victim, such as that imposed on parents to care for and protect their minor children.”] and citing with approval *People v. Burden* (1977) 72 Cal.App.3d 603, 615 [140 Cal.Rptr. 282], in which the court noted defendant father was under common law duty to care for young son].)

that the error complained of did not contribute to the verdict obtained”’ (quoting *Chapman v. California*[, *supra*,] 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].) “To say that an error did not contribute to the verdict . . . is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.”’ (*Harris*, at p. 430, italics omitted.)”

We conclude the inclusion of the legally erroneous theory was harmless beyond a reasonable doubt. The evidence showed Sugg was a direct perpetrator of the requisite injuries caused by depriving the children of the necessary nutrition,¹⁴ and/or the children’s caretaker liable insofar as Sugg permitted them to suffer the requisite injuries, and the closing arguments of counsel never suggested Sugg’s liability was premised on anything other than her conduct as a direct perpetrator or caregiver for the children. (Cf. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1036 [68 Cal.Rptr.2d 655, 945 P.2d 1204] [court considers closing argument to evaluate whether legally erroneous alternative theory was harmless].) The prosecution’s summation emphasized her role as the direct perpetrator of starving the children, and well as her role as a caretaker of the children, and Sugg’s counsel did not argue she was not a direct perpetrator in the level of nutrition given to the children but instead merely argued she was herself anorexic and believed the level of nutrition given to the children was appropriate.

We reject Sugg’s argument that the inclusion of the legally erroneous theory cannot be deemed harmless beyond a reasonable doubt. Her principal argument appears to rest on her claim that, because the evidence was “weak and conflicting” on whether she was a caregiver for the victims (in that the evidence permitted the conclusion she acted as the primary caregiver only two days week while Flores was home providing care for the victims for the rest of the time), it was possible the jury convicted her of the offenses as a mere bystander who “permitted” Flores to inflict the injuries on the victims.

¹⁴ When “other aspects of the verdict . . . leave no reasonable doubt” that the jury rested its verdict on a legally correct theory, the inclusion of a legally incorrect theory may be deemed harmless beyond a reasonable doubt. (Cf. *People v. Chun*, *supra*, 45 Cal.4th at p. 1205.) Here, other aspects of the verdict reinforce our conclusion the jury based its verdict on a legally correct theory that Sugg directly caused the injuries. The jury was instructed on, and found true, the allegations that Sugg *personally* inflicted great bodily injury on Jane Doe in connection with Sugg’s section 273a, subdivision (a), offense against Jane Doe, and that Sugg *personally* inflicted great bodily injury on John Doe 2 in connection with Sugg’s section 273a, subdivision (a), offense against John Doe 2. The determination Sugg personally inflicted the injuries associated with the section 273a offenses appears incompatible with a determination she was guilty of the underlying offenses as a mere bystander who failed to prevent Flores from inflicting the great bodily injuries.

However, that argument disregards that the evidence overwhelmingly demonstrated *she* was “the individual inflicting the abuse” (*Heitzman, supra*, 9 Cal.4th at p. 212), which renders her status as a caregiver irrelevant.¹⁵

Moreover, even assuming the jury concluded Sugg merely “permitted” (rather than directly inflicted) the requisite injury, the fact Flores was a caregiver (or even the principal caregiver) is irrelevant to whether Sugg *also* qualified as a caregiver who could be liable under section 273a for permitting the children to suffer the requisite harm, and the evidence overwhelmingly established she was a caregiver for the victims: (1) Flores and Sugg lived together with the children as a family unit for many months; (2) the children described her as their “new mom” and as “act[ing] as [their] stepmom”; (3) Sugg was the *sole* caregiver for at least part of the week; and (4) Sugg dispensed discipline for the children while they lived under her roof. The fact Sugg was not their biological mother, and not wed to Flores, is irrelevant to whether she had “care and custody” over the victims within the meaning of the statute. (*People v. Morales* (2008) 168 Cal.App.4th 1075, 1083 [85 Cal.Rptr.3d 873] [“ ‘[t]he terms ‘care or custody’ do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver’ ”].) As the court explained in *People v. Perez* (2008) 164 Cal.App.4th 1462, 1476 [80 Cal.Rptr.3d 500]: “[T]he relevant question in a situation involving an individual who does not otherwise have a duty imposed by law or formalized agreement to care for a child (as in the case of parents or babysitters), is whether the individual in question can be found to have undertaken the attendant responsibilities at all. ‘Care,’ as used in the statute, may be evidenced by something less than an express agreement to assume the duties of a caregiver. That a person did undertake caregiving responsibilities may be shown by evidence of that person’s conduct and the circumstances of the interaction between the defendant and the child; it need not be established by an affirmative expression of a willingness to do so. [Fn. omitted.]” For all of these reasons, we are convinced beyond a reasonable doubt that inclusion of the legally erroneous theory was harmless beyond a reasonable doubt.

DISPOSITION

The matter is remanded to the trial court with instructions that the court shall correct the minute orders and abstracts of judgment to reflect imposition

¹⁵ John Doe 2 told the social worker Sugg was mean and personally denied food to them, and personally used corporal discipline with a belt and made him bleed. John Doe 1 testified Sugg personally denied adequate food to them (and even scolded him when he tried to share his food with his siblings) even though there was food in the refrigerator, personally used a belt to inflict corporal discipline, and also punished the children by requiring them to sleep in the garage (as a punishment for one of them taking some cookies) or stand in a corner for an entire day or do exercises until they were “falling down.”

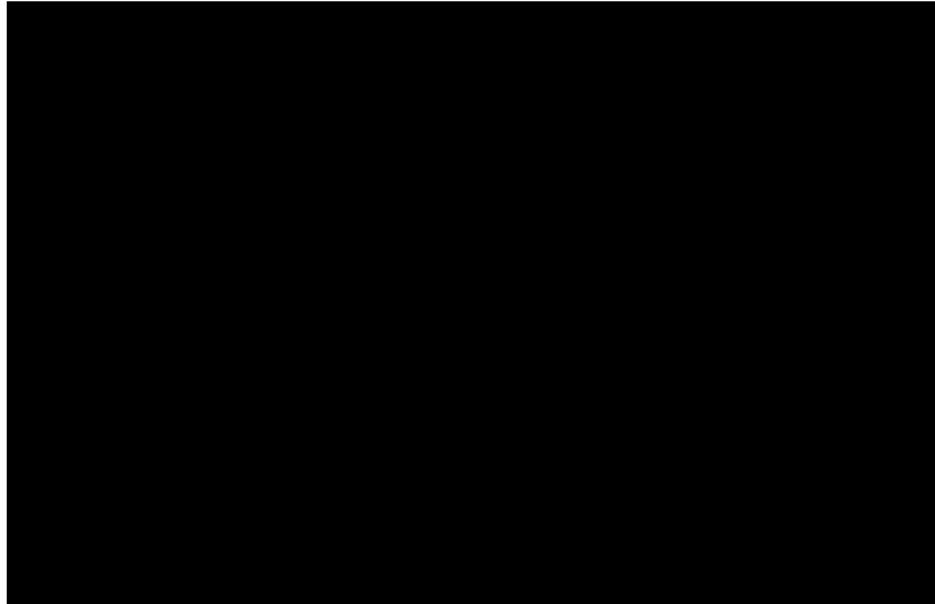
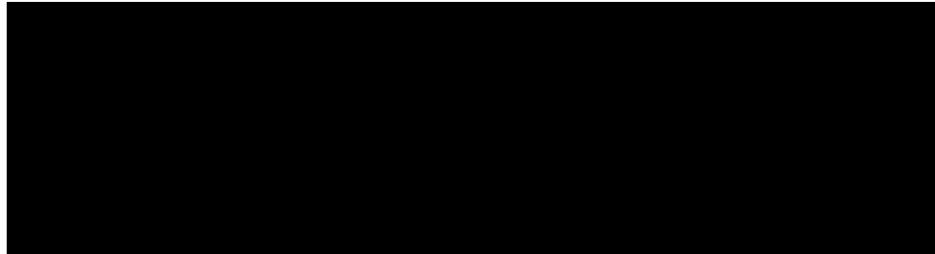
of life terms on counts 3 and 7 as to Flores and counts 1 and 5 as to Sugg and, as so modified, the judgment is affirmed.

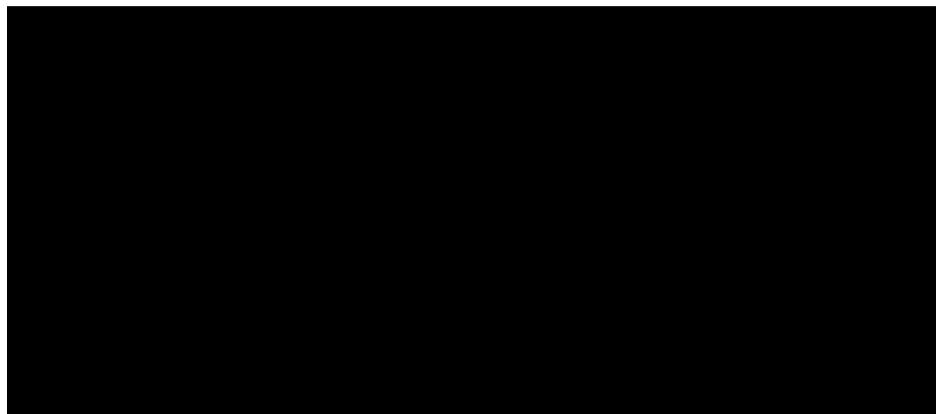
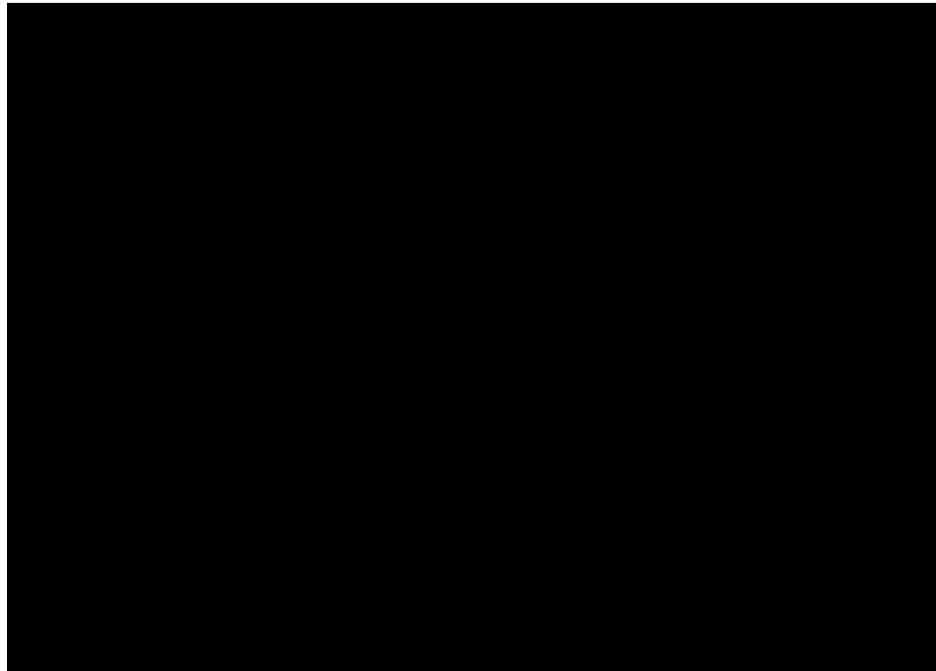
Benke, Acting P. J., and Irion, J., concurred.

Appellants' petition for review by the Supreme Court was denied November 16, 2016, S236938.

[No. B262866. Second Dist., Div. Seven. Aug. 23, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
CHRISTOPHER HRONCHAK, Defendant and Appellant.







COUNSEL

Erick Victor Munoz, 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, Mary Sanchez and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

PERLUSS, P. J.—While serving a 16-month sentence for a felony drug conviction, Christopher Hronchak was resentenced pursuant to Proposition 47 to a misdemeanor, ordered released from prison with 360 days of custody

credit and placed on parole for one year. After Hronchak failed to report to his supervising parole agent—a violation of parole supervision conditions that Hronchak admitted—the court revoked and reinstated parole on condition that Hronchak serve an additional 60 days in custody. On appeal Hronchak contends the parole revocation petition should have been denied because adequate consideration was not given to intermediate sanctions as required by Penal Code section 3000.08, subdivision (f).¹ He also argues, even if the revocation petition was properly granted, the court lacked authority to order Hronchak to serve more than four additional days in custody because the maximum confinement time for a misdemeanor drug offense is 364 days and, pursuant to the terms of Proposition 47, his underlying drug conviction must now be “considered a misdemeanor for all purposes” other than limitations on ownership or possession of firearms. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts in this case are undisputed. Hronchak was convicted of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and sentenced to a state prison term of 16 months on September 5, 2014. He was resentenced to a misdemeanor pursuant to section 1170.18, subdivision (b), added to the Penal Code by Proposition 47, effective November 5, 2014, and released from prison on December 22, 2014 with 360 days of custody credit. In resentencing Hronchak the court ordered him to serve one year of supervised parole following his release from custody. (§ 1170.18, subd. (d).)

On January 2, 2015 Hronchak was convicted of possession of paraphernalia used for unlawfully injecting or smoking a controlled substance, a misdemeanor (Health & Saf. Code, § 11364, subd. (a)), and sentenced to 90 days in county jail.² He was released on Saturday, January 31, 2015. Hronchak failed to report to his supervising parole agent on Monday, February 2, 2015, as required by supervised parole condition 2: “Unless other arrangements are approved in writing, you shall report to your parole agent on the first working day following your release.”

On February 5, 2015 Parole Agent Luis Barnfield attempted to contact Hronchak at the residence address Hronchak had provided. (Supervised parole condition 2 also provides, “You shall inform your supervising parole agent of your residence. . . . Any change or anticipated change to your residence shall be reported to your parole agent in advance.”) Hronchak’s brother advised the agent Hronchak did not live at that residence and said he

¹ Statutory references are to this code unless otherwise stated.

² Hronchak was apparently convicted of unlawful possession of a deadly weapon at the same time and placed on summary probation for that offense.

did not have contact information for him. Barnfield then submitted a warrant request to the Los Angeles Superior Court.

Hronchak was arrested on February 22, 2015. A petition to revoke parole pursuant to section 3000.08, subdivision (f), was filed on February 27, 2015, alleging Hronchak had absconded from parole, failed to report and failed to notify the parole agency of his address. The recommendation from the supervising agency was to return Hronchak to custody for 135 days. The court found probable cause to support revocation and preliminarily revoked parole pending a full hearing. Hronchak was held in custody without bail.

On March 6, 2015, the date set for his parole revocation hearing, Hronchak waived his right to a formal hearing and admitted the violation. His counsel then argued Hronchak was on parole for a misdemeanor and the total time in custody for that offense should not exceed 364 days—the maximum for a misdemeanor. The court acknowledged there was an element of fairness to counsel's position but asked, "Why even place a person on parole? Why does the sentencing court place that person on parole if there's no more time that could be imposed on the parolee?" The court concluded it was not powerless to punish a parole violation but reduced the recommended additional custody time from 135 days to 60 days in county jail (with custody credit for 13 actual days plus 13 conduct days). The court found Hronchak in violation, revoked parole supervision and ordered it reinstated upon completion of his jail sanction.

Hronchak filed a timely notice of appeal on March 11, 2015. (See *People v. Osorio* (2015) 235 Cal.App.4th 1408, 1412 [185 Cal.Rptr.3d 881] (*Osorio*) [parole revocation order is a postjudgment order affecting the substantial rights of the party appealable under § 1237, subd. (b)].) Both the People and Hronchak agree Hronchak has now completed the additional custody time ordered on March 6, 2015 for his parole violation. The Attorney General in her respondent's brief also notes Hronchak's supervised parole period was scheduled to end in December 2015.

DISCUSSION

1. *Hronchak's Challenge to the March 6, 2015 Revocation Order Is Properly Decided by This Court*

The Attorney General argues Hronchak's appeal is moot because he has completed the additional 60-day period of incarceration ordered on March 6, 2015 as a condition of reinstating parole and, in all likelihood, has actually completed the remaining supervised parole period ordered when he was resentenced under Proposition 47. Hronchak responds by citing *Osorio, supra*,

235 Cal.App.4th 1408, in which our colleagues in Division Three of the Fourth Appellate District held the trial court had erred in overruling the defendant's demurrer to a petition for revocation notwithstanding postjudgment evidence that he had been discharged from parole prior to the decision on appeal. Justice Fybel, writing for the court, first explained an appellate court has discretion "to decide a case that, although moot, poses an issue of broad public interest that is likely to recur." (*Id.* at p. 1411.) The court concluded the case before it presented such an issue. The court also suggested that an erroneous parole revocation could have adverse consequences for the defendant in the future: "Should defendant suffer a further criminal conviction, the parole revocation may be used as part of his sentencing determination. The parole revocation also may be used against defendant in other noncriminal arenas, such as employment decisions or child custody matters." (*Id.* at p. 1412.) As a result, Justice Fybel wrote, "we cannot say with reasonable certainty that defendant's release from parole moots his claim . . ." (*Ibid.*)

The Attorney General urges us not to follow *Osorio*. Even if we were inclined to agree the possible collateral consequences of an erroneous parole revocation decision, without more, do not justify deciding an otherwise moot controversy, here, as in *Osorio*, the appeal presents a significant issue of first impression involving the proper application of Proposition 47 that is capable of repetition but likely to evade review: whether the sanction for violating a condition of the one-year supervised parole term contemplated by section 1170.18, subdivision (d), may increase a defendant's total custodial time for the reclassified misdemeanor offense beyond 364 days. Accordingly, we exercise our discretion to retain the case for decision. (See *People v. Morales* (2016) 63 Cal.4th 399, 409 [203 Cal.Rptr.3d 130, 371 P.3d 592] (*Morales*) [even though order discharging defendant from parole may have technically mooted case, Supreme Court exercises discretion to decide whether excess credit for time served can be credited against Prop. 47's one-year parole period "because the issue is likely to recur, might otherwise evade appellate review, and is of continuing public interest"]; *In re Lemanuel C.* (2007) 41 Cal.4th 33, 38, fn. 4 [58 Cal.Rptr.3d 597, 158 P.3d 148] [although defendant's extended civil commitment under Welf. & Inst. Code, § 1800 et seq. had ended, Supreme Court decided whether commitment procedure was constitutional "because it raise[d] important issues that are capable of repetition but likely to evade review"]; *Alfredo A. v. Superior Court* (1994) 6 Cal.4th 1212, 1218–1219 [26 Cal.Rptr.2d 623, 865 P.2d 56] [Supreme Court decided whether juvenile detainee is entitled to a probable cause determination within 48 hours of a warrantless arrest, although technically moot, because the claim "'is distinctly 'capable of repetition, yet evading review'"']]; *In re Law* (1973) 10 Cal.3d 21, 23 [109 Cal.Rptr. 573, 513 P.2d 621] [Supreme Court decided whether parolee was entitled to bail while on parole hold status

although case was technically moot because it “raise[d] a question of broad public interest likely to recur”].)

2. *Resentencing Under Proposition 47 and the Imposition of Misdemeanor Parole*

Proposition 47, the Safe Neighborhoods and Schools Act, amended the Penal Code to require a misdemeanor sentence instead of a felony sentence for certain drug possession and theft-related offenses. In addition, Proposition 47 added Penal Code section 1170.18, authorizing a person currently serving a felony sentence for an offense that is now a misdemeanor to petition for recall of his or her sentence to request resentencing in accordance with the provisions added or amended by Proposition 47. (§ 1170.18, subd. (a).)³

■ An individual who successfully petitions for resentencing under Proposition 47 is subject to a one-year term of parole supervision following his or her release from custody pursuant to section 3000.08, part of the 2011 realignment legislation, unless the court in its discretion elects not to impose the parole term: “A person who is resentenced pursuant to subdivision (b) shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole. Such person is subject to Section 3000.08 parole supervision by the Department of Corrections and Rehabilitation and the jurisdiction of the court in the county in which the parolee is released or resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions to revoke parole and impose a term of custody.” (§ 1170.18, subd. (d); see *Morales, supra*, 63 Cal.4th at pp. 404–405.)

If a parole violation occurs, section 3000.08, subdivision (d), permits the supervising parole agency to impose additional conditions of supervision and “intermediate sanctions” without court intervention: “Upon review of the alleged violation and a finding of good cause that the parolee has committed a violation of law or violated his or her conditions of parole, the supervising

³ Proposition 47 allows a felony sentence (excluding a defendant from a misdemeanor sentence) for the specified crimes if a defendant has a prior conviction for one of the offenses listed under section 667, subdivision (e)(2)(C)(iv), sometimes referred to as “super strikes,” or a prior conviction for an offense requiring sex offender registration under section 290. (See *People v. Shabazz* (2015) 237 Cal.App.4th 303, 308 & fn. 2 [187 Cal.Rptr.3d 828]; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091 [183 Cal.Rptr.3d 362].) An individual currently serving a felony sentence who has one of the disqualifying convictions is similarly ineligible for resentencing. In addition, before resentencing an otherwise eligible petitioner, the court must determine whether resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).)

parole agency may impose additional and appropriate conditions of supervision, including rehabilitation and treatment services and appropriate incentives for compliance, and impose immediate, structured, and intermediate sanctions for parole violations, including flash incarceration in a city or a county jail.”⁴

Section 3008.08, subdivision (f), authorizes a petition to revoke probation only after the supervising parole agency has determined that intermediate sanctions are not appropriate: “If the supervising parole agency has determined, following application of its assessment processes, that intermediate sanctions up to and including flash incarceration are not appropriate, the supervising parole agency shall . . . petition . . . the court in the county in which the parole is being supervised . . . to revoke parole.” (See *Osorio, supra*, 235 Cal.App.4th at p. 1413 [“less restrictive sanctions for an alleged parole violation must be considered before revocation of parole is sought”].) Section 3008.08, subdivision (f), requires that a petition to revoke parole include a written report containing relevant information regarding the parolee and the recommendation to revoke parole and directs the Judicial Council to adopt forms and rules of court to implement it. California Rules of Court, rule 4.541(c), in turn, describes the minimum requirements for the written report included with the petition to revoke; and rule 4.541(e) provides, in addition to those minimum contents, the petition “must include the reasons for that agency’s determination that intermediate sanctions without court intervention . . . are inappropriate responses to the alleged violations.”

3. *Intermediate Sanctions Were Appropriately Considered for Hronchak’s Violation of His Parole Conditions*

In *Williams v. Superior Court* (2014) 230 Cal.App.4th 636, 665 [178 Cal.Rptr.3d 685], a case that addressed the procedural protections to which parolees are entitled in revocation proceedings following realignment, the court held, in part, “[the parole agency’s] report filed with its revocation petition must state the specific reasons (individualized to the particular parolee, as opposed to a generic statement) for its determination that intermediate sanctions ‘are inappropriate responses to the alleged violations.’” (*Id.* at p. 665.) Relying on this portion of the *Williams* holding and the analysis in *Osorio, supra*, 235 Cal.App.4th 1408, in which the Court of Appeal held a demurrer to the parole revocation petition should have been sustained because the petition failed to adequately explain why revocation, rather than a less

⁴ “‘Flash incarceration’ is a period of detention in a city or a county jail due to a violation of a parolee’s conditions of parole. The length of the detention period can range between one and 10 consecutive days. . . .” (§ 3000.08, subd. (e).)

restrictive sanction, had been selected, Hronchak contends the petition to revoke his parole should have been dismissed for lack of consideration of intermediate sanctions.⁵

■ Hronchak's argument is without merit. The parole revocation report, in addition to detailing the circumstances of the charge against Hronchak, provided specific reasons intermediate sanctions were considered inappropriate: Hronchak's arrest and conviction for misdemeanor drug and weapons offenses almost immediately after his release from prison and his inability to conform to the requirements of parole: As the report by Agent Barnfield, dated February 26, 2015, explained, "Hronchak was recently released from State Prison on 12/22/14 It is clearly evident that Hronchak does not value the meaning of freedom and early release. Further, Hronchak should remain in custody since he cannot abide by the law and feels the need to continue in drug use and has armed himself with a dangerous weapon in the community. Hronchak was convicted [in the misdemeanor proceedings after his release from prison]. Hronchak had only been out in the community for 12 days and he cannot show he will succeed in parole supervision. . . . [He] cannot abide by simple directive and report with State Parole." Nothing more was required to satisfy the requirements of section 3000.08 and California Rules of Court, rule 4.541.⁶

⁵ The parolee in *Osorio, supra*, 235 Cal.App.4th 1408 challenged the adequacy of the report filed with the revocation petition in the trial court. (*Id.* at p. 1410.) Hronchak did not. That omission would usually result in a forfeiture of this issue on appeal. (See generally *People v. Stowell* (2003) 31 Cal.4th 1107, 1114 [6 Cal.Rptr.3d 723, 79 P.3d 1030] ["The forfeiture doctrine is a 'well-established procedural principle that, with certain exceptions, an appellate court will not consider claims of error that could have been—but were not—raised in the trial court. [Citation.]' [Citations.] Strong policy reasons support this rule: 'It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' "].) However, the Attorney General, whose office has never been reticent to urge a criminal defendant has forfeited an argument (see, e.g., *People v. Brothers* (2015) 236 Cal.App.4th 24, 33, fn. 6 [186 Cal.Rptr.3d 98]; *People v. Cropsey* (2010) 184 Cal.App.4th 961, 965, fn. 3 [109 Cal.Rptr.3d 324]), has not suggested we decline to review the merits of Hronchak's claim of procedural error.

⁶ Hronchak notes the parole report states the agency used the parole violation decisionmaking instrument (PVDMI) as its evidence-based tool for a recommendation as to the appropriate measures to impose for Hronchak's parole violation and the recommended response level was "continue on parole with remedial sanctions," rather than "refer for revocation." (Cf. *Osorio, supra*, 235 Cal.App.4th at pp. 1413–1414 [explaining development of the PVDMI by the Department of Corrections and Rehabilitation, Division of Adult Parole Operations].) Unlike in *Osorio*, however, where the appellate court was plainly troubled by revocation of parole based on the relatively minor nature of the parolee's violation ("talking to two gang members for 10 minutes") and the agency's departure from the PVDMI recommendation for a moderately intensive response (*Osorio*, at p. 1415), the parole agency here adequately explained why it was departing from the PVDMI recommendation and seeking revocation and reinstatement of parole with additional custodial time.

4. *The Trial Court's Authority Under Sections 1170.18, Subdivision (d), and 3000.08, Subdivision (f), to Revoke and Reinstate Parole on Condition the Parolee Serve Additional Custodial Time Following a Proposition 47 Resentencing Is Not Limited by the 364-day Maximum Sentence for Misdemeanors*

Section 1170.18, subdivision (k), provides, “[a]ny felony conviction that is recalled and resentenced under subdivision (b) . . . shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm” Emphasizing that punishment for a misdemeanor may not exceed 364 days of imprisonment in a county jail (see §§ 18.5 [offense punishable by imprisonment in a county jail up to or not exceeding one year “shall be punishable by imprisonment in a county jail for a period not to exceed 364 days”], 19 [except where a different punishment is prescribed by law, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months]), Hronchak argues, because he was resentenced to a misdemeanor “for all purposes,” the total custody time he can be required to serve must also be 364 days. Since he already had custody credit for 360 days, Hronchak continues, his sanction for violating a condition of parole could not exceed an additional four days.

■ Hronchak’s exclusive focus on the “misdemeanor for all purposes” language in section 1170.18, subdivision (k), fails to acknowledge that an inmate who has petitioned for resentencing under Proposition 47 has agreed to be subject to section 3000.08 parole supervision for one year, unless the court releases the individual from parole, and to court jurisdiction “for the purpose of hearing petitions to revoke parole and impose a term of custody.” (§ 1170.18, subd. (d); see *Morales*, *supra*, 63 Cal.4th at p. 403 [“[w]hen it voted on Proposition 47, the electorate was informed, and it intended, that a person who benefitted from the new legislation by receiving a reduced sentence would be placed on parole for one year after completion of the reduced sentence, subject to the court’s discretion to release the person from that parole”].) If a parole violation is proved, section 3000.08, subdivision (f)(1), specifically authorizes the court to “[r]eturn the person to parole supervision with modifications of conditions, if appropriate, including a period of incarceration in county jail”—exactly what happened in this case. Section 3000.08, subdivision (g), in turn, limits confinement for a parole violation pursuant to subdivision (f)(1) to no more than 180 days in county jail—substantially more than the 60 days actually imposed on Hronchak—without reference to the time in custody the parolee had previously served. That the total time in custody may ultimately exceed 364 days if the resentenced defendant/parolee violates a condition of parole is simply part of the agreed-upon exchange for resentencing under Proposition 47. (See *Morales*, at p. 409 [felon petitioning for relief under Prop. 47 cannot claim

the benefits of an ameliorative change in the law but refuse to accept the price; “[t]he voters could rationally conclude that those who receive the benefit of a new misdemeanor sentence could at least be placed on parole when released on the reduced sentence”]; see generally *People v. Gonzalez* (2014) 60 Cal.4th 533, 537 [179 Cal.Rptr.3d 1, 335 P.3d 1083] [in construing a statute the court does not consider words in isolation but looks to the entire substance of the statute to determine the scope and purpose of the provision at issue]; *People v. Acosta* (2002) 29 Cal.4th 105, 112 [124 Cal.Rptr.2d 435, 52 P.3d 624] [“[w]e must harmonize “the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole” ’ ”].)⁷ That possibility does not in any way detract from the statutory mandate that the reclassified offense is to be considered a misdemeanor conviction for all purposes (except with respect to possessing firearms).

Indeed, whether or not the individual ever violates the conditions of his or her parole, the imposition of a one-year parole term under section 1170.18, subdivision (d), following a successful petition for resentencing necessarily creates an aggregate sentence that is different from, and more restrictive than, the basic misdemeanor sentence. (*Morales, supra*, 63 Cal.4th at p. 407; see Couzens & Bigelow, Proposition 47, “The Safe Neighborhoods and Schools Act” (May 2016) pp. 61–62 [“It appears the intent of the initiative is to authorize the one-year period of parole supervision *in addition to* any resentence imposed by the court [T]he parole term is in addition to the basic misdemeanor sentence”].) Hronchak does not—and could not—argue the one-year parole term itself, mandated by the express language of Proposition 47, violates the “misdemeanor for all purposes” provision of the initiative. By parity of reasoning, imposition of additional time in custody as a sanction for violating valid conditions of that parole, as expressly authorized by sections 1170.18, subdivision (d), and 3000.08, subdivision (f), is also fully consistent with treating the reclassified conviction as a misdemeanor for future purposes.

As the trial court observed, Hronchak’s interpretation of the parole provisions of Proposition 47 would create a largely meaningless period of post-release supervision with conditions and restrictions imposed on the parolee but no effective means for the parole agency or court to enforce them.⁸ Yet an effective one-year parole term for a resentenced offender (unless the trial

⁷ “In construing statutes adopted by the voters, we apply the same principles of interpretation we apply to statutes enacted by the Legislature.” (*People v. Johnson* (2015) 61 Cal.4th 674, 682 [189 Cal.Rptr.3d 794, 352 P.3d 366].)

⁸ Although Hronchak insists the parole agency, faced with a parole violation, could “consider intermediate sanctions which include the ‘teeth’ of flash incarceration,” he fails to explain under his interpretation of the statutory language why a 10-day period of flash incarceration would be permissible for an individual with 360 days of custody credit.

court in its discretion declined to impose parole) was an integral part of the reform proposal presented to the voters in Proposition 47—a recognition that “the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship.” (§ 3000, subd. (a)(1).) The voter information guide specifically informed voters that “[o]ffenders who are resentenced would be required to be on state parole for one year, unless the judge chooses to remove that requirement.” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by the Legislative Analyst, p. 36 [“Resentencing of Previously Convicted Offenders”]; see Couzens & Bigelow, Proposition 47, “The Safe Neighborhoods and Schools Act,” *supra*, at p. 61 [“[i]t is likely the provision for a period of parole was included in Proposition 47 as a response to some of the criticisms of Proposition 36 that no transition period was required for persons suddenly released from a 25-years-to-life sentence after many years in custody”].) We decline to frustrate the voters’ intent by adopting a strained construction of section 1170.18 that deprives the parole agency and the courts of the ability to effectively supervise inmates subject to parole following completion of their newly imposed, Proposition 47 misdemeanor sentence.

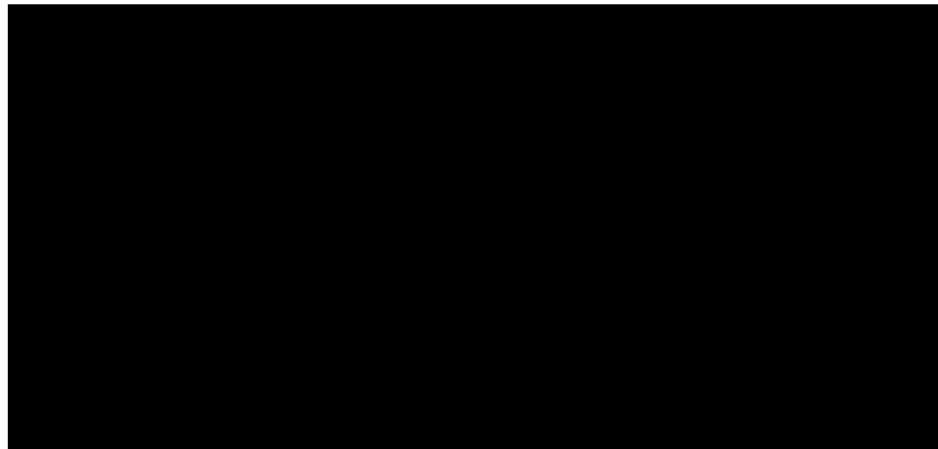
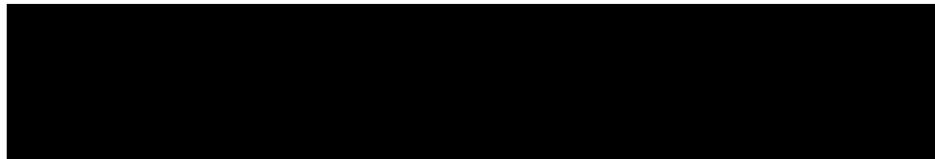
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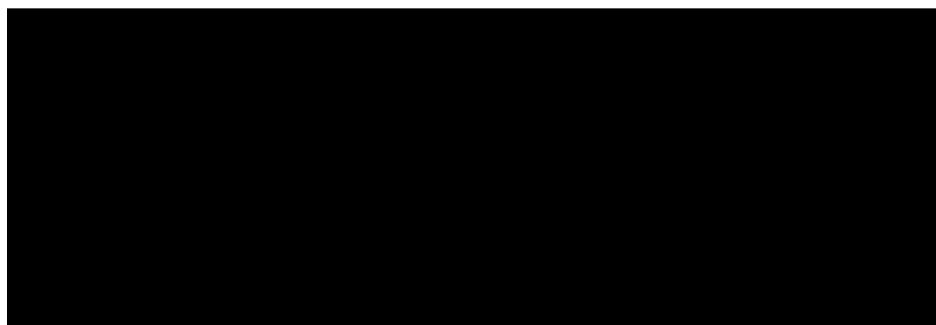
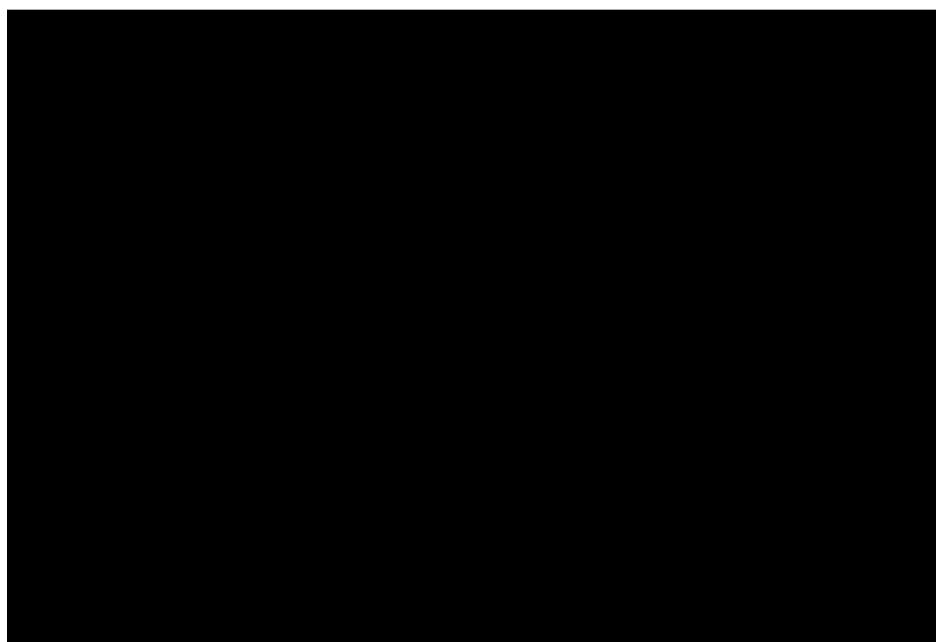
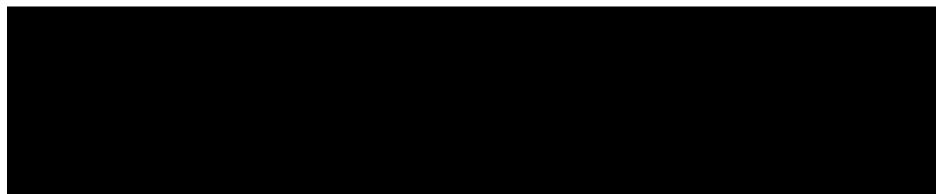
The order is affirmed.

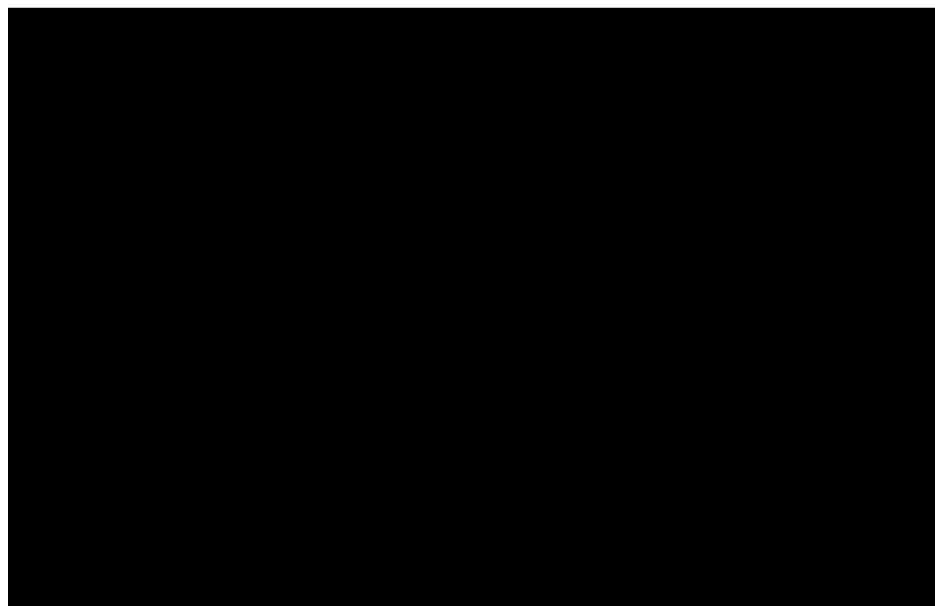
Zelon, J., and Segal, J., concurred.

[No. H042652. Sixth Dist. Aug. 23, 2016.]

In re MOISES MANCILLAS on Habeas Corpus.







COUNSEL

Frederick Martin Schnider, under appointment by the Court of Appeal for Petitioner Moises Mancillas.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Assistant Attorney General, Laurence K. Sullivan and Rene A. Chacon, Deputy Attorneys General, for Respondent The People.

OPINION

BAMATTRE-MANOUKIAN, J.—

I. INTRODUCTION

When a defendant “has been released on probation” with execution of sentence suspended, and the court is subsequently properly notified that the defendant is “confined in prison,” Penal Code section 1203.2a¹ mandates that “the court shall issue its commitment” and “shall be deprived of jurisdiction over defendant if it does not issue its commitment or make other final order terminating its jurisdiction over defendant in the case within 60 days after being notified of the confinement.”

In this case, petitioner Moises Mancillas was placed on probation with execution of a three-year prison term suspended. His probation was subsequently summarily revoked due to his failure to report to probation and failure to attend treatment, and a bench warrant issued for petitioner’s arrest. Before further probation revocation proceedings were held, petitioner was convicted of new offenses in Nevada and sentenced to prison in that state. While in prison in Nevada, petitioner sent notifications to the trial court, which the court received on December 23, 2013. However, the trial court did not act until eight months later, when it ordered petitioner’s previously imposed three-year sentence to run consecutively to his Nevada sentence.

In the instant petition for writ of habeas corpus, petitioner contends the trial court lost jurisdiction, pursuant to section 1203.2a, because it did not order execution of his previously imposed sentence within 60 days of being properly notified of his imprisonment in Nevada. For reasons that we will explain, we agree with petitioner. We will therefore grant the petition for writ of habeas corpus and vacate the order executing his three-year sentence.

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

II. BACKGROUND

A. Case No. SS120011A

On January 4, 2012, the district attorney filed a complaint in case No. SS120011A, charging petitioner with unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 1) and possession of burglar's tools (§ 466; count 2). On January 31, 2012, the district attorney orally amended the complaint to include a charge of possession of a stolen vehicle (§ 496d, subd. (a); count 3), and petitioner pleaded no contest to that charge.

On February 28, 2012, the trial court suspended imposition of sentence and placed petitioner on probation for three years. Petitioner's probation conditions included a requirement that he obey all laws and a requirement that he “[n]ot remain in any vehicle” that he knew to be stolen or to contain any firearms or illegal weapons.

On April 24, 2012, the probation officer filed a probation violation petition. The petition alleged petitioner had been arrested for three felonies and had “[r]emained in a vehicle or drove a vehicle that was suspected stolen.”

B. Case No. SS120735A

On April 24, 2012, the district attorney filed a complaint in case No. SS120735A, charging petitioner with unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 1) with a prior conviction of buying or receiving a stolen vehicle (§ 666.5, subd. (a)), and misdemeanor evading an officer (Veh. Code, § 2800.2, subd. (a); count 2).

On June 1, 2012, the district attorney amended the complaint to allege felony evading in count 2, and petitioner pleaded no contest to that count. The negotiated disposition provided that petitioner would be sentenced to a three-year prison term but that execution of sentence would be suspended and petitioner would be placed on probation. Before petitioner entered his plea, the trial court warned him, “I want to be crystal clear with you. This Court views execution of sentence suspended very differently than felony probation. What that means is any willful violation of probation no matter how small—if you fail to report, if you test positive for alcohol, if you drive without a valid California driver's license. I don't care how small the violation, the Court will send you to prison for a willful violation of probation.” After the trial court reiterated that it would send petitioner to state prison for “any willful violation of probation,” petitioner responded, “I fully understand that.”

At the same hearing, the trial court found petitioner in violation of probation in case No. SS120011A based on his plea in case No. SS120735A.

C. *2012 Sentencing Proceedings*

On July 18, 2012, pursuant to the negotiated agreement, the trial court imposed concurrent three-year prison terms in petitioner's two cases but suspended execution of sentence. In case No. SS120011A, the trial court reinstated probation, and in case No. SS120735A, the trial court placed petitioner on probation for three years.

D. *2013 Probation Violation Proceedings*

On January 7, 2013, the probation officer filed a notice of probation violation in each case, alleging that petitioner had failed to report and had failed to comply with a probation condition requiring him to attend a drug treatment program. On January 22, 2013, the trial court summarily revoked petitioner's probation in each case and issued a bench warrant for petitioner's arrest.

E. *Nevada Proceedings*

According to the declaration petitioner filed in this matter, he was convicted of grand larceny and eluding the police in Nevada on August 6, 2013. Petitioner was sentenced to consecutive prison terms of 12 to 36 months for the grand larceny count and 20 to 50 months for the eluding count.

While serving his sentence in Nevada, petitioner asked prison officials "for the appropriate forms" to request sentencing on his California cases. He was provided with an eight-page packet of forms entitled "Interstate Agreement on Detainers."² Petitioner filled out the forms, one of which was entitled "Inmate's Notice of Place of Imprisonment and Request for Disposition of Indictments, Informations or Complaints." On that form, petitioner requested "final disposition be made" of the two California cases. Petitioner identified himself by name and provided his location, as well as information about his Nevada sentence, and he provided the case numbers of the two California cases. The form was signed by petitioner and two correctional officers at the Nevada prison. Another form in the packet was entitled, "Certificate of Inmate Status," and it stated that petitioner was in custody at the Northern

² The Interstate Agreement on Detainers is codified in section 1389. It provides that when a defendant is in a "penal or correctional institution of a party state," and a detainer has been lodged based on a "untried indictment, information or complaint," the defendant must be tried within 180 days of delivering a request for "a final disposition" to the prosecutor and trial court. (§ 1389, art. III, subd. (a).)

Nevada Correctional Center. That form was signed by James Maxey, the warrants coordinator at the Nevada prison. The signatures on the forms were dated September 30, 2013 and October 3, 2013.

According to the declaration of Mark Rutledge, successor to Maxey as the warrants coordinator for the Nevada Department of Corrections, the original packet of forms is on file at the Nevada Department of Corrections, and the copies provided as exhibits to petitioner's habeas corpus petition are true and correct. Computer records maintained by the Nevada Department of Corrections show that the forms were sent via certified mail to the trial court and the district attorney's office on December 18, 2013. Rutledge retrieved the United States Postal Service return receipts, which confirmed delivery of the forms to the trial court and district attorney's office on December 23, 2013. The postal receipts are included as an exhibit to the habeas corpus petition. At some point after the forms were delivered, the prosecutor called Rutledge to say that the district attorney's office "would not be taking any action" because the forms were not the proper forms for requesting disposition of petitioner's pending probation violations.

Petitioner inquired about the status of his case in March of 2014, by sending a letter to the Monterey County Public Defender's Office.

F. *Section 1203.2a Proceedings*

On July 23, 2014, the probation officer filed a request for sentencing in each of petitioner's cases, pursuant to section 1203.2a.³ The probation officer reported that he had received an email from petitioner's trial counsel on July

³ Section 1203.2a provides: "If any defendant who has been released on probation is committed to a prison in this state or another state for another offense, the court which released him or her on probation shall have jurisdiction to impose sentence, if no sentence has previously been imposed for the offense for which he or she was granted probation, in the absence of the defendant, on the request of the defendant made through his or her counsel, or by himself or herself in writing, if such writing is signed in the presence of the warden of the prison in which he or she is confined or the duly authorized representative of the warden, and the warden or his or her representative attests both that the defendant has made and signed such request and that he or she states that he or she wishes the court to impose sentence in the case in which he or she was released on probation, in his or her absence and without him or her being represented by counsel. [¶] The probation officer may, upon learning of the defendant's imprisonment, and must within 30 days after being notified in writing by the defendant or his or her counsel, or the warden or duly authorized representative of the prison in which the defendant is confined, report such commitment to the court which released him or her on probation. [¶] Upon being informed by the probation officer of the defendant's confinement, or *upon receipt from the warden or duly authorized representative of any prison in this state or another state of a certificate showing that the defendant is confined in prison, the court shall issue its commitment if sentence has previously been imposed.* . . . If the case is one in which sentence has previously been imposed, *the court shall be deprived of jurisdiction*

2, 2014. In the email, petitioner's trial counsel had notified the probation officer that petitioner was incarcerated in Nevada, and he had requested that petitioner be sentenced pursuant to section 1203.2a.

At a hearing on July 24, 2014, petitioner's trial counsel appeared and confirmed that petitioner was in a Nevada prison. Petitioner's trial counsel also confirmed that petitioner had sent a document indicating he wanted the trial court to order that his California sentence run concurrently with his Nevada sentence.

On August 26, 2014, the trial court ordered execution of petitioner's previously imposed concurrent three-year prison terms, ordering those terms to run consecutively to the term he was serving in Nevada. The parties agreed that petitioner did not need to admit the pending probation violation petition since the trial court was proceeding pursuant to section 1203.2a. The petition to revoke probation was formally withdrawn.

G. *Appeal and Habeas Corpus Proceedings*

On October 14, 2014, petitioner filed notices of appeal in both of the underlying cases. This court appointed counsel for petitioner on appeal. The record on appeal was filed on December 16, 2014. According to the declaration of petitioner's appointed appellate counsel, he reviewed the record at that time and wrote to petitioner in Nevada. Petitioner responded and sent appellate counsel a copy of the forms he had sent to the trial court and the district attorney's office. Appellate counsel then performed investigation, obtained a declaration from Rutledge, and filed the instant habeas corpus petition on August 7, 2015. This court ordered the petition considered with petitioner's direct appeal, which was fully briefed on December 24, 2015. This court subsequently affirmed the judgment on direct appeal and issued an order to show cause as to the habeas corpus petition.⁴ (*People v. Mancillas* (May 2, 2016, H041522) [nonpub. opn.].)

III. DISCUSSION

Petitioner contends the trial court lost jurisdiction over his cases, pursuant to section 1203.2a, when it did not order execution of sentence within 60

over defendant if it does not issue its commitment or make other final order terminating its jurisdiction over defendant in the case within 60 days after being notified of the confinement. . . ." (Italics added.)

⁴ Our order to show cause was limited to the question of whether the trial court lost jurisdiction over petitioner due to its failure to comply with section 1203.2a. In his petition for writ of habeas corpus, petitioner had also claimed the district attorney had a duty under *Brady v. Maryland* (1963) 373 U.S. 83, 87 [10 L.Ed.2d 215, 83 S.Ct. 1194] to disclose that it received petitioner's request for disposition of his cases in December of 2013 but failed to disclose the request at that time or during the proceedings in the summer of 2014.

days of December 23, 2013—the date the trial court received notice of petitioner’s imprisonment in Nevada, including the certificate signed by the warrants coordinator.

A. Preliminary Issues

1. Timeliness

The Attorney General claims that the instant petition for writ of habeas corpus is untimely because it was filed about a year after the August 2014 hearing at which the trial court ordered execution of the previously imposed sentence.

We find there was no “significant delay in seeking habeas corpus relief” in this matter. (See *In re Clark* (1993) 5 Cal.4th 750, 765 [21 Cal.Rptr.2d 509, 855 P.2d 729] (*Clark*).) Petitioner’s request for sentencing was received by the trial court on December 23, 2013. In March of 2014, petitioner sent a letter to the Monterey Public Defender’s Office, inquiring about the status of his case. In July of 2014, petitioner’s trial counsel notified the probation officer of petitioner’s request for sentencing. The trial court ordered execution of petitioner’s previously imposed sentence on August 26, 2014. Petitioner filed a timely notice of appeal from that order, and his appointed appellate counsel filed the instant habeas corpus petition in conjunction with the appeal, before the Attorney General filed the respondent’s brief. (Cf. *In re Robbins* (1998) 18 Cal.4th 770, 780 [77 Cal.Rptr.2d 153, 959 P.2d 311] [pursuant to California Supreme Court policies, “a habeas corpus petition is not entitled to a presumption of timeliness if it is filed more than 90 days after the final due date for the filing of appellant’s reply brief on the direct appeal”]; *Clark, supra*, at p. 760 [first habeas corpus petition was not filed until almost one year after underlying judgment was affirmed on direct appeal and over six years after judgment was imposed].) Appointed appellate counsel’s declaration shows he exercised “due diligence in pursuing potential claims” (*Clark, supra*, at p. 775), and there is no indication that any delay has prejudiced the Attorney General’s ability to answer the petition. (See *id.* at pp. 786–787.)

2. Failure to File Habeas Corpus Petition in Superior Court

The Attorney General next claims the petition should have been filed in the trial court because petitioner’s claims are fact specific, and that therefore this court should deny the petition.

■ “[A] reviewing court has discretion to deny without prejudice a habeas corpus petition that was not filed first in a proper lower court.

[Citations.]” (*In re Steele* (2004) 32 Cal.4th 682, 692 [10 Cal.Rptr.3d 536, 85 P.3d 444].) However, both trial and appellate courts have jurisdiction over habeas corpus petitions, and it is reasonable for a petitioner to file a habeas corpus petition in the court in which an appeal is pending. (See *People v. Seijas* (2005) 36 Cal.4th 291, 307 [30 Cal.Rptr.3d 493, 114 P.3d 742] [defendant “acted reasonably” in filing a habeas corpus petition in California Supreme Court after grant of review].)

The claims raised in petitioner’s habeas corpus petition are closely related to the claims raised in petitioner’s direct appeal, and the Attorney General relies on the appellate record in disputing the factual issue of whether the trial court actually received petitioner’s request for sentencing. Thus, the interests of judicial economy are promoted by considering the habeas corpus petition in this court rather than denying the petition so that it can be refiled in the trial court.

3. Failure to Raise Issues on Appeal

The Attorney General asserts that the petition should be dismissed because the issues presented in the habeas corpus petition could have been raised on appeal. However, the habeas corpus petition relies on matters outside the appellate record. Thus, the claim presented in the petition could not have been raised in petitioner’s direct appeal.

4. Evidentiary Issues

The Attorney General argues that the two declarations submitted in support of petitioner’s habeas corpus petition (from petitioner and Rutledge) are hearsay and thus are inadmissible to establish that the trial court received actual notice of petitioner’s confinement in a Nevada prison. The Attorney General does not elaborate on this argument, and our review of the declarations shows that the significant facts in those declarations are based on the declarants’ personal knowledge. Moreover, as petitioner points out in his traverse, other exhibits show the trial court received notice of petitioner’s confinement—copies of the documents sent to the trial court and district attorney’s office, and copies of the certified mail receipts—and the Attorney General does not assert that these documents are inadmissible.

The Attorney General also argues that the appellate record refutes petitioner’s claim that the trial court received notice of his imprisonment in Nevada. The Attorney General notes that during the proceedings held in July and August of 2014, petitioner’s trial counsel “did not argue that sufficient notice of petitioner’s demand had been given to the trial court” earlier, and in fact conceded that the trial court had jurisdiction to order execution of the

previously imposed sentence. However, nothing in the appellate record shows that petitioner's trial counsel knew that petitioner had sent notice of his Nevada imprisonment to the trial court and the district attorney's office in December of 2013. Thus, the appellate record does not refute the showing petitioner has made in this proceeding—that the trial court received notice of petitioner's confinement in a Nevada prison on December 23, 2013.

B. Application of Section 1203.2a

Petitioner claims that the trial court lost jurisdiction over his cases when it failed to sentence him within 60 days of receiving the forms providing notice that he was in prison in Nevada, including the certificate from the warrants coordinator.

■ Petitioner's claim is based on section 1203.2a, which "sets forth sentencing procedures for persons who, while on probation for one offense, are committed to state prison for another offense." (*In re Hoddinott* (1996) 12 Cal.4th 992, 994 [50 Cal.Rptr.2d 706, 911 P.2d 1381] (*Hoddinott*).) "[S]ection 1203.2a was intended to provide a mechanism by which the probationary court could consider imposing a concurrent sentence, and to 'preclude[] inadvertent imposition of consecutive sentences by depriving the court of further jurisdiction over the defendant' when the statutory time limits are not observed. [Citation.]" (*Id.* at pp. 999–1000.) The statute also benefits "[t]he trial court and its clerk and probation officer," who "are afforded the convenience of closing their files in a case which otherwise might remain undisposed of for years." (*Hayes v. Superior Court* (1971) 6 Cal.3d 216, 222 [98 Cal.Rptr. 449, 490 P.2d 1137].)

"[S]ection 1203.2a provides for 3 distinct jurisdictional clocks: (1) the probation officer has 30 days from the receipt of written notice of defendant's subsequent commitment within which to notify the probation-granting court . . . ; (2) the court has 30 days from the receipt of a valid, formal request from defendant within which to impose sentence, if sentence has not previously been imposed . . . ; and (3) the court has 60 days from the receipt of notice of the confinement to order execution of sentence (or make other final order) if sentence has previously been imposed Failure to comply with any one of these three time limits divests the court of any remaining jurisdiction. . . ." (*Hoddinott, supra*, 12 Cal.4th at p. 999.)

Section 1203.2a's third "jurisdictional clock[]" is at issue in the instant case. (*Hoddinott, supra*, 12 Cal.4th at p. 999.) In pertinent part, section 1203.2a provides: "[U]pon receipt from the warden or duly authorized representative of any prison in this state or another state of a certificate showing that the defendant is confined in prison, the court shall issue its

commitment if sentence has previously been imposed. . . . If the case is one in which sentence has previously been imposed, the court shall be deprived of jurisdiction over defendant if it does not issue its commitment or make other final order terminating its jurisdiction over defendant in the case within 60 days after being notified of the confinement.”

Several published cases have addressed a trial court’s failure to comply with section 1203.2a’s requirement of a timely commitment order after receiving notice of a defendant’s confinement in prison, where the defendant had originally been placed on probation with execution of sentence suspended. In *People v. Martinez* (1975) 46 Cal.App.3d 736 [120 Cal.Rptr. 362, 121 Cal.Rptr. 443] (*Martinez*), the defendant was convicted of a criminal offense and “sentenced to state prison for the term prescribed by law,” but execution of the sentence was suspended and the defendant was placed on probation for three years. (*Id.* at p. 739.) While on probation, the defendant was convicted of a second offense and committed to state prison. (*Ibid.*) One day after sentencing in the second case, the probation officer notified the trial court of the defendant’s conviction and sentence. (*Id.* at p. 742.) At the time, former section 1203.2a required a trial court to act upon such notice within 30 days, but the trial court did not revoke the defendant’s probation and order execution of his original sentence until more than 30 days later. (*Martinez, supra*, at p. 742.) As a result, “the court lost jurisdiction to revoke probation on the basis of the second offense,” and its commitment order was void. (*Ibid.*)

The reasoning of *Martinez* was followed in *In re Flores* (1983) 140 Cal.App.3d 1019 [190 Cal.Rptr. 388] (*Flores*). In that case, the trial court originally imposed a state prison sentence but suspended execution of the sentence and placed the defendant on probation with a one-year county jail commitment. (*Id.* at p. 1021.) The defendant subsequently escaped from jail, and a probation violation petition was filed. The defendant also subsequently committed federal crimes and was sentenced to federal prison. At the defendant’s request, federal prison authorities notified the district attorney of the defendant’s confinement, and the defendant sent a document entitled “Application for Speedy Trial” to the trial court, asking for his probation violation matter to be set for trial or dismissed. (*Id.* at p. 1022.) The trial court denied the application and did not order execution of the previously imposed sentence until after the defendant completed his federal prison term, which was beyond the 60-day time limit of section 1203.2a. The defendant sought habeas corpus relief, arguing that the trial court had lost jurisdiction. The *Flores* court held that the trial court should have treated the defendant’s request for trial as a section 1203.2a request, and it ordered the defendant discharged from custody. (*Flores, supra*, at pp. 1022, 1025.)

The *Martinez* and *Flores* opinions were followed in *People v. Timmons* (1985) 173 Cal.App.3d 1000 [219 Cal.Rptr. 611] (*Timmons*). In that case, the defendant was convicted of two offenses and sentenced to prison, but execution of sentence was suspended and he was placed on probation. (*Id.* at p. 1003.) The defendant was later convicted of new offenses in New Hampshire and sentenced to prison in that state. The probation officer filed a notice of probation violation, and the trial court summarily revoked the defendant's probation. The defendant then sent the district attorney and the trial court notice of his imprisonment, and he "requested final disposition" of his probation violation matter. (*Id.* at p. 1004.) The warden of the New Hampshire prison also sent notice to the district attorney and trial court. (*Ibid.*) Probation violation proceedings did not take place until about 11 months later, however, after the defendant had completed serving his New Hampshire prison sentence. (*Ibid.*) After the trial court ordered execution of the previously imposed sentence, the defendant sought habeas corpus relief, claiming section 1203.2a precluded the trial court from making that order. The *Timmons* court agreed and ordered the defendant discharged from custody. (*Timmons, supra*, at p. 1008.)

As in the above cases, the trial court here did not comply with section 1203.2a's third "jurisdictional clock[]" (*Hoddinott, supra*, 12 Cal.4th at p. 999) when it received notice of petitioner's confinement in a Nevada prison but did not "issue its commitment" within 60 days of that notice (§ 1203.2a).

We requested supplemental briefing on the question of whether the trial court's jurisdiction to order execution of the previously imposed sentence was preserved by its summary revocation of petitioner's probation on January 22, 2013. We also asked the parties whether petitioner was a person who "has been released on probation" within the meaning of section 1203.2a after his probation was summarily revoked on January 22, 2013.

In his supplemental letter brief, petitioner contends that he was a person who "has been released on probation" (§ 1203.2a) even after his probation was summarily revoked, because he was still subject to the terms and conditions of his probation at that time. Petitioner further argues that the summary revocation of his probation did not preserve the trial court's jurisdiction to order execution of his sentence because section 1203.2a does not contain any exception for probationers who are in revoked status.

The Attorney General agrees that petitioner "remained a person who had 'been released on probation'" when his probation was summarily revoked on January 22, 2013. However, the Attorney General asserts that the order

summarily revoking petitioner's probation "preserved the trial court's jurisdiction pending petitioner's subsequent arrest, appearance in court, or other action that invoked another statute."

■ Section 1203.2a applies to "any defendant who has been released on probation [and] is committed to a prison in this state or another state for another offense." In determining the meaning of the phrase "has been released on probation" as used in section 1203.2a, we apply well-established rules of statutory construction. ■ "The goal of statutory construction is to ascertain and effectuate the intent of the Legislature. [Citation.] Ordinarily, the words of the statute provide the most reliable indication of legislative intent. [Citation.] 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. [Citations.]' [Citation.] 'When the language is susceptible of more than one reasonable interpretation . . . , 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.'" [Citation.]" (*People v. Jefferson* (1999) 21 Cal.4th 86, 94 [86 Cal.Rptr.2d 893, 980 P.2d 441].)

■ Applying these principles, we agree that the phrase "has been released on probation" (§ 1203.2a) applies to both a defendant who is released on probation with no pending probation violation petition and to a defendant who is released on probation and whose probation has been summarily revoked. Nothing in the language of section 1203.2a indicates it was intended to apply only where a defendant is placed on probation and later incarcerated for subsequent criminal conduct, without any intervening probation violations. Rather, section 1203.2a appears intended to also apply to defendants who are placed on probation and who have pending probation violation petitions at the time of their incarceration for subsequent criminal conduct, which was what happened in *Flores, supra*, 140 Cal.App.3d 1019. To interpret section 1203.2a as applying only to probationers who were not in summary revocation status at the time of their subsequent incarceration for new offenses would lead to anomalous results and conflict with the policy underlying the statute, which is "to provide a mechanism by which the probationary court [can] consider imposing a concurrent sentence, and to 'preclude[] inadvertent imposition of consecutive sentences by depriving the court of further jurisdiction over the defendant' when the statutory time limits are not observed. [Citation.]" (*Hoddinott, supra*, 12 Cal.4th at pp. 999–1000.) If section 1203.2a does not apply to probationers whose probation has been summarily revoked, that class of probationers would be deprived of the opportunity to receive concurrent sentences in many cases.

■ Our construction of section 1203.2a also leads to the conclusion that the January 22, 2013 summary revocation of probation did not preserve the trial court's jurisdiction to order execution of the original sentence. Although "summary revocation of probation preserves the trial court's authority to adjudicate a claim that the defendant violated a condition of probation during the probationary period" (*People v. Leiva* (2013) 56 Cal.4th 498, 515 [154 Cal.Rptr.3d 634, 297 P.3d 870]), the purpose of section 1203.2a is to provide a mechanism for ordering execution of sentence without a formal probation revocation hearing in cases where the defendant is imprisoned for a new offense, in order to give the defendant the opportunity to receive concurrent sentences (*Hoddinott, supra*, 12 Cal.4th at pp. 999–1000). By construing section 1203.2a to apply to defendants whose probation has been summarily revoked, the purpose of the statute is furthered.

Here, petitioner has shown that he is entitled to relief based on the trial court's failure to "issue its commitment" within 60 days of receiving the certificate showing that petitioner was confined in the Nevada prison, as required by section 1203.2a. The trial court was "deprived of jurisdiction" to order execution of sentence in petitioner's cases. (§ 1203.2a.) The only remaining question is the appropriate disposition.

Petitioner asserts that because the trial court did not comply with section 1203.2a's third "jurisdictional clock[]" (*Hoddinott, supra*, 12 Cal.4th at p. 999), this court should vacate the order executing the previously imposed sentence and terminate his probation. Petitioner acknowledges that a different disposition was ordered in *People v. Murray* (2007) 155 Cal.App.4th 149 [65 Cal.Rptr.3d 731] (*Murray*), where the defendant was reinstated on probation after the trial court failed to comply with section 1203.2a.

In *Murray*, the defendant was sentenced to a seven-year prison term in November of 2004, but execution of that sentence was suspended and the defendant was placed on probation for five years. (*Murray, supra*, 155 Cal.App.4th at p. 152.) The defendant was subsequently convicted of a new crime in another county and sentenced to a prison term. The Department of Corrections sent notice of the defendant's commitment to the probation department, but the probation officer did not notify the trial court within 30 days of that notice, as required by section 1203.2a. (*Murray, supra*, at p. 156.) Following the defendant's release from prison, the probation officer filed a probation violation petition based on the defendant's failure to complete a drug program and the commission of the crime in the other county. (*Id.* at pp. 152–153.) The trial court found the defendant in violation of probation and ordered execution of the previously imposed sentence.

The *Murray* court found that the trial court had lost jurisdiction to order execution of the previously imposed sentence, since the probation officer

failed to report the defendant's new prison commitment within the 30-day limit specified by section 1203.2a. (*Murray, supra*, 155 Cal.App.4th at p. 156.) The court held that the trial court's order executing the previously imposed sentence was void and that the prison term the defendant was serving had to be vacated. (*Id.* at p. 158.) However, the loss of jurisdiction "did not affect the original sentence," i.e., the grant of probation, which was effectively reinstated. (*Ibid.*; cf. *Pompi v. Superior Court* (1982) 139 Cal.App.3d 503, 508 [189 Cal.Rptr. 52] [loss of jurisdiction pursuant to § 1203.2a "effectively terminate[s] the previous order of probation"].)

We need not determine whether *Murray* correctly concluded that when a section 1203.2a violation occurs in a case where "sentence originally was imposed, with only execution thereof suspended," the appropriate appellate remedy is to vacate the order executing the previously imposed sentence *without* terminating probation. (*Murray, supra*, 155 Cal.App.4th at p. 158.) In *Murray*, the original five-year probationary period had not expired at the time the appellate court vacated the erroneous order, and thus the defendant was reinstated on probation for the remainder of the original probationary period. In the instant case, petitioner's three-year probationary period expired in 2015. Hence, there is no remaining period of probation that can be reinstated.

IV. DISPOSITION

The petition for writ of habeas corpus is granted. The trial court's August 26, 2014 order executing petitioner's three-year prison sentence is vacated.

Elia, Acting P. J., and Mihara, J., concurred.

[No. D069257. Fourth Dist., Div. One. Aug. 24, 2016.]

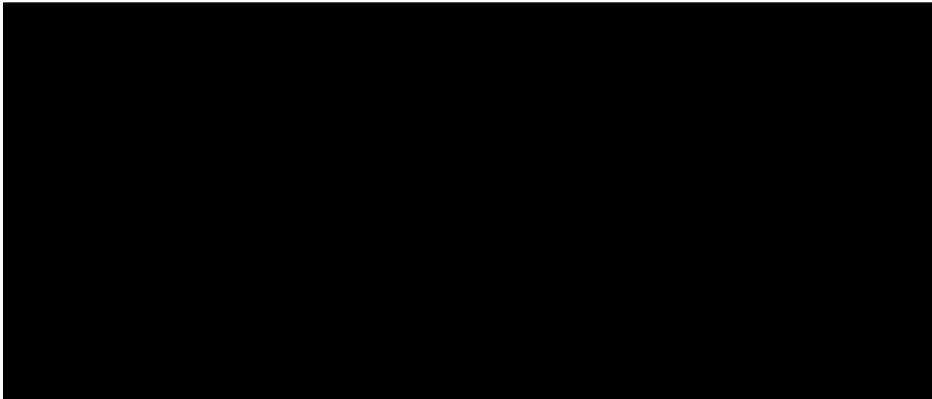
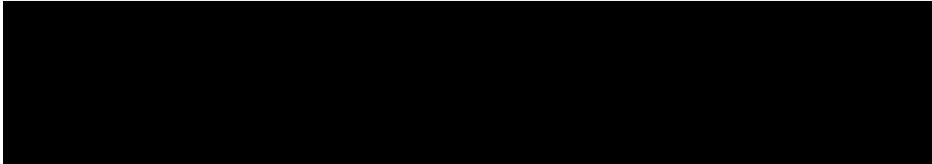
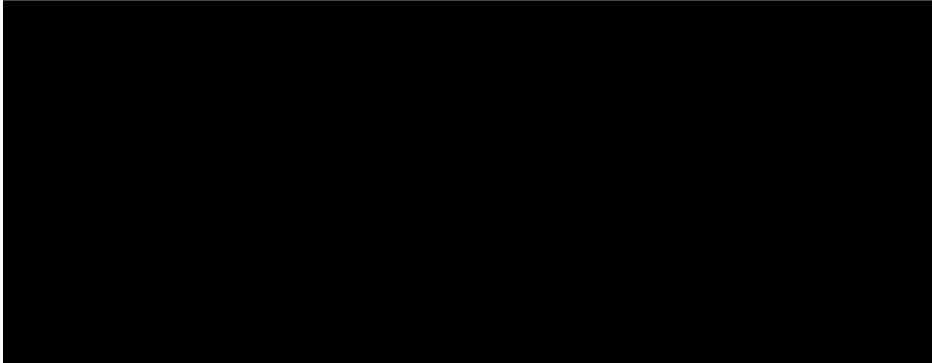
Adoption of A.B., a Minor.
JOHN O. et al., Plaintiffs and Respondents, v.
SCOTT R., Defendant and Appellant.

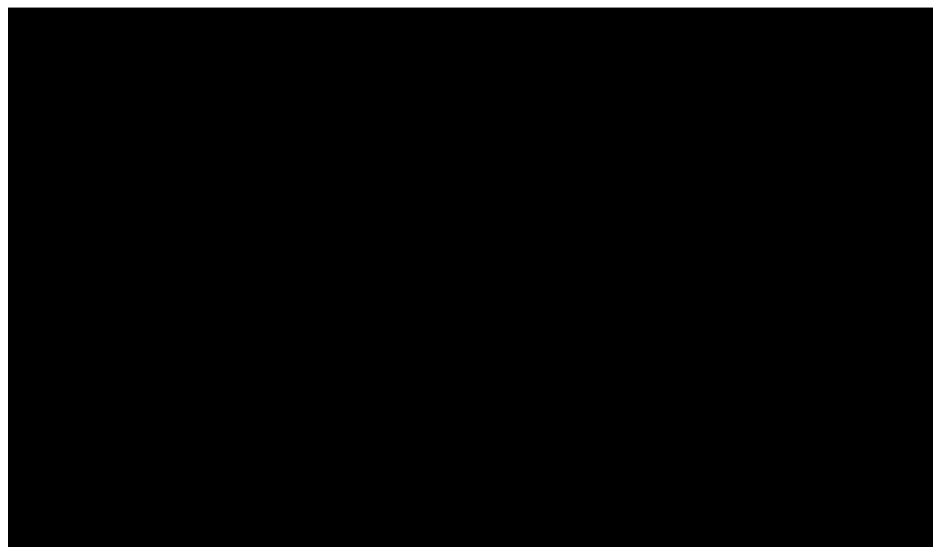
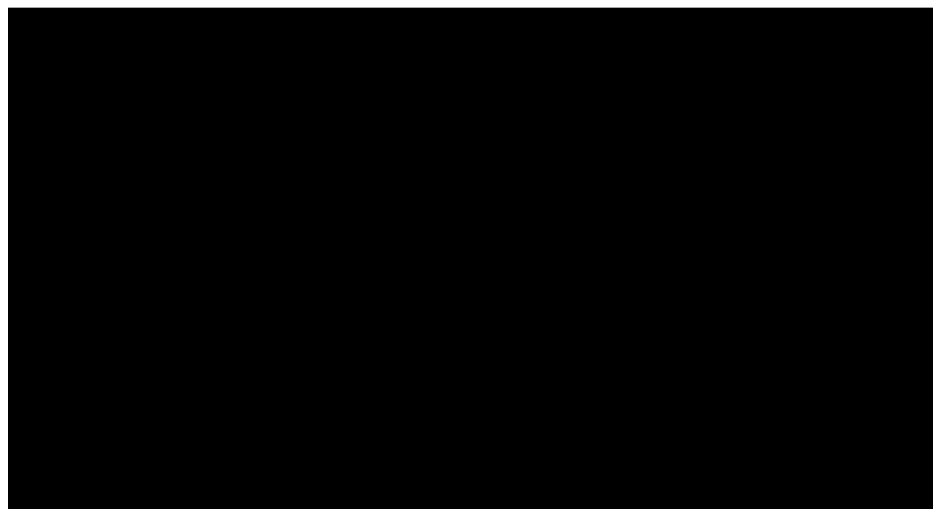
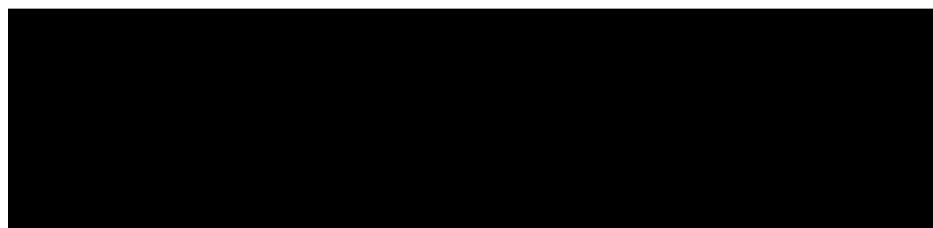
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COUNSEL

Lelah S. Fisher, under appointment by the Court of Appeal, for Defendant and Appellant.

Elizabeth C. Alexander and Neal B. Gold, under appointments by the Court of Appeal, for Plaintiffs and Respondents.

Carl Fabian, under appointment by the Court of Appeal, for Minor A.B.

OPINION

IRION, J.—Scott R. appeals from an order terminating his parental rights to his biological daughter, A.B., under Family Code section 7822,¹ which authorizes the termination of rights of a parent who “has left the child in the care and custody of the other parent *for a period of one year* without any provision for the child’s support, or without communication . . . with the intent . . . to abandon the child.” (§ 7822, subd. (a)(3), italics added.) He contends that the one-year statutory period refers only to the year immediately preceding the filing of the petition for termination of parental rights, which precludes its application to him. Alternatively, Scott asserts that reversal is warranted in any event because (1) he rebutted the presumption that he intended to abandon A.B., (2) the termination of his rights was not in A.B.’s best interests and (3) the juvenile court erred in determining that the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) did not apply absent proof that a tribe he identified actually received notice as required under that statutory scheme. We reject Scott’s arguments and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Scott and Michaela O. met in November 2005. The couple moved in together three and one-half months later, and lived together on and off for almost four years. During that time, Scott was using marijuana and alcohol. After Michaela became pregnant with A.B., she broke up with Scott and moved out. Michaela gave birth to A.B. in November 2009. Scott was not present for the birth, but visited the hospital two or three hours later, bringing a pizza and asking to hold the baby. Scott was not named as A.B.’s father on A.B.’s birth certificate.

Scott sent Michaela a \$50 money order, but she rejected it. He also offered to bring her baby food, but Michaela told him she did not need it, as A.B.

¹ All further statutory references are to the Family Code unless otherwise specified.

was breast-feeding. Scott did not offer to provide any further assistance and did not see A.B. again until two months later, in January 2010, when he met with Michaela and A.B. for approximately two hours. Scott did not otherwise send gifts, cards or other items to A.B.

In early 2010, Michaela sought benefits for A.B. through the department of child support services (DCSS). Scott questioned whether he was A.B.'s father and requested a paternity test, noting on his income and expense declaration that if A.B. was his child, he would pay support and "wish for partial custody." Around that same time, Scott visited Michaela's house but Michaela was not available to see him, and she did not learn of the visit until after Scott had left.

Scott was determined to be A.B.'s biological father and the court issued an order in September 2010 requiring him to pay DCSS for A.B.'s support and to obtain health insurance for her if "available at no or reasonable cost." Scott did not request visitation, but began paying support in October 2010, and continued paying consistently, through wage garnishment, almost every month thereafter, although he never provided A.B. with health insurance.

Sometime in 2011, when Scott tried, unsuccessfully, to visit Michaela, Michaela's brother suggested that he seek court authorization to visit A.B. Scott went to family court and obtained the necessary paperwork to set up visitation, but did not take any further action after being told it would cost \$400 to file the forms. Scott attempted to visit Michaela again in 2012, but she was not home.

In April 2013, Michaela began dating John O. Within a few months, John became involved in A.B.'s care and he began providing financial support for her in October 2013. A.B. called John "Daddy" and became very bonded to him. In the fall of 2014, Michaela moved in with John and they thereafter married.

At about the same time, Michaela had a "falling out" with her family. In October 2014, Scott sent a letter to Michaela, inquiring about A.B. and explaining that he planned to seek visitation through the court by A.B.'s fifth birthday (in Nov. 2014). Shortly thereafter, Michaela's mother contacted Scott.

In late October 2014, Scott initiated a family court proceeding to obtain visitation. He acknowledged that he did not know A.B. and had only seen her a few times since her birth, but emphasized his self-improvement, stating that although he "use[d] to have a drinking problem," he was now sober and had worked on becoming "a more responsible and more reliable [f]ather." In

his visitation request, Scott noted his relationship with Michaela's family and suggested starting visitation at Michaela's mother's home. Michaela called Scott after seeing the visitation request, and they had a lengthy conversation. Scott primarily discussed Michaela's mother, stating that she wanted to see A.B. again, he believed seeing her would be in A.B.'s best interests, and he wanted to visit with A.B. at her house.

Michaela and Scott participated in mediation to address Scott's visitation request. Based on their agreement, the family court ordered a therapist to oversee A.B.'s introduction to Scott and subsequent visitation. The therapist met individually with A.B., Scott, and Michaela and held conjoint sessions with Scott and A.B. in February and March 2015, although Scott did not take full advantage of the authorized visitation. Scott tried to develop a relationship with A.B., but they had limited interaction during the therapy sessions. At the second session, Scott played his guitar and A.B. hugged him when the session was over.

The conjoint therapy sessions proceeded "on a reasonable basis," but ended in March 2015, when John petitioned to terminate Scott's parental rights so that he could adopt A.B.² In response to John's petition to terminate Scott's rights, a social worker scheduled interviews with A.B.'s family. Scott was hesitant to meet, and the social worker had to contact him four to five times to set up his interview, which was unusual for a parent facing termination of parental rights. Moreover, at Scott's request, Michaela's mother and stepfather were included in his interview.³ In her report, the social worker recommended that Scott's parental rights not be terminated, based on her conclusion that he neither abandoned nor intended to abandon A.B.

Despite her earlier recommendation, the social worker testified at the hearing on John's petition that Scott's five-year absence deprived A.B. of stability and that John had provided A.B. with stability and continuity of care during the preceding two years. The social worker also acknowledged that the timing of the falling out between Michaela and her mother and Scott's request for visitation "was likely not to be coincidental."

Michaela and Scott presented conflicting testimony at the hearing as to Scott's attempts to initiate contact with A.B. between 2010 and 2014. Scott introduced evidence (including testimony from Michaela's family members)

² At respondents' request, we take judicial notice of John's adoption petition. (Evid. Code, § 452, subd. (d)(1).)

³ Michaela's mother and stepfather also had multiple "excited" telephone conversations with the social worker.

that he sent Michaela several letters between 2009 and 2014, but Michaela testified she never received any letters from him.⁴

Similarly, Scott testified that Michaela started blocking his telephone calls in 2012 and introduced testimony from Michaela's family that he had called Michaela several times asking to see A.B., but Michaela had ignored his messages. By contrast, Michaela testified that Scott had called her periodically through 2011 but never requested visitation with A.B., and she had not returned his calls because she did not want to give him false hope regarding their relationship. Michaela admitted that she changed her phone number in 2012, but retained voice mail for her old number (which she checked weekly), until late summer of 2013.

After the close of evidence, the court noted the absence of evidence as to the cause of the "huge falling out" between Michaela and her family, but indicated that its focus was on Scott and his actions with respect to A.B. It ruled in relevant part that (1) Michaela's testimony as to Scott's efforts to establish contact was much more credible than that of her family members; (2) Scott was aware of the family court and its procedures but made no meaningful attempt to request visitation until 2014; (3) when Scott first sought visitation at that time, he did not emphasize that Michaela had kept him away from A.B., but instead focused on his personal struggles, which suggested that he was not actively interested in establishing contact with A.B. prior to 2014; (4) Scott failed to have meaningful contact with A.B. for a period of more than one year; (5) the support Scott paid sporadically over the years was token; (6) Scott's communications with Michaela's family members failed to establish that he had a meaningful relationship with A.B.; and (7) A.B. had a good relationship with John, such that adoption was in her best interests. The court therefore ordered termination of Scott's parental rights.

Scott timely appealed.⁵

⁴ Michaela had lived in her deceased grandmother's house during this time and some of her relatives testified that Michaela received numerous letters from Scott at the house; however, as the juvenile court noted, these family members provided inconsistent testimony as to who was living in the house during that time period.

⁵ In the proceedings below, A.B.'s counsel argued that adoption was in the child's best interests based on her age and the significance of Michaela and John in her life. On appeal, A.B.'s appellate counsel has changed approaches, now joining in Scott's arguments that the order terminating his parental rights must be reversed.

DISCUSSION

I

Application of Section 7822

■ Section 7822 establishes the grounds for terminating parental rights due to a parent's voluntary abandonment and, in pertinent part, allows for commencement of proceedings where “[o]ne parent has left the child in the care and custody of the other parent *for a period of one year* without any provision for the child's support, or without communication from the parent, with the intent on the part of the parent to abandon the child.” (§ 7822, subd. (a)(3), italics added.) This statute is liberally construed “to serve and protect the interests and welfare of the child” (§ 7801) and the juvenile court's findings must be based on clear and convincing evidence. (§ 7821.)

A. *One-year Statutory Period for Abandonment*

Scott contends the one-year period of abandonment referenced in section 7822, subdivision (a)(3), refers solely to the year immediately preceding the filing of the petition to terminate parental rights. However, although the statutory language is clear that the one-year statutory period of abandonment must *occur* prior to the filing of the termination petition (*In re Amy A.* (2005) 132 Cal.App.4th 63, 71 [33 Cal.Rptr.3d 298]), neither that language, nor any case interpreting it, establishes the limitation that Scott urges. (See *In re E.M.* (2014) 228 Cal.App.4th 828, 841, fn. 8 [175 Cal.Rptr.3d 711] (*E.M.*) [recognizing, but declining to decide, the issue].) For the reasons that follow, we conclude that no such limitation exists.

■ “The interpretation of a statute is a question of law we review independently.” (*In re Lana S.* (2012) 207 Cal.App.4th 94, 108 [142 Cal.Rptr.3d 792].) To ascertain legislative intent, we first examine the words of the statute and, if the statutory language is clear and unambiguous, its plain meaning governs. (*In re Joshua A.* (2015) 239 Cal.App.4th 208, 214 [190 Cal.Rptr.3d 655].) A court may not interpret a statute to reflect an intention that does not appear from its plain language (*In re Y.A.* (2016) 246 Cal.App.4th 523, 527 [200 Cal.Rptr.3d 933]), and when a particular word or phrase is used in a particular statutory scheme, the omission of similar language from a related provision is often evidence of a different legislative intent. (*In re Joshua A.*, at p. 215.)

■ The plain language of section 7822, subdivision (a)(3), describes abandonment “*for a period of one year*,” but does not limit the one-year time period to the period immediately preceding the filing of the petition. The

absence of limitation in the plain language is consistent with the interpretation of identical language in a different subdivision of section 7822's predecessor statute (Civ. Code, former § 232, subd. (a)(1) (Stats. 1992, ch. 162, § 10, pp. 464, 664, appen., p. 8)) authorizing the termination of parental rights to a child who had lived in an out-of-home placement for a one-year period.⁶ (*In re Connie M.*, *supra*, 176 Cal.App.3d 1225, 1235–1237 (*Connie M.*).)

The predecessor statute was analyzed in *Connie M.*, in which a three-month-old child was placed in foster care from November 1979 to January 1983, when she was briefly returned to the custody of her biological parents. After efforts at reunification failed and Connie was placed back in foster care, the Department of Public Social Services successfully petitioned on her behalf to terminate parental rights. Connie's mother appealed, contending in part that the statutory one-year period only applied to the year immediately preceding the filing of the petition.

The *Connie M.* court rejected the mother's argument, concluding that "to hold that the one-year period immediately preceding the filing of the petition is the requisite year would defeat the legislative purposes" of the statute. (*Connie M.*, *supra*, 176 Cal.App.3d at p. 1239.) The court examined the legislative intent behind Civil Code former section 232 and observed that the chapter containing the section required courts to liberally construe its provisions to "'protect the interests and welfare of the child.'" (*Connie M.*, at p. 1239, quoting Civ. Code, former § 232.5.) The chapter further described its purpose as "'to serve the welfare and best interests of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing from his or her life.'"⁷ (*Connie M.*, at p. 1239, quoting Civ. Code, former § 232.6.)

The *Connie M.* court also found "convincing support for the interpretation that the one-year period can be any time prior to the filing of the petition" based on a comparison of the subdivisions of Civil Code, former section 232. (*Connie M.*, *supra*, 176 Cal.App.3d at p. 1240.) Civil Code, former section 232, subdivision (a)(3), allowed for termination of rights if it is "shown that

⁶ The transition from Civil Code, former section 232, subdivision (a)(1) to Family Code section 7822 was without substantive change. (1994 Fam. Code, 23 Cal. Law Revision Com. Rep. (1993) p. 649.) The 1984 version of Civil Code, former section 232 analyzed in *Connie M.* contained the provision allowing parental termination for abandonment (now contained in Fam. Code, § 7822, subd. (a)(3)) in Civil Code, former section 232, subdivision (a)(1). (*In re Connie M.* (1986) 176 Cal.App.3d 1225, 1238 [222 Cal.Rptr. 673]; Stats. 1983, ch. 309, § 2, p. 903.)

⁷ Civil Code, former sections 232.5 and 232.6 were carried forward without substantive change in 1992 when section 7800 et seq. were enacted (Stats. 1992, ch. 162, § 10, p. 464). (23 Cal. Law Revision Com. Rep., *supra*, at pp. 644, 664, referencing §§ 7800, 7801, 7890.)

'the child has been a dependent child of the juvenile court, and the parent or parents have been deprived of the child's custody *continuously* for *one year immediately prior to the filing of a petition pursuant to this section.*''" (*Connie M.*, at p. 1240.) According to *Connie M.*, the Legislature's use of specific language limiting the one-year period to the time immediately prior to the filing of the petition in Civil Code, former section 232, subdivision (a)(3) and failure to include such language in former subdivision (a)(7), established that it did not intend for such a limitation in the latter circumstance. The court reasoned "[i]f the Legislature had intended the time period of [Civil Code, former section 232,] subdivision (a)(7) to be the one year immediately prior to the filing of the petition, [it] would have done so explicitly, as [it] did in [former] subdivision (a)(3)."⁸ (*Connie M.*, at p. 1240.)

The express legislative purpose underlying section 7822 is identical to the legislative purpose described in *Connie M.* (23 Cal. Law Revision Com. Rep., *supra*, at pp. 644, 664, referencing §§ 7800, 7801, 7890) and therefore, just as in *Connie M.*, interpreting the one-year period as limited to the preceding year would defeat the legislative purpose of section 7822. In addition, because the predecessor to section 7822, subdivision (a)(3), was one of the subdivisions included in Civil Code former section 232, the court's conclusion in *Connie M.*—that the presence of specific limiting language in a different subdivision of the same statute establishes that the Legislature did not intend to include the limitation in a subdivision lacking the limiting language—is equally applicable here. Moreover, the same reasoning applies to an even earlier predecessor of section 7822. In 1961, when the provision allowing termination of parental rights for abandonment was first enacted as part of Civil Code, former section 232, subdivision (a), the provision referenced a "period of one year" and "a period of at least one year" while two other subdivisions in the same section explicitly referred to "the period of one year continuously *immediately prior to the filing of a petition.*" (Civ. Code, former § 232, subds. (b) [addressing termination for cruel treatment or neglect] & (c) [addressing termination for habitual intemperance or moral depravity], italics

⁸ The phrase "for a period of one year" in the predecessor of a related statute has likewise been interpreted as not limited to the year immediately prior to the filing of an adoption petition. (*Connie M.*, *supra*, 176 Cal.App.3d at 1239 [referencing Civ. Code, former § 224, predecessor to § 8604; Stats. 1992, ch. 162, § 10, pp. 464, 681–682, appen., p. 7; Stats. 1990, ch. 1363, § 3, p. 6056].) Section 8604 allows a party to adopt without the noncustodial birth parent's consent if such "parent *for a period of one year* willfully fails to communicate with, and to pay for, the care, support, and education of the child when able to do so." (§ 8604, subd. (b), italics added.) Courts have consistently rejected an interpretation of section 8604's predecessor that would limit the one-year period to the period immediately preceding the filing of the petition. (*Adoption of Burton* (1956) 147 Cal.App.2d 125, 133–134 [305 P.2d 185]; *Adoption of Christopher S.* (1987) 197 Cal.App.3d 433, 441 [242 Cal.Rptr. 866]; *Adoption of Smith* (1969) 270 Cal.App.2d 605, 608 [75 Cal.Rptr. 900]; 10 Witkin, *Summary of Cal. Law* (10th ed. 2005) *Parent and Child*, § 102, p. 170.)

added; Stats. 1961, ch. 1616, § 4, p. 3504.) Clearly, the Legislature knew how to limit the one-year period if that was its intent.

We find the analysis of *Connie M.* persuasive here and therefore conclude that limiting the language of section 7822, subdivision (a)(3), to refer only to the one-year period immediately preceding the petition would defeat the legislative purpose of the statute. We also reject A.B.'s contention that interpreting the statute to authorize a termination of parental rights where a parent abandoned a child, but subsequently established frequent and constant contact with him or her, would be "absurd." In fact, the interpretation A.B. advocates would allow a parent to abandon a child for many years, only to race to the courthouse to obtain visitation as soon as a new stepparent enters the picture, thereby precluding the court from terminating the abandoning parent's rights and interfering with the child's potential adoption, stability and security. In light of the express statutory purpose of "serv[ing] the welfare and best interest of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing from the child's life" (§ 7800; see § 7890), the Legislature could have reasonably concluded that the existence of parental abandonment for a year or more at any point in a child's life is a factor a court should consider in determining whether terminating parental rights is in the child's best interests, notwithstanding the parent's more recent attempts to connect with the child.

For these reasons, we conclude that the Legislature did not intend to limit the one-year period in section 7822, subdivision (a)(3), to the one year immediately preceding the filing of the petition.

B. *Intent to Abandon A.B.*

Scott contends that even if section 7822's one-year statutory period is interpreted as occurring at any time prior to the filing of the petition, he has rebutted any presumption that he intended to abandon A.B. "The questions of abandonment and of intent . . . , including the issue of whether the statutory presumption has been overcome satisfactorily, are questions of fact for the resolution of the trial court." (*In re Marriage of Jill & Victor D.* (2010) 185 Cal.App.4th 491, 506 [110 Cal.Rptr.3d 369].)

Although a court must make such findings based on clear and convincing evidence (§ 7821), the sole issue on appeal is whether substantial evidence supports its conclusions. (*Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1010 [79 Cal.Rptr.3d 743].) In determining if substantial evidence exists, we consider the evidence in a manner that favors the order being challenged. (*Guardianship of Wisdom* (1956) 146 Cal.App.2d 635, 639 [304 P.2d 221].) We do not evaluate "the credibility of witnesses, resolve conflicts in the

evidence or determine the weight of the evidence." (*E.M., supra*, 228 Cal.App.4th at p. 839.) On appeal, appellant bears the burden of establishing insufficient evidence to support the trial court's findings. (*Ibid.*)

■ In determining a parent's intent to abandon, the superior court must objectively measure the parent's conduct, "consider[ing] not only the number and frequency of his or her efforts to communicate with the child, but the genuineness of" the parent's efforts. (*In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1212 [230 Cal.Rptr. 332].) There is no requirement that a parent intend to abandon the child permanently. (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 883 [20 Cal.Rptr.2d 291] (*Daniel M.*).) The Legislature has determined that a child's need for stability cannot be postponed indefinitely to conform to an absent parent's plans to reestablish contact "in the distant future." (*Id.* at p. 884.)

Under section 7822, subdivision (b), a parent's failure to provide identification, provide support, or communicate with his or her child is presumptive evidence of an intent to abandon and his or her token efforts will not overcome this statutory presumption. (See *ibid.*, italics added [allowing a court to make a determination of abandonment if it finds a parent has *either* "made only token efforts to support *or* communicate with the child"]; *Adoption of Oukes* (1971) 14 Cal.App.3d 459, 467 [92 Cal.Rptr. 390] [similar, under Civ. Code, former § 232].) In this case, there was substantial evidence to support the court's finding that Scott made only token efforts to communicate with A.B. for well over a one-year period.⁹ The court found Michaela's testimony regarding the very limited nature and frequency of Scott's contacts with A.B. between early 2010 and the fall of 2014 credible as compared to the contrary testimony of Michaela's family members (and implicitly of Scott himself). Further, it is essentially undisputed that, although Scott initially expressed an interest in having "partial custody" when paternity was established, he did not thereafter actively inquire about A.B. or seek visitation with her until shortly before she turned five.¹⁰

Although Scott may not have intended to abandon A.B. permanently and his efforts toward self-improvement were admirable, the law does not require that A.B.'s life be kept in limbo based on such circumstances. In fact, doing

⁹ Because Scott's efforts to establish contact with A.B. were minimal for the entire period from early 2010, when he last saw A.B., to his filing for visitation in the fall of 2014, the court did not need to focus on any particular one-year period within that four- to five-year time range.

¹⁰ Scott contends John and Michaela failed to prove he left A.B. without financial support. Because section 7822, subdivision (b) states the elements of abandonment in the disjunctive and we resolve the issue of abandonment by finding Scott failed to communicate with A.B. for more than one year, we need not address whether Scott further demonstrated an intent to abandon A.B. by failing to support her.

so would not be consistent with the legislative purpose of providing abandoned children with the stability and security of an adoptive home: “ ‘The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it.’ ” (*In re Daniel M.*, *supra*, 16 Cal.App.4th at p. 884.)

Scott attempts to factually analogize his case to *E.M., supra*, 228 Cal.App.4th 828, wherein this court upheld an order denying a petition to terminate the parental rights of a father who was separated from his children while he addressed his substance abuse issues. (*Id.* at pp. 833, 841.) However, unlike Scott, the father in *E.M.* “regularly telephoned the children” and “asked to see the children numerous times during the statutory period” and his failure to maintain regular contact was “solely because [the mother] had prevented him from doing so.” (*Id.* at pp. 840–841.) In contrast, here substantial evidence establishes that Scott did not make anything other than perfunctory efforts to see A.B. from 2010 to late 2014.

■ Because substantial evidence supports a finding that Scott made only token efforts to communicate with A.B. for well over a one-year period of her life, the court did not err in ruling that he intended to abandon her within the meaning of section 7822, subdivision (a)(3).

C. The Court’s Order Is in A.B.’s Best Interests

Scott also argues that even if substantial evidence supports the trial court’s findings on abandonment, we should nonetheless reverse the termination order because A.B.’s adoption by John is not in her best interests. In Scott’s view, Michaela’s marriage to John provided less stability to A.B., who was cut off from her grandparents and other family; he also expresses concerns about John’s character. A.B. similarly argues that because she was recently deprived of her relationship with her maternal grandmother, it is not in her best interests to also be deprived of the opportunity to have a relationship with her biological father.

“[T]he decision to terminate parental rights lies in the first instance within the discretion of the trial court, ‘and will not be disturbed on appeal absent an abuse of that discretion.’ ” (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1382 [105 Cal.Rptr.3d 521].) “When applying the deferential abuse of discretion standard, ‘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.’ ” (*In re C.B.* (2010) 190 Cal.App.4th 102, 123 [117 Cal.Rptr.3d 846].)

The trial court's finding that adoption by John was in A.B.'s best interests is amply supported by the record. The evidence shows Scott did not know A.B. and had no relationship with her, other than to the extent it developed during two conjoint therapy visits. In contrast, A.B. had formed a relationship with John beginning in 2013 and was very bonded to him by the time of the hearing. The therapist supervising the conjoint therapy and visitations testified that John and Michaela were the primary people in A.B.'s life and A.B. initially expressed no interest in Scott. Even the social worker who prepared the section 7822 report recommending against a termination of Scott's rights testified that John had provided A.B. with stability and continuity of care during the prior two years, something Scott failed to do during A.B.'s life.

Contrary to Scott's implication on appeal, the "evidence" of any purported issues with John's character consists of unsubstantiated hearsay statements in Scott's declarations, none of which were specifically cited to at the hearing. Moreover, although Scott argues that John's presence in A.B.'s life brought less stability and security because A.B. was cut off from Michaela's mother and other maternal family members, he cites no evidence establishing that John's relationship with A.B. and Michaela caused the family rift or that A.B. would have been better off if the court did not allow John to adopt her. Scott likewise has failed to identify any evidence to suggest that his acting as an intermediary between A.B. and Michaela's family would have created greater stability for A.B. Similarly, no evidence established that A.B.'s new relationship with Scott was an essential substitute for her lost relationship with Michaela's mother. In any event, the test on appeal is not whether substantial evidence supports a finding the appellant wishes the court had made but rather whether substantial evidence, contradicted or not, supports the conclusions the court did make. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872–873 [197 Cal.Rptr. 925].)

Scott further argues that termination of his parental rights is not in A.B.'s best interests because he will no longer be obligated to provide child support for her. However, Scott forfeited appellate review of this issue because he did not raise it in the trial court. (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 810–811 [41 Cal.Rptr.2d 731].) Moreover, he has not directed us to any evidence establishing that A.B. would suffer harm if Scott stopped paying such support.

Because the record contains substantial evidence to support the juvenile court's finding that adoption was in A.B.'s best interests, the juvenile court did not abuse its discretion in terminating Scott's parental rights.

II

ICWA

■ Congress enacted ICWA to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families” (25 U.S.C. § 1902.) ICWA allows a tribe to intervene in dependency proceedings because the law presumes it is in the child’s best interests to retain tribal ties and heritage and in the tribe’s interest to preserve future generations. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469 [99 Cal.Rptr.2d 688].) Consequently, a court cannot terminate parental rights over an Indian child without first providing the child’s tribe with notice “by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.” (25 U.S.C. § 1912, subd. (a).)

ICWA notice requirements “are mandatory and cannot be waived by the parties.” (*In re Robert A.* (2007) 147 Cal.App.4th 982, 989 [55 Cal.Rptr.3d 74].) However, “a notice violation under ICWA is not jurisdictional in the fundamental sense, but instead is subject to a harmless error analysis.” (*In re G.L.* (2009) 177 Cal.App.4th 683, 695 [99 Cal.Rptr.3d 356].) “‘An appellant seeking reversal for lack of proper ICWA notice must show a reasonable probability that he or she would have obtained a more favorable result in the absence of the error.’” (*In re Autumn K.* (2013) 221 Cal.App.4th 674, 715 [164 Cal.Rptr.3d 720] (*Autumn K.*)).

■ Under California law, a court may find that ICWA does not apply to termination proceedings if proper notice is given and neither a “tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice.”¹¹ (Welf. & Inst. Code, § 224.3, subd. (e)(3); Cal. Rules of Court, rule 5.482(d)(1).) California law further provides that a “[p]roof of the notice, including copies of notices sent and *all return receipts and responses received*, shall be filed with the court in advance of the hearing” (Welf. & Inst. Code, § 224.2, subd. (c), italics added.). In addition, no termination proceeding “shall be held until at least 10 days after

¹¹ Prior to 2008, the relevant 60-day period was tied to the *sending* of notice rather than its receipt. (See Cal. Rules of Court, former rule 5.664(f)(6), repealed eff. Jan. 1, 2008 [allowing a court to determine that ICWA was inapplicable “[i]f, after a reasonable time following the sending of notice under this rule—but in no event less than 60 days—no determinative response to the notice is received”]; see also, e.g., *In re Justin S.* (2007) 150 Cal.App.4th 1426, 1437 [59 Cal.Rptr.3d 376].) In addition, the California Rules of Court still allow a court to find ICWA inapplicable when a tribe does not respond to notice 60 or more days *following service* in guardianship and conservatorship proceedings. (Cal. Rules of Court, rule 7.1015(c)(9).)

receipt of notice by . . . the tribe.” (*Id.*, subd. (d), italics added; 25 U.S.C. § 1912(a).)

During the course of the proceeding, Scott submitted an ICWA-030 form identifying four separate tribes with which A.B. might be affiliated. Respondents mailed a copy of the form and notice of the termination hearing to each of the tribes and filed a copy of the notice, proof of service and counsel’s declaration with the court. By the time of the hearing in August 2015, three of the four tribes had responded, indicating that A.B. was not affiliated with them. At the continued hearing, the court was informed that no response had been received from the United Keetoowah Band and, with the assent of Scott and A.B., it made a finding that ICWA did not apply.

On appeal, Scott contends the court failed to comply with ICWA’s notice provisions because there is no evidence the United Keetoowah Band received actual notice of the proceeding as the result of an error in the ZIP code used in sending the notice. Scott is correct that the date of receipt of an ICWA notice, rather than the date of its service, is the critical time for determining whether ICWA applies in the absence of any tribal response. (Welf. & Inst. Code, §§ 224.2, subds. (c), (d), 224.3, subd. (e)(3); see also 25 U.S.C. § 1912(a).) However, at the request of Michaela and John, this court has taken judicial notice of evidence that the United Keetoowah Band actually received notice of these proceedings several months prior to the termination hearing and decided not to intervene.¹² Although this evidence was not before the juvenile court at the time of the continued hearing on the termination petition and thus the court erred in finding ICWA inapplicable, it nonetheless establishes that there is no reasonable probability that Scott would have obtained a more favorable result in the absence of error, as required to establish reversible error. (*Autumn K.*, *supra*, 221 Cal.App.4th at p. 715.)

¹² Although an appellate court will generally not consider postjudgment evidence as a basis for reversing a termination of parental rights except in extraordinary circumstances (*In re Zeth S.* (2003) 31 Cal.4th 396, 413 [2 Cal.Rptr.3d 683, 73 P.3d 541]), here the evidence supports an *affirmance* of the decision to terminate Scott’s parental rights. (*In re A.B.* (2008) 164 Cal.App.4th 832, 841 [79 Cal.Rptr.3d 580] [“admission of the evidence to affirm the judgment would promote the finality of the judgment and prevent further delay”]; *In re B.D.* (2008) 159 Cal.App.4th 1218, 1223 [72 Cal.Rptr.3d 153] [considering reports of proceedings occurring after the termination of parental rights to establish harmless error].) In addition, because ICWA compliance can be raised at any time, consideration of this evidence for the first time on appeal is appropriate. (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 866–867 [11 Cal.Rptr.3d 1] [augmenting record with ICWA notices where appellant was challenging ICWA notice rather than termination of parental rights]; *A.B.* at pp. 841, 843 [permitting augmentation with an ICWA form, noting the ICWA issue was “distinct from the substantive merits”].)

DISPOSITION

The order terminating parental rights is affirmed.

McDonald, Acting P. J., and Prager, J.,* concurred.

*Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[No. B263945. Second Dist., Div. Seven. Aug. 24, 2016.]

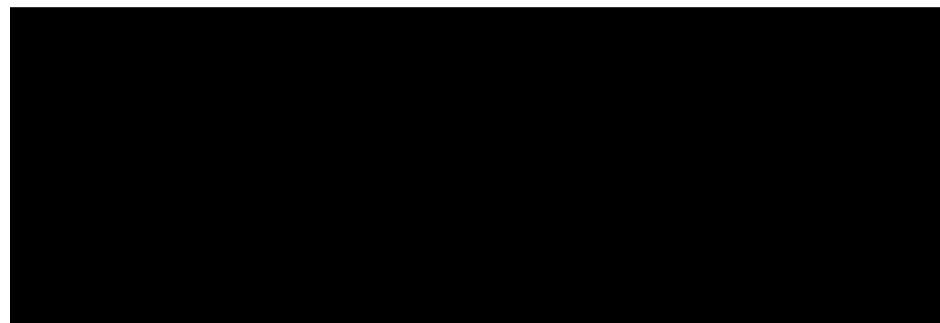
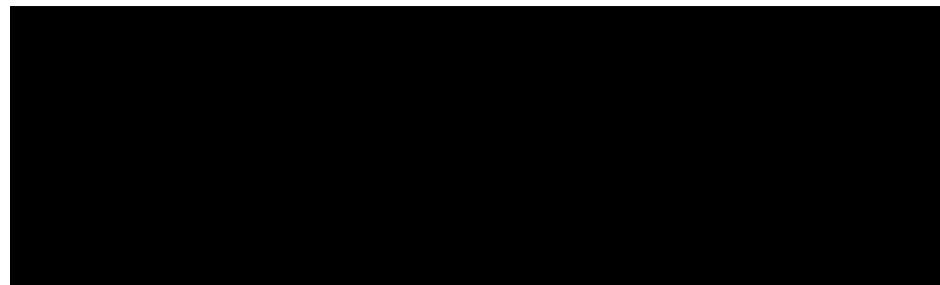
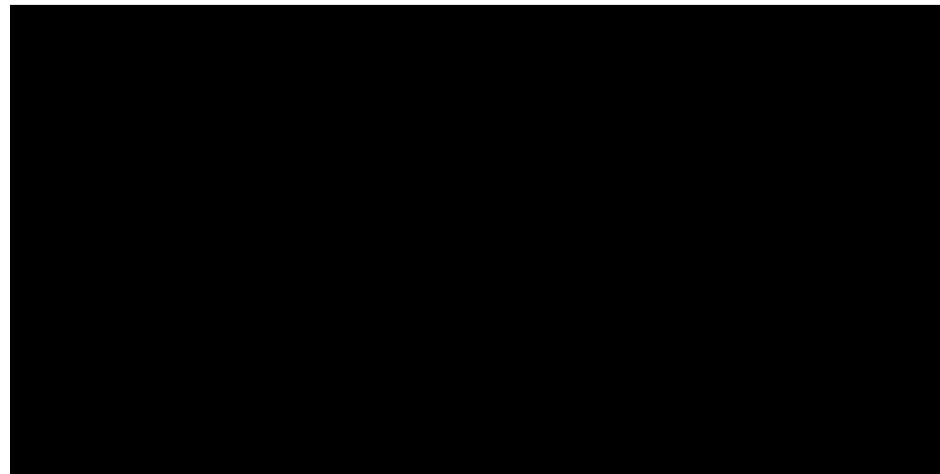
WENDY RANDALL, Plaintiff and Appellant, v.
GEOFFREY MOUSSEAU, Defendant and Respondent.

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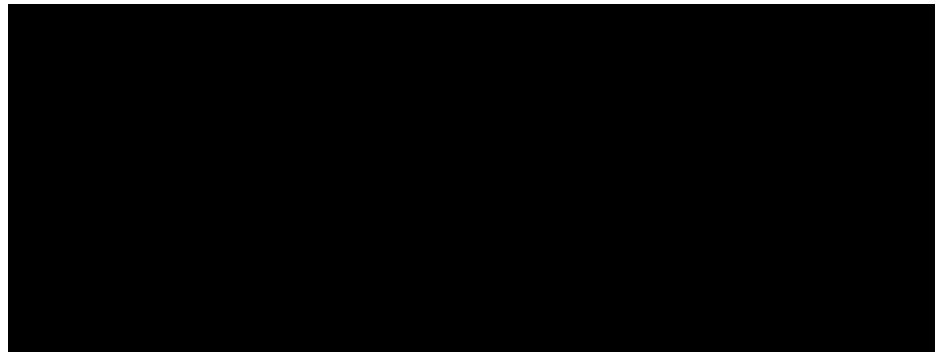
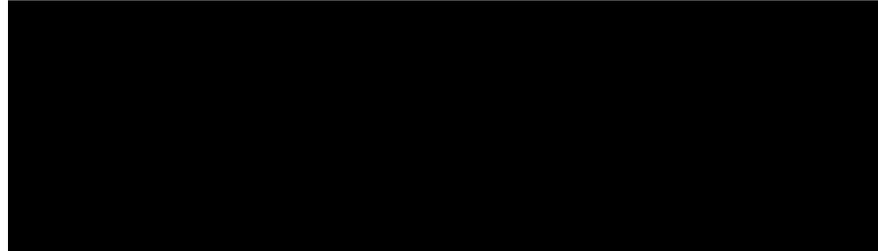
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COUNSEL

Law Offices of Daniel B. Spitzer and Daniel B. Spitzer for Plaintiff and Appellant.

Geoffrey Mousseau, in pro. per., for Defendant and Respondent.

OPINION

ZELON, J.—Litigants in California may exercise their right to appeal without obtaining and transmitting to the Court of Appeal a verbatim transcript of the oral proceedings in the trial court. One alternative mechanism available to litigants is the settled statement, which requires the parties and the court to create an adequate, accurate record of the trial or ruling on appeal. When a proper motion is made, it is the obligation of the parties and the court to work together to prepare the settled statement. California law has long recognized this obligation: a trial court may not “deprive a litigant of his

right of appeal by simply refusing to perform a plain duty.” (*Sansome v. Myers* (1889) 80 Cal. 483, 486 [22 P. 212].)

Appellant Wendy Randall appeals a judgment for defendant after a court trial. There was no court reporter during the trial, and the trial court denied Randall’s motion for a settled statement after trial. The trial court abused its discretion by denying Randall’s motion, and as a result, depriving her of her right to her appeal, but Randall failed to seek timely review of that denial. Because the issue has been forfeited, and because the record before us is insufficient to permit review of the judgment, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

Wendy Randall sued Geoffrey Mousseau for breach of contract and common counts on April 1, 2011. The parties tried the case to the court commencing on January 20, 2015; the court issued a minute order finding for the defendant on both counts on January 22, 2015, and entered judgment for the defendant on March 9, 2015. Randall moved for a new trial and for judgment notwithstanding the verdict on March 18, 2015. The trial court heard and denied both motions on May 1, 2015.

Randall filed a motion for a settled statement (Cal. Rules of Court, rules 8.130, 8.137) on May 15, 2015, attaching a proposed settled statement. Mousseau objected, asserting that Randall was not entitled to use a settled statement when she had made the decision not to hire a court reporter for the trial and subsequent proceedings. Mousseau also filed objections to the contents of the proposed statement, but did not propose any amendments.

In a minute order dated August 14, 2015, the trial court denied the motion, stating: “The request places a burden on the other side who has to review the proposed settlement and provide their own version. The burden is placed on the court to conduct a settlement conference with the parties regarding the contents of the statement. Minute order contains ample information, there is no reason for a further settled statement.”

On appeal, Randall attempted in her briefing to supply the testimony at trial, but did not argue that the trial court had erred in denying her motion for a settled statement. Mousseau argued in response that the failure to provide a record on appeal requires this court to affirm the judgment. Mousseau is correct that we cannot reach the merits of this matter on the record before us because an appealed judgment is deemed correct; it is appellant’s burden to provide an adequate record demonstrating error. He is also correct that

Randall has forfeited this issue.¹ Nonetheless, because many trial courts no longer provide court reporters in civil matters, and this issue is likely to recur, we address the procedure to be followed in these cases.

DISCUSSION

A. *The Trial Court Has a Duty to Settle a Statement*

■ California jurisprudence has long recognized the availability of a settled statement of proceedings at the trial court as a viable alternative to a reporter's transcript on appeal. Although the procedure is now set out in the Rules of Court, the Supreme Court specified the duty of a trial court to settle a statement at the request of a litigant as early as 1889. In *Sansome v. Myers*, *supra*, 80 Cal. 483, 486, the Court declared that a trial court has the obligation to settle a statement, an obligation with which it could not simply fail to comply, explaining: “[t]o so hold would place it in the power of the trial judge to deprive a litigant of his right of appeal by simply refusing to perform a plain duty.” (See also *Western States Const. Co. v. Municipal Ct.* (1951) 38 Cal.2d 146, 151 [238 P.2d 562] [trial court has duty to settle proposed statement].)

The preparation of a settled statement to provide a record for appeal in civil matters is now governed by California Rules of Court, rules 8.130(h)² and 8.137.³ The latter rule sets forth the requirements, and time deadlines, applicable to the request, and defines the role of the parties and the trial judge in preparing the record. To make such a motion, the party must demonstrate that “[a] substantial cost saving will result and the statement can be settled without significantly burdening opposing parties or the court”; or “[t]he designated oral proceedings were not reported or cannot be transcribed”; or that “[t]he appellant is unable to pay for a reporter's transcript and funds are not available from the Transcript Reimbursement Fund.” (Rule 8.137(a)(2).)

■ Over the course of recent years, a number of trial courts, including those in Los Angeles County, have ceased providing court reporters in many

¹ We requested supplemental briefing on this issue from the parties. Randall argued for the first time that remand for preparation of a settled statement would be appropriate, but also asserted that the record was adequate for review. Mousseau reiterated his argument that no settled statement should be available when a party chooses to forgo hiring a court reporter, and argued as well that Randall's request was too late.

² California Rules of Court, rule 8.130(h) applies where there is a reporter's transcript for a proceeding, but a portion cannot be transcribed. It permits the use of a settled statement in those circumstances, but does not limit California Rules of Court, rule 8.137: “[t]his remedy supplements any other available remedies.” (Cal. Rules of Court, rule 8.130(h)(3).)

³ All further references to rules are to the California Rules of Court.

civil proceedings, leaving the litigants with the burden and expense of hiring a private court reporter, or relying on an alternative, such as a settled statement, to create a record for appeal. Rule 8.137 does not indicate a preference for one form of record over the other: the rule expressly permits a litigant, whether or not he or she can afford the cost of a privately retained reporter, to choose a settled statement. (See *Los Angeles County Court Reporters Assn. v. Superior Court* (1995) 31 Cal.App.4th 403, 410 [37 Cal.Rptr.2d 341] [official reporter's transcript not required for appeal; settled statement is authorized substitute].)⁴ The trial court does retain discretion to refuse to settle a statement; it need not consent to a narrative that is inaccurate, but may insist that the statement reflects the actual proceedings. That discretion, however, is limited and must be exercised in a manner that does not interfere with the litigant's statutory right to appeal. (*Burns v. Brown* (1946) 27 Cal.2d 631, 636 [166 P.2d 1]; see also *St. George v. Superior Court* (1949) 93 Cal.App.2d 815, 817 [209 P.2d 823] [trial court's power over the record must not be exercised in an arbitrary manner]; *Eisenberg v. Superior Court* (1956) 142 Cal.App.2d 12, 18 [297 P.2d 803] ["full and plenary power over [the record] is reposed in the trial judge, subject only to the limitation that he *does not act arbitrarily*"].)

The trial court thus must have justification for the actions it takes with respect to the proposed statement. Where a trial court makes specific findings of deficiencies, which are supported by the record, it is not an abuse of discretion to refuse to settle the statement. Without such findings, the trial court does abuse its discretion. (*Sidebotham v. Superior Court* (1958) 161 Cal.App.2d 624, 627–628 [326 P.2d 890]; see also *Keller v. Superior Court* (1950) 100 Cal.App.2d 231, 236 [223 P.2d 309] (*Keller*) [under prior version of rule, it was an abuse of discretion for trial court to refuse to settle statement without specifying deficiencies; "The very purpose of [the rule] . . . is to permit the filing of a narrative statement 'in lieu of a reporter's transcript' "].)

■ Randall satisfied the requirement of the rule, because there was no court reporter in this matter. The trial court did not address this fact, but appeared instead to focus on an alternative ground, that there not be a "significant" burden on the opposing party or the court. The required showing is phrased in the disjunctive, however; the moving party need satisfy only one of the three requirements, not all of them. Even were that not the case, the trial court's findings here mirrored the rule's requirements that both the parties and the court participate in creating an accurate summary of the

⁴ Respondent argued at the trial court, and at this court, that appellant's decision not to hire a court reporter deprived her of the right to seek a settled statement for her appeal. That assertion was made without citation to any authority, and, as demonstrated in the text, was not only erroneous, but also frivolous.

proceedings. While this does require an expenditure of time and effort, it is no more than the rule contemplates, and reflects the policy decision made to permit parties to appeal without the expense and burden of preparation of a reporter's transcript.

The trial court failed to make any findings of deficiencies in the proposed settled statement, but instead found only that the preparation of such a statement would be a burden. That finding is not supported by any part of the record that is before this Court; the trial court did not explain why the preparation would be a burden of any kind, notwithstanding the rule's requirement that such a disqualifying burden be a significant one.⁵ The trial court abused its discretion in its ruling.

■ The failure to comply with the rule, and the resulting absence of a record, is more than significant to the appellant. Appealed judgments and orders are presumed correct, and error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [86 Cal.Rptr. 65, 468 P.2d 193].) Consequently, appellant has the burden of providing an adequate record. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 [240 Cal.Rptr. 872, 743 P.2d 932]; *Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 644 [177 Cal.Rptr.3d 184].) Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. (*Maria P.*, *supra* at pp. 1295–1296.) Without a record, either by transcript or settled statement, a reviewing court must make all presumptions in favor of the validity of the judgment. (*Elena S. v. Kroutik* (2016) 247 Cal.App.4th 570 [202 Cal.Rptr.3d 318].) As has occurred here, appellant is effectively deprived of the right to appeal.

B. *The Moving Party Must Challenge a Denial in a Timely Manner*

■ The appellant must, however, take steps to protect her right to appeal. When the trial court denies a party's motion for a settled statement, the rule requires appellant to "file a new notice designating the record on appeal under rule 8.121 within 10 days after the superior court clerk sends, or a party serves, the order of denial." (Rule 8.137(a)(3).) To preserve the issue of

⁵ The trial court also indicated its belief that the minute order it issued was sufficient. That minute order did not provide a condensed narrative of the proceedings, but merely described the court's conclusions after hearing the evidence. The court acknowledged it had weighed conflicting evidence: "The Court finds even though defendant is a Felon his explanation carries equal evidentiary weight as the Plaintiff's claim. The Court observed the demeanor of all witnesses while testifying." This court cannot determine the sufficiency of that disputed evidence to support the judgment without the required narrative.

The impact of the failure to permit such a narrative to be prepared is further demonstrated by the court's minute order denying the motion for a new trial, where the court stated that its conclusions were supported by the evidence at trial. This court is left unaware of that evidence. Appellant has not identified any error in the denial of that motion other than the issues raised with respect to the judgment. As set forth above, the record is insufficient to resolve those claims.

the denial for appeal, the appellant may seek writ review at the time of the denial, or raise the denial in the opening brief on appeal. (See *Western States Const. Co.*, *supra*, 38 Cal.2d 146; *Keller*, *supra*, 100 Cal.App.2d 231.) In this case, appellant took none of these steps.

■ Here, while appellant detailed her request for a settled statement, and the trial court's denial, she did not contend that the trial court erred in denying her motion. Instead, she asserted in the opening brief, and in the reply, that the record was adequate to permit review by this court. It was not until the supplemental briefing that Randall argued that the trial court erred in denying her motion, and that remand was appropriate. This assertion is untimely; Randall had already forfeited the issue by failing to assert it either by petition for writ of mandate or in her opening brief.

Under these circumstances, we are compelled to affirm the judgment.

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal.

Perluss, P. J., and Garnett, J.,* concurred.

A petition for a rehearing was denied September 16, 2016, and the opinion was modified to read as printed above.

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[No. C079926. Third Dist. Aug. 9, 2016.]

In re H.W., a Person Coming Under the Juvenile Court Law.
THE PEOPLE, Plaintiff and Respondent, v.
H.W., 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 22, 2016, S237415.

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Robert McLaughlin, 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, Daniel B. Bernstein and F. Matt Chen, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

NICHOLSON, J.—In this Welfare and Institutions Code section 602 proceeding, the juvenile court sustained a petition charging the minor, H.W., with theft and possession of burglary tools. The minor challenges only the burglary tools finding. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 13, 2014, loss prevention agent Marcus Nealy and loss prevention manager Stephanie Garza were employed at a Sears department store in Yuba City. Watching the sales floor via the store's closed-circuit surveillance system, Nealy saw the minor enter the store with "a backpack that looked empty" and noticed he was "looking around very suspiciously." Nealy and Garza took up separate positions on the sales floor and communicated by cell phone as they continued to observe the minor.

Garza told Nealy the minor removed the antitheft tag from a pair of jeans using a pair of pliers, carried the jeans into the restroom, and, when the minor came out of the restroom, Garza no longer saw the jeans. Nealy checked the restroom but found no jeans. Meanwhile, Garza alerted Nealy the minor was leaving the store without stopping at a cash register or attempting to pay for the jeans. Nealy headed outside to apprehend the minor.

Once outside the store, Nealy stopped the minor, identified himself as a loss prevention agent, told the minor he "knew [the minor] had concealed the . . . jeans," and escorted the minor back into the store. Garza called the police.

When Yuba City Police Officer Joshua Jackson arrived at the store, Nealy and Garza informed him the minor used "a pair of diagonal cutters or wire cutters" to remove the security tag on the jeans and placed the jeans in the backpack before leaving the store without paying for them. A search of the minor's backpack revealed the jeans and a pair of pliers.¹ The minor had no wallet, no money, no credit cards, and no identification.

Officer Jackson later testified "[p]liers are commonly used as a tool to remove tags from clothing items that have a metal pin-type securing device that cannot be broken or cut with, say, a knife."

¹ Both parties use the term "pliers" throughout their briefing. So do we.

A delinquency petition (Welf. & Inst. Code, § 602, subd. (a)), filed April 14, 2015, alleged the minor committed theft (Pen. Code, § 484,² subd. (a)), possession of burglary tools (§ 466), and trespass (§ 602.5).

Following a contested jurisdiction hearing, the juvenile court sustained the theft and burglary tool possession allegations, but found the trespass allegation had not been proven beyond a reasonable doubt. The minor was adjudged a ward of the juvenile court and placed on juvenile probation. The juvenile court committed the minor to two days in juvenile hall with credit for time served, and set a maximum term of confinement of eight months.

The minor filed a timely notice of appeal.

DISCUSSION

The minor contends there is insufficient evidence to sustain the juvenile court's finding that he possessed a "burglar's tool," or that he possessed the pliers with the felonious intent to commit a burglary, within the meaning of section 466. We disagree.

In addressing the minor's claim, we "review the whole record 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—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] ' “[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder.”' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66 [132 Cal.Rptr.2d 271, 65 P.3d 749].) We accord due deference to the verdict and will not substitute our conclusions for those of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078 [119 Cal.Rptr.2d 859, 46 P.3d 335].) A conviction will not be reversed for insufficient evidence unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755 [79 Cal.Rptr. 529, 457 P.2d 321].)

Section 466 provides: "Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, or other instrument or tool with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer

² Undesignated statutory references are to the Penal Code.

coach, or vehicle as defined in the Vehicle Code, . . . is guilty of a misdemeanor.”

■ “[I]n order to sustain a conviction for possession of burglary tools in violation of section 466, the prosecution must establish three elements: (1) possession by the defendant; (2) of tools within the purview of the statute; (3) with the intent to use the tools for the felonious purposes of breaking or entering.” (*People v. Southard* (2007) 152 Cal.App.4th 1079, 1084–1085 [62 Cal.Rptr.3d 48] (*Southard*).) “‘The offense is complete when tools or other implements are procured with intent to use them for a burglarious purpose.’” [Citation.]” (*Id.* at p. 1088.) Such intent is usually proven by circumstantial evidence. (*People v. Cain* (1995) 10 Cal.4th 1, 47 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

The minor asserts the pliers he possessed are not specifically identified in section 466 and do not otherwise fall within the definition of “other instrument or tool” under that statute because they were not similar to the items listed in section 466 and there was no evidence they could be used for the purpose of breaking, entering, or otherwise gaining access into a building or vehicle.

The People argue the pliers constitute an “other instrument or tool” within the meaning of section 466 because the minor concedes he intended to use the pliers to commit theft inside the store and the evidence shows he used the pliers to remove an antitheft device from the jeans he attempted to steal from the store.

Both parties rely in some fashion on *People v. Gordon* (2001) 90 Cal.App.4th 1409 [109 Cal.Rptr.2d 725] (*Gordon*), superseded by statute as discussed in *People v. Kelly* (2007) 154 Cal.App.4th 961 [66 Cal.Rptr.3d 104] (*Kelly*), and *People v. Diaz* (2012) 207 Cal.App.4th 396 [143 Cal.Rptr.3d 432] (*Diaz*). We discuss each case below.

In *Gordon*, decided by the Court of Appeal, Fourth District, Division One, the defendant was discovered pulling a car stereo speaker out of the victim’s car, the rear passenger window of which had been shattered into small pieces. Six weeks later, a police officer saw the defendant talking to two men who were inside a car either removing or installing a stereo. The officer searched the defendant and found two small pieces of porcelain from a spark plug in his pants pocket. At trial, a police detective testified thieves often use pieces of ceramic spark plugs to shatter car windows because that method makes very little noise. The jury convicted the defendant of violating section 466. (*Gordon, supra*, 90 Cal.App.4th at p. 1411.)

The court reversed. Guided by the rule of *ejusdem generis*, “which applies when general terms follow a list of specific items or categories, or vice versa,” the court noted ceramic pieces were not listed in section 466, and determined they did not fall within that section’s “other instrument or tool” category. Under the rule, “application of the general term is ‘restricted to those things that are similar to those which are enumerated specifically.’” [Citations.]” (*Gordon, supra*, 90 Cal.App.4th at p. 1412.) Concluding that “[n]one of the devices enumerated are those whose function would be to break or cut glass—e.g., rocks, bricks, hammers or glass cutters, and none of the devices listed resembles ceramic spark plug pieces that can be thrown at a car window to break it,” the court concluded “the test is not whether a device can accomplish the same general purpose as the tools enumerated in section 466; rather, the device itself must be *similar* to those specifically mentioned.” (*Id.* at pp. 1412–1413, original italics.)

Several years later, the Court of Appeal, First District, Division Three, in *Kelly*, took a different view. There, police responded to a report of an automobile burglary and found a van with a shattered window. A police inspector apprehended the defendant and found inside his backpack several items, including a slingshot, a box cutter, and a flashlight. The inspector concluded, based on his experience in working burglaries, that those three items were burglary tools because “[a] slingshot is commonly used with a ceramic chip to break automobile windows; this device ‘will crack the glass usually on the first hit.’ Box cutters are used to cut the wires on car stereos. Flashlights are used to see inside dark car interiors.” (*Kelly, supra*, 154 Cal.App.4th at p. 964.) The trial court concluded the defendant violated his probation because he was in possession of burglary tools under section 466. (*Kelly, supra*, at p. 965.)

The defendant appealed, relying on *Gordon* for the proposition that the items found were not “‘other instrument[s] or tool[s]’” within the meaning of section 466. (*Kelly, supra*, 154 Cal.App.4th at p. 965.) The First District, Division Three, disagreed and affirmed. Noting it had no difficulty placing a slingshot or a box cutter within the category of “‘tools’ or ‘instruments’ as those terms are commonly understood[:].”

■ “In *Gordon*, the court seems to have applied the *ejusdem generis* rule without identifying any ambiguity in section 466. We do not consider the language proscribing possession of ‘any instrument or tool’ with the specified felonious intent to be inherently ambiguous. But assuming that it is, *Gordon* thwarts, rather than effectuates, the plain legislative purpose to deter and prevent burglaries. [Citation.] ‘It is to be remembered that ‘the doctrine of *ejusdem generis* is but a rule of construction to aid in ascertaining the

meaning of the Legislature, and may be used to carry out, but not to defeat the legislative intent.’’ [Citation.] The ‘‘major consideration in interpreting a criminal statute is the legislative purpose,’’ and the court ‘‘will usually inquire into the evils which prompted its enactment and the method of elimination or control which the Legislature chose.’’ [Citation.]

‘‘Under *Gordon*’s interpretation, section 466 authorizes law enforcement to apprehend only burglars and would-be burglars who employ a limited set of means to achieve their nefarious ends, while malfeasants who use other means to break and enter are immunized from punishment even where the evidence establishes their intent to use the tool or instrument in their possession to commit burglary. We see nothing in the statute that indicates this is what the Legislature intended. To the contrary, we think the plain import of ‘other instrument or tool,’ and the only meaning that effectuates the obvious legislative purpose of section 466 includes tools that the evidence shows are possessed with the intent to be used for burglary.’’ (*Kelly, supra*, 154 Cal.App.4th at pp. 966, 967–968, fn. omitted.)

The court held there was ‘‘sufficient evidence to conclude that the slingshot and box cutters were instruments or tools within the scope of section 466.’’ (*Kelly, supra*, 154 Cal.App.4th at p. 968, fn. omitted.)

Five years later, the Court of Appeal, Fourth Appellate District, Division Three, in *Diaz* revisited the issue. There, the defendant was apprehended while attempting to commit a residential burglary. The arresting officers found a large black bag containing latex gloves, and later testified that the gloves were ‘‘‘burglary tools.’’’ (*Diaz, supra*, 207 Cal.App.4th at p. 399.) A jury convicted the defendant of several charges, including possession of burglary tools pursuant to section 466. (*Diaz, supra*, at p. 398.)

The Court of Appeal reversed. After considering the statute’s legislative history and comparing *Gordon* and *Kelly*, the court concluded its review of the legislative history supported an interpretation of section 466 closer to *Gordon*’s requirement that ‘‘‘the device itself must be similar to those specifically mentioned’’’ (*Diaz, supra*, 207 Cal.App.4th at p. 401, italics omitted, quoting *Gordon, supra*, 90 Cal.App.4th at p. 1413), than to *Kelly*’s apparent suggestion that ‘‘any item that may be put to use during the course of a burglary suffices for conviction’’ (*Diaz, supra*, 207 Cal.App.4th at p. 402).

The *Diaz* court held as follows: ‘‘[S]ection 466 is limited to instruments and tools used to break into or gain access to property in a manner similar to using items enumerated in section 466. That the perpetrator breaks into or enters property, or attempts to do so, and happens to have access to a tool that

may be used in the course of the burglary is not enough. The tool must be for the purpose of breaking, entering, or otherwise gaining access to the victim's property. Nor is it enough that a common implement may be used for breaking and entering, given the Legislature itself has specified its intent was 'to add only ceramic or porcelain spark plug chips or pieces, not other common objects such as rocks or pieces of metal that can be used to break windows, to the list of burglary tools in Section 466 of the Penal Code.' (Stats. 2002, ch. 335, § 2, p. 1298.)" (*Diaz, supra*, 207 Cal.App.4th at p. 404, italics omitted.)

Finding "there was no evidence that common latex gloves or the bag in which they were found could be used or were intended to score a breach in [the victim's] home defenses or otherwise gain [the defendant] entry or access to [the victim's] property, nor that these items were in any way similar to items the Legislature has set apart in section 466 for additional punishment when possessed as burglary tools," the court concluded there was insufficient evidence to support the defendant's section 466 conviction. (*Diaz, supra*, 207 Cal.App.4th at p. 404.)

■ We disagree with *Gordon* and *Diaz*, agree with the analysis in *Kelly*, and conclude "the plain import of 'other instrument or tool,' and the only meaning that effectuates the obvious legislative purpose of section 466 includes tools that the evidence shows are possessed with the intent to be used for burglary." (*Kelly, supra*, 154 Cal.App.4th at pp. 967–968, fn. omitted.) Such an interpretation is consistent with the purpose of the statute, which is to prevent the crime regardless of whether the tool is used to gain entry, to break into the building, or to effectuate the theft.

In our view, the interpretation of section 466 in *Diaz* is overly narrow and inconsistent with the otherwise unambiguous language of the statute. The *Diaz* court held "[t]he tool must be for the purpose of breaking, entering, or otherwise gaining access to the victim's property." (*Diaz, supra*, 207 Cal.App.4th at p. 404.) However, the language of section 466 contains no such requirement, instead making it a crime to possess the specified items or an "other instrument or tool with intent feloniously to break or enter into any building . . . or vehicle." As explained by the Court of Appeal, First Appellate District, Division Two, in *Southard*, the offense is complete when the tools are "'procured with a design to use them for a burglarious purpose,' " and it is "'not necessary to allege or prove an intent to use them in a particular place, or for a special purpose, or in any definite manner.' "³ (*Southard, supra*, 152 Cal.App.4th at p. 1088, italics added.)

³ In *Southard*, the defendant possessed numerous items specifically designated as burglary tools as well as other items which were not so designated, such as two black sweatshirts, a ski

The interpretation of section 466 in *Diaz* interjects a requirement of breaking, an element long ago eliminated from burglary under section 459. For instance, under circumstances such as those here, it has long been held that a person who enters a store with the intent to commit theft or a felony can be convicted of burglary even though entry is during regular business hours while the store is open to the general public. “[A] party who enters with the intention to commit [larceny or] a felony enters without an invitation. He is not one of the public invited, nor is he entitled to enter. Such a party could be refused admission at the threshold, or ejected from the premises after the entry was accomplished.” (*People v. Gauze* (1975) 15 Cal.3d 709, 713 [125 Cal.Rptr. 773, 542 P.2d 1365], quoting *People v. Barry* (1892) 94 Cal. 481, 483 [29 P. 1026]; accord, *People v. Salemme* (1992) 2 Cal.App.4th 775, 781 [3 Cal.Rptr.2d 398] [a person entering a structure “with the intent to commit a felony is guilty of burglary *except* when he or she (1) has an unconditional possessory right to enter as the occupant of that structure or (2) is invited in by the occupant who knows of and endorses the felonious intent”].) Put another way, a person need not use the tool or instrument he or she possesses to break into the building so long as he or she procured that tool or instrument intending to use it “for a burglarious purpose.” (*Southard, supra*, 152 Cal.App.4th at p. 1088.)

■ Such is the case here. The minor was found to be in possession of pliers. He concedes he possessed and used those pliers for the purpose of committing theft inside the store. He entered the store with the pliers in an otherwise empty backpack, and had no credit cards, money, or other means to pay for any merchandise. Once inside the store, he used the pliers to remove an antitheft device from the jeans, secreted the jeans in the backpack, and left the store without attempting to pay. That is, he “procured [the pliers] with a design to use them for a burglarious purpose” (*Southard, supra*, 152 Cal.App.4th at p. 1088), and did in fact use the pliers for the burglarious purpose of stealing the jeans. Thus, like the box cutters in *Kelly, supra*, 154 Cal.App.4th at page 968, the pliers constituted an “other instrument or tool” for purposes of section 466.

There was, therefore, sufficient evidence to sustain the juvenile court’s finding the minor possessed an “instrument or tool with intent feloniously to break or enter” within the meaning of section 466.

mask, one pair of binoculars, several walkie-talkie radios, a flashlight, and a strap-on head light. In concluding there was sufficient evidence to establish the defendant possessed burglary tools with felonious intent, the court declined to limit its consideration to only those items specifically designated within the statute as burglary tools. Rather, it considered *all* the items found when reaching its conclusion. (*Southard, supra*, 152 Cal.App.4th at p. 1090.)

DISPOSITION

The juvenile court's order is affirmed.

Raye, P. J., and Blease, J., concurred.

Appellant's petition for review by the Supreme Court was granted November 22, 2016, S237415.

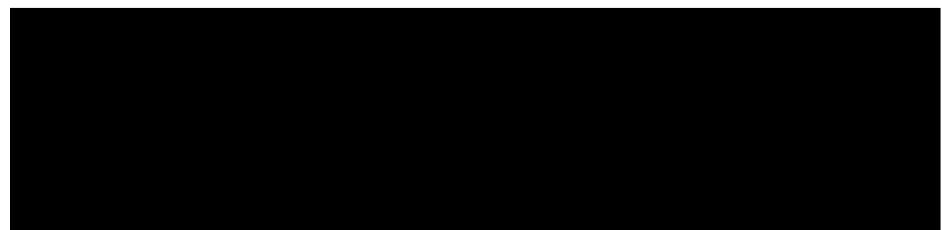
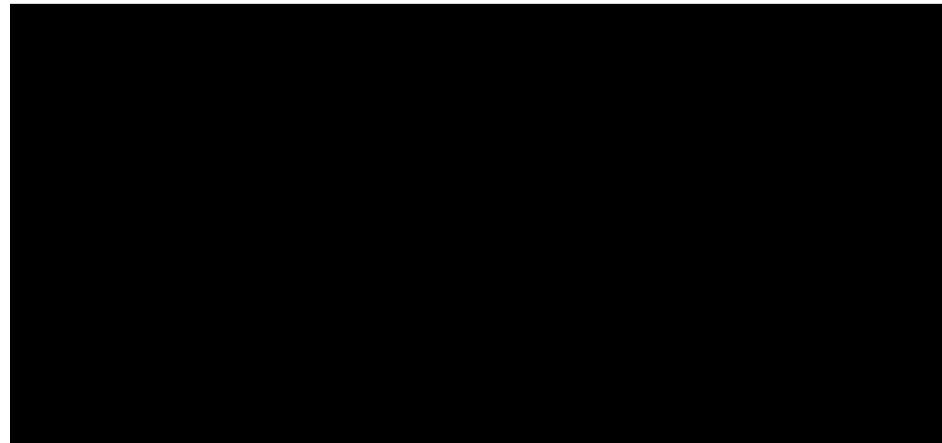
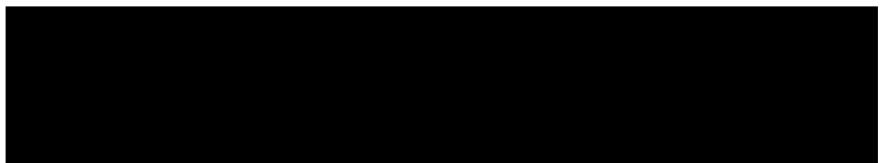
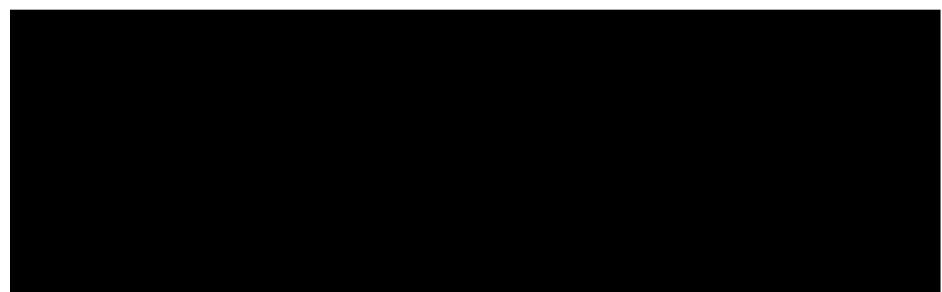
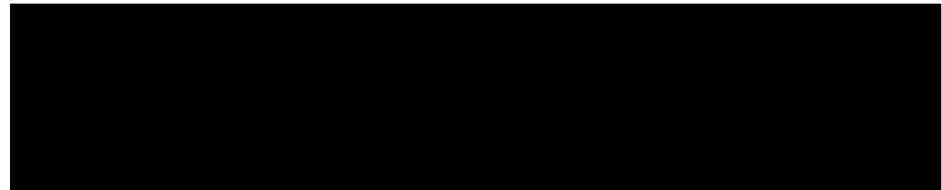
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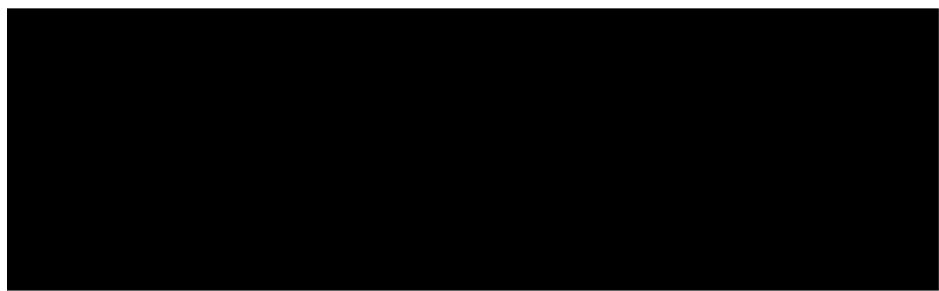
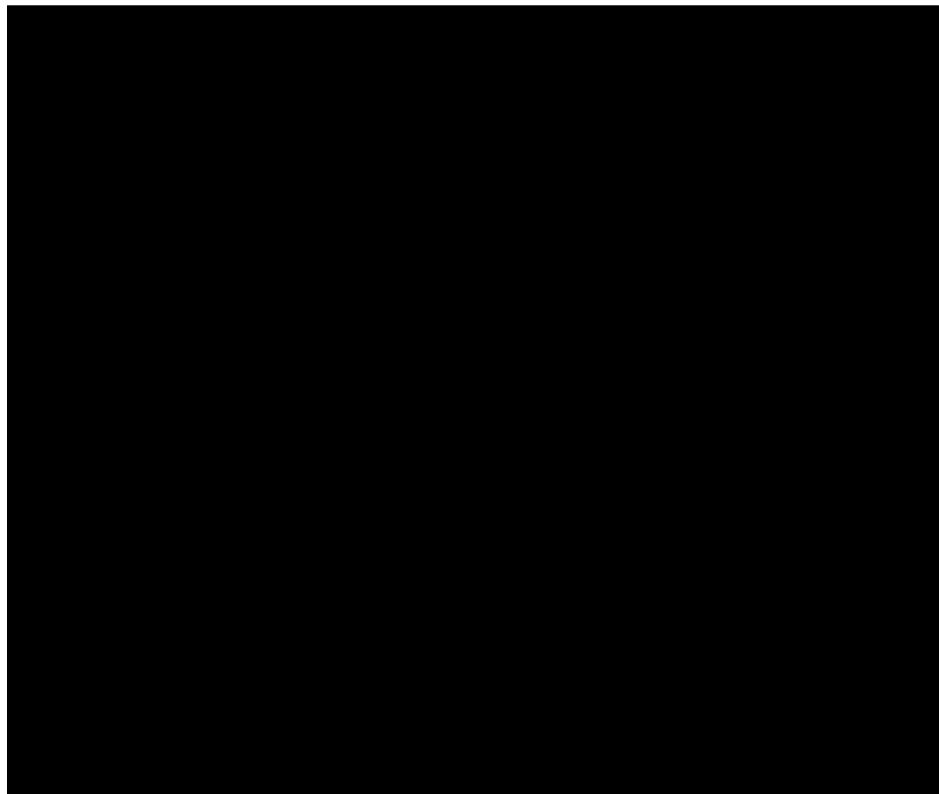
THE PEOPLE, Plaintiff and Respondent, v.
SERGIUS APOSTOLOS ORLOFF, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Scott H. Bentley 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 J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

YEGAN, Acting P. J.—A person confined to a wheelchair is capable of making a criminal threat. Here the threats were directed to a peace officer and a pharmacy manager. Similar prior threats were directed to workers' compensation judges. We have compassion for a person confined to a wheelchair. However, pain and suffering does not give license to threaten people.

Sergius Apostolos Orloff appeals from the judgment entered after a jury had convicted him of making a criminal threat (Pen. Code, § 422)¹ and attempting, by means of a threat, to deter an executive officer from performing his duties. (§ 69.) The trial court found true allegations that he had been convicted of a prior serious felony within the meaning of section 667, subdivision (a)(1), and a prior serious or violent felony within the meaning of California's "Three Strikes" law. (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d).) In the exercise of its discretion, the trial court dismissed the strike and sentenced appellant to prison for eight years eight months. It suspended execution of the sentence and placed appellant on probation for 48 months on condition that he serve 365 days in county jail.

Appellant contends (1) the evidence is insufficient to support his convictions; (2) as to the criminal threat charge, the trial court erroneously failed to instruct the jury *sua sponte* that it must unanimously agree on the same specific criminal act; (3) appellant was denied his constitutional right to effective assistance of counsel; and (4) the trial court erroneously admitted evidence of his prior uncharged threats against other persons. We affirm.²

¹ Unless otherwise stated, all statutory references are to the Penal Code.

² Our summary of the facts is based solely on the evidence presented to the jury. Appellant's summary of the facts in his opening brief includes facts that were not admitted in evidence during the jury trial: facts in the preliminary hearing transcript, the probation report, a police report, and a declaration for an arrest warrant. This is improper. In determining whether the evidence is sufficient to support appellant's convictions, "we must resolve the issue in the light of the *whole record*—i.e., the entire picture of the defendant *put before the jury . . .*" (*People v. Johnson* (1980) 26 Cal.3d 557, 577 [162 Cal.Rptr. 431, 606 P.2d 738], some italics

Threat to Deter Officer Kelley from Performing His Duties

Officer David Kelley had prior police contacts with appellant and was aware of his disability. He was investigating a citizen's complaint that appellant had made "threats of bodily harm or death." He telephonically spoke with appellant and the following conversation ensued:

"[Appellant]: Gets [sic] your facts together, nigger.

"[Kelley]: Wow.

"[Appellant]: You're a fuckin' nigger.

"[Kelley]: Yeah.

"[Appellant]: Yeah, and you're a fuckin' nigger. Gets your facts together you fuckin' asshole.

"[Kelley]: Okay, Mr. Orloff.

"[Appellant]: Hey, you're a fuckin' dead nigger if you keep this shit up."

Even though Officer Kelley knew that appellant was confined to a wheelchair, he believed that the death threat was credible because appellant could pull the "trigger" of a firearm "to hurt, injure, kill someone." He was afraid that appellant might shoot him.

Threat Made Against Pharmacy Manager Masino

Dennis Masino worked as a store manager for CVS Pharmacy. His store filled appellant's prescriptions for pain medication. "[A] couple times that [appellant] was in the store, he got disruptive, started swearing at [Masino's] staff and calling them names." He was "just being very abusive verbally." He threatened "to get [Masino] fired for [his] incompetency and being rude."

In February 2014 Masino told appellant that he was no longer welcome at the store and that his prescription would be transferred "to any pharmacist that he wants." But appellant insisted that Masino had "to give him his medications."

added.) We deny appellant's request, filed on February 16, 2016, to take judicial notice of the transcript of a 911 call made by Dennis Masino on February 25, 2014. Neither the transcript nor the recording of the call was before the jury.

On February 25, 2014, Masino received two telephone calls from appellant. In the first call, appellant said to “expect something when you least expect it.” About 90 minutes later, Masino received the second call. Masino said, “This is Dennis. How may I help you?” Appellant replied, “You’re dead,” and hung up.

Masino understood the threat to mean that his “life [was] at risk.” He was more scared than he had been in his entire life. He immediately called his district manager, who told him to call 911. For several months afterward, he took “extra precautions” while working at the store. Masino knew that appellant was in a wheelchair. But he considered appellant’s death threat credible because “[a]nybody could carry a gun.”

Sufficiency of the Evidence Regarding Attempt to Deter an Executive Officer

■ Appellant claims that the evidence is insufficient to support his conviction of attempting, by means of a threat, to deter an executive officer from performing his duties. (§ 69.) The term “‘executive officer’” includes peace officers “such as police officers or deputy sheriffs.” (*In re Manuel G.* (1997) 16 Cal.4th 805, 818–819 [66 Cal.Rptr.2d 701, 941 P.2d 880].) The crime “requires a specific intent to interfere with the executive officer’s performance of his duties [citation].” (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153–1154 [124 Cal.Rptr.2d 373, 52 P.3d 572]; see also *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1530 [29 Cal.Rptr.3d 586].)

“[W]e review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Stanley* (1995) 10 Cal.4th 764, 792 [42 Cal.Rptr.2d 543, 897 P.2d 481].) “The test is not whether guilt is established beyond a reasonable doubt. [Citations.]” (*In re Roderick P.* (1972) 7 Cal.3d 801, 808 [103 Cal.Rptr. 425, 500 P.2d 1].) “We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.]” (*People v. Medina* (2009) 46 Cal.4th 913, 919 [95 Cal.Rptr.3d 202, 209 P.3d 105].) “[W]e do not reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses. [Citation.]” (*People v. Little* (2004) 115 Cal.App.4th 766, 771 [9 Cal.Rptr.3d 446].) “The conviction shall stand ‘unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” ’ [Citation.]” (*People v. Cravens* (2012) 53 Cal.4th 500, 508 [136 Cal.Rptr.3d 40, 267 P.3d 1113].)

■ Appellant said to Officer Kelley, “Hey, you’re a fuckin’ dead nigger if you keep this shit up.” Viewing this statement in the light most favorable to the judgment, we conclude that a reasonable trier of fact could find beyond a reasonable doubt that appellant was attempting to deter Officer Kelley from performing his duty of investigating a citizen’s complaint that appellant had made “threats of bodily harm or death.” Accordingly, substantial evidence supports appellant’s conviction. We reject appellant’s argument that he “lacked the specific intent to deter the performance of a lawful duty” because his threat merely “insists that the officer comply with a legal duty to have his facts correct.”

*Sufficiency of the Evidence to Support Criminal Threat as to
the Pharmacist*

■ Appellant claims that the evidence is insufficient to support his conviction of making a criminal threat in violation of section 422. To prove this crime, “the prosecution must establish all of the following: (1) that the defendant ‘willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,’ (2) that the defendant made the threat ‘with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,’ (3) that the threat . . . was ‘on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,’ (4) that the threat actually caused the person threatened ‘to be in sustained fear for his or her own safety or for his or her immediate family’s safety,’ and (5) that the threatened person’s fear was ‘reasonabl[e]’ under the circumstances. [Citation.]’ (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228 [109 Cal.Rptr.2d 315, 26 P.3d 1051].)

Here, the criminal threat was appellant’s statement to Masino, “You’re dead.” The threat was made over the telephone. Appellant asserts: “What differentiates this case from a true criminal threat is that the threat was issued over the phone by a person known by its recipient to be disabled.” “Each time Masino saw appellant in the store he was in his motorized wheelchair.” “Masino’s knowledge of appellant’s disability shows Masino knew appellant as someone not to be feared.” A reasonable trier of fact could find that appellant’s threat conveyed to Masino “‘a gravity of purpose and an immediate prospect of execution of the threat’” and that Masino’s fear for his safety “was ‘reasonabl[e]’ under the circumstances.” (*People v. Toledo*, *supra*, 26 Cal.4th at p. 228.) Masino reasonably believed that, despite appellant’s disability, he could carry and fire a gun.

Appellant also contends that his threat, “You’re dead,” was no more than “an angry utterance by a disgruntled customer frustrated that he was not

allowed to obtain a prescribed pain medication.” In support of his contention, appellant cites *In re Ricky T.* (2001) 87 Cal.App.4th 1132 [105 Cal.Rptr.2d 165]. There, a teacher opened a classroom door, which struck a 16-year-old student. The student “cursed [the teacher] and threatened him, saying, ‘I’m going to get you.’” (*Id.*, at p. 1135.) The appellate court concluded that the evidence was insufficient to support the juvenile court’s finding that the student had made a criminal threat in violation of section 422. The court reasoned: “[T]he remark ‘I’m going to get you’ is ambiguous on its face and no more than a vague threat of retaliation without prospect of execution. [Citation.]” (*Ricky T.*, at p. 1138.) “Appellant’s statement was an emotional response to an accident rather than a death threat that induced sustained fear. . . . Students who misbehave should be taught a lesson, but not, as in this case, a penal one.” (*Id.*, at p. 1141.) Here, in contrast, appellant’s statement, “You’re dead,” was a death threat that induced sustained fear. Unlike *Ricky T.*, appellant’s threat was not merely “an angry adolescent’s utterances.” (*Ibid.*)

Alleged Failure to Give a Unanimity Instruction

■ “When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.] The duty to instruct on unanimity when no election has been made rests upon the court *sua sponte*. [Citation.] . . . [T]he principle has emerged that if the prosecution shows several acts, each of which could constitute a separate offense, a unanimity instruction is required. [Citation.]” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534 [70 Cal.Rptr.2d 878].)

Appellant was charged with a single act of threatening Masino. Appellant argues that the evidence shows two criminal acts, but the prosecution did not elect the specific act relied upon and the trial court failed to give a unanimity instruction. One act was a clear death threat—“You’re dead.” The other act was a telephone call that appellant made approximately 90 minutes before the “You’re dead” call. In the first call, appellant told Masino to “expect something when you least expect it.” This vague, ambiguous statement cannot constitute a separate criminal threat in violation of section 422. Thus, the court was not required to instruct *sua sponte* on unanimity. (*People v. Melhado*, *supra*, 60 Cal.App.4th at p. 1534.)

Effective Assistance of Counsel

Appellant maintains that he was denied his constitutional right to effective assistance of counsel because counsel failed (1) to introduce evidence of

appellant's mental illness; (2) to present the defense that, because of his mental illness and medications taken to treat it, appellant "did not have the specific intent to deter Officer Kelley from [the] performance of his lawful duties"; (3) "to bring out the history of the relationship between Officer Kelley and appellant"; (4) "to distinguish Penal Code § 69 from Penal Code § 422"; and (5) to present the defense that he did not threaten Officer Kelley.

■ The standard for evaluating a claim of ineffective counsel is set forth in *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 104 S.Ct. 2052]: "First, [appellant] must show that counsel's performance was deficient. . . . Second, [appellant] must show that the deficient performance prejudiced the defense."

To establish deficient performance, appellant must show that counsel's " 'performance fell below an objective standard of reasonableness under prevailing professional norms.' " (*In re Cudjo* (1999) 20 Cal.4th 673, 687 [85 Cal.Rptr.2d 436, 977 P.2d 66].) Appellant's claims of deficient performance involve counsel's tactical decisions. " ' 'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ' [Citations.] . . . [W]e have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation]. 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' ' [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 86 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

"In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions. [Citations.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 926 [111 Cal.Rptr.2d 2, 29 P.3d 103].) "Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission. In all other cases the conviction will be affirmed and the defendant relegated to habeas corpus proceedings at which evidence dehors the record may be taken to determine the basis, if any, for counsel's conduct or omission. [Citation.]" (*People v. Fosselman* (1983) 33 Cal.3d 572, 581–582 [189 Cal.Rptr. 855, 659 P.2d 1144].)

■ Appellant has failed to carry his burden of showing that there could have been no conceivable reason for trial counsel's allegedly deficient tactical decisions. With considerable hindsight, present retained appellate counsel

simply speculates how a different defense could have been presented. In any event, appellant has failed to carry his burden of showing prejudice. Appellant “must carry his burden of proving prejudice as a ‘demonstrable reality,’ not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]” (*People v. Williams* (1988) 44 Cal.3d 883, 937 [245 Cal.Rptr. 336, 751 P.2d 395].) To prove prejudice, appellant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) We do not lack confidence in the outcome. The evidence against appellant is overwhelming.

Prior Uncharged Threats

Appellant claims that the trial court erroneously admitted evidence of his prior uncharged threats against other persons. Appellant made the threats in 2008 while litigating his workers’ compensation claim before Judge Carero. Appellant telephoned Judge Carero’s secretary, Belinda Doleman, and left a message “that he was going to get the fucking judge, that [the judge] better have a policeman available.” Later, appellant left a message for Judge Carero that “if he didn’t get what he wanted, he was going to jump out of his [wheel]chair and confront Judge Carero, . . . [and] make Judge Carero feel what it was like to be him and have a cervical discectomy” Appellant also said “something to [the] effect” that he was going “to break Judge Carero’s legs.” A few days later, appellant left a message that Judge Carero, Doleman, and David Brotman, another judge, “were going to meet members of the Russian Mafia” who “were going to make sure [they] did what [appellant] wanted.” Appellant said “that he wasn’t going to call anymore because [the judges and the secretary] weren’t going to hear from him and that no one was going to hear from [them] either.”

In arguing that the prior uncharged threats were admissible, the prosecutor declared: “This is the modus operandi of [appellant]. He gets upset about something and he begins to make threats that are taken as credible because of the severity and the language . . . used.” The trial court ruled that the evidence was admissible to show appellant’s “intent when he made the threats” as well as “common scheme or plan, and what happens when [he] becomes upset with people who are not behaving or conforming with his expectations” The trial court concluded that, pursuant to Evidence Code section 352, the “probative value” of the evidence outweighed its prejudicial impact. The prior uncharged threats resulted in appellant’s 2008 conviction of violating section 422, but the jury was not informed of the conviction.

Appellant maintains that the trial court abused its discretion “under Evidence Code § 352 because the probative value of the 2008 threats was far

outweighed by [their] prejudicial effect.” He contends that “[a]dmission of the 2008 threats was cumulative and unnecessary because each charge [in the instant case] . . . offered sufficient evidence for the . . . uncontested issues.” Appellant argues that he was prejudiced by the “Russian Mafia” threat because it showed that, although he was disabled, his threats could “be carried out by somebody else.” Thus, “[t]he Russian Mafia threat was the only threat that could cause a reasonable sustained fear given appellant’s disability.” Furthermore, “the 2008 Russian Mafia threat confused the issues and misled the jury because appellant did not allege to Masino or Officer Kelley that he had connections that could carry out a threat on his behalf.”

Evidence Code section 352 provides, “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” “A trial court’s exercise of discretion under Evidence Code section 352 will not be reversed unless it ‘exceeds the bounds of reason, all of the circumstances being considered.’ [Citation.]” (*People v. Tran* (1996) 47 Cal.App.4th 759, 771 [54 Cal.Rptr.2d 905].)

The trial court’s ruling did not exceed the bounds of reason. The prior uncharged threats were not cumulative evidence. They were highly probative to show that appellant had “‘committed similar distinctive acts of misconduct against similar victims under similar circumstances.’ [Citation.]” (*People v. Walker* (2006) 139 Cal.App.4th 782, 803 [43 Cal.Rptr.3d 257].) The evidence showed that, when appellant was frustrated by persons in positions of authority, he responded by making threats of violence. The prior threats were also probative to show that appellant “made the threat [against Masino] ‘with the specific intent that the statement . . . [was] to be taken as a threat.’” (*People v. Toledo*, *supra*, 26 Cal.4th at p. 228.) In addition, the prior threats were probative to show that appellant made the death threat against Officer Kelley in an attempt to deter him from performing his duties. (§ 69.) “[N]one of the uncharged conduct was particularly inflammatory compared to” the death threats against Masino and Officer Kelley. (*People v. Lindberg* (2008) 45 Cal.4th 1, 25 [82 Cal.Rptr.3d 323, 190 P.3d 664].)

■ Appellant’s concern that the Russian Mafia threat “confused the issues and misled the jury” is unwarranted. The jury was instructed on the limited purpose for which the prior threats were admitted. We presume that the jury followed the instruction. (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 26 [trial court’s instruction on limited purpose of evidence of uncharged robberies “eliminated any danger ‘of confusing the issues, or of misleading the jury’ ”].)

We reject appellant's claim that the limiting instruction was misleading because it specifically referred only to the threats against Doleman and Judge Brotman and did not mention the threats against Judge Carero. The instruction made clear that it applied generally to evidence of "other offenses of criminal threats that were not charged in this case," which included the threats against Judge Carero. In any event, appellant "did not object to or request amplification of the instructions provided and accordingly his claim that they were inadequate and misleading is forfeited on appeal. [Citation.]" (*People v. Souza* (2012) 54 Cal.4th 90, 120 [141 Cal.Rptr.3d 419, 277 P.3d 118].)

Conclusion

The law does not countenance threats of bodily harm against citizens, peace officers, or judges. This is true whether the threats are clear or veiled. Threats against peace officers or judges are directed not only to the individual but also to the public office that the individual occupies. Such threats strike at the heart of government and will not be tolerated.

The judgment is affirmed.

Perren, J., and Tangeman, J., concurred.

Appellant's petition for review by the Supreme Court was denied November 30, 2016, S237618.

[No. A140941. First Dist., Div. Four. Aug. 1, 2016.]

PETER L. FUNSTEN, Plaintiff and Appellant, v.
WELLS FARGO BANK, N.A., et al., as Executors, etc., Defendants and
Respondents.

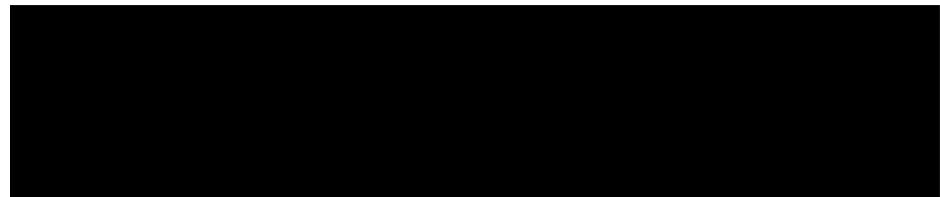
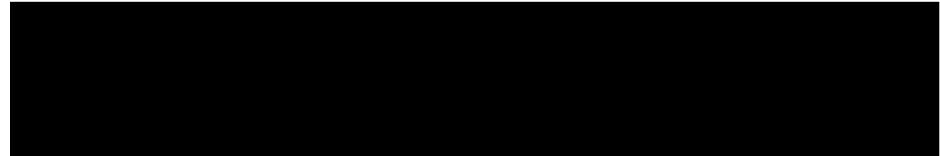
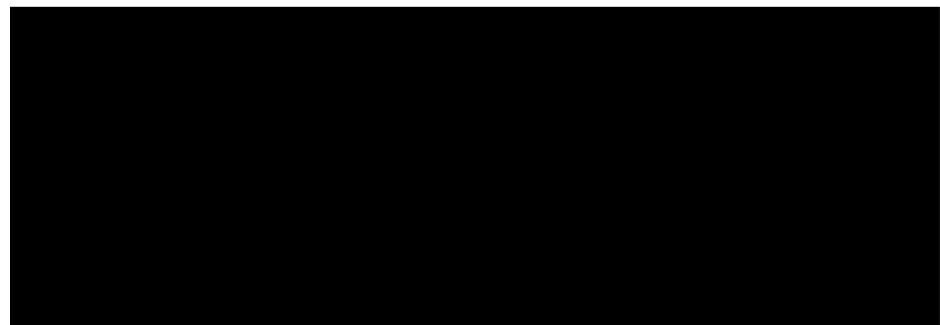
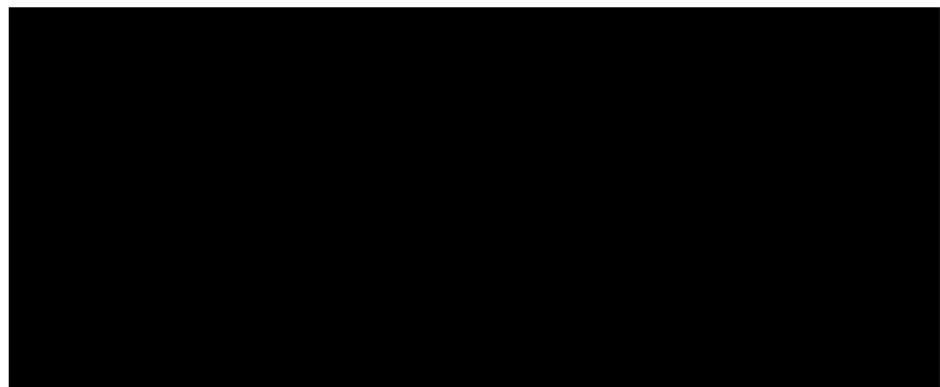
[No. A141853. First Dist., Div. Four. Aug. 1, 2016.]

Estate of ROBERT FOLGER MILLER, Deceased.
GEORGE R. BIANCHI et al., as Executors, etc., Petitioners and Appellants,
v.
PETER L. FUNSTEN, Objector and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Aaron, Riechert, Carpol & Riffle, Charles M. Riffle, Melissa R. Karlsten, Matthew R. Owens; Farella Braun + Martel, Kelly A. Woodruff; Crist, Biorn, Shepherd & Roskoph and Kristopher W. Biorn for Plaintiff and Appellant and for Objector and Appellant.

Reed Smith, Paul D. Fogel, Dennis Peter Maio; Anderson Yazdi, Hwang, Minton + Horn, John D. Minton and Steven D. Anderson for Defendants and Respondents and for Petitioners and Appellants.

OPINION**RUVOLO, P. J.—****I.****INTRODUCTION**

These consolidated appeals arise out of disputes regarding the administration of the Miller Family Trust I (Trust I), which was created by Robert Folger Miller and Maryon Miller in 1991.¹ Trust I became irrevocable when Maryon passed away in 1994. Robert died many years later in early 2013.

¹ The appellate record shows that there is also a Miller Family Trust II (Trust II), although that instrument is not at issue in these appeals. For clarity and consistency, we will use first names to refer to Robert, Maryon and all of their relatives. No disrespect is intended.

In August 2013, Peter L. Funsten, who is Maryon's son, filed a "safe harbor" application under former section 21320 of the Probate Code,² requesting a judicial determination that he would not violate a "no contest" clause in the Trust I instrument by filing a petition to establish that he is the sole successor trustee of Trust I, notwithstanding the fact that Robert designated an additional cosuccessor trustee after Maryon passed away. The executors of Robert's probate estate, George R. Bianchi and Wells Fargo Bank, N.A. (Executors), opposed Peter's safe harbor application. In December 2013, the probate court denied Peter's application, concluding his proposed petition would violate the no contest clause. Peter filed a timely appeal from that order.

In January 2014, Executors filed a petition for a determination that Peter violated no contest clauses in Trust I and in Robert's will by filing creditor's claims against Robert's probate estate to recover damages for the allegedly improper removal of trust assets. In May 2014, the trial court entered a judgment which found that Peter's conduct constituted a contest of Robert's will, but it did not constitute a contest under the terms of the no contest clause in Trust I. Both Peter and Executors timely appealed the judgment.

We conclude that Peter was not entitled to a ruling on the merits of his safe harbor application because that statutory procedure has not been available since former section 21320 was repealed in January 2010. Therefore, we affirm the December 2013 order, but only after striking the probate court's finding that Peter's proposed petition constitutes a contest of Trust I.

We further conclude that the probate court correctly found that Peter did not violate the no contest clause in Trust I by filing creditor's claims against Robert's probate estate, but that the court erred by finding that such conduct constituted a contest of Robert's will. Peter is not a beneficiary of Robert's will, and thus he could not have violated the no contest clause in that instrument as a matter of law. Therefore, we reverse the May 2014 judgment and remand this case with directions for the court to enter a new judgment consistent with this decision.

II.

OVERVIEW OF LAW

To put the facts of this case in proper perspective, we begin with an overview of California law governing the enforcement of no contest clauses.

² Subsequent statutory references are to the Probate Code, unless otherwise stated.

“An in terrorem or no contest clause in a will or trust instrument creates a condition upon gifts and dispositions provided therein. [Citation.] In essence, a no contest clause conditions a beneficiary’s right to take the share provided to that beneficiary under such an instrument upon the beneficiary’s agreement to acquiesce to the terms of the instrument. [Citation.]” (*Burch v. George* (1994) 7 Cal.4th 246, 254 [27 Cal.Rptr.2d 165, 866 P.2d 92].)

California has long followed the common law rule that no contest clauses are generally enforceable, but strictly construed and subject to several public policy exceptions. (*Donkin v. Donkin* (2013) 58 Cal.4th 412, 422 [165 Cal.Rptr.3d 476, 314 P.3d 780] (*Donkin*.)) This rule attempts to reconcile competing policies of (1) “honoring the intent of the donor and discouraging litigation by persons whose expectations are frustrated by the donative scheme of the instrument,” on the one hand, and (2) “avoiding forfeitures and promoting full access of the courts to all relevant information concerning the validity and effect of a will, trust, or other instrument” on the other. (*Ibid.*)

In 1989, legislation was enacted to codify partially this common law. (*Donkin, supra*, 58 Cal.4th at p. 423.) The 1989 legislation recognized the general enforceability of no contest clauses, subject to several express limitations. (*Ibid.*) “The 1989 legislation also established the safe harbor declaratory relief procedure as a method of determining whether a particular motion, petition or other act by a beneficiary would be a contest within the terms of the particular no contest clause. [Citations.] When the Probate Code was repealed and reenacted in 1990, the substance of the 1989 no contest clause provisions was continued, although [the original safe harbor statute] became former section 21320, which was limited to instruments that were or had become irrevocable. [Citation.]” (*Id.* at p. 423, fn. 6.)

In the decades that followed, the Legislature periodically amended the 1990 legislation to comport with and clarify the law as it was developing in the courts. (*Donkin, supra*, 58 Cal.4th at pp. 423–425.) For example, in 2000, the Legislature set outer limitations on the enforceability of no contest clauses in former section 21305. Subdivision (a) of former section 21305 listed actions that did not constitute “a contest unless expressly identified in the no contest clause as a violation of the clause.” Subdivision (b) listed actions that did not “violate a no contest clause as a matter of public policy” “[n]otwithstanding anything to the contrary” in the underlying instrument. Such actions included, for example: “(6) A petition challenging the exercise of a fiduciary power.” (Former § 21305, subd. (b)(6).)

Unfortunately though, as the no contest law evolved, “[t]he complexity of the statutory scheme actually promoted further uncertainty as to the scope of application of a no contest clause, which in turn led to widespread use of the

safe harbor declaratory relief procedure. The frequent use of the safe harbor procedure added an additional layer of litigation to probate matters, which undermined the goal of a no contest clause in reducing litigation by beneficiaries. [Citation.]” (*Donkin, supra*, 58 Cal.4th at p. 424.)

In 2008, the Legislature repealed the 1990 legislation and replaced it “with a new set of statutes governing no contest clauses.” (*Donkin, supra*, 58 Cal.4th at p. 426; see §§ 21310–21315.) The new scheme abandons the former approach of using an “‘open-ended definition of [a] ‘contest,’ combined with a complex and lengthy set of exceptions,’” and instead limits the enforcement of no contest clauses “‘to an express and exclusive list of contest types.’” (*Donkin, supra*, 58 Cal.4th at pp. 425, 426.) That list is set forth in section 21311, subdivision (a), which states: “A no contest clause shall only be enforced against the following types of contests: [¶] (1) A direct contest that is brought without probable cause. [¶] (2) A pleading to challenge a transfer of property on the grounds that it was not the transferor’s property at the time of the transfer. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application. [¶] (3) The filing of a creditor’s claim or prosecution of an action based on it. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application.” The new law also “discontinued the safe harbor declaratory relief procedure of former section 21320. [Citation.]” (*Donkin, supra*, 58 Cal.4th at p. 427.)

The 2008 legislation went into effect on January 1, 2009, and became operative on January 1, 2010. (*Donkin, supra*, 58 Cal.4th at p. 426; see §§ 21310–21315.) The Legislature limited application of the current law to “any instrument, whenever executed, that became irrevocable on or after January 1, 2001.” (§ 21315, subd. (a).)

III.

STATEMENT OF FACTS

A. *Trust I*

1. *Trust Assets and Administration During the Lifetime of the Trustors*

On October 4, 1991, Maryon and Robert executed Trust I as a revocable trust, naming Robert as trustee and Peter as successor trustee. Assets of Trust I, all of which were deemed to be community property, consisted of property described in an attached “Schedule A,” together with any later added property. Two categories of assets were listed on Schedule A: (1) a parcel of

real property located in the Town of Hillsborough, which the parties refer to herein as Robin Road, and (2) all furniture and furnishings in the trustors' home on Robin Road.

During their joint lifetimes, the trustors had full access to trust income and principal. "Immediately upon the death of either of the Trustors," the trust fund was to be divided into three subtrusts, designated "Trust A," "Trust B" and "Trust C." Trust A was to consist of the survivor's interest in the trust assets, while Trust B and Trust C were to hold some combination of the deceased trustor's interest in the assets. Under article VIII, Trust I was to become irrevocable after the death of either trustor, with one possible exception pertaining to Trust A that we discuss below.

During his or her lifetime, the survivor trustor was entitled to the entire net income of all three subtrusts, as well as "such sums out of the principal as the Trustee deem[ed] reasonably necessary for the Survivor's proper support"

2. *Distribution of Trust A (Survivor Trust)*

The distribution of the Trust A fund after the death of the survivor depended on whether Maryon or Robert died first. Article III, paragraph 4 provided that if Maryon was the survivor trustor, she would retain the right to revoke Trust A and to make any future provision for the distribution of the Trust A fund, but if the survivor was Robert, then "Trust A shall be irrevocable and no person shall have the power to alter amend, modify or revoke the same."

If Robert was the survivor trustor, the trust instrument gave him a limited power of appointment with respect to Trust A assets, which was conferred by the following language in paragraph 6 of article III: "Upon the death of the Survivor, if the Trustor husband is the Survivor, Trust A shall terminate and the Trustee shall distribute and deliver the balance of Trust A then remaining (including both principal and any accrued or undistributed income) to such one or more natural persons from the class composed of the Trustor wife's son, PETER L. FUNSTEN, and the issue of PETER L. FUNSTEN living at the time of the death of the Survivor, and on such terms and conditions, either outright or in trust, as the Survivor appoints by his last valid will (whether admitted to probate or not) specifically referring to and exercising this limited power of appointment, whether such will is executed before or after the death of the first of the Trustors to die; provided, however, that the Trustee shall first pay out of the principal of Trust A any estate or inheritance tax attributable to Trust A by reason of the Survivor's death."

Article III, paragraph 6 further provided that if Robert failed to "effectively exercise" or only partially exercised his limited power of appointment, "any

portion of Trust A not effectively appointed by the Survivor shall be distributed in accordance with the provisions of Subparagraphs 8.1, 8.3 and 8.4 of this Article.” As discussed below, those provisions pertain to the distribution of assets from Trust C.

3. Distribution of Trusts B and C (Decedent Trust)

The disposition of the assets from Trusts B and C, which consisted of the decedent trustor’s interest in the Trust I assets, did not depend on which trustor was the first to die. In either case, after the death of the survivor, the two subtrusts were to be combined into Trust C and the resulting fund was to be distributed in accordance with the provisions of article III, paragraph 8. Under those provisions, the deceased trustor’s interest in (1) Robin Road was to be distributed to Peter (subpar. 8.1); (2) the furniture and furnishings on the downstairs level of Robin Road was to be distributed to Peter (subpar. 8.1); (3) the furniture and furnishings on the upstairs level of Robin Road was to be distributed to Maryon’s daughter, Susan Meade Kennedy (Meade) (subpar. 8.3); and (4) the balance of any funds was to be divided equally between Peter and Meade (subpar. 8.4).³

4. The No Contest Clause

Article X, paragraph 3 of the trust agreement stated, in pertinent part: “In the event that any beneficiary of this trust, singularly or in conjunction with any other person or persons, shall contest or in any manner attempt to defeat the validity of this trust or of the last will of either of the Trustors or shall undertake any legal proceeding that is designed to thwart the Trustors’ wishes as expressed herein or to seek to obtain an adjudication in any proceeding in any court that this trust or any of its provisions or that such will or any of its provisions are void or seek otherwise to void, nullify or set aside this trust or any of its provisions or such will or any of its provisions, then the right of that person to take any interest given to him by this trust shall be void and this trust shall be administered as if that person had died without surviving issue before both of the Trustors.”

5. The First Amendment

On January 12, 1994, Maryon passed away. She was survived by Robert, who became the survivor trustor of Trust I and continued to act as its trustee.

On May 22, 1996, Robert executed a “First Amendment to Trust Agreement” (the First Amendment). The First Amendment added paragraphs to the

³ Subparagraph 8.2 of article III provided for a cash payment from the Trust C fund to Maryon’s son Reed Funsten, if he was then living. The record contains very little information about Reed, who plays no role in the current appeals.

trust instrument which designate an additional successor trustee of Trust A. While the original provisions of the Trust I agreement designated Peter as the successor trustee, and Peter's wife as an alternate successor trustee, the First Amendment provided that if Robert for any reason ceased to act as the trustee of Trust A, then Peter and his sister Meade would be cotrustees of Trust A.

B. *Robert's Will*

On April 21, 2006, Robert executed the "Will of Robert Folger Miller." In that instrument, Robert nominated Executors as the executors of his probate estate, exercised his limited power of appointment, and made other directives. But, Robert did not use his will to make any gift from his probate estate.

1. *Exercise of Limited Power of Appointment*

In article III of his will, Robert exercised his limited power of appointment under Trust I by directing that, upon his death, the Trust A fund was to be distributed and delivered in trust to the trustees of a new trust. In article III, paragraph 1, Robert designated Peter and Meade as cotrustees "to act together" to administer the new trust in accordance with paragraph 2, which stated: "Upon my death, simultaneously with the distribution of the assets of Trust A under [Trust I] (including both principal and any accrued or undistributed income) to the Trustee[s] named in paragraph 1 of this Article, Trust A shall terminate and the Trustee[s] shall distribute and deliver the trust fund as then constituted to the beneficiaries named and in accordance with the provisions of subparagraphs 8.1 (as modified hereinbelow), 8.3 and 8.4 of Article III of the said Trust Agreement establishing [Trust I] With respect to the provisions of subparagraph 8.1 of Article III of the said Trust Agreement establishing [Trust I], I intend that the gift of the furniture and furnishings which were located on the downstairs level of my residence at [Robin Road], as of the date of the death of [Maryon], or the sale proceeds therefrom, be completely and fully satisfied by the distribution to [Peter] of the remaining items of such furniture and furnishings located on the downstairs level of my said residence at 101 Robin Road at my date of death together with the pecuniary gift to [Peter] under the provisions of . . . THE ROBERT FOLGER MILLER TRUST"

The validity and actual effect of Robert's limited appointment are not issues presented by these appeals. Nevertheless, it is useful to clarify here what Robert attempted to accomplish. First, he used his power to identify Meade as an additional trustee of the Trust A fund, notwithstanding that Peter was the only successor trustee named in Trust I. Second, Robert used his appointment power to direct a distribution of the Trust A fund to the beneficiaries named in paragraph 8 of article III of Trust I rather than to one

or more of the members of the class of Trust A beneficiaries set forth in paragraph 4 of article III of Trust I. Third, Robert used his appointment power to amend article III, subparagraph 8.1 of the Trust I instrument, notwithstanding the fact that Trust I had become irrevocable upon Maryon's death.

2. Disposition of Residue

In his will, Robert did not make a bequest or devise of any asset of his probate estate. Instead he directed that the residue of his estate was to be added to the trust fund of his personal trust, "THE ROBERT FOLGER MILLER TRUST" (hereafter the RFM Trust), and was to be distributed pursuant to the terms of that instrument.

3. No Contest Clause

The no contest clause, the longest part of Robert's will, began with this paragraph: "In the event that any beneficiary under this will . . . singularly or in conjunction with any other person or persons, contests or in any manner attempts to defeat the validity of [the RFM] Trust, this will or [Trust I] (as modified under the terms of this will or [the RFM] Trust) or undertakes any legal proceeding that is designed to thwart my wishes as expressed herein or in [the RFM] Trust or to seek to obtain an adjudication in any proceeding in any court that this will or any of its provisions or that [the RFM] Trust or any of its provisions are void or seek otherwise to void, nullify or set aside this will or any of its provisions or [the RFM] Trust or any of its provisions, then the right of that person to take any interest given to him by this will shall be void and this will shall be administered as if that person had predeceased me without surviving issue."

The no contest clause set forth a nonexclusive list of 18 possible actions that a will beneficiary might take which were "deemed" to be a violation of the no contest clause, the third of which was described as follows: "3. Filing of any creditor's claim against my probate estate or against the trust fund of my [RFM] Trust (without regard to the validity of such claim), or prosecuting an action based upon such claim; acting in any adverse manner to a fiduciary in any action or proceeding to determine the character, title or ownership of trust property or property of my probate estate."

The no contest clause closed with this additional provision: "Notwithstanding the provisions of California Probate Code Section 21300 et seq., or any successor statute thereto, it is my express intent that the foregoing no contest provision shall be construed in such manner as to give it its broadest and most expansive application. I acknowledge that under California Probate Code

Section 21305(b), as amended from time to time, certain pleadings or actions are considered actions that are not in violation of a no contest clause as a matter of public policy, and to the extent any part of the foregoing no contest clause is considered such a proceeding, it is my intent further that such pleadings or actions be deemed by a court of competent jurisdiction to be a violation of the foregoing no contest clause if the court determines such pleadings or actions to be frivolous or unsuccessful. . . .”

C. *Robert's Trust*

As noted, Robert directed that the residue of his probate estate was to be distributed to the RFM Trust. In October 2007, Robert executed a final amendment and restatement of the trust agreement for the RFM Trust. According to that restated agreement, all assets of the RFM Trust were Robert's separate property. Robert named himself as trustee and Executors as his successor trustees. Beneficiaries of the RFM Trust included Robert's children, Therese and Paul, as well as Peter, Meade and others.

Robert's trust left Peter a cash gift of \$150,000, which was conditioned on Peter accepting that gift along with any furniture from the Robin Road house that was distributed to him from Trust I as “full and complete satisfaction” of the gift of the furniture and furnishings from the downstairs level of Robin Road that was devised to Peter by Robert and Maryon in Trust I. Paragraph 3.3(c) of the RFM Trust agreement stated that if Peter were to make a claim against Trust I, the RFM Trust, or Robert's probate estate with respect to any furniture from Robin Road that was not available for distribution after Robert's death, then Robert's pecuniary gift to Peter “shall lapse and not be effective.”

The RFM Trust agreement also contained a no contest clause which provided for the invalidation of any gifts to any beneficiary who contested or attempted to defeat the validity of any provision of the RFM Trust, Robert's will, or Trust I as modified by Robert.

D. *Peter's Safe Harbor Application*

Robert died on February 14, 2013. In May 2013, Robert's 2006 will was admitted to probate without objection, and Executors were appointed, also without objection.

On August 16, 2013, Peter filed an application in probate court, seeking an order that he would not violate the no contest clause in Trust I by filing a petition for a judicial determination that he is the sole acting trustee of

Trust I. Peter made his application pursuant to former section 21320.⁴ He alleged that he was entitled to a safe harbor determination notwithstanding that former section 21320 was repealed in 2010 because Trust I became irrevocable in 1994 and the “current Probate Code only applies to instruments that became irrevocable after January 1, 2001.” (Citing § 21315.)

The petition that Peter proposed to file alleged the following material facts: When Maryon died, the assets of Trust I included Robin Road, all of its furniture and furnishings, and cash and securities in accounts at Merrill Lynch and Dean Witter. Robert violated the trust agreement by withdrawing more than \$5 million from Trust A, and Peter intended to file an action against Robert’s estate to “redress” that breach of trust. Peter is the “duly appointed and acting Successor Trustee of Trust A within the Trust I trust agreement.” Robert’s attempts to amend the trust and to exercise his special power of appointment to add Meade as a cotrustee had no legal effect, but were efforts by Robert to prevent Peter from pursuing breach of trust claims against Robert’s estate. With his prayer for relief, Peter intended to seek judicial declarations that he is the sole successor trustee of Trust A, and that Robert’s First Amendment and exercise of his power of appointment were invalid. Peter also intended to request an order that if Meade was validly appointed, she be removed as successor trustee of Trust A.⁵

Executors opposed Peter’s application, arguing that the relief requested in the proposed petition violated Trust I’s no contest clause, which explicitly prohibited a challenge of Robert’s will.

At an October 8, 2013, hearing, the Honorable Steven L. Dylina advised the parties that the court had independently discovered that Peter had filed creditor’s claims against Robert’s probate estate while his safe harbor application was pending. The court provided a “sua sponte” advisory opinion that filing the creditor’s claims likely violated the no contest clause in Trust I. After further discussion, the court decided not to rule formally on that matter

⁴ Former section 21320 stated: “(a) If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether a particular motion, petition, or other act by the beneficiary, . . . would be a contest within the terms of the no contest clause. [¶] (b) A no contest clause is not enforceable against a beneficiary to the extent an application under subdivision (a) is limited to the procedure and purpose described in subdivision (a). [¶] (c) A determination under this section of whether a proposed motion, petition, or other act by the beneficiary violates a no contest clause may not be made if a determination of the merits of the motion, petition, or other act by the beneficiary is required. [¶] (d) A determination of whether Section 21306 or 21307 would apply in a particular case may not be made under this section.”

⁵ Peter inadvertently filed his petition at the same time he filed his safe harbor application. The probate court granted Peter relief from that filing mistake. This ruling is not an issue on appeal.

because it was not raised in the safe harbor application or any other pending petition, but the court opined that the creditors' claims raised a significant issue for a future petition. The parties then proffered opposing views on the substantive issue whether filing Peter's proposed petition would violate the Trust I no contest clause. At the conclusion of the hearing, the court found that Peter's proposed petition would constitute a direct attack and a contest of Trust I.

On December 6, 2013, the court file a final order denying Peter's application under former section 21320 for a determination that his proposed petition would not constitute a contest of Trust I. The order incorporated the following finding: "[U]nder the broadly written no contest clause in the Miller Family Trust I dated October 4, 1991, the underlying Petition for Court Determination that Peter L. Funsten is Sole Acting Trustee of the Miller Family Trust I is a direct attack to the trust even under the prior no contest law applicable in 1994." (Italics omitted.)

E. *Peter's Creditor's Claims*

As the probate court observed, Peter filed two creditor's claims against Robert's probate estate while his safe harbor application was pending. Those claims sought damages resulting from actions Robert allegedly took after Maryon's death in violation of his fiduciary duties as trustee of Trust I.

Peter's first claim sought damages for the withdrawal of all funds from two investment accounts that allegedly were assets of Trust I. In support of this claim, Peter outlined the following facts: In May 1993, Robert opened an investment account at Dean Witter Reynolds in his capacity as trustee of Trust I, which was funded with stocks valued at more than \$337,500. In June 1993, Robert opened another trust account at Merrill Lynch, Pierce, Fenner & Smith Inc., which was funded with cash and stock valued at more than \$700,000. At the time of Maryon's death, the Merrill Lynch account contained approximately \$2,898,697 in assets, and the Dean Witter account contained approximately \$2,612,787.93 in assets. Thereafter, "despite the fact that Trust I became irrevocable after the death of his wife, Robert, having no authority whatsoever to do so, withdrew all of the assets from the Dean Witter Account on or about July 1994 and converted them for his own use." Also, Robert allegedly "withdrew all of the assets from the Merrill Lynch Account in or about October 1994 and converted them for his own use." Thus, Peter alleged, "as a result of his actions, Robert breached his fiduciary duty as trustee of Trust I."

Peter's second creditor's claim sought damages for the loss of furniture and furnishings that were located on the lower level of Robin Road at the time of

Maryon's death. Peter alleged that "Robert did not sell any of the downstairs level furniture and furnishings. Rather, during his lifetime, and without any authority, Robert gave away many of the downstairs level furniture and furnishings such that many valuable items are missing or have not been returned to Trust I." Peter further alleged on information and belief that "Robert converted the furniture and furnishings for his own use and breached his fiduciary duty as trustee of Trust I."

On December 17, 2013, Executors rejected both of Peter's claims "Entirely." Executors did not state any ground or provide any explanation for rejecting these claims.

F. *The Executors' Petition*

In January 2014, Executors filed a petition for an order that Peter had violated the no contest clauses in Trust I and in Robert's will by filing the creditor's claims against Robert's probate estate. Executors argued that the provision in Robert's will, which provides that the filing of a creditor's claim constitutes a contest is an enforceable no contest clause under section 21311 of the current law. Furthermore, Executors' reasoned, Peter's decision to contest Robert's will was an express violation of the no contest clause in Trust I.

In his opposition, Peter argued that this case is governed by the former no contest law because section 21315 dictates that current law only applies to instruments that became irrevocable after January 1, 2001, and Trust I became irrevocable in 1994. Furthermore, according to Peter, under the former law any attempt to disinherit a beneficiary for alleging a breach of fiduciary duty by the trustee is void as against public policy.

On February 19, 2014, a hearing on Executors' petition was held before the Honorable George A. Miram. The court took the matter under submission, and, on March 13, 2014, it filed a 13-page order pursuant to which it granted in part and denied in part Executors' petition for a declaration that Peter violated the no contest clauses in Trust I and in Robert's will.

The court applied the current law to determine whether Peter's actions constituted a contest of Robert's will with the effect of voiding any interest that Peter acquired under that will. The court found that under section 21311, subdivision (a)(2), the will's no contest clause created a valid forced election, pursuant to which Peter was required to choose between accepting what was bequeathed to him under the will or pursuing his creditor's claims, and by filing his claims Peter elected the latter course of action and forfeited his interests under the will. In reaching this conclusion, the court also found that,

to the extent the current law continues to recognize a public policy exception for claims against a fiduciary, that exception would not apply to Robert's will because Robert was never a fiduciary of his own probate estate.

The court reached a different conclusion regarding the impact of the creditor's claims on Peter's status as a beneficiary of Trust I. The court found that the "plain wording of the no contest clause in Trust I . . . would appear to include the contest of [Robert's] will as a contest of Trust I for purposes of the no contest clause." However, the court also found that the trust's no contest clause was not enforceable against Peter under the circumstances presented here. Applying the former law (because the trust became irrevocable prior to 2001), the court found that former section 21305 codified a common law policy which protects beneficiaries from disinheritance for challenging the actions of a fiduciary. The court concluded that this policy protected Peter from being disqualified as a beneficiary of Trust I based on the filing of creditor's claims which alleged a breach of fiduciary duty by the trustee of Trust I.

In accordance with the findings summarized above, the March 2014 order ends with this conclusion: "[T]his court finds that while [Peter] has engaged in conduct that constitutes a contest under the terms of the no contest clause in [Robert's] will, Peter . . . has not engaged in conduct that constitutes a contest under the terms of the no contest clause in Trust I." The probate court incorporated its March 2014 order into a final judgment which was filed on May 9, 2014.

IV.

DISCUSSION

A. *Standard of Review*

These consolidated cases present three rulings for our review: the denial of Peter's safe harbor application; the finding that Peter's creditor's claims violate the no contest clause in Robert's will; and the finding that Peter's creditor's claims do not violate the no contest clause in Trust I.

The parties agree our standard of review is de novo. "The standard of review where the applicability of a no contest clause is at issue and there are no disputed facts is de novo. [Citation.]" (*Bradley v. Gilbert* (2009) 172 Cal.App.4th 1058, 1068 [91 Cal.Rptr.3d 680].) Furthermore, the interpretation of a statute is also a question of law subject to independent review on appeal. (*Ibid.; Jenkins v. Teegarden* (2014) 230 Cal.App.4th 1128, 1138 [179 Cal.Rptr.3d 304].)

B. Peter Was Not Entitled to a Safe Harbor Ruling

In his first appeal, Peter contends that the denial of his safe harbor application must be reversed because the former law applies to the no contest clause in the Trust I instrument, and the probate court committed legal error by concluding that Peter's proposed petition constituted a contest of the trust under the former law. We do not reach the merits of this claim because we conclude that Peter was not entitled to a safe harbor ruling under the circumstances presented here.

As noted above, Peter's August 2013 safe harbor application was filed under former section 21320, a statute that was repealed on January 1, 2010, and was not replaced with a new law authorizing a safe harbor procedure. Thus, the threshold question is whether this former statute was available to Peter in this case. Executors raise this issue in their respondents' brief. In reply, Peter argues that the former safe harbor statute is available to obtain an advisory opinion on any issue arising under the former no contest law. We disagree.

■ Our starting point is section 3, the general statute governing the "applicability of changes to the Probate Code." (*Rice v. Clark* (2002) 28 Cal.4th 89, 99 [120 Cal.Rptr.2d 522, 47 P.3d 300].) Section 3, subdivision (c) states: "Subject to the limitations provided in this section, a new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, creation of a fiduciary relationship, death of a person, commencement of a proceeding, making of an order, or taking of an action." "The manifest purpose" of section 3 is "to make legislative improvements in probate law applicable on their operative date whenever possible . . ." (*Rice v. Clark, supra*, 28 Cal.4th at p. 99.)

As noted in our overview of the law, an important improvement in probate law accomplished by the 2008 legislation was the reduction in litigation by beneficiaries that resulted from the elimination of the safe harbor procedure. (*Donkin, supra*, 58 Cal.4th at pp. 424–426.) Thus, interpreting the current law to eliminate the right to file a safe harbor application after the operative date of the current law would advance the legislative purpose of section 3. However, as the statutory language of section 3 reflects, the general rule in favor of retroactive application of a Probate Code statute is subject to exceptions, and Peter contends two of these exceptions are applicable here.

■ Section 3, subdivision (b) states that "[t]his section governs the application of a new law except to the extent otherwise expressly provided in the new law." Here, the new no contest law includes section 21315, which

expressly provides that “[t]his part applies to any instrument, whenever executed, that became irrevocable on or after January 1, 2001,” but that it “does not apply to an instrument that became irrevocable before January 1, 2001.” Thus, notwithstanding section 3, subdivision (c), the current no contest law applies only to instruments that became irrevocable after January 2001, and the former law on this subject applies to instruments that became irrevocable before that date.

However, Peter erroneously assumes that section 21315 also establishes that the safe harbor procedure is still available to beneficiaries who seek rulings regarding the enforceability of no contest clauses under the former law. Section 21315 addresses the question of what law applies to an *instrument*. Peter’s safe harbor application is not an instrument, but a pleading (i.e., a procedural device) that he filed under a statute that had already been repealed. Because Peter’s application is not an instrument, section 21315 is inapposite.

■ Peter also attempts to invoke section 3, subdivision (g), which states: “If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its amendment or repeal by the new law.” By its clear terms, section 3, subdivision (g) applies to “a matter” if (1) the new law does not apply to that matter, *and* (2) that matter “occurred” before the operative date of the new law. A safe harbor application satisfies the first prong of this exception because the new no contest law does not apply to safe harbor applications. However, Peter’s safe harbor application did not “occur” before the operative date of the new law; Peter filed his application more than three years after the operative date of the current no contest law. Thus, section 3, subdivision (g) did not authorize the probate court to reach the merits of Peter’s safe harbor application in this case.

Donkin, supra, 58 Cal.4th 412 is instructive. That case involved a family trust established by a husband and wife in 1988. (*Id.* at p. 415.) Husband died first. Shortly before wife’s death in 2005, she executed a trust amendment that changed the allocation of trust assets after her death. Both the trust instrument and its amendment contained no contest clauses. (*Id.* at p. 418.) In 2009, beneficiaries filed an application under former section 21320 for a safe harbor ruling regarding the effect of a proposed petition to compel the immediate distribution of trust assets pursuant to the allocation set forth in the original trust instrument. (*Donkin*, at pp. 419–420.) When the new no contest law became operative in January 2010, the safe harbor application was still pending. (*Ibid.*) The probate court and Court of Appeal addressed the merits of the application, accepting the parties’ theory that a safe harbor ruling was available because the former law applied to the trust instrument.

(*Id.* at p. 421.) However, when the Supreme Court granted review, it implicitly rejected that theory.

Before reaching the merits of the case, the *Donkin* court addressed the preliminary question whether the trial court erred “as a procedural matter” by ruling on the safe harbor application after the operative date of the 2008 legislation. (*Donkin, supra*, 58 Cal.4th at p. 427.) To answer that question, the court applied section 3. It considered the general rule that “‘a new law applies on the operative date to all matters governed by the new law,’” and it also observed that under section 3, subdivision (d), even when a petition is filed before the operative date of a new law, “‘any subsequent proceedings taken after the operative date concerning the petition . . . is governed by the new law and not by the old law.’” (*Donkin*, at p. 427, italics omitted.) However, these rules did not answer the question before the court because a safe harbor application is a “matter” that is not governed by the new law and because the new law does not provide that an already pending safe harbor application would be subject to dismissal after the operative date of the new law. (*Ibid.*)

Ultimately, the *Donkin* court found its answer in section 3, subdivision (g) which, as discussed above, authorizes application of a repealed statute “[i]f the new law does not apply to a matter that occurred before the operative date.” (*Donkin, supra*, 58 Cal.4th at p. 427.) Since the *Donkin* beneficiaries filed their application *before* the operative date of the new legislation that repealed the safe harbor statute, the court found that “the cause was properly before the probate court” under section 3, subdivision (g). (*Donkin*, at p. 427.)

The *Donkin* court went on to conduct a separate inquiry to determine what substantive no contest law applied to the trust instrument in that case. (*Donkin, supra*, 58 Cal.4th at p. 428.) To answer that question, the court applied section 21315, which, as discussed above, limits the retroactive application of the current no contest law to instruments that became irrevocable on or after January 1, 2001. (*Donkin*, at p. 432.) Under that statute, the court found that the current law presumptively applied because the trust instrument became irrevocable after January 1, 2001. (*Ibid.*)

■ *Donkin* confirms our conclusion that the propriety of a safe harbor application is a procedural issue that must be resolved independently of the question regarding what substantive law governs the enforceability of the underlying no contest clause. Indeed, in *Donkin*, the trust beneficiaries were entitled to a safe harbor ruling under section 3, subdivision (g) notwithstanding the fact that the current no contest law applied to the trust instrument at issue in that case. In this case, unlike *Donkin*, Peter’s safe harbor application

was not filed before the operative date of the new law. Thus, neither the section 3, subdivision (g) exception nor any other rule we have found authorized Peter to file his application under a statute that no longer exists.

Under these circumstances, the trial court erred by reaching the merits of Peter's safe harbor application. Instead, the application should have been dismissed or denied outright.

C., D.*

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V.

DISPOSITION

In the December 2014 order, the finding that Peter's proposed petition constituted a contest of Trust I is reversed. The order denying Peter's safe harbor application is otherwise affirmed.

The May 2015 judgment is reversed and this matter is remanded to the probate court with directions to modify its findings in its March 13, 2014 order to the extent they conflict with our conclusions above, and to enter a new judgment denying Executors' petition for a determination that Peter violated the no contest clauses in Trust I and in Robert's will.

The parties are to bear their own costs on appeal.

Reardon, J., and Rivera, J., concurred.

*See footnote, *ante*, page 959.

[No. B265879. Second Dist., Div. Eight. Aug. 26, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
KEDRENE McDOWELL, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

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

Page 1

Figure 1. The relationship between the number of species and the area of forest cover in each state.

For more information about the study, please contact Dr. Michael J. Koenig at (314) 747-2146 or via email at koenig@dfci.harvard.edu.

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

COUNSEL

David R. Greifinger, 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, Susan Sullivan Pithey and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

RUBIN, J.—Kedrene McDowell appeals from the judgment resentencing him to an overall prison term the same length as his previous plea-bargained sentence after the trial court granted his motion to reduce two of his several convictions to misdemeanors pursuant to Proposition 47. We affirm because Proposition 47 permits imposing a new sentence that equals the previous sentence and because the trial court did not abuse its discretion by doing so here.

FACTS AND PROCEDURAL HISTORY

In 2012 McDowell pled no contest to six felony burglary counts (Pen. Code, § 459) and admitted the truth of allegations that he committed the current offenses while out on bail for another crime (Pen. Code, § 12022.1) and had one prior conviction that qualified as a strike under the “Three Strikes” law.¹ As part of a plea bargain, the court sentenced him to a total of 10 years in state prison as follows: 16 months for each count, calculated as one-third the midterm, doubled under the Three Strikes law (96 months), plus two years for the out-on-bail allegation. These were to run consecutively to the four-year sentence imposed in the out-on-bail case (*People v. McDowell* (Super. Ct. L.A. County, 2012, No. YA081900)). In exchange, three other counts were dismissed: two for burglary and one for petty theft with a prior conviction. (§ 666, subd. (b).)

In January 2015 McDowell filed a petition to resentence his burglary convictions as misdemeanor shoplifting counts (§ 459.5), pursuant to Proposition 47. (§ 1170.18, subds. (a) & (b).) The parties stipulated to reduce two of the burglary counts—numbers 5 and 7—to misdemeanors. Meanwhile, the principal four-year term imposed in the other case (*People v. McDowell* (Super. Ct. L.A. County 2012, No. YA081900)) had already been reduced to a misdemeanor, with McDowell credited for time served. This required upon resentencing the selection of a new principal term.

At the hearing on the petition, McDowell’s lawyer asked for a combined nine-year sentence, calculated as (1) four years based on the midterm on count 1 for burglary, doubled under Three Strikes; (2) another four years based on one-third the midterm on three other burglary counts, doubled to 16 months under Three Strikes; and (3) 180 days each on the two burglary counts that were reduced to misdemeanors. The prosecutor argued for 10 years, based on the plea bargain that McDowell accepted and his lengthy criminal history, which included juvenile petitions for petty theft, robbery,

¹ All further section references are to the Penal Code.

grand theft, grand theft auto, and battery, and adult convictions for robbery, burglary, and unlawful use of an access card (§ 496).

The trial court initially wrestled with whether Proposition 47 required a sentence reduction once a petition was granted, or whether the terms of the plea bargain governed. The trial court decided that a 10-year sentence was warranted based on both the terms of the plea agreement and McDowell's substantial criminal history. McDowell contends the trial court erred because (1) the terms of his plea bargain were subject to changes in the law such as Proposition 47, thereby requiring a reduction in the total sentence, and (2) the trial court abused its discretion by imposing the high term for the principal offense.

DISCUSSION

1. *Proposition 47 Authorizes Imposition of the Same Length Sentence*

Effective November 5, 2014, Proposition 47 reduced certain crimes to misdemeanors and created a mechanism whereby prisoners serving a felony sentence could petition the trial court to reconsider and recall those sentences and then impose a misdemeanor sentence instead. (§ 1170.18; *People v. Awad* (2015) 238 Cal.App.4th 215, 220 [189 Cal.Rptr.3d 404].)

McDowell relies on *Doe v. Harris* (2013) 57 Cal.4th 64 [158 Cal.Rptr.3d 290, 302 P.3d 598], for the proposition that changes to the law can apply retroactively to alter the terms of a plea agreement. At issue in *Doe* was whether changes in the sex offender registration laws that called for public disclosure of certain information about sex offenders applied to a defendant who pled guilty to a sex offense at a time when those disclosure requirements did not exist. The Supreme Court held that, “as a general rule, . . . requiring the parties’ compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to reference the possibility the law might change translate into an implied promise the defendant will be unaffected by a change in the statutory consequences attending his or her conviction.” (*Id.* at pp. 73–74.)

Based on this, McDowell contends that Proposition 47 effected a change in the law that requires a concomitant reduction in sentence should the trial court grant a petition to resentence some counts as misdemeanors. We disagree.

If the trial court grants a section 1170.18 petition, it then has jurisdiction to resentence the defendant, and must do so under the generally applicable sentencing procedures found in section 1170 et seq. (*People v. Sellner* (2015)

240 Cal.App.4th 699, 701 [192 Cal.Rptr.3d 836] (*Sellner*).) Under these provisions, the judgment, or aggregate determinate term, is viewed as intertwined pieces consisting of a principal term and one or more subordinate terms. (*Ibid.*)

Upon remand for resentencing following a reversal, a trial court may, but need not, impose a combined term that equals the original sentence. The trial court must select the next most serious conviction to compute a new principal term and may modify the other sentences as deemed appropriate. (*Sellner, supra*, 240 Cal.App.4th at pp. 701–702.) The *Sellner* court applied this rule to affirm a new sentence under section 1170.18 that increased the sentence on the count that became the new principal term. (*Sellner*, at pp. 701–702.)

Likewise, in *People v. Garner* (2016) 244 Cal.App.4th 1113 [198 Cal.Rptr.3d 784], the court affirmed an order resentencing the defendant under Proposition 36, the Three Strikes Reform Act of 2012, which allows persons given strike sentences to seek new sentences for offenses that were no longer considered strikes. The *Garner* court held that recalling a sentence under Proposition 36 should be treated the same as a sentencing recall under section 1170, subdivision (d), permitting the trial court to reconsider all the charges against a defendant. (*Garner*, at pp. 1117–1118.) We believe the *Sellner* and *Garner* rationales apply here.

■ Proposition 47 provides: “Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence.” (§ 1170.18, subd. (e).) The clear import of this provision is that Proposition 47 permits a new sentence that is either equal to or less than the original term. (*People v. Roach* (2016) 247 Cal.App.4th 178, 184–187 [202 Cal.Rptr.3d 1] [applying rationale of both *Sellner* and *Garner*, and holding that Prop. 47 authorizes resentencing under the generally applicable sentencing procedures, including the principle that the new sentence may not exceed, but may equal, the original sentence].) We agree with this reasoning and therefore hold that the trial court was not automatically required to reduce the sentence to reflect the lesser sentences imposed for misdemeanors.

2. *The Trial Court Did Not Abuse Its Sentencing Discretion*

■ McDowell contends that the trial court abused its discretion by relying on the term of the original plea agreement as a factor in imposing the high term on the new principal count. Even if that were an improper factor—an issue we do not reach—the trial court may consider as an aggravating circumstance the number and increasing severity of a defendant’s convictions. (Cal. Rules of Court, rule 4.421(b)(2).) McDowell does not dispute the nature of his criminal history and does not address this point. The

trial court said, “I think he should receive the same sentence, particularly in light of his extremely serious history.”

Although we can envision situations in which the reduction of multiple felony counts to misdemeanors would make maintenance of the original sentence inappropriate, this case is not one of them. Because the record shows that the trial court relied on the seriousness of McDowell’s criminal history and otherwise complied with section 1170.18 when it reassessed McDowell’s sentence, the court’s reference to the earlier plea bargain was of no significance.

DISPOSITION

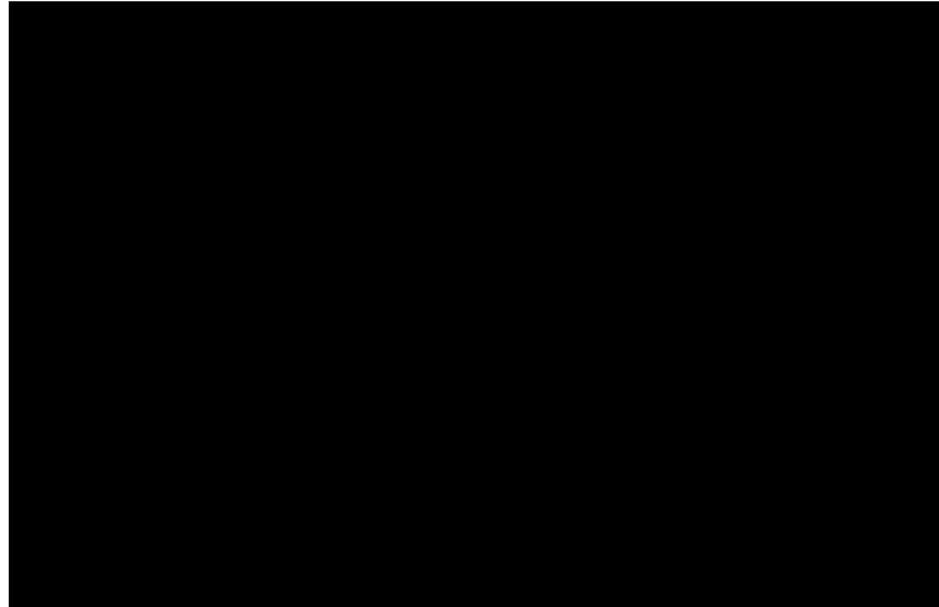
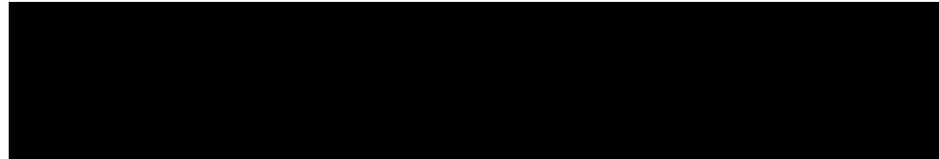
The sentencing judgment is affirmed.

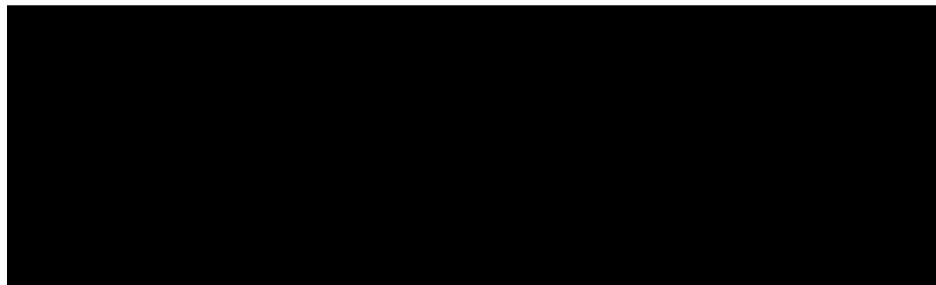
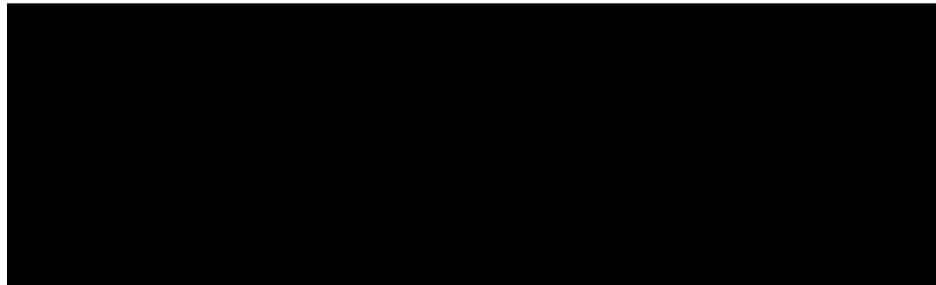
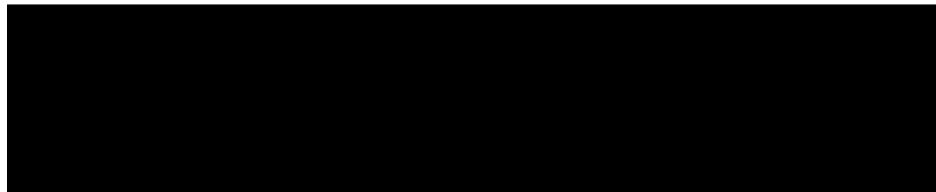
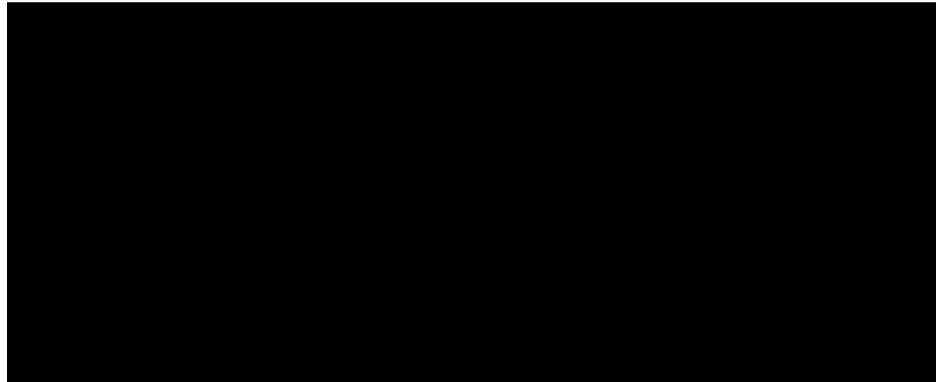
Bigelow, P. J., and Grimes, J., concurred.

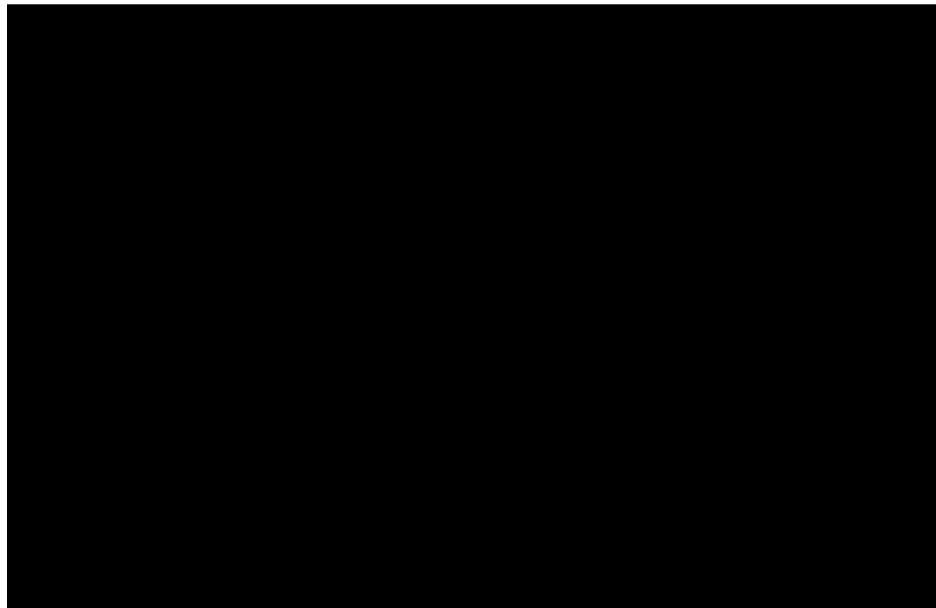
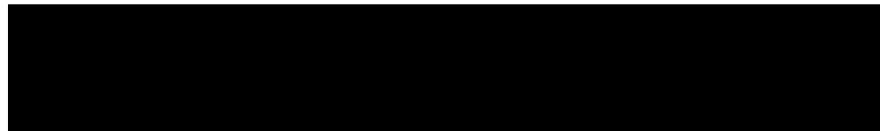
Appellant’s petition for review by the Supreme Court was denied November 30, 2016, S237650.

[No. A142201. First Dist., Div. Two. Aug. 26, 2016.]

SCHELLINGER BROTHERS et al., Plaintiffs and Respondents, v.
JAMES F. COTTER, Defendant and Appellant.







COUNSEL

Nossaman, Brendan F. Macaulay and Matthew J. Poole for Defendant and Appellant.

Law Offices of Ethan A. Glaubiger and Ethan A. Glaubiger for Plaintiffs and Respondents.

OPINION

RICHMAN, J.—This is the third appeal involving a frustrated attempt by respondent Schellinger Brothers¹ to develop a large tract of real property in the City of Sebastopol (the City) it had agreed to purchase from appellant James F. Cotter. We opened our opinion in the second appeal with the following:

“In *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245 [102 Cal.Rptr.3d 394] (*Schellinger I*), this court first encountered the controversy surrounding a proposed commercial development that had become ensnared in a bureaucratic and politically charged morass that saw the certification of an environmental impact report (EIR) stymied for five years. The frustrated developer sued the municipality for a writ of administrative mandate to halt the seemingly endless proceedings under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq. (CEQA)). We held that none of the developer’s statutory arguments could ‘be used to halt the decisionmaking process specified by CEQA that is still ongoing.’ (*Schellinger I, supra*, at p. 1250.) We specifically rejected Schellinger’s central contention that one provision of CEQA—Public Resources Code section 21151.1—imposed a ‘mandatory, nonwaivable jurisdictional deadline’ of one year for approval of an EIR. (*Id.* at pp. 1259–1261.)

“In the course of developing the developer’s statutory claims, we stated that ‘the developer’s active participation in that process . . . amounts to laches,’ an additional ground for denying relief. (*Schellinger I, supra*, at p. 1250.) We explained that ‘a significant portion of the extended delay was solely attributable to Schellinger, which was repeatedly revising the scope of its proposal,’ thereby adding ‘a dimension of complications that distinguished this proposed project from the run-of-the-mill development.’ (*Id.* at pp. 1268, 1270–1271.)

“Those statements were the basis for this collateral, follow-up litigation between James F. Cotter, the owner of the land, and Schellinger Brothers, the proposed developer of the project. Cotter sued Schellinger for breach of the contract to purchase the property. Cotter’s position was that *Schellinger I* established as a matter of law that Schellinger breached the contract by taking an unreasonably long period of time to secure approval of the project. The trial court disagreed with this reading of *Schellinger I*, and after a bench trial, concluded that Schellinger’s actions were reasonable. As part of its judgment,

¹ Schellinger Brothers is a partnership of actual brothers William and Frank. Individually, and as the partnership, they are the plaintiffs herein. For simplicity, they will hereafter collectively be designated as Schellinger except when there is a reference to a specific individual.

the court fixed a date by which Schellinger must secure final approval of the project by the municipality.” (*Cotter v. Schellinger Brothers* (Aug. 5, 2013, A135014) [nonpub. opn.] (*Schellinger II*)).

We affirmed that judgment, noting that “the history of this dispute would bring tears to the eyes of a brass monkey.” (*Schellinger II, supra*, A135014.) We spoke too soon, for a third round of litigation commenced by Schellinger was already under way. Following a bench trial of Schellinger’s complaint against Cotter for breaching the contract between them, the Honorable Elliot Lee Daum entered a money judgment for \$2,855,431.77 in favor of Schellinger, and then an order awarding costs and attorney fees.

Cotter appeals from the judgment and from the order. He contends (1) Judge Daum misinterpreted the contract; (2) Judge Daum’s finding that Cotter breached the contract is both legally erroneous and not supported by substantial evidence; and (3) Judge Daum erred in concluding that Schellinger was entitled to consequential damages that were the proximate result of Cotter’s breach. Assuming that he will prevail with these arguments, Cotter argues that the cost and fee order must also be reversed. We are in full agreement with Judge Daum’s ultimate conclusions: (1) Cotter committed an egregious breach of his contract with Schellinger, a breach animated by egregious bad faith, and (2) Schellinger suffered damages proximately caused by Cotter’s breach in the amount fixed by the trial court. And although the amount of damages appears to be of unprecedented size, the distinct circumstances of the transaction put them within “the expenses properly incurred in preparing to enter upon the land” and consequential damages, both made recoverable by Civil Code section 3306. We thus affirm.

BACKGROUND

This cause was the subject of a five-day bench trial with 11 people who testified in person, one who testified via deposition, and dozens of exhibits. The statement of decision prepared by Judge Daum figures prominently in this appeal. With minor, nonsubstantive editorial changes we have made to the text, and footnotes we have added for context, the statement deserves quotation almost in its entirety:

“This case involved the contract for sale of commercial property in Sebastopol, California, an approximately 21 acre tract known as Laguna Vista. Seller is defendant James Cotter. The buyers are known as The Schellinger Brothers, plaintiffs in this case. Mr. Cotter is 80 years old, a self-described, self-made man who came to Sonoma County in 1964 and started a commercial real estate business that spread to many other parts of

the country. [Plaintiffs] have confined most of their construction and development to Northern California where they have been in business for about 35 years.

“After plaintiff’s opening (defendant deferred) Scott Kincaid was called to testify, *inter alia*, that as [Schellinger’s] senior loan officer at Community Bank, he had prepared the necessary documents so plaintiffs would have the funds to purchase the subject property. He described the lengthy history of lending to [Schellinger] for numerous projects. It appears to the court that [Schellinger’s] credit history with the bank is impeccable and longstanding. While ‘tender’ has been made something of an issue, this Court has no doubt that [Schellinger was] ready, willing, and, most significantly, able to consummate this deal with more than adequate funding. According to witness Kincaid, the bank was willing to collateralize the loan with other holding[s] of [Schellinger], eschewing the need for security in the form of the subject property itself, a nearly 21 acre piece of land with apparently increasing value. Plaintiff Bill Schellinger’s testimony that a \$3 million dollar loan ‘is not a big deal to us’ is a very credible claim and the court accepts that characterization. Tender was simply not a problem for [Schellinger].

“After a protracted trial before Judge [Rene] Chouteau in 2011, the plaintiffs were given 2 years to obtain the necessary subdivision Map that would make the project worth while and viable. The Court takes plaintiff Bill Schellinger’s comment that ‘everybody knew we weren’t going to get the Map’ at his word.

“At issue, therefore, was [Schellinger’s] determination to go forward without the Map, the force and effect of which would be a waiver.

“The negotiations for the sale commenced in August of 1997. After numerous delays and efforts to smooth out the many wrinkles of permits through the City of Sebastopol and other jurisdictional agencies, [Cotter] made efforts to sell the property to a different buyer, Tux Tuxhorn in 2005.^[2]

² According to Bill Schellinger, “Mr. Tuxhorn called me up and told me that Mr. Cotter was trying to sell him our property [¶] . . . [¶] He wanted to know what the status was, if we were still going ahead or what we were doing with it.” Already, Schellinger’s frustration had reached the point it was willing to drop the project if Cotter “wanted to sell it to somebody else, he could buy us out. And he [Cotter] said, no, that wasn’t his intention and for us to carry on.” Judge Daum clearly did not credit Cotter’s testimony that “I had nothing whatsoever to do with this Tuxhorn thing. I never heard of him.”

But the topic of a new strategy clearly was on Cotter’s mind. There was evidence in the form of an appraisal commissioned by Cotter that since the agreement was signed in 1998, the value of the undeveloped property had more than doubled to \$6 million, and would quadruple to \$12 million if it was developed. About this time, in July of 2005, Cotter wrote Schellinger a letter in which he stated “I . . . consider the contract terminated due to the long time that has

“Among the key requirements for execution of the contract and consummation of the sale was 1) the necessity of obtaining a subdivision Map approval through the City; and 2) the completion of Lot Line Adjustments that definitively circumscribe the metes and bounds of the various parcels that were to make up the 21 acre total. In 1999 the Lot Line Adjustment was apparently completed, but [Cotter] apparently refused to sign it and the application expired.

“These key requirements were negotiated as part of the contract in the following provisions:

“[Schellinger’s] obligation to close escrow was expressly conditioned on the occurrence of, among other things, two events—the approval by the City and recordation of a final subdivision map. The Agreement^[31] provides:

“ ‘Section C: The intent of this Agreement is that upon the successful completion of an approved final map recordation, seller [Cotter] shall retain the front commercial parcels [I]t is mutually understood that the exact size of the parcels can not be determined until the project is mapped, surveyed, and has certified approval

“ ‘Section 6: Purchaser’s obligation to perform under this Agreement is subject to the following conditions: (a) Purchaser’s obtaining all approvals for a final subdivision map from City of Sebastopol, California for a Master Planned Development. Purchaser shall promptly apply for and diligently attempt to obtain approvals from Sebastopol, California

“ ‘Section 4: Escrow shall close within 30 days after recordation of final subdivision map from the City of Sebastopol. . . .

“ ‘Section 10: Closing Date. The conveyance of the Property to Purchaser and the closing of this transaction (‘Close of Escrow’) shall take place within 30 days following the satisfaction of the conditions set forth in Section 6 and 7.

“ ‘Section 15: (a) Seller’s Covenants. Commencing with the full execution of this Agreement by both parties and until the Close of Escrow: (a) Seller shall not permit any liens, encumbrances, or easements to be placed on the Property, other than the Approved Exceptions, nor shall Seller enter into any

passed,” but he was “willing to enter into a new contract for \$4,500,000 on the same basis as the old contract as amended with a specified closing date that is not dependent on any approvals for development. The closing date will have to be no later than September 30, 2005. [¶] If that proposal is not agreeable with you, I will proceed with other plans for the property.”

³ Judge Daum was quoting from the parties’ May 1998 purchase and sale agreement.

agreement regarding the sale, rental, management, repair, improvement, or any other matter affecting the Property that would be binding on purchaser or the property after the Close of Escrow without the prior written consent of Purchaser.

“ ‘(b) Seller shall not permit any act of waste or act that would tend to diminish the value of the property for any reason. . . .⁴

“ ‘Section 28: This agreement shall inure to the benefit of and shall be binding upon the parties to this agreement and their respective heirs, successor[s], and assigns.’

“In addenda executed by the parties [Schellinger] agreed to obtain a lot line adjustment to sever that portion of the properties which were subject to the agreement from the remainder of Cotter’s properties. Because Cotter had not kept property taxes current because the City required that the taxes be paid for the Lot Line Adjustment, [Schellinger] agreed to pay the property taxes for 1998 through June 2001, which totaled \$25,400.00. Even after the obligation ended, [Schellinger] voluntarily continued to pay Cotter’s taxes because Cotter was not paying them and [Schellinger] was concerned that outstanding taxes would negatively impact [its] map application. [Schellinger] finally stopped paying the taxes after Cotter sued them in a case heard by Judge Rene Chouteau in 2011 [i.e., *Schellinger II*].

“The lot line adjustment was ready to be finalized in 2002. It was never completed when [Cotter] submitted escrow instructions not to record the lot line adjustment until [Schellinger’s] subdivision Map was recorded.

“Despite prodigious efforts on the part of [Schellinger] to comply with the EIR process in order to obtain the Map^[5] and other necessary permits, [Schellinger was] continually frustrated in their efforts by a combination of City denials and non-action.

“No doubt [Cotter] was frustrated, too, and he filed suit against [Schellinger] for breach of contract and to, in essence, terminate the contract. Nonetheless Judge Chouteau ruled, *inter alia*, as follows:

“ ‘My interpretation is that in the context of this lawsuit and the question of what was reasonable, and that the Schellingers’ actions were reasonable in

⁴ The provision reads in full: “Seller shall not permit any act of waste or act that would tend to diminish the value of the Property for any reason, except that caused by ordinary wear and tear.” (And see fn. 12, *post.*)

⁵ Not only did the City never certify the EIR, the city council never even held a scheduled vote on certifying it. (See *Schellinger I*, *supra*, 179 Cal.App.4th 1245, 1252–1253.) Schellinger’s application for approval of the project, which included a tentative subdivision map application, was deemed complete by the City in 2003. (*Schellinger I*, at p. 1251.)

trying to accommodate the community and the City in reducing the density of the development to meet the needs of the community. The Court of Appeal decision [in *Schellinger I*] although binding in this court has to be read in the context of the facts and the claims before the court, and the issue in that case was whether the city had violated the statute which requires approval to be within a year. In that context, the Court of Appeal determined . . . that [it would be] unreasonable [to expect] the Schellingers to come into court to sue the city as to the one-year limitation [when they] themselves had participated in the process that extended beyond the year. I do not interpret that to mean that their efforts to meet [the] needs [of] the community by revising the project in the abstract to be unreasonable in any sense. I think the analysis of the mediation is similar. The Schellingers, in order to try to deal with the issues raised by the community, carried on a period of mediation that lasted approximately a year. As a matter of fact, it appeared to be successful and resulted in an agreement in the mediation only to be rejected by the City Council.^[6]

“Cotter received no damages or other relief in the lawsuit, save and except, perhaps, Judge Chouteau’s setting of a two year timeline for obtaining of the subdivision Map, culminating in June of 2013. It was apparent to [Schellinger] that the 2 year limitation would be insufficient, and they began to consider their option of simply waiving that requirement. The Court finds specifically that it was theirs to waive under traditional contract law and the terms of the original agreement, since the obtaining of the Map would inure solely to their benefit and going through without it put only the Schellingers, not Cotter, at risk. In the case of *Johnson v. Lehtonen* (1957) 151 Cal.App.2d 579, [582] [312 P.2d 35], the Court [of Appeal] observed: . . . ‘This provision is obviously for the benefit of the buyer and might have been waived by him.’ [Citation.] It was, nevertheless, still Cotter’s obligation to obtain the necessary Lot Line Adjustment in order to circumscribe the property bounds as described above. He at least began the process subsequent to his suit against the Schellingers, but it was never completed.^[7]

⁶ In *Schellinger I* we described a mediation that took almost a year to produce an agreement that was then rejected by the Sebastopol City Council. As two members of the council had participated in the mediation, Schellinger probably assumed council approval was a mere formality. When the agreement was then rejected, “[f]or Schellinger, this was the final straw. . . . Schellinger’s next move was to commence this litigation.” (*Schellinger I*, 179 Cal.App.4th 1245, 1253 [102 Cal.Rptr.3d 394].)

⁷ Judge Daum had before him Judge Chouteau’s judgment, which included this finding: “The failure to record a lot line adjustment . . . was caused by Mr. Cotter.” Cotter’s pending motion to take judicial notice of other materials from *Schellinger II* is denied because Judge Daum was never asked to notice these documents at trial. (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2 [112 Cal.Rptr.3d 853, 235 P.3d 152].)

“The Excavation Problem

“In the Winter of 2012^[8] significant rains occasioned the hiring of one David Ruffino, a landscape contractor from Chico, by . . . Cotter (who had hired Mr. Ruffino for work in the Chico area on prior occasions) to ameliorate flooding and drainage problems at the property. Ruffino worked without benefit of permit, but his work was halted by personnel from the City of Sebastopol when they discovered Ruffino’s permitless status. Though Ruffino did not testify at the trial, his deposition was used to supplement the evidence in varying particulars by both sides. Sadly the lack of permit was only the tip of the iceberg of difficulties created by his failed efforts.

“City Engineer Susan Kelly testified about the unauthorized ditch created by Mr. Ruffino as did Stephen Bargsten from the [North Coast Region] Water Quality Control Board [(Regional Board)] and Dr. Michael Josselyn, a Ph.D biologist from his firm Wetland Research Associates. The entire project has been put into doubt by Mr. Ruffino’s efforts because not only were they unpermitted, they jeopardized sensitive wetlands areas. The exact consequences of these actions are not completely known, but they include a 5 year monitoring period and the requirement of significant time and expense for restoration of the habitat ostensibly destroyed by Mr. Ruffino. There is no question but that Mr. Ruffino was the agent for [Cotter] and that [Cotter] is legally responsible for his actions. (*Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503 [154 Cal.Rptr. 874].) In one of the more disturbing aspects of his deposition testimony, Mr. Ruffino stated: ‘Q. Mr. Cotter asked you to lie about what you knew about the trench? Correct? A. Yes. Q. He told you that you need to testify that you knew nothing about the trench; correct? A. Yes. Q. And you refused to do that; correct? A. Well, I don’t lie. And, you know, so that’s it.’ Page 88, lines 1–9 [of Ruffino’s deposition].

“Not only does this testimony raise questions about the potential waste involved in [Cotter’s] actions, but [Cotter’s] overall credibility is called into serious question thereby.

“The final witness who testified for [Schellinger] in this case is Lawrence McLaughlin, City Attorney and City Manager of Sebastopol. Mr. McLaughlin testified that while the Lotline Adjustment and Subdivision Map applications were pending, . . . Cotter attempted to meet with him to discuss his offer to merely donate the property to the City, in complete derogation of any rights of [Schellinger] and utterly without regard to the contract for sale of the

⁸ It was actually January 2012, the month following entry of Judge Chouteau’s judgment against Cotter in *Schellinger II*.

subject property.^[19] Mr. McLaughlin was appropriately concerned that any such talks would smack of bad faith and perhaps interference with contract as a tort. [Schellinger] had spent 15 years and nearly three million dollars by the time of [Cotter's] last effort to simply give the property to the City for a park in October of 2013. This seemingly magnanimous gesture would have pulled the rug out from [Schellinger's] earnest attempts to consummate the project and fulfill the original terms of the contract. This scheme by [Cotter] was not magnanimous, indeed it bordered on the unconscionable.

"It is the conclusion of this Court that [Cotter] has breached the contract and is liable for the consequential damages suffered by [Schellinger] due to that breach.

"Remedy

"Things without all remedy should be held without regard. What's done is done.

"Lady Macbeth

"Of course the Macbeths were unable to get out the 'Damn spot' and wash their hands of blood, but where does the breach in this case leave the parties? While a longstanding remedy for failure to appropriately complete a property sale by a seller is specific performance, there are critical reasons why that won't work in this case. As [Cotter] took pains to point out during the trial, without the completion of the Lot Line Adjustments, there is no realistic way to parse out precisely what the property lines would be. There was testimony that two of the parcels could be definitively described, but those comprise but 1 and 1/3 acres of the 21 acre whole. This Court is loath to delve into the realm of surveying in an effort to formulate some equitable remedy.

"Even more significant than [Cotter's] recalcitrance is the trench problem. The uncertainty created by [Cotter's] agent Ruffino makes the remedy of specific performance illusory and ultimately no remedy at all. Through no fault of [Schellinger], the property was rendered all but useless and will be for years and many dollars to come.

"Damages

"Plaintiff Bill Schellinger and his son Scott have testified credibly that they expended \$2,855,431.77 in pursuit of this project. They have been through a

⁹ Cotter made this offer while Schellinger and the City were engaged in the year-long mediation. The offer was conveyed to one of the city council members who was participating in the mediation. (See fn. 6, *ante*.) Cotter repeated the offer directly to City Manager McLaughlin in October 2013.

number of lawsuits, a year's worth of failed mediation, and the project is actually farther away [from completion] than it was in 1999. It seems that it is time to walk away, but not without recompense. Accordingly, this Court awards [Schellinger] their damages in the sum of \$2,855,431.77 plus costs according to proof." (Boldface omitted.)

After a judgment for this amount was entered, Judge Daum denied Cotter's dual motion for new trial and vacation of the judgment, made on the grounds of excessive damages and insufficient evidence to support the judgment.¹⁰ Thereafter the parties stipulated to entry of an order fixing Schellinger's costs and attorney fees at \$74,360.

DISCUSSION

Cotter mounts a comprehensive attack on the judgment. He begins by contending Judge Daum misinterpreted the agreement with Schellinger. This misinterpretation led Judge Daum to create a nonexistent duty, which Cotter was found to have breached. Next, assuming a legal duty was correctly identified by Judge Daum, there is insufficient evidence to establish that he, Cotter, breached it. Then, if there was a duty and he did breach it, the damages award should be overturned because Judge Daum applied an incorrect standard for measuring damages, and erroneously concluded that any damages were foreseeable or proximately caused by Cotter's breach. Finally, Cotter tells us "there is no substantial (or admissible) evidence supporting *any* award of damages to Schellinger *whatsoever.*" (Italics added.)

The Subdivision Map Act

Cotter frames the first issue in his brief as follows: "Schellinger could not unilaterally waive the final subdivision map condition. The finding he [sic]

¹⁰ What Judge Daum said at the hearing where he orally denied the motion is pertinent because it augments several points in his statement of decision: "[I]n this case, . . . the Court found and does find that the credibility of the plaintiffs who testified, not only the Schellinger Brothers but their [sic] son Scott's testimony about what they lost as a result of their efforts to make this project happen and what they lost as a result of defendant Cotter's transgressions with respect to the contract . . . were such that the Court found those claims credible, found their description of their losses credible, and while they may have referred to summaries and documentation to refresh their recollection of their losses, it wasn't the documents in this Court's view that they were relying on, they were relying on what their losses were that they knew that they had suffered that came out of their pocket, . . . that they were very much aware of as the years went by. [¶] And certainly the testimony throughout the trial, all the evidence . . . with all of the expenses and the time and the delays and the efforts, that had apparently all gone for naught, and that played a huge part in this Court's consideration. It was their credibility. The credibility was impeccable in the Court's view, and in addition to everything else and all of the other considerations . . . played an extremely important part and continues to."

could contradicts the express terms of the contract and renders it illegal and void in violation of the Subdivision Map Act.” (Boldface and underscore omitted.) Cotter argues that that statute “generally prohibits the sale, lease, or financing of any parcel of a subdivision until the recordation of an approved map in full compliance” with it (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 999 [129 Cal.Rptr.2d 869, 62 P.3d 103]; see Gov. Code, § 66499.30), and contracts which allow for waiver of that compliance are illegal and void. (*Sixells, LLC v. Cannery Business Park* (2008) 170 Cal.App.4th 648, 653–654 [88 Cal.Rptr.3d 235]; *Black Hills Investments, Inc. v. Albertson's, Inc.* (2007) 146 Cal.App.4th 883, 893–894 [53 Cal.Rptr.3d 263].) So, “[b]y interpreting the Contract to permit Schellinger to waive the Map Condition, the trial court rendered it an illegal and void contract.” Cotter concedes he is only now raising this issue, but urges that we use our discretionary power to permit a change in the theory on which the case was tried because the issue is purely one of law not involving the need to resolve a conflict in the evidence. We decline to exercise our discretion in Cotter’s favor, for a number of reasons.

First, we disagree that the issue is purely legal. While it is true, as Cotter states, that the recitals in the original contract referred to the Subdivision Map Act, by the time of Judge Chouteau’s decision in *Schellinger II* the terms of the original contract hardly governed the relationship between the parties. And contrary to Cotter’s conclusory statement that no extrinsic evidence was introduced on any Subdivision Map Act (Gov. Code, § 66410) issue,¹¹ Schellinger notes that evidence extrinsic to the contract was received at trial “establishing Cotter’s obligation to obtain the LLA [Lot Line Adjustment] which was disputed and outside the written agreement”—evidence we understand that could impact the Map Act issue. In Schellinger’s words, “the heart of this case—the modification of the purchase agreement based upon over 15 years of events, and intent of the parties—is subject to the substantial evidence standard.”

We mention the above not to establish what standard of review we apply to the issue, but rather to show how Cotter’s failure to raise the issue below precludes him from raising it now. As the Supreme Court has observed, the rule against changing the theory on which a case was tried “is to be stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial.” (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780 [97 Cal.Rptr. 657, 489 P.2d 537].)

¹¹ Cotter asserts that “[n]o witness testified about the intent of the parties regarding the Map Condition, or who was the intended beneficiary of that condition. The court considered only the Contract terms—an exercise that must be reviewed *de novo* here.”

Second, it does not positively appear that Judge Daum actually ruled that on the Subdivision Map Act issue in the way Cotter believes. To repeat, the relevant language in the statement of decision was: “It was apparent to [Schellinger] that the 2 year limitation would be insufficient, and they began to consider their option of simply waiving that requirement. The Court finds specifically that it was theirs to waive under traditional contract law and the terms of the original agreement, since the obtaining of the Map would inure solely to their benefit and going through without it put only the Schellingers, not Cotter, at risk.” The word “it” in the second sentence may be read to encompass merely “the 2 year limitation” fixed in *Schellinger II* as the antecedent subject, with no reference to compliance with the Subdivision Map Act. Again, proving a different meaning to the word “it” would obviously move us away from a pristine question of law.

Third, Cotter never asked Judge Daum for clarification of the nature of the reference in the statement of decision to the Subdivision Map Act. One of the reasons for the theory of trial preclusion is the manifest unfairness of attributing something to the trial court that was never intended. (See *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1351, fn. 12 [82 Cal.Rptr.3d 229, 190 P.3d 586] and authorities cited.) A reviewing court will hesitate to put words in a trial court’s mouth, particularly if those words amount to reversible error. Such hesitation is doubled if the reversible error is giving judicial enforcement to an illegal contract.

Fourth, there are a number of factors reflective of the unusual circumstances of this entire dispute. Cotter’s attorney expressly argued to Judge Daum that the issue of waiving the Subdivision Map Act belonged to Schellinger, which did not timely raise it for the trial. Or, as Cotter’s counsel put it in closing argument, any issue of waiver has “not been argued and it’s not been based on evidence.” Indeed, the issue of Schellinger’s noncompliance with the Subdivision Map Act was not among the 53 affirmative defenses set out in Cotter’s answer. In sum, the lesson we take from the totality of the circumstances is that this appeal is simply way too late in this protracted dispute to add a new issue.

Breach

Concerning the general issue of whether he breached the agreement, and under the general caption of “There Is No Substantial Evidence to Support The Finding Cotter Breached the Contract,” Cotter puts forth the following arguments: (1) “Cotter did not anticipatorily breach the contract”; (2) “Schellinger did not tender”; (3) “Cotter did not breach the contract by failing to obtain the Lot Line Adjustment” because (a) “Schellinger had the duty to obtain the Lot Line Adjustment—not Cotter,” and (b) “Even if Cotter had a duty to

obtain the Lot Line Adjustment, there is no substantial evidence he breached that duty resulting in damage to Schellinger"; and (4) "The trench issue cannot support a finding of waste, nor support the court's award of damages." Cotter is comprehensively incorrect.

The merest comparison of the briefs demonstrates that Cotter is in conspicuous noncompliance with an elemental principle of appellate practice, namely, that a party challenging the sufficiency of the evidence to support a factual determination made by the trier of fact is *required* to set out *all* evidence pertinent to that determination, on penalty of forfeiting review. (E.g., *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [92 Cal.Rptr. 162, 479 P.2d 362].) It is not the first time Cotter has ignored the principle. He made similar arguments in *Schellinger II*. Our response was as follows: "[W]e presume the record contains sufficient evidence to sustain every factual determination made by Judge Chouteau, and it is Cotter's burden, as the appellant, to demonstrate that this presumption is unsound. (E.g., *In re Marriage of Fink* (1979) 25 Cal.3d 877, 887 [160 Cal.Rptr. 516, 603 P.2d 881]; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [92 Cal.Rptr. 162, 479 P.2d 362].) [¶] Cotter makes only a token effort to shoulder this heavy burden. He does cite to some favorable testimony in his brief, but the most cursory comparison with Schellinger's brief demonstrates just how much was left out. ‘‘A claim of insufficiency of the evidence . . . consisting of mere assertion without a fair statement of the evidence, is entitled to no consideration when it is apparent . . . that a substantial amount of evidence was received on behalf of the respondents. Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondent's to prove that the court was right. . . . An appellant is not permitted to evade or shift his responsibility in this manner.’’ (*Grand v. Griesinger* (1958) 160 Cal.App.2d 397, 403 [325 P.2d 475].) Schellinger met Cotter's challenge, but the disparity in evidentiary summaries is so great that we summarily reject Cotter's attempt to persuade us that substantial evidence does not support Judge Chouteau's finding" (*Schellinger II*, *supra*, A135014.)

Although Cotter does cite to some of the evidence received by Judge Daum, the references are nowhere near complete. For example, Sebastopol City Engineer Susan Kelly's testimony was cited by Judge Daum in connection with what Judge Daum termed "the excavation problem," but her sole appearance in Cotter's brief is in connection with the lot line adjustment issue. Not at all discussed are City Manager and City Attorney Lawrence McLaughlin, Regional Board senior environmental scientist Stephen Bargsten, or Dr. Michael Josselyn, who testified as an expert on environmental mitigation. (Josselyn is referred to once, not by name, but simply as "Schellinger's

expert.”) Mr. Ruffino’s sole appearance in Cotter’s opening brief is to be quoted in the statement of decision. There is no mention of the testimony of Kenneth Cavin, who at different times worked for both parties on the property, and who prepared Schellinger’s lot line adjustment application, which would have been submitted to the City if Cotter hadn’t refused to sign it. Most glaringly, Cotter makes only three citations to his own testimony. This is systematic evasion and omission. As this is the second time it has occurred, there is no reason to exempt Cotter from strict application of the forfeiture rule.

In addition, and as a separate ground for our decision, if the point had been preserved for review, Cotter would also lose on the merits. We emphasize that if what follows appears truncated, it is because we do not want to extend our discussion beyond establishing the substantial evidence that supports Judge Daum’s judgment, his express findings, and whatever findings may be implied from the statement of decision in support of the judgment. (*Kulko v. Superior Court* (1977) 19 Cal.3d 514, 519, fn. 1 [138 Cal.Rptr. 586, 564 P.2d 353]; *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531 [125 Cal.Rptr.3d 292]; *SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462 [17 Cal.Rptr.3d 96].)

What Cotter calls the trench issue—and which obviously refers to the work done by contractor Ruffino in 2012—is dispositive.

As already noted, Cotter agreed not to “permit any act of waste or act that would tend to diminish the value of the Property for any reason.” (See fn. 4, *ante*.) The agreement does not define “waste,” the clear implication being that it was familiar to Schellinger and Cotter, both of whom were impliedly found by Judge Daum to be parties with considerable experience in the field of developing commercial property.¹²

Cotter views the notion of waste as simple and straightforward. In his words: “Judge Daum never found the trench issue to constitute waste that could constitute a breach of Section 15(b) of the Contract. . . . Such a finding would be legally erroneous, and could not support a damages award of \$2,855,431.77. [¶] Waste occurs only when the injury to real property is ‘sufficiently substantial and permanent.’ (*Avalon [Pacific-]Santa Ana, L.P. v.*

¹² There is some further mention of waste in the appendix to the agreement, which defines the term “hazardous substances” to include: (1) “hazardous waste” and “solid waste” as defined by federal authorities, in specified federal statutes “or under any other Environmental Law”; (2) whatever “substances, materials, and wastes that are or become regulated or classified as hazardous or toxic under federal, state, or local laws or regulations”; and (3) any “material, waste, or substance” containing or constituting petroleum, asbestos, PCBs, or “a flammable explosive.”

HD Supply Repair & Remodel, LLC (2011) 192 Cal.App.4th 1183, 1215 [122 Cal.Rptr.3d 417].) ‘Waste will [be] found only when the market value of property is permanently diminished or depreciated.’ (*Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 777 [184 Cal.Rptr. 308].) Here, there was no evidence of permanent damage. At worst, the trench was a problem costing \$225,000 to fix, with five years of monitoring. Moreover, there was zero evidence of diminution of value. No witness attempted to value the property before/after the trench issue. Schellinger declined to offer an expert on property value. No value opinion was offered by Mr. Cotter, the only witness who could have. (Evid. Code, § 813.) Having failed to prove diminution of value, Schellinger can recover nothing.”

It seems clear from the context that by using the word “waste” the parties intended to adopt the broad concept ordinarily attributed to Civil Code sections 818 and 2929 and Code of Civil Procedure section 732, as any act or omission on the part of Cotter which would substantially impair the utility or value of the property to be conveyed to Schellinger. But the concept is considerably broader—and more subtle—than Cotter portrays. The two decisions quoted by Cotter help in proving the point.

■ In the first, the Court of Appeal stated: “ “[W]aste is conduct (including in this word both acts of commission and of omission) on the part of the person in possession of land which is actionable at the behest of, and for protection of the reasonable expectations of, another owner of an interest in the same land.” ”¹³ (*Avalon Pacific-Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC, supra*, 192 Cal.App.4th 1183, 1211, quoting *Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 597–598 [125 Cal.Rptr. 557, 542 P.2d 981].) The defendant must be “ ‘under a duty to preserve and protect the property involved.’ ” (*Avalon*, at p. 1212; see *Hickman v. Mulder* (1976) 58 Cal.App.3d 900, 908 [130 Cal.Rptr. 304] [willful mismanagement and neglect to do acts necessary to preserve property amount to bad faith waste].)

The circumstances of the second decision cited by Cotter, *Smith v. Cap Concrete, Inc., supra*, 133 Cal.App.3d 769, are particularly instructive. There, more than 60 truckloads of “broken concrete material” was dumped on the property. “[T]he agreed cost of removal of the concrete material was \$6,000.” The owner sued the concrete company. The case was tried on stipulated facts to the bench, which ruled against the owner. (*Id.* at p. 773.) Division One of this district reversed, concluding that “[w]hile loss of market value is the ultimate test [citation], it is a measure which will be applied flexibly,” it will

¹³ Cotter does not dispute that Schellinger possessed an equitable interest in the property through its contract of purchase. (E.g., *Miller & Lux v. Batz* (1904) 142 Cal. 447, 451 [76 P. 42]; *Jackson and Thomas v. Torrence* (1890) 83 Cal. 521, 537 [23 P. 695]; *Southern Pacific Land Co. v. Kiggins* (1930) 110 Cal.App. 56, 60 [293 P. 708].)

admit of “‘the possible exception of a few instances,’” “having in mind the ‘quantity or quality of the estate, the nature and species of property, [and] the relation to it of the person charged to have committed the wrong.’” (*Id.* at pp. 777, 775, 777.) “[I]t is enough that [defendant’s] conduct reduced the value of the subject property The damage we discern is palpable. Depreciation of the market value of the property in its present condition can easily be inferred from the stipulated facts.” (*Id.* at pp. 777–778.)

■ In addition to the facts on the ground, Cotter’s mental state may be of consequence. Our Supreme Court noted there may be instances of “waste committed in bad faith,” where the plaintiff may point to the defendant as a “reckless, intentional, and . . . even malicious despoiler[] of property,” causing damage that is unrelated to financial fluctuations in the economy at large. (*Cornelison v. Kornbluth, supra*, 15 Cal.3d 590, 604.) Yet proof of an overt destructional urge is not required. (See *Fait v. New Faze Development, Inc.* (2012) 207 Cal.App.4th 284, 299 [143 Cal.Rptr.3d 382] [“we do not understand the *Cornelison* decision to conclude that *only* such ‘despoilers of property’ can be liable for ‘bad faith’ waste,” “defendants may have had the best of intentions, but that . . . does not entitle them to escape liability for waste”]; *id.* at p. 300 [“‘bad faith’ waste under *Cornelison* is any waste that is *not* the result of the economic pressures of a market depression”].) As with ordinary non-bad-faith waste, simple but intentional passivity can suffice. (*Nippon Credit Bank v. 1333 North Cal. Boulevard* (2001) 86 Cal.App.4th 486, 493–495 [103 Cal.Rptr.2d 421] [failure to pay property taxes]; *Osuna v. Albertson* (1982) 134 Cal.App.3d 71, 75 [184 Cal.Rptr. 338] [same]; *Hickman v. Mulder, supra*, 58 Cal.App.3d 900, 909 [“many occasions of waste arise because of *inaction* [T]he failure to do what is needed can . . . be described . . . as willful”].)¹⁴

¹⁴ The only mention of property taxes in the original agreement between Cotter and Schellinger concerned how they were to be prorated at the close of escrow. Thereafter, in the “Contract Supplement/Addendum No. Two” executed in September 2000, the parties agreed: “Because the close of escrow has been delayed by a lengthy subdivision approval process, the Buyer agrees to pay the Seller’s real estate taxes on the above properties (land portion only) for the period beginning June 22, 1998 and ending June 22, 2001 in the amount of \$25,400. Buyer shall immediately deposit \$25,400 into the existing escrow [account] . . . and immediately release said sum to the Seller.” The obvious purpose of this provision was to clear up the arrearages mentioned by Judge Daum.

However, Judge Daum also concluded that Schellinger continued to pay Cotter’s property taxes for the next decade (eventually totaling about \$128,000), even though there was no contractual obligation to do so. Cotter testified that one of the aims behind a 2005 letter he sent to Schellinger (see fn. 2, *ante*) was “to put pressure on them [i.e., Schellinger] to do the taxes.” The obvious inference is that Schellinger paid the taxes because Cotter would not. Wholly apart from any other factor, Cotter committed waste for each year he did/would not pay the assessed ad valorem taxes on the parcels. Although Judge Daum laid no particular emphasis on this point, the evidence on it was uncontradicted, and thus the conclusion that Cotter allowed

Whether the defendant acted in bad faith “is within the province of the trier of fact to determine . . . subject to review under the established rule of appellate review” (*Cornelison v. Kornbluth, supra*, 15 Cal.3d 590, 604; see *Fait v. New Faze Development, Inc., supra*, 207 Cal.App.4th 284, 296; *Hickman v. Mulder, supra*, 58 Cal.App.3d 900, 909), meaning it would be a question of fact reviewed for substantial evidence.

We cannot agree that Judge Daum failed to identify Cotter’s authorizing the digging of the trench as a material breach. That matter clearly occupies pride of place among the discussion of Cotter’s various efforts to sabotage the contract with Schellinger, meriting not only a separate section of the statement of decision (“The Excavation Problem”), but reiteration under the discussion of “Remedy.” In light of the sheer amount of space it occupies in the statement of decision, it is inconceivable that Judge Daum treated it as anything other than a breach. It does not have to be the sole, or most significant, breach. It can be one of several, so long as it is material. Judge Daum clearly viewed it as such. It is that conclusion to which we now turn.

Whether a breach is material is usually left to the trier of fact “to determine from all the facts and circumstances shown in evidence.” (*Smith v. Empire Sanitary Dist.* (1954) 127 Cal.App.2d 63, 73 [273 P.2d 37]; see *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051–1052 [241 Cal.Rptr. 487] and authorities cited.) As already noted, the defendant’s mental state can be among those circumstances. (*Cornelison v. Kornbluth, supra*, 15 Cal.3d 590, 604; *Smith v. Empire Sanitary Dist., supra*, 127 Cal.App.2d at p. 73, citing Rest., Contracts, § 275 [“The willful, negligent or innocent behavior of the party failing to perform” is “influential” in determining materiality]; Rest.2d Contracts, § 241 [“the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing” is “significant” in determining materiality]) So can the timing of the breach. (*Asso. Lathing etc. Co. v. Louis C. Dunn, Inc.* (1955) 135 Cal.App.2d 40, 49–50 [286 P.2d 825].) All we have to do is determine whether there is substantial evidence to support Judge Daum’s implied finding that what Cotter did in connection with the trench constituted a material breach of his contract with Schellinger.

■ Cotter’s bad faith was a recurring theme of the statement of decision. It went far beyond his simple refusal—we cannot believe it was financial inability—to pay the taxes on the property for 13 years, which alone is sufficient to establish waste. (*Nippon Credit Bank v. 1333 North Cal. Boulevard, supra*, 86 Cal.App.4th 486, 493; *Osuna v. Albertson, supra*, 134 Cal.App.3d 71, 75.) Judge Daum noted Cotter’s “recalcitrance” in refusing to

waste appears as a matter of law. This conclusion is consistent with Judge Daum’s ultimate decision, and by itself constitutes a basis for affirming the judgment.

assist in securing the lot line adjustments. Twice Cotter took steps completely at odds with his obligations to Schellinger: first when he negotiated to sell the property to Mr. Tuxhorn, and second when he offered to give the property to the City. The latter drew Judge Daum's condemnation as a "scheme," one that was in such "complete derogation of any rights of [Schellinger] and utterly without regard to the contract for sale of the subject property" that it "bordered on the unconscionable." And indeed it did, for it is the most elemental implied covenant to a contract for sale that the seller will not thereafter convey the object of the contract to another. (See *Brown v. Superior Court* (1949) 34 Cal.2d 559, 564–565 [212 P.2d 878] ["In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. [Citations.] Where the parties contract to make a particular disposition of property . . . the agreement necessarily includes a promise not to breach the contract by . . . failing to dispose of the property as agreed."]; 1 Miller & Starr, Cal. Real Estate (4th ed. 2015) §§ 1:66–1:67, pp. 1-217-1-218, 1-233-1-234.)

Judge Daum also had a negative opinion of "Cotter's overall credibility" based on what he learned during the course of the trial. By contrast, the Schellinger evidence was deemed credible, and its actions were repeatedly characterized as "reasonable."

The timing of Cotter's dispatch of Ruffino to the property was, from Schellinger's perspective, especially harmful. Summoning Ruffino to the project in late January 2012—a time unquestionably prior to the termination deadline of June 2013 fixed by Judge Chouteau—Cotter pointed out the problem, which Ruffino at his deposition termed "a big freaking mess," as to which Cotter "instructed me to . . . dig a trench where the water would drain out." Ruffino estimated it would take a crew of least four workers a week to fix the problem, at an estimated cost of \$20,000. Ruffino's crew started work on January 27.

Cotter's motive may be open to question, but the consequences are not.¹⁵ The uncontested testimony was that the trench was approximately four feet wide, 200 feet long, and encroached into a protected wetlands area. Because of this encroachment, in July 2012 the Regional Board issued a draft

¹⁵ By "motive" we are here referring to the reason Cotter directed Ruffino to perform certain work at the site. An additional "motive," which clearly did factor into Judge Daum's negative opinion of Cotter's veracity, was Cotter's threat to Ruffino to "come at me with everything that he's got" if Ruffino did not testify at his deposition "[t]hat I didn't dig the trench down there on the property." There was also evidence that Cotter did not pay Ruffino, and that he ignored repeated inquiries from City officials attempting to confirm that Ruffino had acted at Cotter's direction.

abatement order and a proposed “cleanup” plan.¹⁶ Cotter was ordered to “[s]ubmit a work plan . . . that describes and shows in detail how [he] propose[s] to restore wetland functions The plan shall contain: . . . an engineering and biological design for all wetland restoration components; a time schedule for restoration activities; . . . and a monitoring proposal to evaluate whether the restoration is successful.” Cotter’s counsel wrote that “It is Mr. Cotter’s intention to cooperate with the public agencies that have jurisdiction over the matter.” But Cotter never submitted a plan.

By the time of trial, the Regional Board had made a final abatement order and imposed its own remediation plan. That order recites that when “staff inspected the Site again on July 11, 2013,” they “expected to see that work had been done at the site to apply erosion control management best practices, as . . . had been discussed. There was no visual evidence that erosion control efforts or best management practices had been implemented . . . , and staff observed additional erosion within the area of . . . trenching” that had destroyed or damaged wetlands by “altering the conditions that supported wetland hydrology.”

According to Dr. Josselyn, the remediation process is complex: typically, “it’s a planning process, a permitting process[, an] . . . implementation process and then a monitoring process,” which can take 18 to 24 months. This would be followed by “a lengthy compliance period,” “that . . . most often is a five-year period” at a minimum. “[I]f you haven’t met the conditions at the end of five years, you need to undertake some remediation.” The Regional Board may “require mitigation beyond what [is needed] to replace the area that was disrupted,” such as “creation of more wetlands than what was . . . impacted.” More particularly to this case, “by filing a clean up and abatement order, . . . there’s a whole set of rules that come into play that the Regional Board can then implement in terms of ordering the clean up.” The wording of the Regional Board’s order suggested to Dr. Josselyn that “already the Board is recognizing there’s some impacts that [go] beyond simply a restoration and may require additional wetlands to be created.” Dr. Josselyn testified “in my experience, [the Regional Board] can request

¹⁶ The Regional Board is one of the entities entrusted with enforcement of the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.), including “the prevention and abatement of water pollution,” and discharges of “waste.” (*Id.*, § 13225, subds. (a) and (b).) (We hasten to add that the definition of “waste” in the context of that statutory scheme (see *id.*, § 13050, subd. (d)) is completely consistent with the more widespread and common use concept than the arcane concept we are considering here.) However, the Regional Board construes this definition to include “sediment . . . discharged [in]to waters of the state.” The Regional Board may require that any person being investigated “shall furnish, under penalty of perjury, technical or monitoring program reports” (*id.*, § 13267, subd. (b)(1)), and may also order that person to “clean up . . . or abate” the problem, including to “take other necessary remedial action” (*id.*, § 13304, subd. (a)).

two-to-one mitigation for impacts to waters,” meaning, “if it’s 200 yards of wetlands that were disrupted by this ditch they may require 400 yards of wetlands to be provided to mitigate.” Dr. Josselyn—who had worked on preparing the EIR for the City—testified that not only would the EIR have to be redone, but that the City would defer all action on Schellinger’s pending application until the Regional Board issued a “closure letter” following “completion of the work that was ordered by the board.” In that sense, the consequences of the trenching ordered by Cotter had truly frozen further action on Schellinger’s application to develop the property.

According to Dr. Josselyn, an additional point of potential aggravation was Cotter’s failure to respond when the impropriety of Ruffino’s trenching was brought to his attention: “In this particular case, we wouldn’t know what the board may require because of the failure to act in the initial time that the owner was contacted.” However, Dr. Josselyn did expect that the Regional Board would be “very strict” in enforcing compliance with its order. Dr. Josselyn estimated the likely costs for the process on Cotter’s property to be approximately as much as \$265,000. This figure did not include possible fines.

■ So, while the contract was still in force, Cotter was under a duty to preserve the property for transfer to Schellinger. (*Avalon Pacific-Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC*, *supra*, 192 Cal.App.4th 1183, 1211–1212; *Hickman v. Mulder*, *supra*, 58 Cal.App.3d 900, 909.) Instead of doing so, Cotter’s unilateral action set in train a series of events that made it impossible for Schellinger to get what it bargained for, at least by the time of the contract’s expiration date of June 2013 fixed by Judge Chouteau. Indeed, the likely period of Regional Board oversight would be a minimum of six years, through 2018. Cotter’s unilateral action had effectively put a cloud on the property concerning what could be done with it until the Regional Board released its hold. Given Cotter’s experience as a property developer and as a California-licensed general contractor, a claim of ignorance of the need to obtain a permit could not be entertained. What remains is what appears to be the almost willful destruction of the purpose of the contract, extinguishing any utility of the contract to Schellinger. In short, Cotter wrecked the project for Schellinger.

■ Judge Daum could certainly treat that virtual destruction as a substantial impairment of the property’s value. The damage was not permanent in the literal sense, but it was more permanent than the concrete rubble in *Smith v. Cap Concrete, Inc.*, *supra*, 133 Cal.App.3d 769, which could be removed at any time. Here, the property is impaired until the Regional Board says otherwise. Certainly Cotter’s “conduct reduced the value of the subject property” (*id.* at p. 777) were it to be acquired subject to that restriction.

Together with Cotter's demonstrated instances of bad faith and his nonpayment of taxes, Judge Daum could readily conclude that Cotter had breached the contract by committing waste, in violation of his agreement with Schellinger. (Cf. *Bewick v. Mecham* (1945) 26 Cal.2d 92, 99 [156 P.2d 757] ["A party who prevents fulfillment . . . of his own obligation commits a breach of contract".] He could just as readily conclude that this breach was a material one because it entailed the virtual and volitional destruction of the subject of the contract. (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, *supra*, 195 Cal.App.3d 1032, 1051–1052; *Smith v. Empire Sanitary Dist.*, *supra*, 127 Cal.App.2d 63, 73.)¹⁷

Something periodically restated by our Supreme Court seems almost designed with this case in mind: "'A party to a contract cannot take advantage of his own act or omission to escape liability thereon. Where a party to a contract prevents the fulfillment of a condition or its performance by the adverse party, he cannot rely on such condition to defeat his liability.' " (*Nelson v. Reisner* (1958) 51 Cal.2d 161, 171 [331 P.2d 17]; accord, e.g., *Pacific Venture Corporation v. Huey* (1940) 15 Cal.2d 711, 717 [104 P.2d 641]; see *Wolf v. Marsh* (1880) 54 Cal. 228, 232.)

Damages

Judge Daum awarded Schellinger damages of \$2,855,431.77. This figure derived from Schellinger's exhibit Nos. 34 and 35. Headed "Job Cost Journal" for Laguna Vista, each is a computer-generated printout with a number of categories (e.g., "Property Tax," "Civil Engineering," "City/County Fees"), and hundreds of individual entries. Schellinger overhead was included, but payroll was not. Neither exhibit was itself admitted in evidence. However, these exhibits were the basis for the testimony cited by Judge Daum.

Scott Schellinger is the son of William Schellinger. (See fn. 1, *ante*.) He testified that he had been "involved in the Laguna Vista Project" from the day he first started working for the family firm in 2001, that he "was actually hired at least in part to manage this project." Among his responsibilities—and his alone—were taking over for his father the duty of "keeping track of what the costs have been [on] this . . . project." "I manage the invoices as they come into the office. I approve or question them. Then they go to the accounting department. They're entered into the computer system if they're valid. The checks are cut." Exhibit No. 35 "represents all the invoices that I

¹⁷ Because Cotter was in material breach of the contract, Schellinger was excused from its duties of performance (e.g., *De Burgh v. De Burgh* (1952) 39 Cal.2d 858, 863 [250 P.2d 598]; *Hale v. Sharp Healthcare* (2010) 183 Cal.App.4th 1373, 1387 [108 Cal.Rptr.3d 669]), thus making the issue of tender immaterial and academic.

approved from the time I started working on the project.” Prior to testifying, Scott Schellinger reviewed the figures for accuracy so that he could state under oath that exhibit No. 35 was an accurate reflection of the costs associated with the project that have been paid by Schellinger since he took over responsibility for the project.¹⁸

Both exhibits Nos. 34 and 35 were prepared by Scott Schellinger. In response to an unsuccessful objection by Cotter that Scott Schellinger’s testimony lacked foundation “in light of the fact they testified they have these documents and chose not to bring them” to court, Schellinger’s counsel elicited the reason why: Schellinger did indeed still have possession of “the documents that are related to the invoices and payments for the billing that shows up on Exhibits 34 and 35,” “span[ning] the time from 1997 to the present,” and filling 15 or 16 boxes when they were produced for Cotter at a deposition.

Exhibit No. 34 was the basis for the testimony of William Schellinger. It covered only the project costs from 1997 up to when Scott Schellinger took over in 2001. His testimony paralleled that of his son on the internal procedures for the figures set forth.

The bottom line on exhibit No. 34 was \$146,331.20. The bottom line on exhibit No. 35 was \$2,709,100.57.¹⁹ Together they account for the damages award of \$2,855,431.77.

According to Cotter, the award “cannot stand because: (1) the trial court applied the wrong measure of damages; (2) there is no substantial evidence that Schellinger’s damages were proximately caused by Cotter’s alleged breach; (3) there is no substantial evidence the damages awarded to Schellinger were foreseeable at the time of contracting; and (4) there is no substantial (or admissible) evidence supporting any award of damages to Schellinger whatsoever.” Each of these arguments is baseless.

Cotter states the award was “based *solely* upon the conclusory, oral testimony of Bill and Scott Schellinger who merely read a grand total from

¹⁸ Scott Schellinger also prepared exhibit No. 30, which included expenses incurred before he began working on the project. After he had testified concerning the preparation of exhibit No. 30, Schellinger moved for its admission in evidence. Cotter objected on the ground of hearsay and because “there’s also no foundation because some of the entry [sic] predate 2001.” Judge Daum sustained “the objection,” but with the proviso that his ruling “doesn’t preclude consideration of further testimony by this witness as to the facts set forth in it, if they’re from his personal knowledge.” The following day William Schellinger testified about the newly prepared exhibit No. 34 and Scott Schellinger about the revised version of exhibit No. 30, now renumbered exhibit No. 35.

¹⁹ When Schellinger moved for receipt of exhibits Nos. 34 and 35 in evidence, Judge Daum sustained Cotter’s objections of “[h]earsay. . . . Also documents prepared for litigation.”

an inadmissible summary.” At a later point in his brief, Cotter disparaged the testimony as “consist[ing] only of Bill and Scott Schellinger reading a total from an excluded summary of items they did not independently recall, but which was characterized as all ‘cash out the door’ relating to the project. Schellinger offered no evidence that each payment was properly recoverable as damages.” Cotter continues: “By awarding Schellinger its total ‘cash out the door’ (without evidence of causation and foreseeability), the trial court went beyond the measure of damages for contract cases, and beyond the broader (and inapplicable) measure of damages for tort cases. (Civ. Code, § 3333.) Rather, the trial court effectively awarded Schellinger the inapplicable ‘out-of-pocket’ measure of damages available for fraud under Civil Code section 3343.” And several pages later, Cotter asserts in his brief: “Schellinger failed to offer admissible evidence of its damages. . . . [¶] Schellinger provided no evidentiary support to demonstrate any of that total number was attributable to expenses properly recoverable in this lawsuit. . . . [¶] Further, Schellinger provided only a total dollar amount without providing any detail, categorization, facts, or other support for the number.” No authority cited by Schellinger “excuses its failure of proof” or “permits conclusory oral testimony.” “Schellinger’s testimony was not supported by *any* admissible documentary evidence.”

There are several layers of erroneous reasoning in these statements.

First, Cotter is incorrect to state “Schellinger failed to offer admissible evidence of its damages.” The unstated premise is that witnesses were merely uttering out loud the hearsay conclusions of exhibits Nos. 34 and 35. Cotter seems unaware that this is not the first commercial litigation that generated a lot of paper. California has an established and sensibly tolerant approach for such cases.

What was commonly known as the voluminous writing rule allowed admission of a statement or summary reflecting numerous accounts or documents “‘which cannot be examined in court without great loss of time.’” (*Globe Mfg. Co. v. Harvey* (1921) 185 Cal. 255, 261 [196 P. 261] [quoting Code Civ. Proc., former § 1855]; accord, e.g., *San Pedro Lumber Co. v. Reynolds* (1898) 121 Cal. 74, 86 [53 P. 410]; *Dallman Co. v. Southern Heater Co.* (1968) 262 Cal.App.2d 582, 595–596 [68 Cal.Rptr. 873].) And that such a writing may itself be admissible appears still to be the rule. (See Evid. Code, § 1523, subd. (c); *Heaps v. Heaps* (2004) 124 Cal.App.4th 286, 293 [21 Cal.Rptr.3d 239] [“since the schedule was a general compilation of documents that could not be examined individually by the court without great loss of time, it was admissible”]; cf. *Greenwich S.F., LLC v. Wong* (2010) 190

Cal.App.4th 739, 749 [118 Cal.Rptr.3d 531] [“the court admitted into evidence a handwritten itemization prepared by [testifying witness] Lee”]; Simons, Cal. Evidence Manual (2015) § 8:21, pp. 588–589.)

But that is not a point that demands decision here, because Judge Daum did not admit exhibits Nos. 34 and 35 in evidence. What was received was oral testimony concerning the exhibits, as Judge Daum noted in the course of closing argument and again at the argument on the motions. As Judge Daum described on the latter occasion, “while they may have referred to summaries and documentation to refresh their recollection of their losses, it wasn’t the documents in this Court’s view that they were relying on, they were relying on what their losses were that they knew that they had suffered that came out of their pocket, that came out of their coffers that they were very much aware of as the years went by.” (See fn. 10 at p. 995 and accompanying text, *ante*.) This is expressly admissible pursuant to Evidence Code section 1523, subdivision (d): “Oral testimony of the content of a writing is not . . . inadmissible . . . if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.” Scott and William Schellinger each testified to his personal knowledge and authentication of the documents summarized in the exhibit he had prepared. (Evid. Code, § 1401.) Judge Daum did not abuse his discretion in receiving their testimony, which is substantial evidence for the amounts involved. (Evid. Code, § 411; *Greenwich S.F., LLC v. Wong, supra*, 190 Cal.App.4th 739, 767–768.)

With respect to the substantive point of recovery, there would be no dispute if this were a general breach of contract situation that would ordinarily use Schellinger’s out-of-pocket expenses—commonly known as “reliance damages”—as a measure of damages under Civil Code section 3300. (See, e.g., *Buxbom v. Smith* (1944) 23 Cal.2d 535, 541 [145 P.2d 305]; *Agam v. Gavra* (2015) 236 Cal.App.4th 91, 105–106 [186 Cal.Rptr.3d 295]; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 883, p. 970.) But this is not the ordinary situation, and, as we recently recognized, that general statute does not apply. (*Greenwich S.F., LLC v. Wong, supra*, 190 Cal.App.4th 739, 751.)

The parties have always agreed that the correct measure of damages is the specific rule established by Civil Code section 3306 (section 3306), which provides: “The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, the expenses properly

incurred in preparing to enter upon the land, consequential damages according to proof, and interest.”²⁰

It will be appreciated at once that the situation where contractual performance hung fire for almost 15 years is about as atypical a situation as one is likely to see. Still, the very novelty of the setting does not mean that section 3306 is unable to authorize the damages awarded by Judge Daum with its language “expenses properly incurred in preparing to enter upon the land [and] consequential damages.” Demonstrating this conclusion requires comparison of the concepts of general and consequential damages.

■ “Contractual damages are of two types—general damages (sometimes called direct damages) and special damages (sometimes called consequential damages). [Citations.] [¶] . . . [¶] General damages are often characterized as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. [Citations.] Because general damages are a natural and necessary consequence of a contract breach, they are often said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable the parties at the time of contracting are ‘deemed’ to have contemplated them. [Citations.] [¶] . . . [¶] Unlike general damages, special damages are those losses that do not arise directly and inevitably from any similar breach of any similar agreement. Instead, they are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties. Special damages are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test). [Citations.] Special damages ‘will not be presumed from the mere breach’ but represent loss that ‘occurred by reason of injuries following from’ the breach.” (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 968–969 [22 Cal.Rptr.3d 340, 102 P.3d 257].)

■ Section 3306 obviously reaches some clear instances of general damages in situations where specific performance is not ordered: (1) if paid by the buyer, the purchase price; (2) regardless of whether specific performance is ordered, any appreciation or depreciation of the property’s value occurring by reason of the breach; (3) title and escrow expenses; (4) interest

²⁰ The compilers of several leading practice guides believe there is authority supporting their conclusion that “When the buyer’s damages claims are based on other duties or promises and are not the direct result of the promise to convey land, the specific damage limitations of [section] 3306 may not apply.” (1 Cal. Real Property; Remedies and Damages (Cont.Ed.Bar 2d ed. 2016) § 4.47, p. 4-70; Cal. Attorney’s Guide to Damages (Cont.Ed.Bar 2d ed. 2015) § 2.10, p. 2-11.) As noted in the text, Schellinger has not attempted to remove itself from section 3306.

on these items; and (5) “expenses properly incurred in preparing to enter upon the land.” The statutory language for the last item has only once been the subject of anything approaching judicial interpretation.

In *Crag Lumber Co. v. Crofoot* (1956) 144 Cal.App.2d 755 [301 P.2d 952] (*Crag Lumber*), the plaintiff bought unimproved land from the defendant for \$31,250, intending to mill the timber on the acreage. The plaintiff spent \$174,000 building a sawmill and logging roads on the property, and felled almost a million board feet of trees, all before discovering that the defendant did not own the land he had purported to sell. The Court of Appeal held that the trial court had erred in awarding damages that included approximately \$41,500 for depreciation of the mill and the cost of building the logging roads, stating: “The trial court found that this item [the depreciation] was a cost for entry upon the land and also that the building of access roads to and into the land for the purpose of taking out timber from the land to the mill were costs expended in preparation for such entry. But these costs were not expenditures incurred in preparing to enter upon the land. They were expenditures made in accomplishing the general purposes for which the property was bought, that is, expended in the use of the land. The phrase ‘to enter upon the land’ refers to the taking of possession rather than to things done to put the land to general use. This land was timber land. Its highest and best use was for the marketing or manufacturing into lumber of the timber growing thereon. Nothing was expended in preparing to enter upon the land. The expenditures were made for the use of the land and that use continued for some time until, by reason of [defendant’s] breach . . . possession was lost.” (*Crag Lumber, supra*, 144 Cal.App.2d 755, 779.)

We agree with the *Crag Lumber* court that the phrase “to enter upon the land” refers to the taking of possession rather than the use of the property. But the crucial fact in *Crag Lumber*—which may account for its total absence from Cotter’s brief, and, perhaps more surprisingly, from Schellinger’s—is that the buyer there had actually taken possession of the property long before making the expenditures for the mill and roads, so the costs could not possibly have been found to have been made in preparing to enter upon the land. We further agree with *Crag Lumber* that the context of the contract may be dispositive. So it proves here.

It cannot be too often emphasized that the agreement between Cotter and Schellinger was not your run-of-the-mill contract for the sale of real property. It was a negotiated resolution between experienced parties, who were clearly

aware of the ultimate intended use of the property. That goal was the commercial development of the merged parcels, with choice bits being reconveyed back to Cotter. Both Cotter and Schellinger understood that no date could be specified with any assurance that the conditions for exchanging performances had been satisfied because so much was beyond their control. The agreement also accepted that there would be considerable dealings with local government, whose actions could not be put on a timetable. This explains the use of the open-ended escrow. The agreement further accepted that the dealings with the City of Sebastopol would be lengthy and handled by Schellinger, so lengthy that Schellinger agreed to keep Cotter “informed in writing . . . on a quarterly basis” of Schellinger’s “progress” in “obtaining all approvals” for the project, while Cotter provided Schellinger with the power to “contact any federal, state, or local governmental authority or agency” concerning “any matters relating to the Property.” Cotter also made Schellinger his “‘attorney in fact’ to obtain the development approvals contemplated by this Agreement.”

So, extensive interaction with local government was expressly contemplated by the parties. Hardly less explicit was the understanding that the costs of that interaction would be shouldered by Schellinger prior to taking formal possession at the close of the escrow. Those costs would not be present in the usual breach of a contract for the sale of real property, but they clearly would be in the context of this contract. Those costs would qualify as losses foreseeable by Cotter in the event of his breaching the agreement. (See *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.*, *supra*, 34 Cal.4th 960, 969.) Accordingly, they could, and obviously in Judge Daum’s decision did, qualify as both “expenses properly incurred [by Schellinger] in preparing to enter upon the land” and consequential damages allowed by section 3306.

We conclude that Schellinger made the “proper showing” for consequential damages under that statute, and produced substantial evidence that was credited by Judge Daum. (*Greenwich S.F., LLC v. Wong*, *supra*, 190 Cal.App.4th 739, 758, 767–768.) Our examination has established as a matter of law that Schellinger’s losses were foreseeable and proximately caused by Cotter’s breach. (See *Hedlund v. Superior Court* (1983) 34 Cal.3d 695, 705 [194 Cal.Rptr. 805, 669 P.2d 41] [“Although foreseeability is most often a question of fact . . . when there is no room for a reasonable difference of opinion it may be decided as a question of law”]; *Capolungo v. Bondi* (1986) 179 Cal.App.3d 346, 354 [224 Cal.Rptr. 326] [same for causation]; cf. *Smith v. Cap Concrete, Inc.*, *supra*, 133 Cal.App.3d 769 [both issues apparently decided as a matter of law by reviewing court].)

DISPOSITION

The judgment and the order are affirmed. Schellinger shall recover its costs on appeal.

Kline, P. J., and Miller, J., concurred.

[No. F070068. Fifth Dist. Aug. 29, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
THOMAS LEE SPILLER, Defendant and Appellant.

[REDACTED]

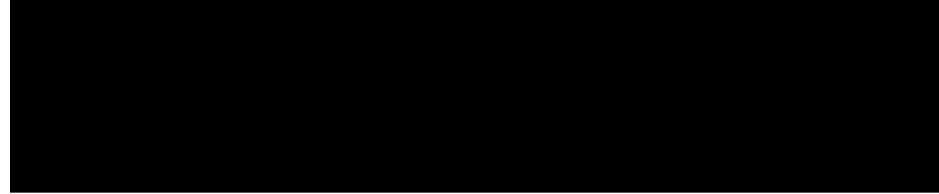
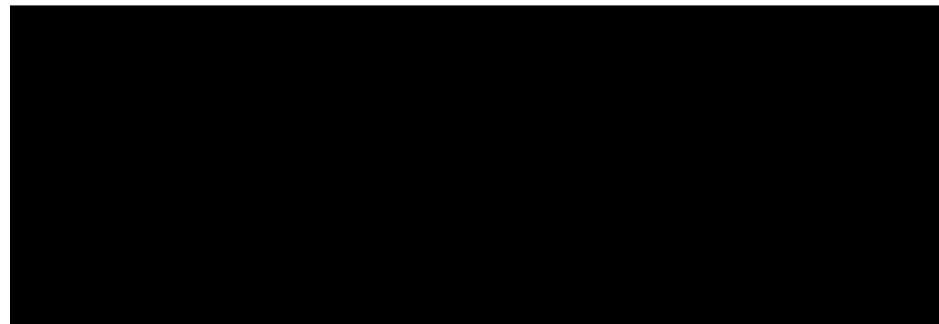
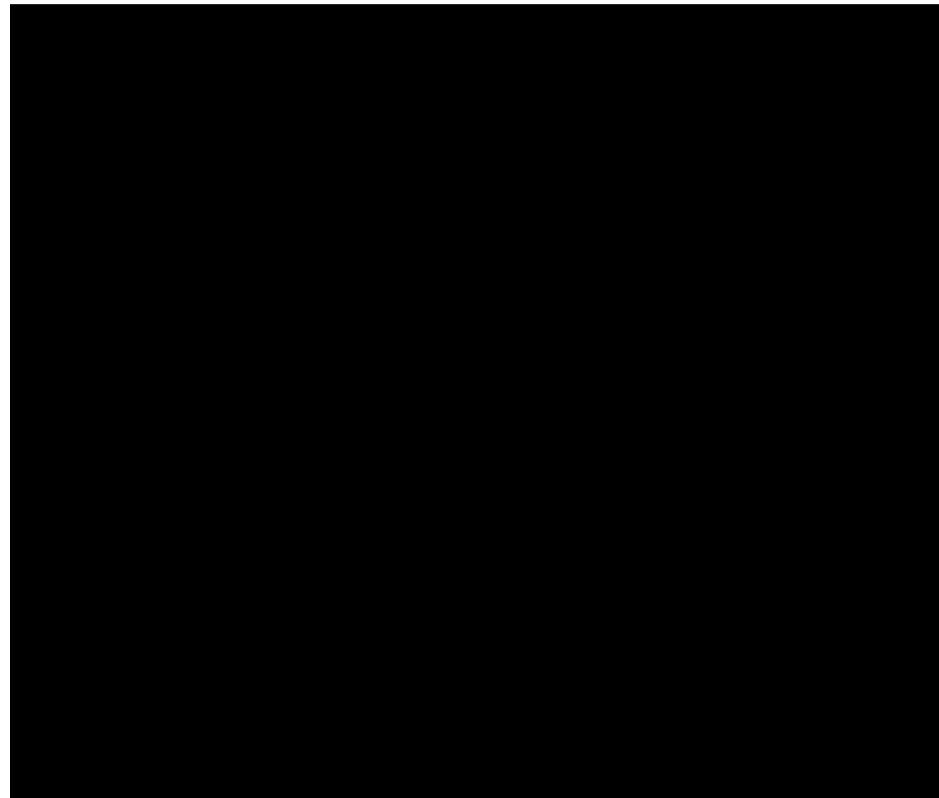
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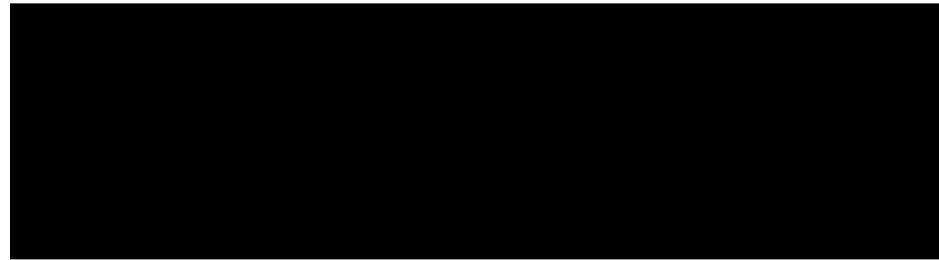
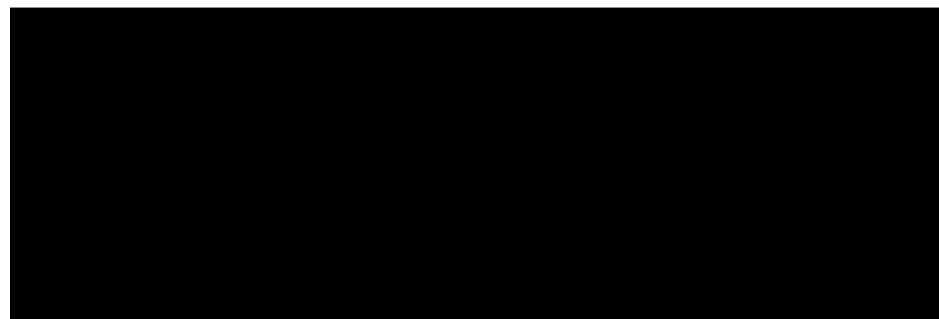
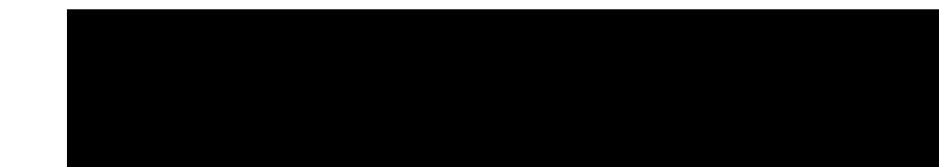
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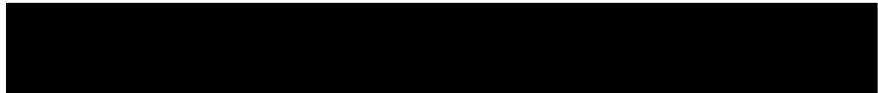
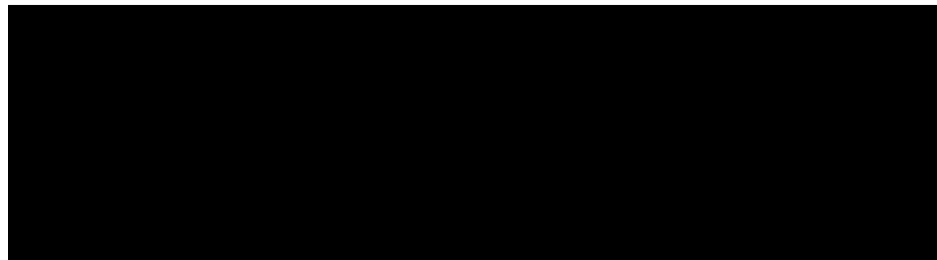
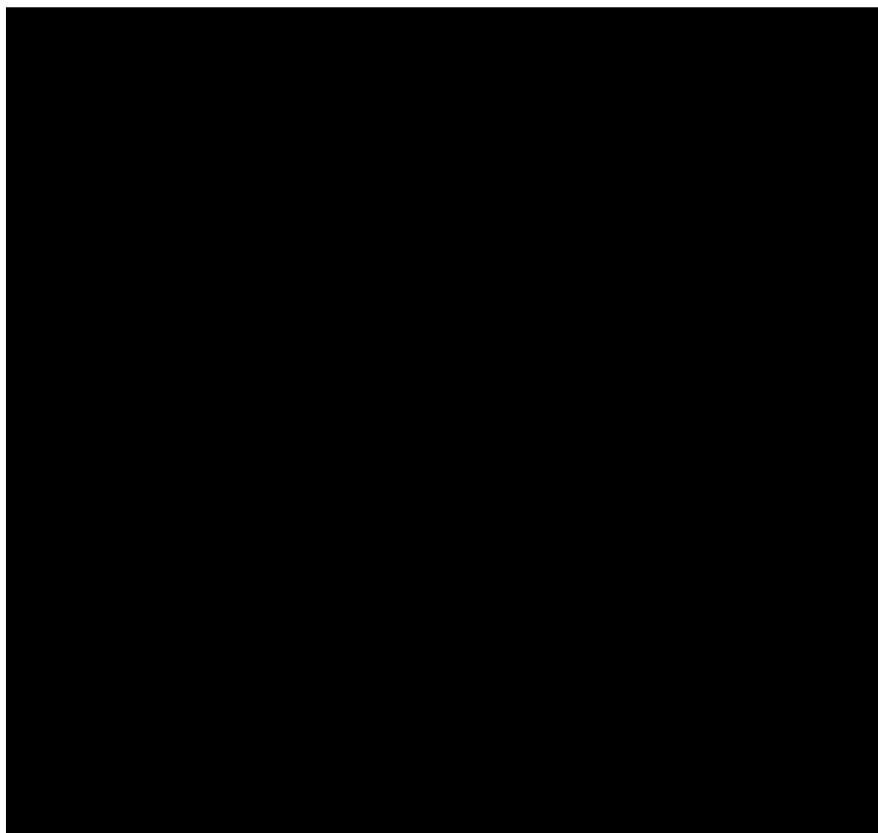
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COUNSEL

Diane Nichols, 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, Kathleen A. McKenna, Ivan Marrs and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

PEÑA, J.—

INTRODUCTION

Proposition 36, also known as the Three Strikes Reform Act of 2012 (Proposition 36 or the Act) created a postconviction release proceeding for offenders serving indeterminate life sentences under the three strikes law for crimes that are not serious or violent felonies. (Pen. Code,¹ § 1170.126.) One of the factors rendering an inmate statutorily ineligible for resentencing is the presence of any prior convictions for so-called super strikes, offenses specified in section 667, subdivision (e)(2)(C)(iv) or section 1170.12, subdivision (c)(2)(C)(iv). (§ 1170.126, subd. (e)(3).)

In this opinion, we answer the question of what is a prior conviction under Proposition 36: Must it occur prior to the conviction resulting in the inmate's third strike sentence, or may it occur prior to the court's ruling on the inmate's petition for resentencing? We conclude a prior disqualifying conviction must occur prior to the inmate's conviction resulting in the inmate's indeterminate life sentence under the three strikes law.

Defendant Thomas Lee Spiller, currently serving a third strike indeterminate life sentence for a nonserious and nonviolent offense, petitioned the superior court to recall his sentence and resentence him as a second strike offender. The court denied his petition, finding defendant ineligible for resentencing because he had a disqualifying prior conviction for attempted murder (§§ 664, 187). Defendant's disqualifying "prior" conviction occurred after the conviction resulting in his third strike indeterminate life sentence. On appeal, defendant maintains the trial court erred in finding him statutorily ineligible for resentencing. We agree and will remand the matter back to the superior court for a determination of whether resentencing would pose "an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

FACTS

In March 1997, defendant was convicted of five counts of robbery (§ 211) and was sentenced to 10 years in prison.

¹ All undefined statutory references are to the Penal Code unless otherwise specified.

[REDACTED]

In June 1998, defendant was convicted of smuggling methamphetamine into prison (§ 4573), and conspiring to smuggle methamphetamine into prison (§ 182, subd. (a)). In addition, defendant was found to have suffered five prior “strike” convictions (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)). He received a sentence of 25 years to life under the three strikes law.

In March 2001, defendant was convicted of attempted murder (§§ 664, 187) and assault while serving a life sentence (§ 4500), with a great bodily injury enhancement (§ 12022.7). He received a consecutive term of 45 years to life.

On November 6, 2012, voters passed Proposition 36.

On December 23, 2013, defendant filed a petition seeking to recall his sentence of 25 years to life pursuant to his 1998 conviction. Under Proposition 36, a prior conviction for an offense such as attempted murder (§§ 664, 187) disqualifies an inmate from resentencing, even if the inmate’s third strike offense is nonserious and nonviolent. (§ 1170.126, subd. (e)(3)), referring to §§ 667, subd. (e)(2)(C)(iv)(IV), 1170.12, subd. (c)(2)(C)(iv)(IV).) The trial court denied defendant’s petition, reasoning he was ineligible for resentencing because his conviction for attempted murder was a prior disqualifying conviction.

DISCUSSION

Defendant contends he is eligible for resentencing because he did not have a disqualifying prior conviction at the time he received the sentence he now seeks to recall. He argues his conviction for attempted murder—the disqualifying conviction—is not a prior conviction because it succeeded the conviction resulting in his indeterminate life sentence under the three strikes law. We agree.

A. *Background of Proposition 36*

On November 6, 2012, the electorate passed Proposition 36. Proposition 36 has prospective and retrospective components. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1292 [155 Cal.Rptr.3d 856].)

The prospective portion of Proposition 36 changed the requirements for sentencing a third strike offender under the three strikes law. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167 [151 Cal.Rptr.3d 901].) Prior to the enactment of Proposition 36, a defendant who had two or more prior serious or violent felony convictions was subject to a sentence of 25 years to life upon any new felony conviction. (Former §§ 667, subds. (b)–(i), 1170.12.)

Proposition 36 amended sections 667 and 1170.12 to require courts to impose life sentences only where the new offense is not just any felony offense, but a serious or violent offense, unless the prosecution pleads and proves certain disqualifying factors. In all other cases, the defendant will be sentenced as a second strike offender. (*People v. Yearwood, supra*, at pp. 167–168.)

■ The retrospective portion of the Act applies to inmates already serving an indeterminate life sentence under the three strikes law. The Act added section 1170.126 to the Penal Code, a resentencing provision providing eligible inmates serving an indeterminate life sentence the opportunity to be resentenced as a second strike offender. Section 1170.126, subdivision (e) sets forth several criteria for eligibility.

First, the inmate must be serving an indeterminate term of life imprisonment imposed under the three strikes law for a nonserious, nonviolent felony conviction. (§ 1170.126, subd. (e)(1); see §§ 667.5, subd. (c) [list of violent felonies], 1192.7 [list of serious felonies].)

Second, the inmate's current sentence must not involve certain disqualifying factors, such as the commission of certain felony sex offenses, crimes involving the use of a firearm or deadly weapon during the commission of a crime or the intent to cause great bodily injury to another person, and crimes involving the possession of substantial quantities of a controlled substance. (§§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(i)–(iii), 1170.12, subd. (c)(2)(C)(i)–(iii).)

Finally, the defendant must have no prior convictions for certain felonies also known as super strikes. (§ 1170.126, subd. (e)(3).) These offenses include certain sexually violent offenses, sex crimes against children, homicide offenses, assault with a machine gun on a peace officer, possession of weapons of mass destruction, convictions for offenses in California punishable by life imprisonment or death, solicitation to commit murder, and attempted murder. (§§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv).)

■ If the inmate meets the eligibility criteria, he or she is entitled to resentencing to twice the term otherwise provided as punishment for the current felony “unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f).) Thus, whether an eligible inmate ultimately obtains resentencing depends upon the superior court's assessment of the inmate's dangerousness.

B. *Analysis*

Defendant seeks resentencing on his current convictions for drug smuggling and conspiracy to commit drug smuggling. The parties do not dispute

these offenses are nonserious and nonviolent felonies (§ 1170.126, subd. (e)(1)), nor do they implicate one of the disqualifying factors under subdivision (e)(2) of section 1170.126. The parties also agree attempted murder is a disqualifying offense. The only issue is whether defendant's conviction for attempted murder is a "prior conviction," because it occurred after his drug smuggling conviction—the conviction resulting in his third strike sentence. If so, the prior conviction renders him statutorily ineligible for resentencing.

■ The resolution of this issue turns on what constitutes a "prior conviction" under subdivision (e)(3) of section 1170.126. In construing a voter initiative, the usual rules of statutory interpretation apply. (*People v. Briceno* (2004) 34 Cal.4th 451, 459 [20 Cal.Rptr.3d 418, 99 P.3d 1007].) Our fundamental task is to ascertain and effectuate the electorate's intent in passing the initiative measure. (*Ibid.*) The plain language of the initiative is the most reliable indicator of the voters' intent. (*Ibid.*) Therefore, our first step is to scrutinize the statute's words, assigning them their usual and ordinary meanings and construing them in the context of the overall statutory scheme. (*Ibid.*) If the language of the statute allows for more than one reasonable interpretation, we will look to "‘other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.’" (*Ibid.*)

The pertinent portions of section 1170.126 provide the following:

"(d) [A] petition for a recall of sentence . . . specify all of the currently charged felonies, which resulted in the sentence under paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, or both, and shall also specify all of the prior convictions alleged and proved under subdivision (d) of Section 667 and subdivision (b) of Section 1170.12.

"(e) 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 1170.12.

“(f) Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e). If the petitioner satisfies the criteria in subdivision (e), the petitioner shall be resentenced pursuant to paragraph (1) of subdivision (e) of Section 667 and paragraph (1) of subdivision (c) of Section 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.”

■ As can be seen, section 1170.126 is written so that statutory eligibility determinations are made as of the date the defendant was sentenced to his or her indeterminate third strike life sentence. The current conviction is the conviction the inmate is currently serving a third strike indeterminate life sentence for, and prior convictions are those which occurred *prior* to the inmate’s current conviction.

■ Focusing on the language of subdivision (e)(3) of section 1170.126 specifically, the People argue the use of the term “has” in subdivision (e)(3) indicates the prior conviction must only have occurred prior to the court’s decision on the inmate’s petition for resentencing. “[T]he Legislature’s use of present tense language has often been interpreted as indicating an intent to establish ‘current’ requirements.” (*People v. Brewer* (2001) 87 Cal.App.4th 1298, 1304 [105 Cal.Rptr.2d 293], superseded by statute on other grounds as noted in *Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1504, 1510, fn. 13 [71 Cal.Rptr.3d 125].) Thus, according to the People, prior disqualifying convictions must only have occurred prior to the superior court’s decision as to the inmate’s petition for resentencing.

However, verb tense is not always dispositive. Indeed, section 667, which was amended by the passage of the three strikes law, uses both past tense and present tense language in describing a prior conviction. (See § 667, subds. (b) [“It is the intent of the Legislature . . . to ensure longer prison sentences and greater punishment for those who commit a felony and *have been previously convicted* of one or more serious and/or violent felonies” (italics added)], (e)(2)(C) [if “a defendant *has two or more prior serious and/or violent felony convictions* as defined in subdivision (c) . . . that have been pled and proved” (italics added)].) Nonetheless, it is well settled that under the three strikes law, a prior strike conviction must occur prior to, and not contemporaneous with or subsequent to, the inmate’s current conviction. (*People v. Flood* (2003) 108 Cal.App.4th 504, 506 [133 Cal.Rptr.2d 516]

[three strikes law applies to persons who “‘commit a felony and *have been previously convicted* of serious and/or violent felony offenses’ (§ 667, subd. (b)’].) We, therefore, do not ascribe significant meaning from the fact the verb “has” is used in the phrase “The inmate has no prior convictions” under the resentencing provisions. (§ 1170.126, subd. (e)(3).)

■ Moreover, interpreting the term “prior conviction” to mean the same thing under the resentencing provisions as the initial sentencing provisions makes sense given the fact Proposition 36 did not merely add section 1170.126 (the resentencing provision) to the Penal Code, but it also amended sections 667 and 1170.12 (the initial sentencing provisions). Logically, section 1170.126 cannot be interpreted in isolation but must be construed in the context of the three strikes law, as amended by the Act, as a whole. There is a presumption that terms must be interpreted to be consistent with the statutory scheme of which they are a part. (*Ibarra v. City of Carson* (1989) 214 Cal.App.3d 90, 96 [262 Cal.Rptr. 485] [“[i]n construing a statute we are required to interpret its terms consistent with the statutory scheme of which it is a part and to harmonize all the statutes if possible in accordance with the intent of the Legislature”].) While this presumption is rebuttable if there are contrary indications of legislative (or voter) intent (*Delaney v. Baker* (1999) 20 Cal.4th 23, 41–42 [82 Cal.Rptr.2d 610, 971 P.2d 986]), as we explain below, we find no evidence of a contrary intent by the electorate.

■ The People contend there is no evidence the voters would intend to similarly define what constitutes a prior conviction under the initial sentencing and resentencing provisions of Proposition 36. It is true there is no direct evidence of this, however, “‘[t]he enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted.’” (*People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1015 [171 Cal.Rptr.3d 86].) Where terms within a statute have been judicially construed, “‘‘‘the presumption is almost irresistible’’’ that the terms have been used “‘‘‘in the precise and technical sense which had been placed upon them by the courts.’’’” (*Ibid.*) This principle equally applies to legislation adopted by initiative. (*Ibid.*)

Further, the ballot materials fail to indicate the voters intended to expand the meaning of the term “prior conviction” when amending sections 667 and 1170.12, and enacting section 1170.126. One of the express purposes of Proposition 36 was “‘to restore the original intent of California’s Three Strikes law—imposing life sentences for dangerous criminals like rapists, murderers, and child molesters.’” (Historical and Statutory Notes, 49 West’s Ann. Pen. Code (2016 supp.) foll. § 667, p. 72.) This was to be achieved, in part, by “‘[r]equir[ing] that murderers, rapists, and child molesters serve their full sentences’” (*Id.* at p. 73.) The ballot materials further provided the

initiative would “Require that murderers, rapists and child molesters [some of the super strike offenders] serve their full sentences—they will receive life sentences, even if they are convicted of a *new* minor third strike crime.” (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1, p. 105, italics added.) Thus, the ballot materials only refer to the term “prior conviction” to mean a conviction preceding the inmate’s conviction resulting in his or her third strike sentence.

The People argue we must consider the term “prior conviction” in light of the general objectives to be achieved by Proposition 36. As evidenced by the Voter Information Guide, six arguments were advanced in favor of the Act: “(1) ‘make the punishment fit the crime’; (2) ‘save California over \$100 million every year’; (3) ‘make room in prison for dangerous felons’; (4) ‘law enforcement support’; (5) ‘taxpayer support’; and (6) ‘tough and smart on crime.’ (Voter Information Guide, Gen. Elec.[, *supra*,] argument in favor of Prop. 36, p. 52, capitalization omitted.)” (*People v. Yearwood, supra*, 213 Cal.App.4th at p. 171.) The ballot materials also provide that “Prop. 36 will help stop clogging overcrowded prisons with non-violent offenders, so we have room to keep violent felons off the streets” and “Prop. 36 will keep dangerous criminals off the streets.” (Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 36, p. 52.)

The People assert that to construe the definition of a prior conviction under section 1170.126 to mean a super strike conviction must occur prior to the defendant’s third strike conviction would be incongruent with a key purpose of the Act: to protect the public safety. According to the People, super strike offenders are per se dangerous to the public safety, regardless of when they committed a super strike offense.

We do not agree that interpreting the term “prior conviction” to mean the same thing in the initial sentencing and resentencing provisions under Proposition 36 would be incongruent with the purposes of the Act. Defendant here was not deemed a super strike offender until sometime after he began serving his third strike sentence. Consistent with the assurances provided to voters, he will be ineligible for resentencing for the commission of any *new* offenses. (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 36, § 1, p. 105.)

To the extent an inmate who commits a super strike offense while serving a third strike life sentence is dangerous, we emphasize that simply because an inmate is statutorily eligible for resentencing as to a nonserious and nonviolent offense does not mean the inmate will be released from prison or that he or she will be resentenced at all. The Act contains a safety valve permitting the superior court to deny relief to an inmate if “resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f).) Under subdivision (f) of section 1170.126, the court

may “expand its inquiry to factual matters beyond the scope of defendant’s earlier convictions and the offenses for which the original sentence was imposed.” (*People v. Berry* (2015) 235 Cal.App.4th 1417, 1420–1421 [186 Cal.Rptr.3d 89].) Indeed, the superior court is permitted to consider the following in exercising its discretion under subdivision (f) of section 1170.126:

“(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; and

“(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.” (§ 1170.126, subd. (g).)

Thus, the fact an inmate committed a super strike offense while serving a third strike indeterminate life sentence will still be considered in the court’s resentencing determination.

In the event a court determines the inmate does not pose an unreasonable risk of danger to public safety and is entitled to resentencing, the inmate will still be subject to a prison term for the commission of the super strike offense. Moreover, an inmate serving an indeterminate life term for a serious or violent felony “will not be granted parole if the Board of Parole Hearings determines that ‘consideration of the public safety requires a more lengthy period of incarceration’ (§ 3041, subd. (b); see *In re Vicks* (2013) 56 Cal.4th 274, 294–295 [153 Cal.Rptr.3d 471, 295 P.3d 863].)” (*People v. Johnson* (2015) 61 Cal.4th 674, 690 [189 Cal.Rptr.3d 794, 352 P.3d 366] (*Johnson*).) Reducing the inmate’s sentence imposed for an offense that is neither serious nor violent will result only in the earlier consideration for parole.

Here, even if the superior court determines resentencing does not pose a threat to public safety, defendant will continue to serve a prison term of 45 years to life for his super strike offense. Thus, the spectre of dangerous criminals walking out of prison as a result of our holding is simply just that—a spectre.

We note one other court has considered this issue previously, but review of the matter was subsequently dismissed by our Supreme Court following *Johnson, supra*, 61 Cal.4th 674. (*People v. Dunckhurst* (Cal.App.), superseded

by *Johnson*, *supra*, 61 Cal.4th 674.)² Out of an abundance of caution, we invited the parties to submit supplemental briefing to address whether *Johnson* has any bearing on the issue presently before us. After reviewing the parties' briefs and considering all arguments therein, we conclude *Johnson* did not resolve the issue before us, but it is persuasive authority.

In *Johnson*, our Supreme Court considered in part whether a defendant who is serving a third strike sentence for a serious and violent felony is eligible for resentencing as to another current conviction that is neither serious nor violent. (*Johnson*, *supra*, 61 Cal.4th at p. 687.) The court held an inmate is not ineligible because Proposition 36 calls for a "count-by-count approach to sentencing." (*Johnson*, at p. 690.) The court reasoned, in relevant part, that "evaluating eligibility for resentencing on a count-by-count basis promotes sentencing that fits the crime." (*Id.* at p. 694.)

Here, defendant was sentenced to an indeterminate life sentence under the three strikes law for a nonserious and nonviolent felony. At the time he was sentenced, he had no prior disqualifying convictions. Although the lower court may ultimately determine resentencing would pose an unreasonable risk to the public safety, our conclusion that defendant is not statutorily disqualified from resentencing because of his subsequent conviction is consistent with the fundamental objectives of Proposition 36. It ensures the "punishment fit[s] the crime" and does not thwart the electorate's objective in ensuring "truly dangerous criminals will receive no benefits . . . from the reform." (Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 36, p. 52, capitalization omitted.)

■ We conclude defendant is not statutorily ineligible for resentencing because his 2001 conviction for attempted murder occurred after the offense for which he seeks resentencing. The conviction may, nonetheless, be considered in the superior court's determination of whether defendant "would pose an unreasonable risk of danger to public safety."³ (§ 1170.126, subd. (f).)

² We make no inferences from our Supreme Court's dismissal of *People v. Dunckhurst* nor do we rely on the opinion.

³ We are cognizant that the issue of what constitutes a prior conviction has recently been considered as the term applies to the reclassification procedures under Proposition 47, The Safe Neighborhoods and Schools Act, approved by California voters in November 2014. (See *People v. Montgomery* (2016) 247 Cal.App.4th 1385 [203 Cal.Rptr.3d 228]; see also *People v. Zamarripa* (2016) 247 Cal.App.4th 1179 [202 Cal.Rptr.3d 525].) In both cases, the courts resolved the matter against the defendants and held that a prior conviction is a conviction occurring any time prior to the filing of the petitioner's redesignation application, rather than prior to the crime for which the petitioner was seeking reclassification and resentencing. (*Montgomery*, *supra*, at p. 1387; *Zamarripa*, *supra*, at p. 1181.)

While both initiatives are acts of lenity, we do not consider our colleagues' interpretation of what constitutes a prior conviction under Proposition 47 relevant to Proposition 36. As noted, Proposition 36 amended the three strikes law and was designed to deal with inmates currently serving indeterminate life sentences for nonserious and nonviolent offenses. On the other hand,

DISPOSITION

The order denying defendant's resentencing petition is reversed. The matter is remanded for a hearing to determine whether defendant would pose an unreasonable risk of danger to public safety such that he should not be resentenced.

Kane, Acting P. J., and Smith, J., concurred.

Respondent's petition for review by the Supreme Court was denied November 30, 2016, S237726. Werdegar, J., was of the opinion that the petition should be granted.

Proposition 47, enacted two years after Proposition 36 (Cal. Const., art. II, § 10, subd. (a)), was designed to deal with individuals sentenced as felons for low-level felony crimes now rendered misdemeanors (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 [191 Cal.Rptr.3d 295]). Offenses reduced to misdemeanors under Proposition 47 involve crimes of theft and drug use for personal consumption. The initiatives deal with a different class of offenders, and the resentencing of petitioners under both initiatives results in entirely different consequences.

[Nos. B261165, B262524. Second Dist., Div. Eight. Aug. 29, 2016.]

LUIS CASTRO-RAMIREZ, Plaintiff and Appellant, v.
DEPENDABLE HIGHWAY EXPRESS, INC., Defendant and Respondent.

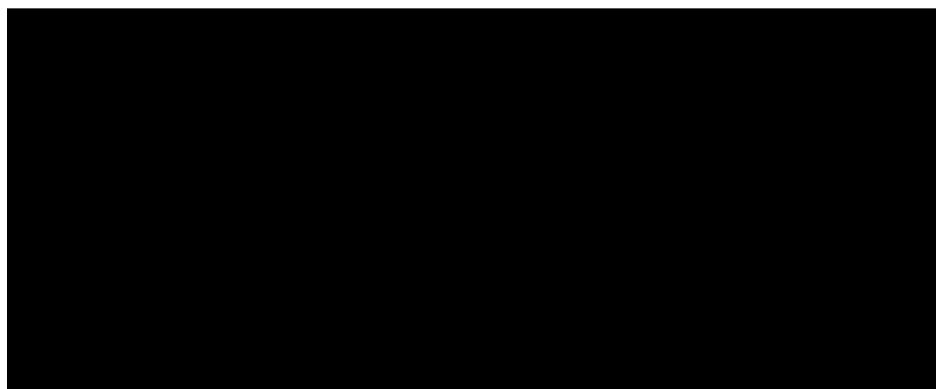
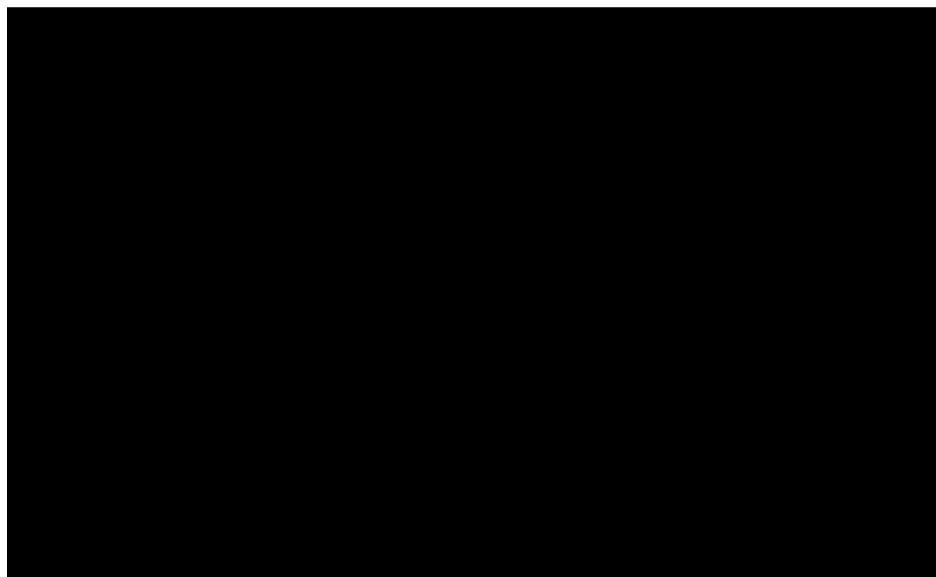
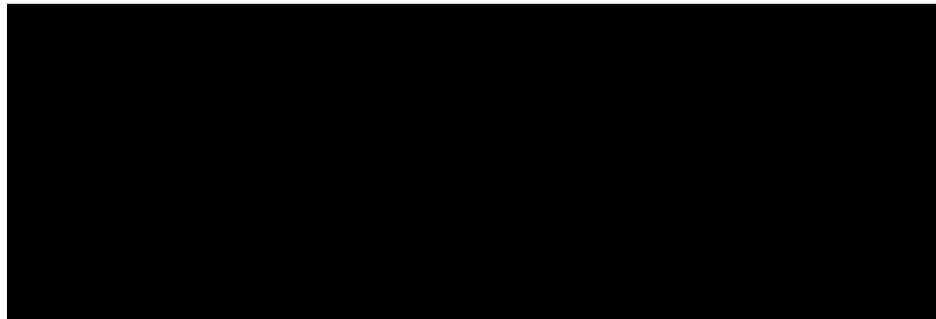
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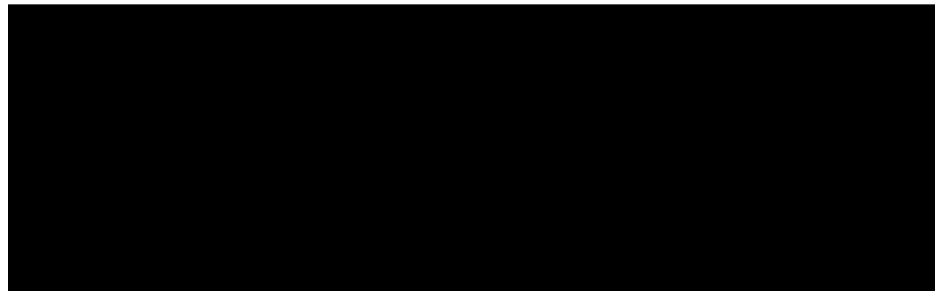
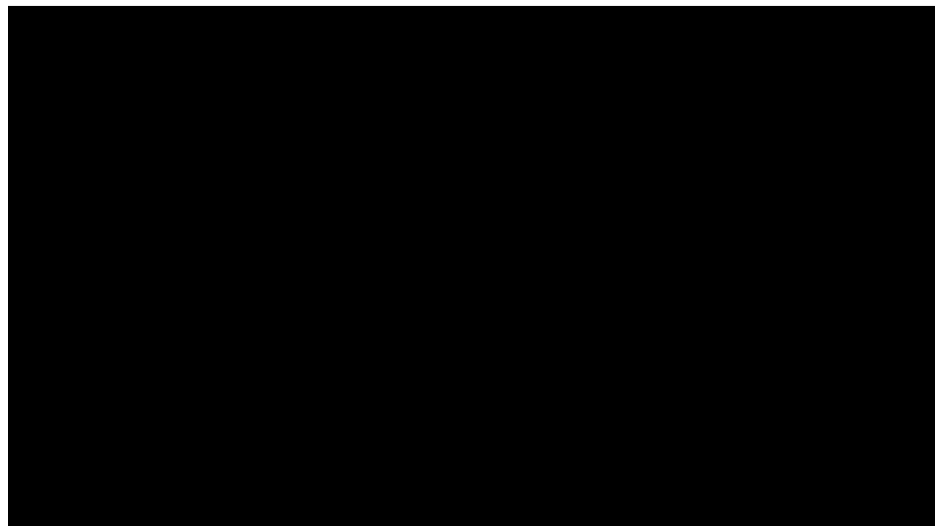
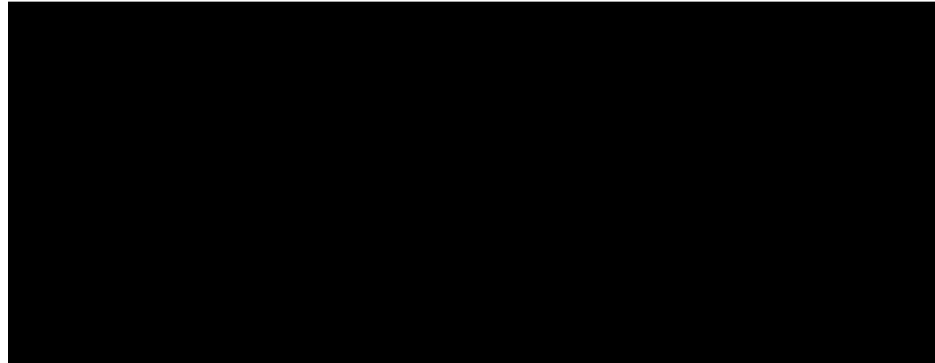
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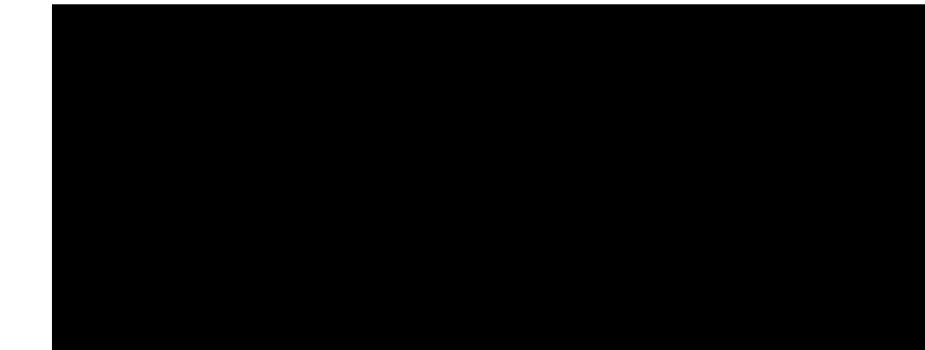
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COUNSEL

Employees' Legal Advocates and A. Jacob Nalbandyan for Plaintiff and Appellant.

Gordon & Rees, Don Willenburg, Mark S. Posard and Jennifer M. Lynch for Defendant and Respondent.

OPINION

FLIER, J.—Plaintiff Luis Castro-Ramirez sued his former employer, Dependable Highway Express, Inc. (DHE), alleging causes of action for disability discrimination, failure to prevent discrimination, and retaliation under the California Fair Employment and Housing Act (FEHA or the Act) (Gov. Code, § 12900 et seq.), as well as wrongful termination in violation of public policy. (He alleged other claims not pursued on appeal.) Plaintiff's son requires daily dialysis, and, according to the evidence, plaintiff must be the one to administer the dialysis. For several years, plaintiff's supervisors scheduled him so that he could be home at night for his son's dialysis. That schedule changed when a new supervisor took over and ultimately terminated plaintiff for refusing to work a shift that did not permit him to be home in time for his son's dialysis. The trial court granted defendant's motion for summary judgment and denied plaintiff's motion to tax costs.

We reverse the judgment and the order denying the motion to tax costs. Plaintiff has demonstrated triable issues of material fact on his causes of

action for associational disability discrimination, failure to prevent discrimination, retaliation, and wrongful termination in violation of public policy.

FACTS AND PROCEDURE

1. *The Complaint*

Plaintiff alleged that, when DHE hired him to work as a truck driver in 2010, he told DHE he had a disabled son who required dialysis on a daily basis and he (plaintiff) was responsible for administering the dialysis. He requested work schedule accommodations that his supervisor initially granted, permitting him to attend to his son in the evening. In 2013, a new supervisor changed his work schedule. Plaintiff complained to the new supervisor about the change in schedule. On April 23, 2013, the supervisor gave plaintiff the 12:00 p.m. shift. Plaintiff objected and explained that the shift would not allow him to be home early enough in the evening to tend to his disabled son. The supervisor spoke to a manager and then terminated plaintiff's employment. The supervisor told plaintiff he "had quit by choosing not to take the assigned shift."

Plaintiff's complaint alleged a cause of action for associational disability discrimination in violation of FEHA, claiming defendant "was substantially motivated, in part, to terminate Plaintiff because of his association with his disabled family members." Plaintiff also alleged DHE's conduct was in retaliation for his assertion of rights under FEHA. Plaintiff alleged several other causes of action, including failure to take reasonable steps to prevent the unlawful discrimination, and wrongful termination in violation of public policy.

2. *DHE's Motion for Summary Judgment*

The pertinent facts reflected in the parties' summary judgment papers are as follows. DHE employed plaintiff at will. DHE hired plaintiff in December 2009 to work out of its Los Angeles terminal as a local driver. During his time with DHE, he drove different routes throughout Los Angeles County.

Plaintiff's son needs a kidney transplant and has required daily home dialysis treatments for the last 15 years. Plaintiff is the only person in his household who knows how to operate the dialysis machine for his son. One has to take classes to learn how to operate the machine.

When plaintiff first began work at DHE, he informed the recruiting manager who hired him that he had daily obligations at home related to administering dialysis to his son. Plaintiff reported to Armando Gomez and

Winston Bermudez, who were his initial supervisors, for over three years. Bermudez became his supervisor in 2011, when Bermudez was promoted to the dispatcher position. When Bermudez became his supervisor, plaintiff told Bermudez that he had a disabled son to whom he needed to apply daily dialysis. He also told Bermudez he needed to end his shifts early enough to get home for his son's treatments. Bermudez met plaintiff's needs as often as he could by giving him a shift that enabled him to care for his son. Bermudez never gave plaintiff a shift that began as late as noon. Gomez also knew about plaintiff's special need to go home early to care for his son and informed Bermudez of this when Bermudez first became a dispatcher. Thus, while the schedules of DHE's drivers varied from day to day, plaintiff's typical schedule was from 9:00 or 10:00 a.m. until 7:00 or 8:00 p.m. There were times, however, when plaintiff worked shifts ending later, such as after 10:00 or 11:00 p.m.

Plaintiff's ability to work later depended on his son's condition on any given day. The amount of time his son needed to be connected to the machine varied between 10 and 12 hours. The time at which plaintiff would need to start administering dialysis also varied from between 7:00 p.m. and 12:00 a.m. There was no "normal day," beyond these general guidelines. On days when his son would need to be connected on the earlier side, plaintiff would communicate this to Gomez or Bermudez.

Throughout his employment, plaintiff performed satisfactorily with no problems. Plaintiff loved his job and appreciated DHE's assistance "from the heart." That assistance changed, however, when Bermudez was no longer his supervisor.

Sometime in March 2013, DHE promoted Bermudez to operations manager and Boldomero Munoz-Guillen (known as Junior) became plaintiff's supervisor (and Bermudez supervised Junior). When this happened, Bermudez told Junior that plaintiff had special needs related to his disabled son and needed to leave early. Bermudez asked Junior to "work with" plaintiff.

At some point later in March 2013, plaintiff complained to Bermudez that Junior had changed his hours, and he was starting later and finishing later and was unable to leave to tend to his son. Bermudez told Junior that plaintiff was complaining about his changing hours and his need to leave early. Junior told Bermudez that he did not need to bring plaintiff in earlier at the time, but Junior indicated he would "work on that." Bermudez never reported plaintiff's special needs to human resources and did not monitor plaintiff's schedule after plaintiff complained to him about Junior.

On April 15, 2013, approximately a week before plaintiff's termination, one of DHE's customers sent an e-mail to Bermudez and another manager

(not Junior) asking for plaintiff, the “regular drive[r],” to do the customer’s deliveries at 7:00 a.m. The customer stated that it “ha[d] always been done like that until recently.” When plaintiff asked Junior about deliveries to this customer, Junior told him that the customer did not want plaintiff to make those deliveries and did not like plaintiff’s work, and that was why Junior had given him shifts starting later. A few days later, the customer called plaintiff directly. The customer asked plaintiff why he was not making deliveries. Plaintiff explained that Junior had said the customer did not like his work. The customer told plaintiff that was untrue and gave him a copy of the e-mail specifically requesting plaintiff’s services. When deposed, Junior testified that he had seen the e-mail from the customer, but he could not recall exactly when.

On April 22, 2013, Junior assigned plaintiff a shift that started at 11:55 a.m., the latest he had ever started a shift, and ended at 9:04 p.m. He had “no problem” with the route that day because it still allowed him to be home in time for his son’s dialysis. But he told Junior: “Please, I need to have my job like always. I’ve always had help from everyone except you.”

The following day, on April 23, 2013, Junior assigned plaintiff a shift beginning at 12:00 p.m. Unlike the previous day, this assignment was for a route from Los Angeles to Oxnard and back, including multiple pickups and deliveries. Plaintiff explained to Junior that it was too late in the day for him to drive that route because he could not get back in time to administer dialysis to his son by 8:00 p.m. Plaintiff requested another route or simply to take that day off. He also reminded Junior that Bermudez had already talked to Junior about plaintiff’s need for shifts enabling him to leave early for his son.

When plaintiff complained to Junior, Junior laughed and said, “Winston [Bermudez] doesn’t work here anymore. Now it’s me.” Junior told plaintiff that, if he did not do the route, he was fired. Plaintiff said he was sorry, but he could not do it. Junior told him to return the next day to sign the termination paperwork.

Plaintiff returned to DHE for three consecutive days after that because he wanted to work. On the third day, another manager told him that he had not worked for three days and “of course” he was terminated. DHE processed the termination as a “[v]oluntary [t]ermination” or “[r]esignation,” with the stated reason being “[r]efused assignment.” Plaintiff refused to sign the document stating he had resigned.

On the day Junior terminated plaintiff, Junior scheduled at least eight other drivers to start shifts well before noon, with start times at 4:54 a.m., 5:54 a.m., 7:00 a.m., 7:54 a.m., 8:06 a.m., 8:54 a.m., 9:00 a.m., and 10:54 a.m.

Maria Ramirez, DHE's human resources manager, testified: "It is not uncommon for drivers at [DHE] to refuse work assignments for a variety of reasons; if one of its drivers refuses a work assignment for any reason, this is grounds for termination." DHE's employee handbook states refusal to obey a supervisor's order or refusal to perform a job assignment is grounds for disciplinary action, including suspension without pay, discharge, counseling, and warning notices.

3. *The Trial Court's Rulings*

The trial court granted DHE's motion for summary judgment, concluding that there was no triable issue of material fact on any cause of action. The court rejected plaintiff's theory that DHE violated FEHA by terminating him for requesting an accommodation to care for a relative with a disability. The court concluded plaintiff's evidence at best showed that Junior was unwilling to provide accommodation to the same extent as plaintiff's previous supervisor. The court found no evidence to show the termination decision was based on plaintiff's association with his child, or in retaliation for his scheduling requests. Even assuming plaintiff could make a *prima facie* case, the court found inadequate evidence that defendant's stated reason for termination was pretextual. Plaintiff could not show the assignment he refused was improperly motivated, because plaintiff worked nearly identical hours the previous day without objection.

The court entered judgment for DHE and entered an amended judgment of dismissal several weeks later, awarding statutory costs to DHE in the amount of \$7,592.08. Still later, on January 8, 2015, the trial court denied plaintiff's motion to tax or strike DHE's costs, rejecting plaintiff's argument that an employer is not entitled to costs in a FEHA action.

Plaintiff appealed from the judgment and the subsequent order denying his motion to tax costs. We consolidated the appeals for purposes of briefing, oral argument, and decision.

STANDARD OF REVIEW

We review an order granting summary judgment de novo, "considering all the evidence set forth in the moving and opposition papers except that 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*)).)

A defendant moving for summary judgment must show "that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c,

subd. (p)(2).) “In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [his or] her evidentiary submission while strictly scrutinizing defendants’ own showing, and resolving any evidentiary doubts or ambiguities in plaintiff’s favor.” (*Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763, 768 [107 Cal.Rptr.2d 617, 23 P.3d 1143].) We accept as true both the facts shown by the losing party’s evidence and reasonable inferences from that evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856 [107 Cal.Rptr.2d 841, 24 P.3d 493]; *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 148 [65 Cal.Rptr.2d 112].)

Summary judgment is appropriate only when “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).) A triable issue of material fact exists if the evidence and inferences therefrom would allow a reasonable juror to find the underlying fact in favor of the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 850, 856.)

DISCUSSION

1. *Associational Disability Discrimination*

FEHA provides a cause of action for associational disability discrimination, although it is a seldom-litigated cause of action. (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 656–657 [163 Cal.Rptr.3d 392] (*Rope*), superseded by statute on another ground.) As to disability discrimination generally, FEHA makes it unlawful for an employer, “because of the . . . physical disability . . . of any person, . . . to discharge the person from employment . . . or to discriminate against the person . . . in terms, conditions, or privileges of employment.” (Gov. Code, § 12940, subd. (a).)¹ The very definition of a “physical disability” embraces association with a physically disabled person. FEHA explains that the phrase “‘physical disability’ . . . includes a perception . . . that the person is associated with a person who has, or is perceived to have” a physical disability. (§ 12926, subd. (o).)² Accordingly, when FEHA forbids discrimination based on a disability, it also forbids discrimination based on a person’s association with another who has a disability.

¹ Further undesignated statutory references are to the Government Code.

² The complete text states: “As used in [FEHA] in connection with unlawful practices, unless a different meaning clearly appears from the context: [¶] . . . [¶] (o) ‘Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or military and veteran status’

■ A prima facie case of disability discrimination under FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation, and (3) the plaintiff was subjected to adverse employment action because of the disability. (*Green v. State of California* (2007) 42 Cal.4th 254, 262 [64 Cal.Rptr.3d 390, 165 P.3d 118] (*Green*); see *Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 378–379 [184 Cal.Rptr.3d 9]; *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 255 [102 Cal.Rptr.2d 55] (*Jensen*).) Adapting this framework to the associational discrimination context, the “disability” from which the plaintiff suffers is his or her association with a disabled person. Respecting the third element, the disability must be a substantial factor motivating the employer’s adverse employment action. (Cal. Code Regs., tit. 2, § 11009, subd. (c); *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 229, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; *Rope, supra*, 220 Cal.App.4th at p. 658.)

Once the plaintiff establishes a prima facie case, “the burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action.” (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44 [90 Cal.Rptr.2d 15].) The plaintiff may then show the employer’s proffered reason is pretextual (*Rope, supra*, 220 Cal.App.4th at p. 656) or offer any further evidence of discriminatory motive (*Guz, supra*, 24 Cal.4th at p. 356). “In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias.” (*Ibid.*)

Here, DHE challenges plaintiff’s case on several grounds. First, it argues that plaintiff’s “entire case hinges on his fervent belief that [DHE] had an obligation to provide him with a special schedule as an accommodation for his son’s illness,” but it contends DHE had no such duty. Second, DHE argues that, as a matter of law, plaintiff cannot establish his association with his disabled son motivated his termination, and moreover he cannot show that DHE’s legitimate, nondiscriminatory reason for terminating him was pretextual. As we shall explain, none of these arguments entitles DHE to summary judgment.

a. *Plaintiff’s Associational Disability Discrimination Cause of Action Survives His Abandonment of His Failure to Accommodate Cause of Action*

DHE maintains that fundamentally this is a reasonable accommodation case, and argues that FEHA is “clear” that employers need not make

includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.” (§ 12926, subd. (o).)

accommodations for associates of the disabled—that is, only employees who are themselves disabled are entitled to reasonable accommodations. For his part, plaintiff tells us he has abandoned the reasonable accommodation cause of action and is not challenging the court’s ruling on it. We agree that the trial court’s ruling on the failure to accommodate cause of action is not at issue on appeal, and we do not decide whether FEHA establishes a separate duty to reasonably accommodate employees who associate with a disabled person.

To us, the proper inquiry is: Even if DHE had no separate duty under FEHA to provide plaintiff with reasonable accommodations for his son’s illness, was there sufficient evidence that discriminatory animus motivated Junior’s refusal to honor plaintiff’s scheduling request and his termination of plaintiff? We address that point in part 1.b., *post*. We pause here to point out that plaintiff’s abandonment of his failure to accommodate cause of action does not in itself mean he may not pursue his claim that he suffered discrimination based on associational disability. Nor does his decision to not pursue a failure to accommodate mean that associational disability is no longer part of this case.

In its respondent’s brief, DHE implicitly acknowledges that the abandonment of the accommodation cause of action does not sound the death knell to the discrimination cause of action because DHE proceeds to argue that there is no triable issue of fact either of motive or pretext for plaintiff to establish discrimination. Even so, we find accommodation relevant as to plaintiff’s discrimination cause of action. We first observe that no published California case has determined whether employers have a duty under FEHA to provide reasonable accommodations to an applicant or employee who is associated with a disabled person. We acknowledge that the reasonable accommodation subdivision of section 12940 does not expressly refer to persons other than an applicant or employee. The pertinent language makes it an unlawful employment practice “[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee.” (§ 12940, subd. (m)(1).) But we do not read subdivision (m)(1) in isolation; instead we read parts of a statutory scheme together and construe them in a manner that gives effect to each. (*City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468 [14 Cal.Rptr.2d 514, 841 P.2d 1034].) And under section 12926, subdivision (o), “‘physical disability . . .’ includes a perception” that a person “is associated with a person who has, or is perceived to have,” a physical disability. In other words, association with a physically disabled person appears to be itself a disability under FEHA. Like the many other definitions set forth in section 12926, this definition of a physical disability applies “in connection with unlawful practices [under FEHA], unless a different meaning clearly appears from the context.” (§ 12926.) Accordingly, when section 12940, subdivision (m) requires employers to reasonably accommodate “the known physical . . .

disability of an applicant or employee,” read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee’s association with a physically disabled person. Again, given plaintiff’s concession, we do not decide this point. We only observe that the accommodation issue is not settled and that it appears significantly intertwined with the statutory prohibition against disability discrimination, a subject to which we now turn.

As we explained above, FEHA creates an associational disability discrimination claim in the manner just described—by reading association with a physically disabled person (§ 12926, subd. (o)) into the Act where discrimination based on “physical disability” appears (§ 12940, subd. (a)). By express terms, the two pertinent sections of FEHA make it unlawful to “discharge [a] person from employment” (§ 12940, subd. (a)) based on physical disability and other characteristics, which include “a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.” (§ 12926, subd. (o).)

In *Rope*, our colleagues in Division One found sufficient allegations of both associational disability discrimination and wrongful termination in violation of public policy in a case in which the employee was fired after he announced his plan to donate a kidney to his sister. (*Rope, supra*, 220 Cal.App.4th at pp. 657–658.) Accordingly, *Rope* reversed the trial court’s sustaining of a demurrer to those causes of action. (*Id.* at p. 661.) In significant contrast, the *Rope* court rejected the plaintiff’s claim of retaliation based on a request to accommodate, impliedly acknowledging that discrimination and accommodation retaliation are separate, albeit related, concepts. (*Id.* at pp. 651–654.)³

b. *The Proper Framework for Associational Disability Rests on State, Not Federal, Law*

Even though DHE acknowledges that *Rope* sets out the current California law on associational disability, DHE points to several federal cases in support of its argument that plaintiff has not established a triable issue of fact as to discrimination. DHE relies on federal cases interpreting the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.). The ADA and the cases cited by DHE are easily distinguished. We do not discard ADA precedents blindly, and indeed we often look to federal law interpreting the ADA when construing FEHA, particularly when the question involves parallel statutory language. (*Gelfo v. Lockheed Martin Corp.* (2006)

³ That part of the *Rope* decision dealing with retaliation for requesting accommodation was later superseded by amendments to section 12940, subdivision (m)(2). (See pt. 2., *post*.)

140 Cal.App.4th 34, 57 [43 Cal.Rptr.3d 874].) But the two statutory schemes are not coextensive. Our Legislature has expressly declared “[t]he law of this state in the area of disabilities provides protections independent from those in the [ADA]. Although the federal act provides a floor of protection, this state’s law has always, even prior to passage of the federal act, afforded additional protections.” (§ 12926.1, subd. (a).) One instance in which we should part ways with federal case authority is when the statutory language is *not* parallel. That is the case here.

The ADA creates a cause of action for associational disability discrimination using language that structurally is different than FEHA. The “[g]eneral rule” is that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability” (42 U.S.C. § 12112(a).) “[T]he term ‘discriminate against a qualified individual on the basis of disability’ includes,” among other things, “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” (42 U.S.C. § 12112(b)(4).) Unlike FEHA, the ADA does not define the term “disability” itself as including association with the disabled. Instead, it defines *discrimination* based on association as one type of “‘discriminat[ion] against a qualified individual on the basis of disability.’” (42 U.S.C. § 12112(a).) Elsewhere, the ADA states “‘discriminat[ing] against a qualified individual on the basis of disability’” also includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual *with a disability who is an applicant or employee*.” (42 U.S.C. § 12112(b)(5)(A), *italics added*.) One cannot, therefore, read “association with a disabled person” into every use of the term “disability” in the ADA.

Because of these structural differences, including differences in language for associational disability accommodation, federal precedent (e.g., *Erdman v. Nationwide Ins. Co.* (3d Cir. 2009) 582 F.3d 500, 510; *Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698, 700 (*Larimer*); *Den Hartog v. Wasatch Academy* (10th Cir. 1997) 129 F.3d 1076, 1084; *Tyndall v. National Education Centers* (4th Cir. 1994) 31 F.3d 209, 214) is less helpful than in other FEHA interpretations.

Since we are not tasked to decide whether either FEHA or the ADA creates a failure to accommodate cause of action based on associational disability, we next turn to DHE’s principal argument on appeal—that its motion for summary judgment was properly granted because there is no triable issue of fact as to either discriminatory motive or pretext.⁴

⁴ The dissent criticizes the limitations we established for supplemental briefing, arguing that our discussion of discriminatory motive and pretext “hinges entirely on Junior’s failure to accommodate plaintiff’s request for a different shift” (dis. opn., *post*, at p. 1059), and we

c. *Triable Issues of Material Fact Exist as to Discriminatory Motive and Pretext*

Moving to DHE's challenge to the evidence of discriminatory motive and pretext, our starting point is *Rope*. *Rope* relied substantially on *Larimer*, which the *Rope* court described as "the seminal authority on disability-based associational discrimination under the ADA." (*Rope, supra*, 220 Cal.App.4th at p. 656.)

In *Larimer*, the court opined that "[t]hree types of situation are, we believe, within the intended scope of the rarely litigated . . . association section [of the ADA]. We'll call them 'expense,' 'disability by association,' and 'distraction.' " (*Larimer, supra*, 370 F.3d at p. 700.) The court continued: "They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ('expense') his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ('disability by association') the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ('distraction') the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours." (*Larimer, supra*, 370 F.3d at p. 700.)⁵

Rope acknowledged the three categories in which *Larimer* found a motive for associational disability discrimination (expense, disability by association, and distraction). At the same time, *Rope* observed that *Larimer* "provided an 'illustrat[ive],' rather than an exhaustive, list of the kind of circumstances which might trigger a claim of associational discrimination." (*Rope, supra*, 220 Cal.App.4th at p. 657.) "[A]nd more importantly, *Larimer* was decided under the ADA; the provisions of FEHA are broadly construed and afford employees more protection than the ADA." (*Ibid.*; see § 12926.1, subd. (a).)

therefore should have permitted briefing on the failure to accommodate issue. As we have stated in the text, we do not decide the accommodation issue. Instead, we conclude there is a triable issue of fact as to associational disability discrimination. That issue was fully briefed in respondent's brief at pages 23-37.

⁵ *Larimer* inserted the "qualification concerning the need for an accommodation" into category 3 "because the right to an accommodation, being limited to disabled employees, does not extend to a nondisabled associate of a disabled person" under the ADA. (*Larimer, supra*, 370 F.3d at p. 700.) FEHA and the ADA differ structurally in the way they create causes of action for associational disability discrimination, as we noted in part 1.b.

So while the *Rope* plaintiff's alleged facts did not "fit neatly within" one of *Larimer*'s three categories, the court concluded the plaintiff had sufficiently pleaded a prima facie "'expense'" claim for associational disability discrimination. (*Rope, supra*, at p. 657.)

In *Rope*, the employer hired the plaintiff in late 2010. When hired, he allegedly informed the employer that he intended to take a leave of absence to donate a kidney to his sister in February 2011. He requested a paid leave of absence to do so, under a then-new statute requiring the employer to provide paid leave. Two days before the statute took effect on January 1, 2011, the employer terminated him on the allegedly pretextual basis of poor performance. (*Rope, supra*, 220 Cal.App.4th at pp. 642–643, 658.) The "reasonable inference" from these facts was that the employer "acted preemptively to avoid an expense stemming from [the plaintiff's] association with his physically disabled sister." (*Id.* at p. 658.) The plaintiff had therefore met his burden "to show the adverse employment action occurred under circumstances raising a reasonable inference that the disability of his relative or associate was a substantial factor motivating the employer's decision." (*Ibid.*)

We agree with *Rope* that *Larimer* provides an illustrative, rather than an exhaustive, list of the kinds of circumstances in which we might find associational disability discrimination. The common thread among the *Larimer* categories is simply that they are instances in which the "employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person." (*Larimer, supra*, 370 F.3d at p. 702.) As we discuss above, this is an element of a plaintiff's prima facie case—that the plaintiff's association with a disabled person was a substantial motivating factor for the employer's adverse employment action. *Rope* held the alleged facts in that case could give rise to an inference of such discriminatory motive. Our facts do not fit neatly within one of the *Larimer* categories either, but a jury could reasonably infer the requisite discriminatory motive.

■ A jury could reasonably find from the evidence that plaintiff's association with his disabled son was a substantial motivating factor in Junior's decision to terminate him, and, furthermore, that Junior's stated reason for termination was a pretext. Junior knew that plaintiff needed to finish his assigned route at a time that permitted him to administer dialysis to his son. Bermudez told Junior of plaintiff's needs in this respect and asked Junior to work with plaintiff when Junior took over as plaintiff's supervisor. That same month, plaintiff complained to Bermudez that Junior was scheduling him later than usual, prompting Bermudez to remind Junior of plaintiff's need to be home for his son's dialysis. Despite knowing plaintiff's need to be home early, the month after Junior took over, he scheduled plaintiff for a shift that started at noon, later than plaintiff had ever started before. Junior did this

even though eight other shifts well before noon were available, and even though DHE's customer had specifically requested that plaintiff—the customer's regular driver—do its 7:00 a.m. deliveries. There was no apparent reason why Junior could not have scheduled plaintiff for one of these earlier shifts. (The explanation Junior proffered earlier for not assigning plaintiff the 7:00 a.m. shift was false. Junior told plaintiff the customer was unhappy with his work and did not want him making the customer's deliveries; in fact, the customer's feedback was quite the opposite, and plaintiff never had any performance issues at DHE.) Plaintiff told Junior he could not work the shift and route assigned to him because he had to be home to administer dialysis to his son, but he asked to return the next day for an assignment. It should have been apparent plaintiff was not acting in bad faith or simply being insubordinate. Yet Junior ignored plaintiff's requests. Instead, he laughed and told plaintiff Bermudez was not in charge anymore. Even though DHE's policies allowed for less severe disciplinary action than termination, for plaintiff's one-time refusal to work the shift assigned to him, Junior terminated him.

One reasonable inference from these facts is that Junior, as the person responsible for scheduling the drivers, wanted to avoid the inconvenience and distraction plaintiff's need to care for his disabled son posed to Junior. Thus, Junior engineered a situation in which plaintiff would refuse to work the shift, giving Junior reason to terminate him. In other words, plaintiff's termination for refusal to work the shift was a pretext for Junior's desire to be rid of someone whose disabled associate made Junior's job harder. Just as the facts in *Rope* gave rise to the inference that the employer acted preemptively to avoid the expense of paid leave (*Rope, supra*, 220 Cal.App.4th at p. 658), these facts may give rise to the inference that Junior acted proactively to avoid the nuisance plaintiff's association with his disabled son would cause Junior in the future.

DHE contends a fact finder could not infer discriminatory motive from Junior's actions because it is undisputed that plaintiff had no "set" schedule, he worked a nearly identical shift the day before his termination with no problems, and the time at which he administered dialysis to his son was "fully within his discretion." DHE suggests these facts show Junior had no reason to know plaintiff would refuse to work the shift assigned to him. But none of this evidence negated Junior's demonstrated knowledge that plaintiff had a disabled son at home constraining his schedule. Plaintiff may not have had a set schedule in the sense that he did not start or finish his shifts at the exact same time every day, but he had a typical schedule that allowed him to start around 9:00 or 10:00 a.m. and finish by 7:00 or 8:00 p.m. Furthermore, to say plaintiff had full discretion as to what time he could administer dialysis mischaracterizes plaintiff's responsibility. It is not as though plaintiff had the freedom to administer dialysis at a time of his choosing. The way plaintiff described it, the time varied based on his son's condition. On some days, his

son's condition would worsen and he would need to be connected to the machine for a longer period of time. Plaintiff had learned how to check his son's condition and, on that basis, determine when he would need dialysis. Plaintiff could work the shift starting at 11:55 a.m. one day before his termination because it did not involve a route to far-away Oxnard and permitted him to be home in time for dialysis. The facts are that Junior knew plaintiff had a special need related to his disabled son, and plaintiff told Junior that was the reason he could not work the shift on April 23, 2013. Plaintiff was able to perform satisfactorily for over three years with the schedule that previous supervisors provided until Junior took over and fired plaintiff shortly after becoming his supervisor.

Viewing the evidence in a light favorable to the nonmoving party and indulging the reasonable inferences in his favor, as we must, plaintiff has demonstrated a triable issue of material fact in response to DHE's showing. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 470 [30 Cal.Rptr.3d 797, 115 P.3d 77] (*Miller*) ["We stress that, because this is an appeal from a grant of summary judgment in favor of defendants, a reviewing court must examine the evidence *de novo* and *should draw reasonable inferences* in favor of the nonmoving party. [Citation.] We believe the Court of Appeal failed to draw such inferences and took too narrow a view of the surrounding circumstances."].)

A relatively recent district court case, *Kouromihelakis v. Hartford Fire Ins. Co.* (D.Conn. 2014) 48 F.Supp.3d 175, is instructive. *Kouromihelakis* denied an employer's motion to dismiss the plaintiff's claim that he was fired because of the known disability of his father. The plaintiff alleged that he had to regularly assist in the care of his disabled father, who suffered a debilitating stroke; his job performance was excellent; he periodically did not report for work by 9:00 a.m.; the employer was aware of his father's disability and the reason for the plaintiff's tardiness; the plaintiff asked for, but was refused, a change in hours under the employer's "flex time" policy to accommodate his duties to his disabled father; and the employer terminated him after he arrived late one day. (*Id.* at pp. 178, 180–181.) The court concluded these allegations were sufficient to plead a plausible "'distraction'" claim under *Larimer*, and, viewed in a light most favorable to the plaintiff, supported "a reasonable inference that the defendant terminated the plaintiff's employment based on a belief about future absences." (*Kouromihelakis*, at pp. 180–181.) Like *Kouromihelakis*, the evidence here gives rise to the reasonable inference that Junior terminated plaintiff based on a belief that plaintiff would want earlier shifts in the future. Neither *Kouromihelakis* nor this case fit neatly within the distraction paradigm set forth in *Larimer*, but a neat fit is not required.

The cases on which DHE principally relies do not advance its case. In *Ennis v. National Assn. of Business and Education Radio, Inc.* (4th Cir. 1995) 53 F.3d 55 (*Ennis*), the court affirmed summary judgment for the employer because the plaintiff could not establish at least two elements of her *prima facie* case: (1) “at the time of the discharge, she was performing her job at a level that met her employer’s legitimate expectations”; and (2) “her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.” (*Id.* at p. 58.) She could not show she was performing her job adequately because the employer had extensively documented numerous instances of poor job performance over the course of several years. (*Id.* at pp. 61–62.) Her employer terminated her for poor job performance. (*Id.* at p. 57.) She could not show her association with her HIV-positive minor son instead motivated her termination, especially in light of the strong evidence that she had performed poorly for years. (*Id.* at p. 62.) She had no facts credibly giving rise to an inference of unlawful discrimination. (*Ibid.*) Here, by contrast, there was no issue with plaintiff’s performance, and thus no concomitant showing that he was legitimately terminated. It was undisputed that he was performing satisfactorily during his entire time with DHE. His request for an earlier schedule only became an issue when Junior took over, and his onetime refusal to work a shift does not equate with the *Ennis* plaintiff’s poor performance over several years.

Magnus v. St. Mark United Methodist Church (7th Cir. 2012) 688 F.3d 331, 339, is also distinguishable. In *Magnus*, the plaintiff asserted her employer terminated her because of her association with her mentally disabled daughter, emphasizing that the termination came two weeks after she received a merit-based raise, and one day after she arrived at work an hour late due to a medical situation with her daughter. (*Id.* at p. 333.) But the undisputed evidence showed the raise was an across-the-board increase given to all full-time employees regardless of merit, and the employer had decided to terminate her the weekend before she arrived late to work. (*Id.* at pp. 333–334, 338–339.) The plaintiff could not rebut the employer’s legitimate, nondiscriminatory reasons for its actions. The employer based the termination on numerous documented performance deficiencies and her refusal to work weekends (because of the need to care for her daughter). (*Id.* at pp. 335–336, 338.) The court observed that the plaintiff’s true complaint was that the church failed to accommodate her need to care for her disabled daughter because it mandated that she work weekends—but the ADA did not require employers to reasonably accommodate for an employee’s association with a disabled person. (*Magnus*, at pp. 334, 339.) FEHA, however, differs structurally from the ADA when defining associational disability causes of action. Further, like in *Ennis*, the many performance deficiencies in *Magnus* also justified the plaintiff’s termination, not just a onetime refusal to work that appears to have been engineered.

In sum, DHE failed to show it was entitled to summary adjudication of the associational disability discrimination cause of action. Plaintiff's evidence gives rise to reasonable inferences of discriminatory motive and pretext.

2. *Retaliation*

■ The retaliation provision of FEHA forbids an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under" FEHA. (§ 12940, subd. (h).) "Employees may establish a prima facie case of unlawful retaliation by showing that (1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action." (*Miller, supra*, 36 Cal.4th at p. 472.)

DHE asserts plaintiff cannot establish retaliation because he lacks evidence of a protected activity, and even if he engaged in protected activity, he cannot show a causal link between that activity and the adverse employment action. We are not persuaded that DHE is entitled to summary adjudication on these grounds.

"Retaliation claims are inherently fact-specific" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052 [32 Cal.Rptr.3d 436, 116 P.3d 1123] (*Yanowitz*)), and "protected conduct can take many forms" (*id.* at p. 1042). "Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination." (*Id.* at p. 1046.) "[C]omplaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct." (*Id.* at p. 1047.)

■ But employees need not explicitly and directly inform their employer that they believe the employer's conduct was discriminatory or otherwise forbidden by FEHA. (*Yanowitz, supra*, 36 Cal.4th at p. 1046.) "'[A]n employee is not required to use legal terms or buzzwords when opposing discrimination. The court will find opposing activity if the employee's comments, when read in their totality, oppose discrimination.' " (*Id.* at p. 1047.) "We do not believe employees should be required to elaborate to their employer on the legal theory underlying the complaints they are making, in order to be protected by the FEHA." (*Miller, supra*, 36 Cal.4th at p. 474.) "[C]ourts should recognize that plaintiffs have limited legal knowledge."

(*Ibid.*, citing *Moyo v. Gomez* (9th Cir. 1994) 40 F.3d 982, 985.) FEHA does not protect “‘only the impudent or articulate. The relevant question . . . is not whether a formal accusation of discrimination is made but whether the employee’s communications to the employer sufficiently convey the employee’s reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.’” (*Yanowitz, supra*, at p. 1047.) Further, FEHA need not actually prohibit the conduct of which the employee complains. (*Miller, supra*, 36 Cal.4th at p. 473.) All that is required is an employee’s good faith belief that the conduct was unlawful. (*Ibid.*) Employees’ belief that they are complaining about prohibited conduct “may be inferred from the nature and content of their repeated complaints. The issue of a plaintiff’s subjective, good faith belief involves questions of credibility and ordinarily cannot be resolved on summary judgment.” (*Id.* at p. 476.)

Two California Supreme Court cases in particular illustrate the principle that employees need not complain with the clarity and precision of lawyers to engage in protected conduct: *Miller* and *Yanowitz*. In *Miller*, the plaintiffs asserted they complained about improper sexual relationships between a supervisor and several of his subordinates, favoritism accorded to those subordinates, and subsequent hostile or harassing treatment by those subordinates after the plaintiffs expressed their complaints. (*Miller, supra*, 36 Cal.4th at pp. 452, 472–473.) The Court of Appeal concluded that, although the plaintiffs opposed the supervisor’s conduct, “they had not expressed opposition to sex discrimination or sexual harassment. As the court understood the record, ‘[p]laintiffs were not complaining about sexual harassment but unfairness. This is not protected activity under the FEHA.’” (*Id.* at p. 474.) The Court of Appeal concluded the defendants were entitled to summary judgment on the plaintiffs’ retaliation claim. (*Id.* at p. 460.) Our Supreme Court reversed, holding that although the plaintiffs “may not have recited the specific words ‘sexual discrimination’ or ‘sexual harassment,’ the nature of their complaint certainly fell within the general purview of FEHA, especially when we recall that this case is before us on review of a grant of summary judgment.” (*Id.* at p. 475.)

In *Yanowitz*, the plaintiff’s manager instructed her to terminate a dark-skinned female sales associate at a retail store because he did not consider the sales associate to be sufficiently physically attractive. (*Yanowitz, supra*, 36 Cal.4th at p. 1038.) In response, the plaintiff asked the manager for an adequate justification for terminating the sales associate. (*Ibid.*) On several subsequent occasions, the manager asked the plaintiff if she had fired the sales associate, and the plaintiff each time asked for adequate justification. (*Ibid.*) The plaintiff ultimately refused to terminate the sales associate. She never explicitly told the manager that she believed his order was discriminatory. (*Ibid.*) Our Supreme Court held “a trier of fact properly could find that [the manager] knew that [the plaintiff’s] refusal to comply with his order to

fire the sales associate was based on [the plaintiff's] belief that [the manager's] order constituted discrimination on the basis of sex—that is, the application of a different standard to a female employee than that applied to male employees—and that her opposition to the directive thus was not merely an unexplained insubordinate act bearing no relation to suspected discrimination. [Citation.] A trier of fact properly could find that by repeatedly refusing to implement the directive unless [the manager] provided ‘adequate justification,’ [the plaintiff] sufficiently conveyed to [the manager] that she considered the order to be discriminatory and put him on notice that he should reconsider the order because of its apparent discriminatory nature.” (*Id.* at p. 1048.) Thus, the plaintiff’s evidence permitted a reasonable trier of fact to find that she engaged in protected activity. (*Ibid.*)

Likewise, here, the evidence would permit a reasonable trier of fact to find protected activity. Plaintiff complained to Bermudez in March 2013 that Junior had changed his hours so that he was having problems tending to his son. Bermudez communicated the complaint about the change in hours to Junior. Junior already knew that plaintiff sought earlier hours because of his obligation to care for his disabled son—Bermudez told Junior this when Junior took over. When Junior assigned plaintiff a later shift on April 22, 2013, the day before his termination, plaintiff worked it, but complained to Junior that he had “always had help from everyone except you,” and pleaded with Junior “to have my job like always.” The following day, plaintiff expressed opposition to the shift Junior assigned him because he could not return in time to care for his son, and plaintiff refused to work it. Junior terminated him directly.

The trier of fact could reasonably find that plaintiff’s repeated complaints to Bermudez and Junior about the change in his scheduling, when both knew that he needed earlier hours to administer dialysis to his son, constituted opposition to the denial of an accommodation in his schedule. Put otherwise, plaintiff showed opposition to a practice he believed was unlawful (§ 12940, subd. (h)). Tied as the complaints were to his son’s disability, the trier of fact also could find that Junior had reason to know plaintiff’s complaints were not just an unexplained insubordinate act bearing no relation to perceived unlawful practices. Rather, one hearing plaintiff’s complaints could infer that plaintiff believed the denial of an accommodated schedule to care for his son was unlawful. He need not have used the terms “unlawful” or “reasonable accommodation” themselves. Even assuming FEHA did not actually require DHE to reasonably accommodate plaintiff based on his son’s disability, plaintiff’s good faith belief that DHE was acting unlawfully was sufficient. (*Yanowitz, supra*, 36 Cal.4th at p. 1043.)

■ The evidence would also permit a trier of fact to infer a causal link between plaintiff’s complaints and his termination. Proximity in time between

the employee's protected activity and the adverse employment action satisfies the employee's prima facie burden. (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388 [48 Cal.Rptr.3d 313].) Plaintiff's termination came the month after his first complaint and on the heels of his last two complaints. To the extent DHE argues it has offered evidence of a legitimate, nondiscriminatory reason to terminate plaintiff (his refusal to work), we have explained in Discussion, part 1. that a trier of fact could find this reason pretextual.

DHE additionally maintains that, at best, plaintiff's remarks constituted a request for reasonable accommodation, not a complaint that Junior denied him a reasonable accommodation he previously received. DHE cites *Rope* for the proposition that "a mere request—or even repeated requests—for an accommodation, without more," do not constitute protected activity. (*Rope, supra*, 220 Cal.App.4th at p. 652; accord, *Nealy v. City of Santa Monica, supra*, 234 Cal.App.4th at p. 381 [relying on *Rope* to hold that "protected activity does not include a mere request for reasonable accommodation"].)

We note that *Rope* is no longer good law on that point. On July 16, 2015, the Governor approved a bill superseding *Rope* on this issue (Assem. Bill No. 987 (2015–2016 Reg. Sess.)). This amendment to section 12940, effective January 1, 2016, makes it unlawful for an employer to retaliate or otherwise discriminate against a person for requesting a reasonable accommodation, regardless of whether the employer granted the request. (§ 12940, subd. (m)(2).) The Legislature's findings in enacting the amendment included this: "Notwithstanding any interpretation of this issue in *Rope* . . . , the Legislature intends (1) to make clear that a request for reasonable accommodation on the basis of religion or disability is a protected activity, and (2) by enacting paragraph (2) of subdivision (m) . . . , to provide protection against retaliation when an individual makes a request for reasonable accommodation under these sections, regardless of whether the request was granted. With the exception of its holding on this issue, *Rope* . . . remains good law." (Stats. 2015, ch. 122, § 1(d), approved by Governor, July 16, 2015.)

DHE contends Assembly Bill No. 987 (2015–2016 Reg. Sess.) does not apply retroactively to this case to make a request for accommodation protected activity.⁶ "A statute has retrospective effect when it substantially changes the legal consequences of past events." (*Western Security Bank v.*

⁶ Plaintiff raised Assembly Bill No. 987 (2015–2016 Reg. Sess.) in his reply brief, and the bill became effective after briefing in this matter was complete. Our original opinion in this matter discussed and relied on Assembly Bill No. 987. DHE filed a petition for rehearing arguing in part that we should permit supplemental briefing on whether Assembly Bill No. 987 operates retroactively. We granted the petition in this respect and permitted supplemental briefing, but as we discuss, we ultimately need not decide the retroactivity issue.

Superior Court (1997) 15 Cal.4th 232, 243 [62 Cal.Rptr.2d 243, 933 P.2d 507].) To decide whether an amendment applies to actions that occurred before its enactment, the court asks as a threshold matter whether the amendment merely clarified existing law or changed existing law. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471 [20 Cal.Rptr.3d 428, 99 P.3d 1015].) “[A] statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment” “because the true meaning of the statute” was always the same. (*Western Security Bank v. Superior Court, supra*, at p. 243.) “In that event, . . . liability would have existed at the time of the actions, and the amendment would not have changed anything.” (*McClung v. Employment Development Dept.*, *supra*, at p. 472.) But if the amendment changed the law and imposed liability for earlier actions, the court must decide if the change applies retroactively. (*Ibid.*)

DHE argues Assembly Bill No. 987 (2015–2016 Reg. Sess.) effected a change in the law, which change applies prospectively only; therefore, *Rope* governs and precludes plaintiff’s retaliation cause of action. Plaintiff, on the other hand, argues Assembly Bill No. 987 merely clarified existing law such that Assembly Bill No. 987 applies to acts predating its enactment. We need not decide whether Assembly Bill No. 987 applies in this case.⁷ Even assuming it achieved a change in the law that does not apply retroactively, and thus *Rope* is not superseded for our purposes, *Rope* does not dictate that we adjudicate the retaliation cause of action in DHE’s favor.

As we have explained, *Rope* held that mere requests for accommodation without anything more did not represent protected activity. (*Rope, supra*, 220 Cal.App.4th at p. 652.) *Rope* emphasized that protected activity consists of “oppos[ing] any practices forbidden” by FEHA (§ 12940, subd. (h)), while mere requests for an accommodation do not “demonstrate some degree of opposition to or protest of the employer’s conduct.” (*Rope, supra*, at pp. 652–653; accord, *Nealy v. City of Santa Monica, supra*, 234 Cal.App.4th at p. 381 [request for an accommodation and engaging in the interactive process with employer did not amount to “‘oppos[ing] any practices forbidden under’ FEHA”].) Plaintiff here did more than simply request an accommodation. A reasonable juror could find that his repeated complaints about the sudden changes to his schedule represented “some degree of opposition” to DHE’s failure to continue to provide that schedule. In other words, we disagree with DHE’s characterization that, at best, plaintiff’s remarks constituted a mere request for reasonable accommodation.

⁷ Our colleagues in the Fourth District recently considered these issues in *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216. They held that Assembly Bill No. 987 (2015–2016 Reg. Sess.) represented a change in the law, not a clarification, and Assembly Bill No. 987 did not operate retroactively. (*Moore*, at pp. 246–247.)

3. *Failure to Prevent Discrimination and Wrongful Termination in Violation of Public Policy*

In DHE's moving papers, it stated one argument against the causes of action for failure to prevent discrimination and wrongful termination—that they failed as a matter of law when no discrimination or other unlawful conduct in violation of public policy occurred. On appeal, DHE argues the same. Given that DHE is not entitled to summary adjudication on the discrimination and retaliation causes of action, it has not shown it is entitled to summary adjudication on failure to prevent discrimination and wrongful termination.

4. *Costs on Appeal*

The court awarded DHE costs as the prevailing party in the action. Plaintiff appealed from the court's order denying his motion to tax costs. Because we are reversing the judgment, and DHE is no longer the prevailing party, DHE is no longer entitled to costs. The order denying the motion to tax costs is also reversed.

DISPOSITION

The judgment in case No. B261165 is reversed. On appeal, plaintiff has challenged the court's ruling on only four of his eight causes of action. The court shall enter an order granting DHE's motion for summary adjudication on the causes of action plaintiff has abandoned: (1) failure to provide reasonable accommodation, (2) failure to engage in good faith interactive process, (3) hostile work environment, and (4) failure to prevent harassment. The court's order shall deny summary adjudication on the remaining causes of action: (1) disability discrimination, (2) failure to prevent discrimination, (3) retaliation, and (4) wrongful termination in violation of public policy. The order denying the motion to tax costs in case No. B262524 is reversed. Plaintiff shall recover his costs on appeal.

Rubin, Acting P. J., concurred.

GRIMES, J., Dissenting.—Respectfully, I dissent.

The majority in the original published opinion in this appeal, filed April 4, 2016, held that the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; FEHA) creates a duty according to the plain language of the act to provide reasonable accommodations to an applicant or employee who is associated with a disabled person. The present majority opinion has retreated from that holding. My colleagues state they do not decide whether

FEHA establishes a separate duty to reasonably accommodate employees who associate with a disabled person. (Maj. opn. *ante*, at p. 1038.) The majority neither acknowledges its prior holding nor explains the retreat from it. The majority does, however, “find accommodation relevant as to plaintiff’s discrimination cause of action.” (Maj. opn. *ante*, at p. 1038.) And, while repeating that it does not decide the point, the majority observes that Government Code section 12940, subdivision (m)¹—making it unlawful to fail to reasonably accommodate the known physical disability of an applicant or employee—“may reasonably be interpreted to require accommodation based on the employee’s association with a physically disabled person.” (Maj. opn. *ante*, at p. 1039.)

While ordinarily I would not discuss an undecided issue, I am compelled to do so here. For while the majority purports not to decide whether FEHA requires an employer to reasonably accommodate employees who associate with a disabled person, in my view the majority in effect has done just that. I disagree with the majority’s approach for four reasons.

First, despite the grant of rehearing in this case, the majority explicitly refused to allow the parties to brief the critical issue of whether and how accommodation is relevant to plaintiff’s discrimination cause of action. Second, I cannot agree with the majority’s proposition that the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.; ADA) and the federal cases decided under it are “easily distinguished” and that we should “part ways with federal case authority” because the statutory language in the ADA is not parallel with FEHA. (Maj. opn. *ante*, at pp. 1039–1040.) On the contrary, I see no reason to construe FEHA as departing from the ADA on this issue. Third, unless there is a duty to adjust the work schedule of a nondisabled employee to accommodate the needs of a disabled associate, there is no evidence from which to infer the defendant employer here discriminated against plaintiff when it assigned a shift that did not meet those needs, and fired plaintiff for refusing the assignment. Fourth, plaintiff did not demonstrate a material factual dispute whether he engaged in a protected activity to support a retaliation claim, because under the law in effect during his employment with defendant, repeated requests for an accommodation, without more, did not constitute protected activity. In short, the conduct at the heart of plaintiff’s claim is defendant’s refusal to assign a shift that would allow plaintiff to tend to his disabled son. No authority has held an employer must do so, and nor should we.

¹ Further statutory references are to the Government Code.

1. *The Majority Did Not Comport with Government Code Section 68081 in Partially Denying Defendant's Petition for Rehearing.*

In my earlier dissent, I pointed out that plaintiff expressly told us in his briefs he had abandoned the theory that an employer has a duty to accommodate a nondisabled employee who is associated with a disabled person. The majority states that plaintiff “abandoned the reasonable accommodation cause of action.” (Maj. opn. *ante*, at p. 1038.) Not so; plaintiff did not merely abandon one cause of action. He expressly abandoned the premise of a duty to accommodate a disabled associate. Plaintiff repeatedly told us “this is not an accommodation case.” Plaintiff asserted the issue “whether reasonable accommodations are available to the associates of the disabled . . . is not before this Court.”

Instead, plaintiff asserted that even if he was not entitled to an accommodation under FEHA, he was “entitled to an intermittent medical leave of absence to care for his disabled son pursuant to the CFRA [California Family Rights Act (§ 12945.2)], at least on the day he was terminated.” Plaintiff stated: “The fact that [defendant] may not have discriminated because it was not obligated to affirmatively act to protect [plaintiff’s] employment under one set of laws (the reasonable accommodation provision of the FEHA) does not mean it did not discriminate when another set of laws (the child care leave provision of the CFRA) obligated [defendant] to affirmatively act to protect his employment. In effect, the CFRA forbade [defendant] from terminating [plaintiff] on April 23, 2013 after he voiced his inability to work his schedule for the day because of his child care obligations to his disabled son.”

Undeterred by the absence of briefing on an issue that no party proposed, the majority held in the opinion filed April 4, 2016, that FEHA creates a duty to accommodate a nondisabled employee who is associated with a disabled person.

Thereafter, defendant petitioned for rehearing on three grounds, the first two of which are these: “First, the Court based its decision to reverse the dismissal of Plaintiff’s associational disability discrimination claim on its determination that [FEHA] requires employers to accommodate non-disabled employees with disabled relatives. However, Plaintiff did not appeal the dismissal of his failure to accommodate claim under FEHA and expressly abandoned this theory of liability on appeal. Thus, neither party briefed the issue. [¶] Second, the Court based its decision to reverse the dismissal of Plaintiff’s retaliation claim in part on its determination that Plaintiff engaged in protected conduct by requesting an accommodation. In coming to this conclusion, however, the Court relied on a change in the law, the legislature’s

enactment of AB987, which occurred during the parties' briefing process. AB987 amended FEHA to state that requests for accommodation are protected activity. However, the Court never requested supplemental briefing on the issue of whether AB987 operates retroactively, which [defendant] contends it does not. Thus, [defendant] never had an opportunity to brief this issue, as Plaintiff raised it for the first time in his reply brief."

The majority issued an order on April 27, 2016, granting in part and denying in part the petition for rehearing. The order granted the parties permission to brief only the second issue, "whether the amendment to Government Code section 12940, subdivision (m), effective January 1, 2016 [(Assem. Bill No. 987 (2015–2016 Reg. Sess.))], applies in this case." Assembly Bill No. 987 went into effect more than two years after plaintiff's termination of employment with defendant. After the parties submitted their briefs, *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216 (*Moore*) was decided. *Moore* held that Assembly Bill No. 987 represented a change in the law, not a clarification, and Assembly Bill No. 987 did not operate retroactively. (*Moore*, at p. 247.) The majority now finds it need not decide this issue.

Likewise, the majority now says it does not decide whether FEHA establishes a separate duty to reasonably accommodate employees who associate with a disabled person. However, the majority finds accommodation relevant to plaintiff's discrimination cause of action. (Maj. opn. *ante*, at p. 1038.) The majority reasons that "when section 12940, subdivision (m) requires employers to reasonably accommodate 'the known physical . . . disability of an applicant or employee,' read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person. Again, given plaintiff's concession, we do not decide this point. We only observe that the accommodation issue is not settled and that it appears significantly intertwined with the statutory prohibition against disability discrimination . . ." (Maj. opn. *ante*, at pp. 1038–1039.)

The majority's discussion of what it perceives as triable issues of material fact as to discriminatory motive and pretext (maj. opn. *ante*, at pp. 1042–1044) hinges entirely on Boldomero Munoz-Guillen's (Junior) failure to accommodate plaintiff's request for a different shift so he could care for his disabled son.

Defendant's petition for rehearing sought permission to brief the accommodation issue that the majority characterizes as "not settled." (Maj. opn. *ante*, at p. 1039) As set forth above, defendant's first basis for seeking rehearing was that "the Court based its decision to reverse the dismissal of Plaintiff's

associational disability discrimination claim on its determination that [FEHA] requires employers to accommodate non-disabled employees with disabled relatives.” The majority opinion does not comport with section 68081 because it rests on an issue that no party proposed and that was never briefed, even after defendant timely petitioned for rehearing to brief that issue. Section 68081 provides that before issuing a decision, “based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing.” And “[i]f the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition” (*Ibid.*)

Ten years after section 68081’s enactment, the Court of Appeal expressed the “significant principle” that “judges, including appellate judges, are required to follow the law. In this case, the Appellate Department of the Los Angeles Superior Court decided a case on a point not raised by the parties, and without notice to the parties that it might do so.” (*California Casualty Ins. Co. v. Appellate Department* (1996) 46 Cal.App.4th 1145, 1147 [54 Cal.Rptr.2d 118] (*California Casualty*).)

In *California Casualty*, the defense in a court trial elicited an expert opinion over the plaintiff’s objection. On appeal, the plaintiff argued the opinion was inadmissible and the error was prejudicial. The defendant responded there was no abuse of discretion and no prejudice. The appellate department scrutinized the record to determine if the expert opinion was admissible and in doing so also scrutinized the plaintiff’s objection, concluding it was inadequate to preserve the issue for appellate review—an issue no party had asserted or briefed. The Court of Appeal found it was error to decide the case on that ground without warning the parties the court was considering that ground, and giving them an opportunity to brief it. (*California Casualty*, *supra*, 46 Cal.App.4th at pp. 1148–1149.)

I believe the majority had a duty to permit briefing on the issue of whether and how accommodation is “relevant to” and “significantly intertwined” with plaintiff’s discrimination cause of action before it decided an “unsettled” issue which was not proposed or briefed by any party. (*Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864–865 [245 Cal.Rptr. 1, 750 P.2d 778] [in denying a party’s request for an opportunity to submit supplemental briefing on a point first raised by the Court of Appeal in oral argument, the Court of Appeal did not comport with § 68081; Court of Appeal had a duty “upon timely request to allow supplemental briefing before it renders a decision which was not proposed or briefed by any party”].)

2. *No Sound Basis Exists for Construing FEHA as Departing from Federal Case Law Governing Associational Disability Discrimination Under the ADA.*

FEHA prohibits disability discrimination. It is unlawful for an employer, “because of the . . . physical disability . . . of any person, to . . . discharge the person from employment . . . or to discriminate against the person . . . in terms, conditions, or privileges of employment.” (§ 12940, subd. (a).) FEHA also forbids discrimination based on a person’s association with a person with a physical disability. Section 12926 provides in pertinent part that “‘physical disability, [and other protected characteristics]’ includes a perception that . . . the person is associated with a person who has, or is perceived to have, any of those characteristics.” (§ 12926, subd. (o).)

There is very little California authority on discrimination against a person associated with a disabled person. The only authority expressly involving a claim of associational disability discrimination is *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635 [163 Cal.Rptr.3d 392] (*Rope*). In *Rope*, the court concluded the plaintiff pleaded facts sufficient to support a claim for association-based disability discrimination. (*Id.* at p. 642.) The plaintiff alleged he informed his employer at the time he was hired in September 2010 that he intended to donate a kidney to his sister in February 2011. He requested a paid leave of absence to recuperate from the surgery, under a then-new statute requiring the employer to provide paid leave, effective as of January 1, 2011. Two days before the statute took effect, the employer terminated the plaintiff’s employment on the allegedly pretextual basis of poor performance. (*Id.* at pp. 642–643.)

Rope observed that the “reasonable inference is that [the employer] acted preemptively to avoid an expense stemming from [the plaintiff’s] association with his physically disabled sister.” (*Rope, supra*, 220 Cal.App.4th at p. 658.) *Rope* relied on Judge Posner’s opinion in *Larimer v. International Business Machines* (7th Cir. 2004) 370 F.3d 698 (*Larimer*), describing *Larimer* as “the seminal authority on disability-based associational discrimination under the ADA . . .” (*Rope*, at p. 656.)

In *Larimer*, the court identified three circumstances in which an employer might have a motive to discriminate against an employee who is associated with a disabled person, and concluded these types of situation were within the intended scope of the “rarely litigated” association provision of the ADA. (*Larimer, supra*, 370 F.3d at p. 700.) The court denominated the categories as “expense,” “disability by association,” and “distraction.” (*Ibid.*)

Larimer explained: “[The three types] can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1)

(‘expense’) his spouse has a disability that is costly to the employer because the spouse is covered by the company’s health plan; (2a) (‘disability by association’) the employee’s homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee’s blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) (‘distraction’) the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer’s satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.” (*Larimer, supra*, 370 F.3d at p. 700.) As to the “distraction” category, the court continued: “The qualification concerning the need for an accommodation (that is, special consideration) is critical because *the right to an accommodation, being limited to disabled employees, does not extend to a nondisabled associate of a disabled person.*” (*Ibid.*, italics added, citing cases and 29 C.F.R. § 1630.8.)

In *Larimer*, the court affirmed summary judgment for the employer, where the employee was fired shortly after his twin children, who were born with a variety of serious medical conditions because of their prematurity, came home from the hospital. (*Larimer, supra*, 370 F.3d at p. 699.) The court held the plaintiff “must lose” because the case fit none of the categories the court described. (*Id.* at pp. 700, 701 [no evidence that health care costs were an issue, no evidence of communicable or genetic disease, and “no evidence that [the plaintiff] was absent or distracted at work because of his wife’s pregnancy or the birth and hospitalization of his daughters”].)

The majority dismisses the ADA and the federal cases construing it, saying they are “easily distinguished” and that we should “part ways with federal case authority” because the statutory language of FEHA and the ADA are “*not parallel.*” (Maj. opn. *ante*, at pp. 1039–1040.) The majority reasons that “association with a physically disabled person appears to be itself a disability under FEHA” (maj. opn. *ante*, at p. 1038), which defines a physical disability (and all other protected characteristics) to include a perception that “the person is associated with a person who has, or is perceived to have, any of those characteristics” (§ 12926, subd. (o)). According to the majority, FEHA thus “differs structurally from the ADA” (maj. opn. *ante*, at p. 1045), which forbids discrimination against a qualified individual on the basis of disability, and defines such discrimination to encompass “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association” (42 U.S.C. § 12112(b)(4)).

I recognize the literal differences in wording, but I cannot agree that FEHA may be construed as declaring that a person with no disability ipso facto becomes “disabled” by association with a disabled person. I see no material difference in the purpose or effect of the two statutes so far as their associational disability discrimination provisions are concerned. FEHA, of course, is broader than the ADA. *Rope* and other authorities, and FEHA itself, confirm that the provisions of FEHA “are broadly construed and afford employees more protection than the ADA.” (*Rope, supra*, 220 Cal.App.4th at p. 657, citing *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 57 [43 Cal.Rptr.3d 874] [“because FEHA ‘provides protections independent from those in the [ADA]’ and ‘afford[s] additional protections [than the ADA]’ (§ 12926.1, subd. (a)), state law will part ways with federal law in order to advance the legislative goal of providing greater protection to employees than the ADA”].)

But in many ways FEHA is similar to the ADA, and we should not construe FEHA as departing from the ADA without a clear legislative statement of intent to do so. (See generally *Green v. State of California* (2007) 42 Cal.4th 254, 262–263 [64 Cal.Rptr.3d 390, 165 P.3d 118] [“In passing [the 1992 amendment to FEHA], at least one legislative analysis observed the Legislature’s ‘conformity [to the ADA rules] will benefit employers and businesses because they will have one set of standards with which they must comply in order to be certain that they do not violate the rights of individuals with physical or mental disabilities.’ ”].) Our Legislature has expressly provided broader protection in FEHA than the ADA in certain important areas. (See Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2015) ¶¶ 9:2091 to 9:2100, pp. 9-172 to 9-173.) Notably, the Legislature has *not* stated an intent that FEHA depart from the ADA by requiring an employer to accommodate a nondisabled employee with a disabled associate.

3. *The Evidence Does Not Permit an Inference That the Disability of Plaintiff's Son Was a Substantial Factor Motivating the Employer's Decision to Terminate Plaintiff.*

The majority, after “part[ing] ways with federal case authority,” and observing that it was “not tasked to decide whether either FEHA or the ADA creates a failure to accommodate cause of action based on associational disability” (maj. opn. *ante*, at p. 1040), finds that triable issues of material fact exist that prevent summary judgment on plaintiff’s associational disability discrimination claim. I again disagree, seeing no evidence from which to infer that the employer discriminated against plaintiff when it assigned a schedule that did not meet the needs of his disabled son, and fired plaintiff for refusing the assignment.

To avoid summary judgment, plaintiff was required to produce evidence that his discharge “occurred under circumstances raising a reasonable inference that the disability of his [son] was a substantial factor motivating the employer’s decision.” (*Rope, supra*, 220 Cal.App.4th at p. 658; see *ibid.* [[“]if the disability plays no role in the employer’s decision . . . then there is no disability discrimination’ ”].)

The majority appears to accept the fundamental principles stated in *Rope* and *Larimer*, described in part 2, *ante*: namely, that there are three types of situation that evidence a motive for associational disability discrimination: expense, disability by association, and distraction. The majority points out that this case does not “fit neatly within the distraction paradigm set forth in *Larimer*, but a neat fit is not required.” (Maj. opn. *ante*, at p. 1044.) I agree with that statement, and with *Rope*’s observation that *Larimer* provided an illustrative, rather than an exhaustive, list of the kinds of circumstances in which an employer might have a motive to discriminate against an employee who is associated with a disabled person. (*Rope, supra*, 220 Cal.App.4th at p. 657.) But while a “neat fit” is not required, the evidence here does not show any fit of any kind in any of *Larimer*’s categories (or any other circumstance showing a discriminatory motive).

The critical element of any circumstance that might trigger a claim of associational disability discrimination is that it suggests the employer “has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.” (*Larimer, supra*, 370 F.3d at p. 702, italics added.) That is the point of the *Larimer* categories. An employer may be motivated to discriminate against an employee based on an associate’s disability, where the associate’s disability may cost the employer money (expense), or where the employer fears the employee will become ill from associating with a disabled person (disability by association), or where the employer perceives the employee is somewhat inattentive at work due to the distraction of caring for a disabled associate, though not to the point of needing a schedule accommodation (distraction). But plaintiff here presents no evidence of any of these circumstances, or any other circumstances suggesting a motive to fire him because of his son’s disability.

As I noted earlier, the majority’s discussion of what it perceives as triable issues of material fact as to discriminatory motive and pretext (maj. opn. *ante*, at pp. 1042–1044) hinges entirely on Junior’s failure to accommodate plaintiff’s request for a different shift so he could care for his disabled son. In effect, the majority is saying that evidence of Junior’s refusal to make the schedule change plaintiff requested is evidence that he did so because of the son’s disability. That is a (mistaken) tautology, not cause and effect, and it necessarily assumes that the employer had an obligation to accommodate

plaintiff's desired schedule. There is no such obligation under the ADA or FEHA, and no authority—until now—suggests otherwise.

Indeed, *Larimer* specifically held that under the ADA, there is no associational disability discrimination claim where the employer refuses to accommodate the nondisabled employee, because “the right to an accommodation, being limited to disabled employees, does not extend to a nondisabled associate of a disabled person.” (*Larimer, supra*, 370 F.3d at p. 700.) The majority rejects the *Larimer* principle in its footnote 5 because it again asserts the ADA and FEHA “differ structurally.” (Maj. opn. *ante*, at p. 1041, fn. 5.) This rejection of the *Larimer* principle is simply another demonstration that the majority’s decision rests on a point they claim not to be deciding: that FEHA obliges the employer to accommodate the disabled associate of a nondisabled employee. I am aware of no other authority or scholarly writing that takes issue with the *Larimer* principle; to the contrary, as explained below, federal cases before and after *Larimer* consistently hold there is no duty to accommodate a nondisabled employee by changing his schedule so he can care for a disabled associate.

These authorities illustrate the requirement for a showing of discriminatory motive in associational disability discrimination cases. One of those is *Erdman v. Nationwide Ins. Co.* (3d Cir. 2009) 582 F.3d 500 (*Erdman*). There, the Third Circuit affirmed summary adjudication for the employer on the plaintiff’s claim she was fired because of her daughter’s known disability (Down syndrome). The court reiterated that “the association provision does not obligate employers to accommodate the schedule of an employee with a disabled relative” (*id.* at p. 510), and the pertinent question is whether a reasonable jury could infer from the evidence that the plaintiff was terminated “because of her [daughter’s] disability” (*ibid.*). The answer was no.

Erdman explained: “[T]here is a material distinction between firing an employee because of a relative’s disability and firing an employee because of the need to take time off to care for the relative. . . . [The plaintiff] must show that [the employer] was motivated by [the daughter’s] disability rather than by [the plaintiff’s] stated intention to miss work; in other words, that she would not have been fired if she had requested time off for a different reason.” (*Erdman, supra*, 582 F.3d at p. 510.) The court concluded the record was “devoid of evidence indicating that [the employer’s] decision to fire [the plaintiff] was motivated by [the daughter’s] disability. Indeed, [the employer] was aware of [the daughter’s] disability for many years before [the plaintiff] was fired. The most [the plaintiff] can hope to show is that she was fired for requesting time off to care for [the daughter], not because of unfounded

stereotypes or assumptions on [the employer's] part about care required by disabled persons." (*Erdman, supra*, 582 F.3d at p. 511.)²

This case is virtually the same as *Erdman*. It is undisputed that defendant hired plaintiff, despite knowing of his son's disability and plaintiff's need for work schedule accommodations; his job did not have a set start and end time, and his hours varied throughout his employment; defendant accommodated plaintiff's request for earlier schedules for some years, until a new supervisor (who scheduled plaintiff to shifts that regularly earned him more money than he had with previous supervisors) one day assigned plaintiff to a schedule virtually identical to the shift plaintiff accepted the day before without complaint; and plaintiff refused the assignment after being warned that if he did so, he would be fired. Nothing about this suggests Junior's decision to fire plaintiff was motivated by the son's disability.

The majority discusses two cases that defendant cites in connection with the absence of evidence that plaintiff's association with his son motivated his termination. These are *Ennis v. National Assn. of Business & Education Radio, Inc.* (4th Cir. 1995) 53 F.3d 55 (*Ennis*) and *Magnus, supra*, 688 F.3d 331. In both of these cases, the employers terminated the plaintiffs for poor performance, and the courts rejected the plaintiffs' claims they were discharged because of their association with disabled family members, finding the evidence insufficient to infer associational disability discrimination. (*Ennis*, at p. 62 ["[m]ere unsupported speculation [that the employer discharged the plaintiff because of possible impact of her child's HIV positive status on the employer's insurance rates] is not enough to defeat a summary judgment motion"]; *Magnus*, at p. 338 [timing of the plaintiff's termination one day after her late arrival because of a medical issue with her disabled daughter was insufficient to infer associational discrimination].) The majority points

² See also *Magnus v. St. Mark United Methodist Church* (7th Cir. 2012) 688 F.3d 331, 339 (*Magnus*) (affirming summary judgment for the defendant employer, rejecting claim the timing of the plaintiff's termination (two weeks after she received a raise, and one day after she arrived late to work because of a medical situation with her disabled daughter) was sufficient to infer associational discrimination; "despite the fact that the [employer] may have placed [the plaintiff] in a difficult situation considering her commendable commitment to care for her disabled daughter [by requiring her to work weekends], she was not entitled to an accommodated schedule"); *Den Hartog v. Wasatch Academy* (10th Cir. 1997) 129 F.3d 1076, 1077, 1084 (affirming summary judgment for an employer who discharged the plaintiff teacher after his adult son with bipolar affective disorder attacked and threatened several members of the school community; the ADA "does not require an employer to make any 'reasonable accommodation' to the disabilities of relatives or associates of an employee who is not himself disabled"); *Tyndall v. National Education Centers, Inc.* (4th Cir. 1994) 31 F.3d 209, 214 (affirming summary judgment for the employer, who had discharged a disabled employee who was frequently absent from work, due both to her own disability and to the disability of a family member; the ADA "does not require an employer to restructure an employee's work schedule to enable the employee to care for a relative with a disability").

out that here, “by contrast [with *Ennis*], there was no issue with plaintiff’s performance, and thus no concomitant showing that he was legitimately terminated,” and “the many performance deficiencies in *Magnus* also justified the plaintiff’s termination.” (Maj. opn. *ante*, at p. 1045.)

I see no pertinence in the majority’s distinction. In this case, defendant terminated plaintiff for refusing to work an assigned shift, not for poor performance, and the issue (the same issue as in *Ennis* and *Magnus*) is whether plaintiff has produced evidence from which a jury could infer that the real motive for the termination was his son’s disability. As in *Ennis* and *Magnus*, plaintiff has not done so, and his job performance has nothing to do with it.

The majority insists that the facts “give rise to the inference that Junior acted proactively to avoid the nuisance plaintiff’s association with his disabled son would cause Junior in the future.”³ (Maj. opn. *ante*, at p. 1043.) Once again, this assertion depends on the principle the majority claims it is not deciding: that the employer is obliged to accommodate a nondisabled employee who is associated with a disabled person. In my view, as explained above, there is no authority for that conclusion, federal or state, and no reason for construing FEHA in a manner different from federal authorities construing the ADA.

I am sympathetic to plaintiff’s point that his previous supervisors had accommodated his requests for earlier shifts, and that his last supervisor

³ The majority also finds *Kouromihelakis v. Hartford Fire Ins. Co.* (D.Conn. 2014) 48 F.Supp.3d 175 to be instructive. (Maj. opn. *ante*, at p. 1044.) I do not, because the facts are so different. In *Kouromihelakis*, the district court denied the defendant employer’s motion to dismiss the plaintiff’s claim he was fired because of the known disability of his father. The plaintiff was a regional sales consultant. His regular work hours were 9:00 a.m. to 6:00 p.m. with lunch from 1:00 to 2:00 p.m., but he was exempt, paid a salary, not an hourly wage. As such, the defendant’s tardiness policy did not apply to him. The plaintiff alleged he was required to assist in the care of his disabled father; his job performance was excellent; he was periodically unable to report for work by 9:00 a.m.; the employer was aware of his father’s disability and the reason for the plaintiff’s tardiness; and the defendant had a “flex time” policy but denied the plaintiff’s requests to change his hours so he could care for his disabled father. One day, the plaintiff was approved to take four hours personal time off, but when he arrived at work at 1:26 p.m., his supervisor considered him late and terminated him for tardiness. (*Kouromihelakis*, at p. 178.) The court concluded these allegations were “sufficient to plead a plausible ‘distraction’ claim,” and supported “a reasonable inference that the defendant terminated the plaintiff’s employment based on a belief about future absences.” (*Id.* at pp. 180–181.) The majority likens *Kouromihelakis* to this case, saying the evidence here gives rise to the reasonable inference that Junior terminated plaintiff “based on a belief that plaintiff would want earlier shifts in the future.” (Maj. opn. *ante*, at p. 1044.) But here, plaintiff was an hourly worker whose job required him to report on time for whatever shift and route he was assigned on any given day, there is no evidence here that defendant had a “flex time” policy, and there is no evidence suggesting plaintiff was discharged because Junior feared in the future he would miss work to care for his son.

could have assigned him to earlier shifts on April 23, 2013. But I am left with no basis in the law on which to find a FEHA violation based on the assignment of a route to Oxnard with a noon start time (a schedule virtually identical to the shift plaintiff accepted the day before without complaint). Even in the case of a *disabled employee*, toward whom the employer *does* owe a duty to reasonably accommodate, it has been held that the employer's past accommodations did not prove the reasonableness of the employee's request to continue to provide those accommodations. (See, e.g., *Terrell v. USAir* (11th Cir. 1998) 132 F.3d 621, 626, fn. 6 [employer who temporarily reduced employee's working hours to accommodate carpal tunnel syndrome was not obliged to create part-time position; "An employer that 'bends over backwards to accommodate a disabled worker . . . must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation.' "].)

However desirable it might seem for the law to require an employer to accommodate the needs of the disabled associate of a nondisabled employee, the courts are not free to expand the law in this way without any basis in the statutory language or other precedent.

4. *The Retaliation Claim Fails Because the Evidence Does Not Permit an Inference That Plaintiff Engaged in Protected Activity.*

Finally, turning to the retaliation claim, I disagree with the majority's conclusion that plaintiff demonstrated a triable issue of fact as to the first element of a retaliation claim: that he engaged in a protected activity. (*Yanowitz v. L'oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 [32 Cal.Rptr.3d 436, 116 P.3d 1123] (*Yanowitz*).) Plaintiff contends he "oppos[ed] associational disability discrimination" when he complained about his supervisor "interfering with his schedule." Plaintiff does *not* contend he requested an accommodation, which in any event would not have demonstrated an essential element of a retaliation claim. During plaintiff's employment with defendant, a mere request, or even repeated requests, for an accommodation, without more, did not constitute protected activity under FEHA. (*Rope, supra*, 220 Cal.App.4th at pp. 652–653.)

The majority notes that *Rope* is no longer good law on that point. (Maj. opn. *ante*, at p. 1049.) But the only court to have considered the question has held that, before Assembly Bill No. 987 (2015–2016 Reg. Sess.) became effective on January 1, 2016, a mere request, or even repeated requests, for an accommodation did not constitute protected activity. (*Moore, supra*, 248 Cal.App.4th at p. 247 [where the plaintiff alleges the defendant engaged in retaliation before Jan. 1, 2016, the effective date of Assem. Bill No. 987, a request for accommodation, without more, is not sufficient to constitute

protected activity; the plaintiff must have engaged in opposition to practices forbidden under FEHA or filed a complaint, testified, or assisted in any proceeding under FEHA].)⁴

I disagree with the majority's conclusion that plaintiff's repeated complaints about the changes to his schedule represented "some degree of opposition" to defendant's failure to give plaintiff the schedule he wanted, so as to constitute protected activity. While a formal accusation of discrimination is unnecessary, it *is* necessary that "'the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.' [Citation.]" (*Yanowitz, supra*, 36 Cal.4th at p. 1047.) There is nothing at all in the evidence to suggest that plaintiff thought defendant's scheduling was unlawful. And certainly there is no evidence to suggest that plaintiff actually conveyed to defendant any belief that defendant's actions were unlawful. The majority summarizes the evidence in the summary judgment papers concerning plaintiff's complaints to his employer on the last two days of his employment as follows:

"On April 22, 2013, Junior assigned plaintiff a shift that started at 11:55 a.m., the latest he had ever started a shift, and ended at 9:04 p.m. He had 'no problem' with the route that day because it still allowed him to be home in time for his son's dialysis. But he told Junior: 'Please, I need to have my job like always. I've always had help from everyone except you.'

"The following day, on April 23, 2013, Junior assigned plaintiff a shift beginning at 12:00 p.m. Unlike the previous day, this assignment was for a

⁴ Though the Legislature clearly intended to change the law by enacting Assembly Bill No. 987 (2015–2016 Reg. Sess.) to declare a request for accommodation is protected activity, it is not at all clear that the Legislature intended the change to apply to a request by a nondisabled employee to accommodate a disabled relative or associate. With no California or federal authority establishing a duty to accommodate someone who is neither a job applicant nor an employee, I do not presume that is what the Legislature intended. In its letter briefs, defendant provided legislative history of Assembly Bill No. 987 indicating it was intended to protect employees requesting accommodations for their *own* disabilities. (See, e.g., Legis. Counsel's Dig., Assem. Bill No. 987 (2015–2016 Reg. Sess.) Stats. 2015, ch. 122 ["This bill would, in addition, prohibit an employer or other covered entity from retaliating or otherwise discriminating against a person *for requesting accommodation of his or her disability . . .*" (italics added)]; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 987 (2015–2016 Reg. Sess.) as amended May 27, 2015, p. 1 ["This bill makes it an unlawful employment practice under [FEHA] to retaliate or otherwise discriminate against a person who requests an accommodation . . . *for the person's known physical or mental disability . . .*" (italics added)]; Sen. Judiciary Com., Analysis of Assem. Bill No. 987 (2015–2016 Reg. Sess.) as amended May 27, 2015, p. 1 ["This bill would make it an unlawful employment practice under [FEHA] to retaliate or otherwise discriminate against a person who requests an accommodation . . . *for the person's known physical or mental disability . . .*" (italics added)].)

route from Los Angeles to Oxnard and back, including multiple pickups and deliveries. Plaintiff explained to Junior that it was too late in the day for him to drive that route because he could not get back in time to administer dialysis to his son by 8:00 p.m. Plaintiff requested another route or simply to take that day off. He also reminded Junior that Bermudez had already talked to Junior about plaintiff's need for shifts enabling him to leave early for his son.

"When plaintiff complained to Junior, Junior laughed and said, 'Winston [Bermudez] doesn't work here anymore. Now it's me.' Junior told plaintiff that if he did not do the route, he was fired. Plaintiff said he was sorry, but he could not do it. Junior told him to return the next day to sign the termination paperwork." (Maj. opn. *ante*, at p. 1034.)

The majority finds these statements by plaintiff may be reasonably understood to constitute "opposition to a practice he believed was unlawful." (Maj. opn. *ante*, at p. 1048.) I think it is unreasonable to interpret plaintiff's complaints as opposition to a practice he believed was unlawful. Plaintiff's statements are only reasonably understood as a request for a different route, with no hint that he believed he had a lawful right to a different route or that it was discriminatory to refuse to give him a different route.

The majority likens this case to *Yanowitz*, where the plaintiff did not explicitly state to her superior that she believed his order to terminate a sales associate, because the associate was "'not good looking enough,'" constituted unlawful sex discrimination. (*Yanowitz, supra*, 36 Cal.4th at p. 1044.) But in *Yanowitz*, the evidence permitted a finding that, in view of the nature of the order, the plaintiff's "refusal to implement the order, coupled with her multiple requests for 'adequate justification,' sufficiently communicated to [her superior] that she believed that his order was discriminatory." (*Id.* at p. 1048.) There is no comparable evidence here that plaintiff believed defendant's scheduling was discriminatory or that he conveyed that belief to defendant. "Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a *prima facie* case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination." (*Id.* at p. 1046.)

I would affirm the grant of summary judgment for defendant. I would reverse the trial court's order awarding defendant its costs and remand for a ruling under the standard announced in *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 99–100 [186 Cal.Rptr.3d 826, 347 P.3d 976]

(“an unsuccessful FEHA plaintiff should not be ordered to pay the defendant’s fees or costs unless the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit”).

Respondent’s petition for review by the Supreme Court was denied November 30, 2016, S237652.

[Nos. A135335, A136212. First Dist., Div. Five. Aug. 12, 2016.]

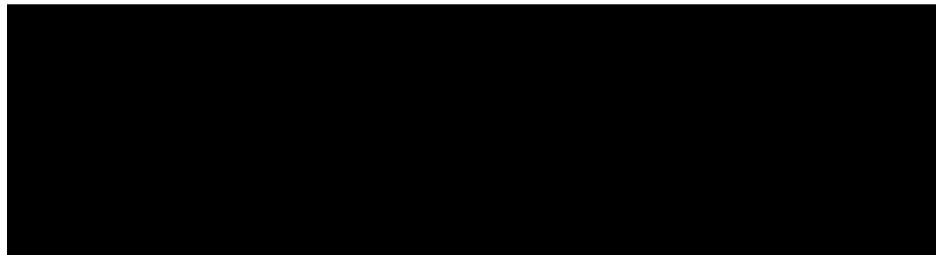
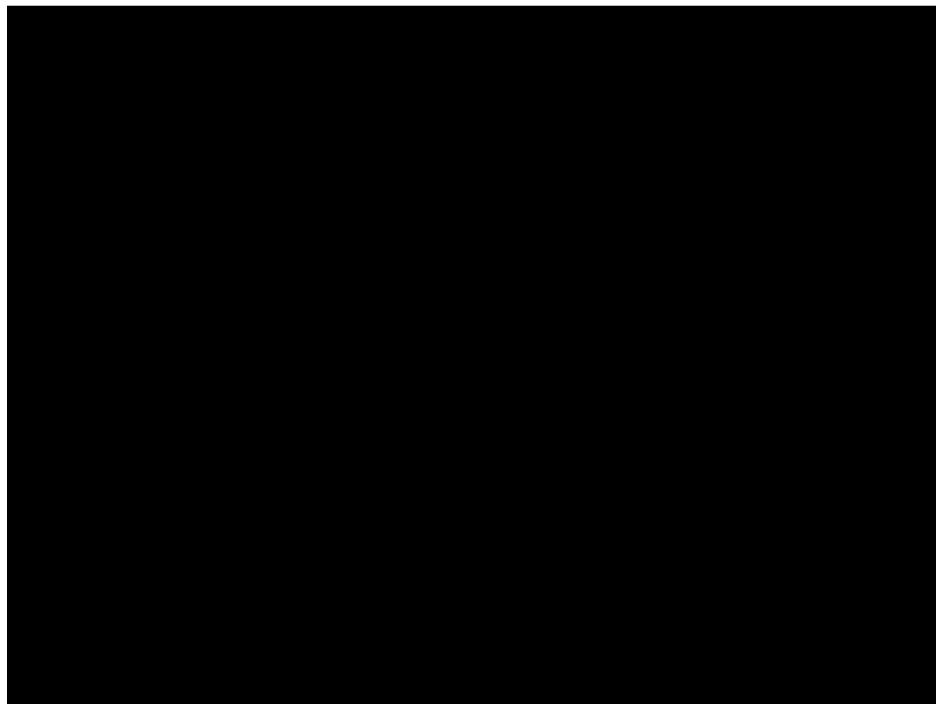
CALIFORNIA BUILDING INDUSTRY ASSOCIATION, Plaintiff and Respondent, v.
BAY AREA AIR QUALITY MANAGEMENT DISTRICT, Defendant and Appellant.

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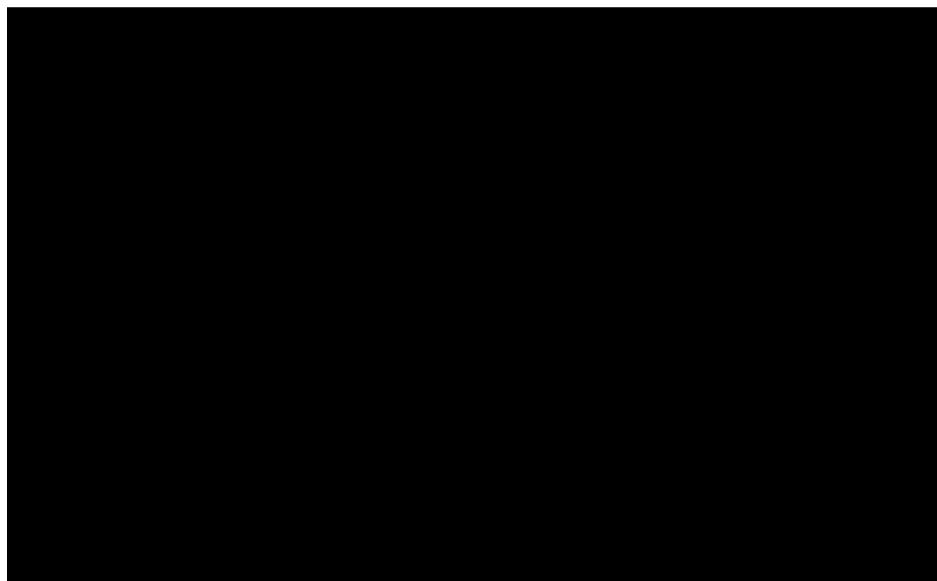
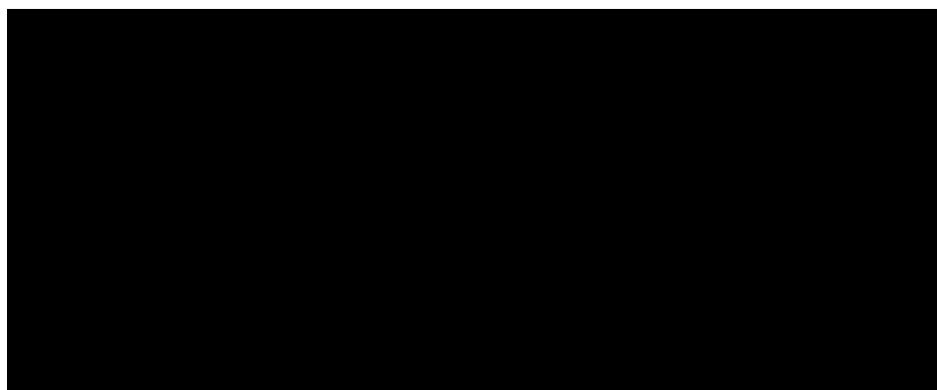
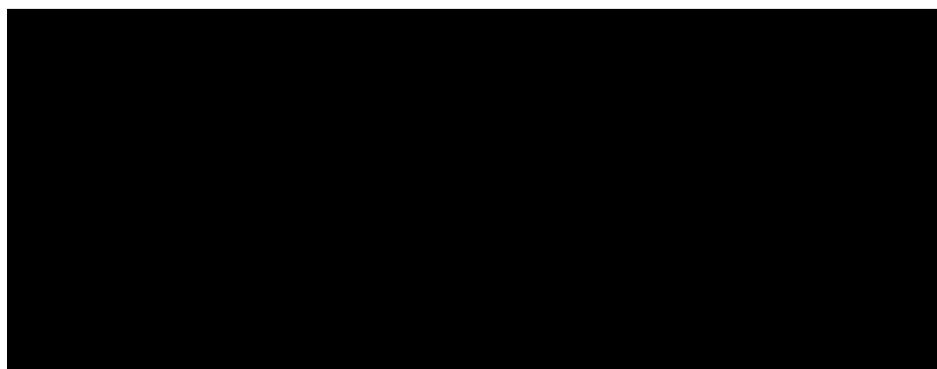
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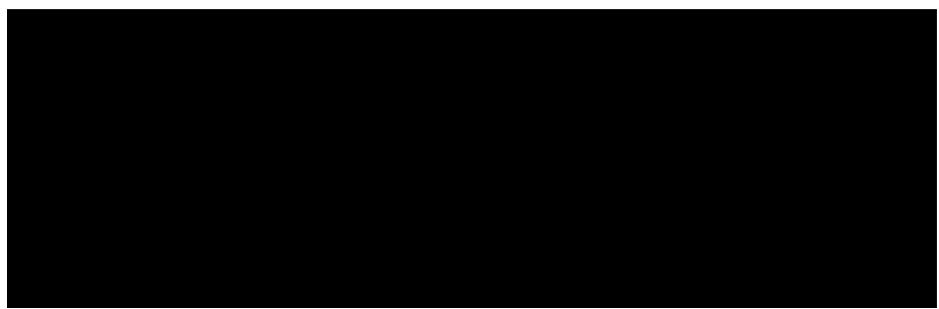
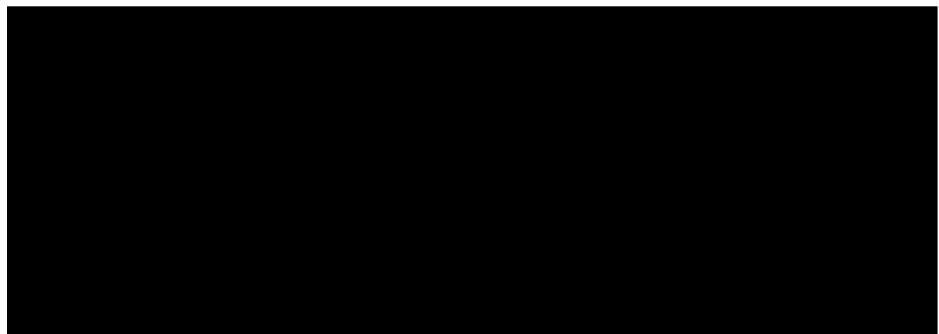
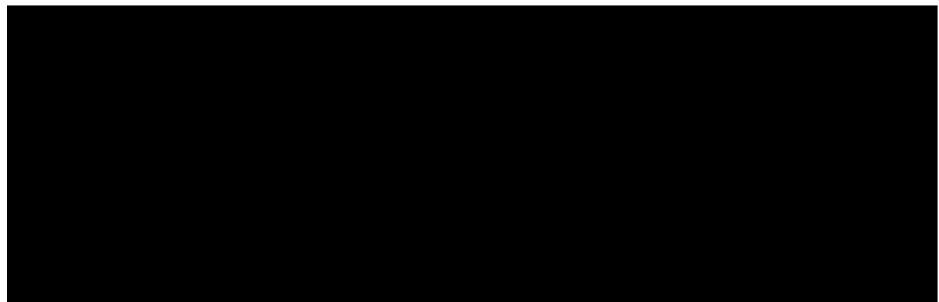
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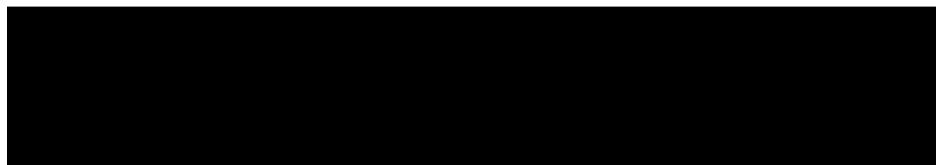
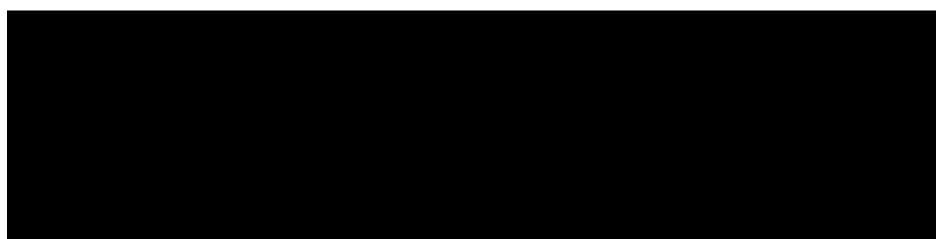
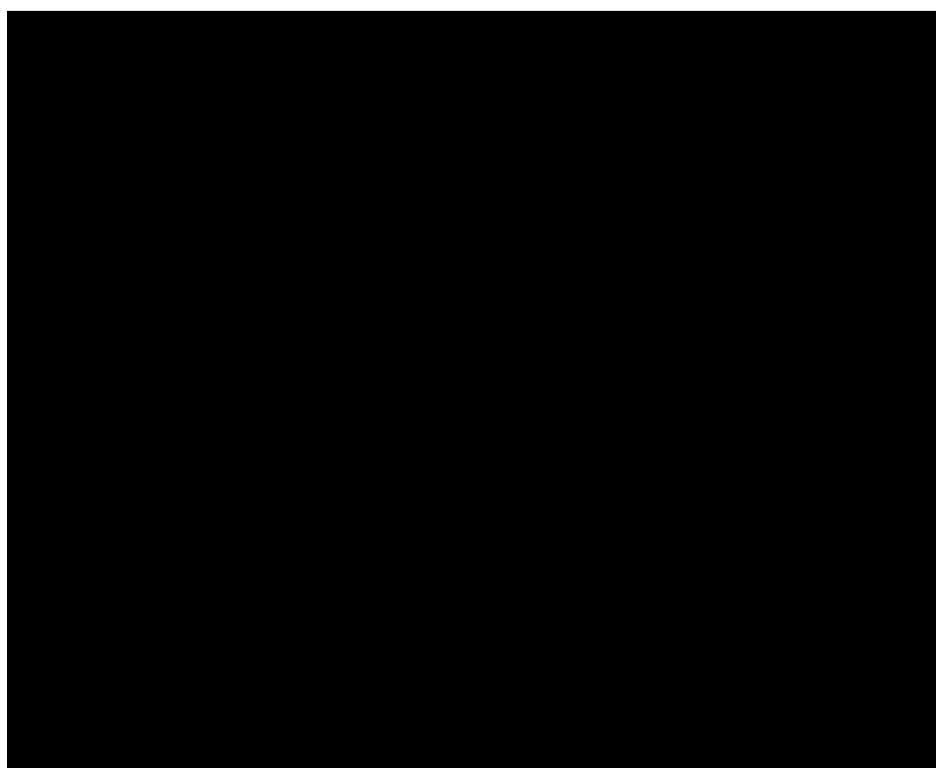


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COUNSEL

Shute, Mihaly & Weinberger, Ellison Folk, Erin B. Chalmers and Brian C. Bunger for Defendant and Appellant.

Ruby R. Fernandez for South Coast Air Quality District as Amicus Curiae on behalf of Defendant and Appellant.

Paula A. Forbis for County of San Diego as Amicus Curiae on behalf of Defendant and Appellant.

Matthew D. Vespa for Sierra Club and Center for Biological Diversity as Amici Curiae on behalf of Defendant and Appellant.

Burke, Williams & Sorensen and Thomas B. Brown for League of California Cities and California State Association of Counties as Amici Curiae on behalf of Defendant and Appellant.

Cox, Castle & Nicholson, Andrew B. Sabey, Christian Cebrian, Michael H. Zischke and Bradley B. Brownlow for Plaintiff and Respondent.

Perkins Coie and Geoffrey L. Robinson for Center for Creative Land Recycling as Amicus Curiae on behalf Plaintiff and Respondent.

OPINION

NEEDHAM, J.—The California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) requires public agencies to conduct an environmental review of discretionary projects they carry out or approve and to prepare an environmental impact report (EIR) for any project that may have a significant effect on the environment. (Pub. Resources Code, §§ 21151, 21100, 21080, 21082.2.) The CEQA guidelines¹ encourage public agencies to develop and publish “thresholds of significance” to assist in

¹ References to the “CEQA Guidelines” are to the regulations for the implementation of CEQA codified in title 14, section 15000 et seq. of the California Code of Regulations, which

determining whether a project's effect will be deemed significant. (CEQA Guidelines, § 15064.7.) "A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant." (*Id.*, subd. (a).)

Following a grant of review of our previous opinion in this case, the Supreme Court held CEQA "does not generally require an agency to consider the effects of existing environmental conditions on a proposed project's future users or residents." (*California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 392 [196 Cal.Rptr.3d 94, 362 P.3d 792] (*Building Association*)). It remanded the case to this court to consider whether thresholds of significance adopted by appellant Bay Area Air Quality Management District (District) ran afoul of this principle and the extent to which respondent California Building Industry Association (CBIA) was entitled to relief. (*Id.* at pp. 392–393.) We conclude the challenged thresholds are not invalid on their face, but may not be used for the primary purpose envisioned by District, namely, to routinely assess the effect of existing environmental conditions on future users or occupants of a project.

I. BACKGROUND

A. *The Thresholds and District Guidelines*

District is a regional agency charged with limiting nonvehicular air pollution in the San Francisco Bay Area. It is authorized to adopt and enforce rules and regulations regarding the emission of pollutants, and to ensure state and federal ambient air quality standards are met. (Health & Saf. Code, §§ 39002, 40000, 40001, subd. (a), 40200.) Among its other activities, District monitors air quality, engages in public outreach campaigns, issues permits to certain emitters of air pollution, and promulgates rules to control emissions. (Health & Saf. Code, §§ 42300, 42301.5, 42315.)

In 1999, District published thresholds of significance concerning certain air pollutants, along with guidelines concerning their use and the analysis of air quality issues, in general, under CEQA. District's 1999 thresholds and guidelines were intended to serve as a guide for those who prepare or evaluate air quality impact analyses for projects and plans in the San Francisco Bay Area, and set forth the levels at which toxic air contaminants (TACs) and certain types of particulate matter would be deemed environmentally significant.

have been developed by the Office of Planning and Research and adopted by the Secretary of the Natural Resources Agency. (Pub. Resources Code, § 21083.)

In 2009, District drafted new proposed thresholds of significance, partly in response to the Legislature's adoption of laws addressing greenhouse gases (GHGs). It cited three factors justifying the new thresholds: (1) the enactment of more stringent state and federal air quality standards since the adoption of the earlier thresholds and the addition of PM_{2.5} (particulate matter with a diameter of 2.5 microns or less) to the substances regulated; (2) the discovery that TACs present an even greater health risk than previously thought; and (3) the growing concern with global climate change.

A number of organizations, businesses, and local governments participated in public hearings, meetings, and workshops held by District regarding the proposed revisions. One participant was CBIA, a statewide trade organization representing members involved in residential and light commercial construction, including home builders, architects, trade contractors, engineers, designers, and other building industry professionals. During the public hearing process, CBIA and other groups expressed concern the proposed thresholds and guidelines were too stringent and would make it difficult to complete urban infill projects close to existing sources of air pollution. According to these groups, EIRs would be required for many projects where they otherwise would not have been, and other projects would not be approved. If these infill projects were not feasible, they argued, developers would build in more suburban areas, thus (paradoxically) causing even more pollution due to automobile commuter traffic.

On June 2, 2010, District's board of directors passed resolution No. 2010-06 (Resolution), adopting new thresholds of significance for air pollutants, including GHGs, TACs and PM_{2.5} (the Thresholds). As set forth in the Resolution, the Thresholds "reflect the levels at which environmental effects should be considered 'significant' for purposes of CEQA, such that exceedance of the [T]hresholds will normally establish that the effect is 'significant' under CEQA and compliance with the [T]hresholds normally will establish that the effect is less than 'significant' under CEQA."

The Thresholds, which were attached as exhibit A to the Resolution, set "[c]onstruction-[r]elated" and "[o]peration-[r]elated" significance levels for TACs and PM_{2.5} emissions, broken down into four separate categories: (1) "Risks and Hazards—New Source (Individual Project)"; (2) "Risks and Hazards—New Receptor (Individual Project)"; (3) "Risks and Hazards—New Source (Cumulative Thresholds)"; and (4) "Risks and Hazards—New Receptor (Cumulative Thresholds)." Relevant to this case are the significance levels applicable to a new receptor (Receptor Thresholds), as to which the Resolution states, "[I]t is the policy of the [District] that Lead agencies in the Bay Area apply the CEQA Thresholds of Significance for the Risk and Hazard thresholds

for Receptor Projects for Notices of Preparation issued, and environmental analyses begun, after January 1, 2011.”²

Also in 2010, District published new “CEQA Air Quality Guidelines” (District Guidelines), which include the Thresholds and suggest methods of assessing and mitigating impacts found to be significant. The self-stated purpose of these District Guidelines “is to assist lead agencies in evaluating air quality impacts of projects and plans proposed in the San Francisco Bay Area Air Basin (SFBAAB). The [District] Guidelines provide[] [District]-recommended procedures for evaluating potential air quality impacts during the environmental review process consistent with CEQA requirements. . . . [¶] Land development plans and projects have the potential to generate harmful air pollutants that degrade air quality and increase local exposure. The [District] Guidelines contain instructions on how to evaluate, measure, and mitigate air quality impacts generated from land development construction and operation activities. The [District] Guidelines focus on criteria air pollutant, greenhouse gas (GHG), toxic air contaminant, and odor emissions generated from plans or projects. [¶] The [District] Guidelines are intended to help lead agencies navigate through the CEQA process. The [District] Guidelines offer step-by-step procedures for a thorough environmental impact analysis of adverse air emissions due to land development in the Bay Area.” (District Guidelines, ¶ 1.1, p. 1-1.)

Paragraph 5.2.1, page 5-3, of the District Guidelines directs the lead agency to “determine whether operational-related TAC and PM_{2.5} emissions generated as part of a proposed project siting a new source or receptor would expose existing or new receptors to levels that exceed [the District’s] applicable *Thresholds of Significance*.” Paragraph 5.2.5, page 5-8, of the District Guidelines, entitled “Siting a New Receptor,” states: “If a project is likely to be a place where people live, play, or convalesce, it should be considered a receptor. It should also be considered a receptor if sensitive individuals are likely to spend a significant amount of time there. . . . Examples of receptors include residences, schools and school yards, parks and play grounds, daycare centers, nursing homes, and medical facilities. . . . [¶] When siting a new receptor, a Lead Agency shall examine existing or future proposed sources of TAC and/or PM_{2.5} emissions that would adversely

² The Receptor Thresholds set significance levels for the future occupants of a project if, within a 1,000-foot zone of influence, (1) the targeted emissions exceed compliance with a qualified community risk reduction plan; (2) the cumulative emissions from all sources of specified pollutants expose those occupants to an increased cancer risk greater than 100 in a million, or the emissions from a single source expose those occupants to an increased cancer risk greater than 10 in a million; or (3) there is an incremental annual average increase of more than 0.3 microgram of PM_{2.5} per cubic meter from a single source or 0.8 microgram per cubic meter from all sources. The same measures of significance were set for new sources of emissions (the “Source Thresholds,” which are not challenged by CBIA).

affect individuals within the planned project. A Lead Agency shall examine: [¶] • the extent to which existing sources would increase risk levels, hazard index, and/or PM_{2.5} concentrations near the planned receptor, [¶] • whether the existing sources are permitted or non-permitted by [the District], and [¶] • whether there are freeways or major roadways near the planned receptor. [¶] [The District] recommends that a Lead Agency identify all TAC and PM_{2.5} sources located within a 1,000 foot radius of the proposed project site.”

B. *CBIA’s Petition for Writ of Mandate and Complaint for Declaratory Relief*

On November 29, 2010, CBIA filed a petition for writ of mandate and complaint for declaratory relief challenging the Thresholds. (Code Civ. Proc., §§ 1060, 1085; Pub. Resources Code, § 21168.5.) The trial court conducted a hearing on the merits of the following claims: (1) District should have conducted a CEQA review of the Thresholds before their promulgation because they constitute a “project” within the meaning of CEQA; (2) the Receptor Thresholds were arbitrary and capricious to the extent they required an evaluation (impermissible under CEQA) of the impacts the environment would have on a given project; (3) aspects of the Thresholds were not based on substantial evidence; and (4) the Thresholds failed the “rational basis” test because sufficient evidence did not exist for their approval. Following a hearing, the court agreed District should have conducted an environmental review under CEQA before issuing the Thresholds and issued a writ of mandate directing District to set aside its approval of the Thresholds. The court awarded CBIA attorney fees under Code of Civil Procedure section 1021.5.

C. *District’s Appeal*

District appealed the order granting the writ and the award of attorney fees, arguing the Thresholds were not a project requiring a CEQA review prior to their promulgation. We agreed and reversed the order granting the writ. We also rejected CBIA’s defensive challenges to the sufficiency of the evidence supporting the Thresholds, as well as CBIA’s argument that the Receptor Thresholds should be set aside because the purpose of CEQA was to protect the environment from proposed projects, not to protect the future occupants or users of proposed projects from the environment. (See *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 473 [134 Cal.Rptr.3d 194]; *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1612–1616 [127 Cal.Rptr.3d 636]; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 905 [98 Cal.Rptr.3d 137]; *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, 1468 [37 Cal.Rptr.2d 93].)

With respect to this last issue, we declined to resolve whether, as a general rule, an EIR may be required solely because an existing project may adversely affect future users or occupants of a project. We found the issue was better reserved for a case in which the Receptor Thresholds had actually been applied to a project, and concluded the Receptor Thresholds were not invalid on their face because there were circumstances in which they could be utilized even if, as a general rule, CEQA did not require an analysis of the effect the existing environment would have upon future occupants or users. We also reversed the trial court's award of attorney fees, finding CBIA was no longer a successful party under Code of Civil Procedure section 1021.5. (*Building Association, supra*, 62 Cal.4th at p. 393.)

D. *Supreme Court Decision on Grant of Review*

CBIA filed a petition for review on the following issues: (1) whether CEQA requires an analysis of the impacts of the existing environment upon a project; (2) whether CEQA established a "blanket exemption" from environmental review for an agency's adoption of a rule, regulation or ordinance of general application adopted as a threshold of significance; and (3) whether CEQA applied a heightened evidentiary burden to the question of whether an activity is a project when the potential environmental change involves displaced development. The Supreme Court granted the petition in part, limiting the scope of review to the question: "Under what circumstances, if any, does CEQA require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?" (*Building Association, supra*, 62 Cal.4th at p. 381.)

In the proceedings before the Supreme Court on review, District took the position that "when existing environmental conditions on or near the proposed project site pose hazards to humans brought to the site by the project, the project may have potentially significant environmental effects requiring evaluation." (*Building Association, supra*, 62 Cal.4th at p. 386.) CBIA took the "contrasting view" that the relevant consideration when determining the need for an EIR was the project's effect on the environment, not the environment's effect on the project. (*Ibid.*) In its opinion, the Supreme Court agreed with CBIA as a general matter: "In light of CEQA's text and structure, we conclude that CEQA generally does not require an analysis of how existing environmental conditions will impact a project's future users or residents." (*Building Association, supra*, 62 Cal.4th at p. 386.)

In reaching this conclusion, the Supreme Court acknowledged District's argument that CEQA is concerned with public health and safety, and requires a finding of "'a significant effect on the environment'" ([Pub. Resources Code,] § 21083(b)) whenever the 'environmental effects of a project will

cause substantial adverse effects *on human beings*, either directly or indirectly.’ ([Pub. Resources Code,] § 21083(b)(3))’ (*Building Association, supra*, 62 Cal.4th at p. 386.) But the District’s reading of this language “goes too far The statute does not provide enough of a basis to suggest that the term ‘environmental effects’ as used in this context is meant, as a general matter, to encompass these broader considerations associated with the health and safety of a project’s future residents or users. [Public Resources Code s]ection 21060.5 defines ‘environment’ as ‘the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.’ ([Pub. Resources Code,] § 21060.5.) Given the text of [Public Resources Code] section 21083 and other relevant provisions of the statutory scheme to which it belongs—including CEQA’s statute-wide definition of ‘environment’—the phrase in question is best interpreted as limited to those impacts on a project’s users or residents that arise from the project’s effects on the environment. Even if one reads into CEQA’s definition of ‘environment’ a concern with people—a reading that, notwithstanding [Public Resources Code] section 21060.5, is conceivable given the Legislature’s interest in public health and safety—[Public Resources Code] section 21083 does not contain language directing agencies to analyze the environment’s effects *on* a project. Requiring such an evaluation *in all circumstances* would impermissibly expand the scope of CEQA.” (*Building Association*, at p. 387, *italics added*.)

The Supreme Court continued: “The rest of the statute’s relevant provisions underscore why. Despite the statute’s evident concern with protecting the environment and human health, its relevant provisions are best read to focus almost entirely on how projects affect the environment. (E.g., [Pub. Resources Code,] §§ 21060.5 [defining environment], 21068 [“Significant effect on the environment” means a substantial, or potentially substantial, adverse change in the environment’], 21083(b)(1) [directing that a project shall be found to have a “‘significant effect on the environment’” if it ‘has the potential to degrade the quality of the environment’].) Indeed, the key phrase ‘significant effect on the environment’ is explicitly defined by statute in a manner that does not encompass the environment’s effect on the project. (§ 21068 [“Significant effect on the environment” means a substantial, or potentially substantial, adverse change in the environment.’].) And nowhere in the statute is there any provision that cuts against the specificity of that definition by plainly delegating power for the agency to determine whether a project must be screened on the basis of how the environment affects its residents or users.” (*Building Association, supra*, 62 Cal.4th at p. 387.)

The court then turned its attention to CEQA Guidelines section 15126.2, subdivision (a), cited by District in support of its position that CEQA requires a consideration of the environment’s effect upon future users of a project.

CEQA Guidelines section 15126.2, subdivision (a) “calls for an EIR to ‘identify and focus on the significant environmental effects of the proposed project,’ including ‘any significant environmental effects the project might cause by *bringing development and people into the area affected.*’ (Italics added.)” (*Building Association, supra*, 62 Cal.4th at p. 385.) It further states: “[A]n EIR [should] ‘evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., flood-plains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas.’ ” (*Ibid.*; see CEQA Guidelines, § 15126.2, subd. (a).)

The Supreme Court found valid the above quoted portions of CEQA Guidelines section 15126.2, subdivision (a) “to the extent they call for evaluating a project’s potentially significant *exacerbating* effects on existing environmental hazards.” (*Building Association, supra*, 62 Cal.4th at p. 388.) “Because this type of inquiry still focuses on the *project’s impacts on the environment*—how a project might worsen existing conditions—directing an agency to evaluate how such worsened conditions could affect a project’s future users or residents is entirely consistent with this focus and with CEQA as a whole.” (*Id.* at p. 389.) But the court found two additional sentences contained in CEQA Guidelines section 15126.2, subdivision (a) to be “clearly erroneous and unauthorized under CEQA: ‘[A]n EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there.’ ” (*Building Association, supra*, 62 Cal.4th at p. 390.) These two sentences—which described a project that would not itself exacerbate the hazard, but whose occupants might be jeopardized by existing conditions—“impos[ed] a requirement too far removed from evaluating a project’s impacts on the environment.” (*Ibid.*)

The Supreme Court recognized statutory exceptions to the general rule that CEQA does not require an analysis of the environment’s effects upon a project. “Although CEQA does not generally require an evaluation of the effects of existing hazards on future users of the proposed project, it calls for such an analysis in several specific contexts involving certain airport (§ 21096) and school construction projects (§ 21151.8), and some housing development projects (§§ 21159.21, subds. (f), (h), 21159.22, subds. (a), (b)(3), 21159.23, subd. (a)(2)(A), 21159.24, subd. (a)(1), (3), 21155.1, subd. (a)(4), (6).)” (*Building Association, supra*, 62 Cal.4th at p. 391.) These provisions “constitute specific exceptions to CEQA’s general rule requiring consideration only of a project’s effect on the environment, not the environment’s effects on project users. Accordingly, we cannot, as the District urges, extrapolate from these statutes an overarching, general requirement that an

agency analyze existing environmental conditions whenever they pose a risk to the future residents or users of a project.” (*Id.* at p. 392.)

Having clarified that CEQA “does not generally require an agency to consider the effects of existing environmental conditions on a proposed project’s future users or residents” but does mandate “an analysis of how a project might exacerbate existing environmental hazards” (*Building Association, supra*, 62 Cal.4th at p. 392), the Supreme Court remanded the case to us to “address certain potentially important arguments for and against [CBIA’s petition for writ relief] in light of CEQA’s requirements” as it had interpreted them (*id.* at p. 393). We now consider the validity of the Receptor Thresholds in light of the Supreme Court’s decision in *Building Association*, and the relief, if any, to which CBIA is entitled with respect to those thresholds.

II. DISCUSSION

A. CEQA Review and Thresholds of Significance—General Principles

■ “CEQA embodies our state’s policy that “the long-term protection of the environment . . . shall be the guiding criterion in public decisions.”’ [Citations.] To implement this policy, CEQA and the Guidelines issued by the State Resources Agency have established a three-tiered process. [Citation.] In the first step, an agency conducts a preliminary review to determine whether CEQA applies to a proposed activity. [Citation.] If the project is exempt from CEQA, either because it is not a ‘project’ as defined in section 15378 of the Guidelines or because it falls within one of several exemptions to CEQA, ‘no further environmental review is necessary. The agency may prepare and file a notice of exemption, citing the relevant section of the Guidelines and including a brief “statement of reasons to support the finding.”’ [Citations.] If, however, the project does not fall within any exemption, the agency must proceed with the second tier and conduct an initial study. [Citation.] If the initial study reveals that the project will not have a significant environmental effect, the agency must prepare a negative declaration, briefly describing the reasons supporting the determination. [Citations.] Otherwise, the third step in the process is to prepare a full environmental impact report (EIR) on the proposed project.’” (*San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012, 1019–1020 [172 Cal.Rptr.3d 134].)

■ Under CEQA Guidelines section 15064.7, “(a) Each public agency is encouraged to develop and publish thresholds of significance that the agency uses in the determination of the significance of environmental effects. A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which

means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant. [¶] (b) Thresholds of significance to be adopted for general use as part of the lead agency's environmental review process must be adopted by ordinance, resolution, rule, or regulation, and developed through a public review process and be supported by substantial evidence." Such thresholds may be employed at various stages of CEQA review, but are not determinative and "cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant." (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 [11 Cal.Rptr.3d 104].)

B. Standard of Review

■ "Any statute, local ordinance or regulation that conflicts with state law is invalid and preempted." (*Mountains Recreation Conservation Authority v. Kaufman* (2011) 198 Cal.App.4th Supp. 1, 5 [130 Cal.Rptr.3d 844].) CBIA argues the Receptor Thresholds are invalid because they require agencies to consider the effect of existing environmental conditions upon future users and occupants of proposed projects, contrary to the Supreme Court's holding in *Building Association* that "CEQA does not require an agency to consider the impact of existing conditions on future project users" except for certain airport, school and housing development projects. (*Building Association, supra*, 62 Cal.4th at p. 378.) Questions concerning the interpretation or application of CEQA, and the consistency of local regulations with CEQA, are matters of law subject to de novo or independent review. (*Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1311 [154 Cal.Rptr.3d 682]; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1375 [44 Cal.Rptr.3d 128]; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 109–110 [126 Cal.Rptr.2d 441], disapproved on another ground in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1109, fn. 3 [184 Cal.Rptr.3d 643, 343 P.3d 834]; see *PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1305 [183 Cal.Rptr.3d 451].)

C. A Lead Agency Cannot Require an EIR or Mitigation Measures Based Solely on a Determination a Project Will Have a Significant Effect upon a New Receptor

■ District acknowledges in its brief on remand that the Receptor Thresholds "provide public agencies with a standard by which to determine whether future project residents or users will be exposed to an unacceptable

health risk because the project will be located near a source of toxic air pollution.” As the Supreme Court made clear in *Building Association*, CEQA does not generally require an agency to consider the effects of existing environmental conditions on a proposed project’s future users or occupants. (*Building Association, supra*, 62 Cal.4th at p. 392.) Consistent with *Building Association*, a lead agency could not require the preparation of an EIR, other CEQA review, or the implementation of mitigation measures for a proposed project solely because the emissions in the existing environment meet the criteria of the Receptor Thresholds as to future users or occupants of the project. District’s suggestion that local agencies could impose such a requirement by virtue of their police powers, if not under CEQA, raises an issue not properly before us because this case concerns only the scope of environmental review under CEQA.

D. *The Receptor Thresholds Have Valid Applications Under Certain Circumstances*

District argues that although “the mere exposure of people to existing hazards [does] not cause an environmental effect requiring analysis under CEQA,” the Receptor Thresholds need not be set aside because there are legitimate circumstances in which they could be utilized during the CEQA process. We consider each in turn.

1. *Voluntary Use of Receptor Thresholds by an Agency*

District contends that while CEQA does not generally require an evaluation of existing conditions upon future occupants or users of a proposed project, a public agency retains the discretion to make such an evaluation when conducting an analysis of its own project. It argues that in such cases, the Receptor Thresholds provide an appropriate measure of existing air pollution. We agree.

■ In *Building Association, supra*, 62 Cal.4th at page 388, the Supreme Court explained that CEQA “does not proscribe consideration of existing conditions” for the purpose of determining whether a proposed project would “exacerbate hazards that are already present.” It then noted, “Nor, for that matter, does CEQA prohibit an agency from considering—as part of an environmental review for a project it proposes to undertake—how existing conditions might impact a project’s future users or residents. Indeed, it appears that such an analysis had been widely understood to be an integral aspect of CEQA review for three decades. ([Off. of Planning & Research], CEQA: The California Environmental Quality Act: Law and Guidelines 1984 (Jan. 1984) Discussion of amendments, [CEQA] Guidelines former § 15126, p. 137 [dismissing as early as 1983 the alleged ‘artificial distinction’ between

examining ‘the effects of the project on the environment’ and ‘the effects of the environment on the project’].)’ (*Building Association, supra*, 62 Cal.4th at p. 388, fn. 12, italics added.)

CBIA suggests the Supreme Court’s reference to “an environmental review for a project it proposes to undertake” refers to planning and zoning decisions by an agency, rather than CEQA review as contemplated by the Receptor Thresholds. We do not think the Supreme Court would have used the term “environmental review” to mean something other than review under CEQA in a case involving the validity of thresholds of significance under CEQA, particularly when the sentence that follows notes that an analysis of how existing conditions might affect future users and residents “had been widely understood to be an integral aspect of CEQA review for three decades.” (*Building Association, supra*, 62 Cal.4th at p. 388, fn. 12.) We therefore construe footnote 12 of the *Building Association* decision to mean that while CEQA cannot be used by a lead agency to require a developer or other agency to obtain an EIR or implement mitigation measures solely because the occupants or users of a new project would be subjected to the levels of emissions specified, an agency may do so voluntarily on its own project and may use the Receptor Thresholds for guidance. (See *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 700–701 [177 Cal.Rptr.3d 677] [county not precluded from arguing it had voluntarily undertaken environmental review not required by CEQA].)

2. *Exacerbation of Existing Conditions*

■ District argues the Receptor Thresholds may be applied to any new project to determine whether it would worsen existing conditions and thus affect future users of the project. As the Supreme Court explained in *Building Association*: “[T]he statutory language [of CEQA] emphasizes how the analysis of a project’s potential to exacerbate existing conditions is not an exception to, but instead a consequence of, CEQA’s core requirement that an agency evaluate a project’s impact on the environment. . . . Because this type of inquiry still focuses on the *project’s impacts on the environment*—how a project might worsen existing conditions—directing an agency to evaluate how such worsened conditions could affect a project’s future users or residents is entirely consistent with this focus and with CEQA as a whole.” (*Building Association, supra*, 62 Cal.4th at p. 389.)

CBIA responds that the Receptor Thresholds are not the appropriate vehicle for measuring the exacerbating effects of a project on the existing environment. When such an analysis is required, CBIA argues, the proposed project is a *source* of environmental contamination, and its effect within the presumptive 1,000-foot zone of influence (including its effect upon persons

living in or working at the site of the project itself) would be measured by the Source Thresholds, which are not at issue at this stage of the appeal. We agree that conceptually, a proposed project that would itself worsen environmental conditions would be a source—but it would also be a receptor to the extent it brought users or occupants to the site. The Source Thresholds and Receptor Thresholds are numerically identical, and would presumably yield the same result when applied to a project likely to worsen environmental conditions. But while this might render the Receptor Thresholds *redundant* in certain cases, it does not mean they could not be used as a component in measuring the effects of such a project, as discussed in *Building Association*.

3. School Projects Under CEQA

■ The Supreme Court's decision in *Building Association* recognized “[a]lthough CEQA does not generally require an evaluation of the effects of existing hazards on future users of the proposed project, it calls for such an analysis” with respect to certain school projects. (*Building Association, supra*, 62 Cal.4th at p. 391.) District correctly argues the Receptor Thresholds could be used by a school district acting as a lead agency to determine such hazards.

Public Resources Code section 21151.8, subdivision (a)(1), provides that an EIR or negative declaration will not be approved for a project involving the purchase of a school site or the construction of a new elementary or secondary school unless those documents include information necessary to determine whether the property is located on certain hazardous sites or within 500 feet from the edge of a freeway or busy traffic corridor. The school district, as the lead agency, must consult with air quality districts and other agencies regarding facilities within one-quarter mile of the proposed school site “that might reasonably be anticipated to emit hazardous emissions or handle hazardous or extremely hazardous substances or waste.” (Pub. Resources Code, § 21151.8, subd. (a)(2)(A).) When specified facilities or sources of pollution have been identified, the governing board of the school district must make written findings that “(i) *The health risks from the facilities or other pollution sources do not and will not constitute an actual or potential endangerment of public health to persons who would attend or be employed at the proposed school.* [¶] (ii) Corrective measures required under an existing order by another agency having jurisdiction over the facilities or other pollution sources will, before the school is occupied, *result in the mitigation of all chronic or accidental hazardous air emissions to levels that do not constitute an actual or potential endangerment of public health to persons who would attend or be employed at the proposed school.* . . . [¶] (iii) For a schoolsite with a boundary that is within 500 feet of the edge of the closest traffic lane of a freeway or other busy traffic corridor, the governing

board of the school district determines, through analysis pursuant to paragraph (2) of subdivision (b) of Section 44360 of the Health and Safety Code, based on appropriate air dispersion modeling, and after considering any potential mitigation measures, that *the air quality at the proposed site is such that neither short-term nor long-term exposure poses significant health risks to pupils.*" (Pub. Resources Code, § 21151.8, subd. (a)(3)(B)(i)–(iii), italics added.)

■ The CEQA review of a school project thus requires the school district to consider whether specified existing sources of pollution are an "endangerment of public health" of persons at the school site, whether corrective measures could mitigate this danger, and whether air quality poses "significant health risks" to students. (Pub. Resources Code, § 21151.8, subd. (a)(3)(B)(i)–(iii).) The purpose of the Receptor Thresholds is to determine whether a project will have a significant effect on the environment.

■ A finding of significance is mandatory if "[t]he environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly." (Pub. Resources Code, § 21083, subd. (b)(3); CEQA Guidelines, § 15065, subd. (a)(4).) "In other words, while '[e]ffects analyzed under CEQA must be related to a physical change' ([CEQA] Guidelines, § 15358, subd. (b)), such a change may be deemed *significant* based solely on its impact on people." (*Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 779 [166 Cal.Rptr.3d 1] (*Parker Shattuck*)).

Although the suggested 1,000-foot zone of influence for the Receptor Thresholds does not correspond precisely to the quarter-mile (1,320-foot) radius within which sources of air pollution must be analyzed by a school district under Public Resources Code section 21151.8, subdivision (a)(2)(A), sections 5.1.3 and 5.2.5 of the District Guidelines recognize a lead agency may "enlarge the 1,000-foot radius on a case-by-case basis." (District Guidelines, ¶ 5.2.5, p. 5-8.) Given the confluence of purpose between measuring environmental significance as contemplated by the Receptor Thresholds, and measuring risks to human health as contemplated by the CEQA requirements for siting a new school, the levels of air pollution described by the Receptor Thresholds could be used by a school district to assess the health risk to students and employees at a proposed school site.³

³ Another exception to the general rule that CEQA does not require an evaluation of the effects of existing hazards on future users of a project is Public Resources Code section 21096 (noted in *Building Association, supra*, 62 Cal.4th at p. 391), which describes the procedures for "a project situated within airport land use compatibility plan boundaries, or, if an airport land use compatibility plan has not been adopted, for a project within two nautical miles of a public airport . . ." (Pub. Resources Code, § 21096, subd. (a).) It provides in relevant part, "A lead agency shall not adopt a negative declaration for [such a] project . . . unless the lead agency considers whether the project will result in a safety hazard or noise problem for persons using the airport or for persons residing or working in the project area." (Pub. Resources Code,

4. CEQA Exemptions for Housing Development Projects

The Public Resources Code exempts certain housing development projects from CEQA review when, among other things, “[t]he site of the project is subject to a preliminary endangerment assessment prepared by an environmental assessor to determine the existence of any release of a hazardous substance on the site and to determine the potential for exposure of future occupants to significant health hazards from any nearby property or activity.” (Pub. Resources Code, § 21159.21, subd. (f), italics added; see *id.*, §§ 21159.22, subd. (b)(3) [agricultural housing for employees], 21159.23, subd. (a)(2)(A) [low-income housing], 21159.24, subd. (a)(1) & (3) [urban infill projects].) “If a potential for exposure to significant hazards from surrounding properties or activities is found to exist, the effects of the potential exposure shall be mitigated to a level of insignificance in compliance with state and federal requirements.” (Pub. Resources Code, § 21159.21, subd. (f)(2).) Transit priority projects are treated similarly. (Pub. Resources Code, § 21155.1, subd. (a)(4), (4)(B).)

■ The Supreme Court in *Building Association* recognized these CEQA exemption statutes were exceptions to the general rule that CEQA did not require an evaluation of the effects of existing hazards on future users of a proposed project. (*Building Association*, *supra*, 62 Cal.4th at p. 391.) “[T]hese statutes reflect an express legislative directive to consider whether existing environmental conditions might harm those who intend to occupy or use a project site.” (*Ibid.*) A lead agency charged with CEQA review of a project governed by these statutes could apply the Receptor Thresholds to determine whether air quality posed a health risk to future occupants of a qualifying housing project.

Citing *Parker Shattuck*, *supra*, 222 Cal.App.4th at page 781, CBIA argues that future occupants of a housing project that is potentially eligible for an exemption are not part of the “environment” for CEQA purposes. This mischaracterizes the issue, which is not whether such future occupants are, in general, a part of the environment, but whether the statutes at issue create an exception to the general rule that CEQA does not require an assessment of the environment’s effect on a project. The court in *Parker Shattuck* concluded an EIR was not required for a project on a site with toxic soil contamination absent evidence the environment would be changed by a disturbance of the soil; although the project was not categorically exempt from CEQA review, “whether a project should be categorically exempt from CEQA is different from whether the project involves a significant effect on the environment.”

§ 21096, subd. (b), italics added.) The Receptor Thresholds concern air quality and emissions rather than safety hazards or noise problems, and would not appear germane to an analysis of an airport project under this section. District does not argue otherwise.

(*Parker Shattuck, supra*, 222 Cal.App.4th at p. 781.) Here, we are concerned not with the need for an EIR on a specific project, but with whether the significance levels set forth in the Receptor Thresholds may be used to evaluate whether a housing project was exempt from CEQA review. Consistent with the reasoning in *Building Association*, they may be used for this purpose.

5. Planning Decisions

■ District submits the Receptor Thresholds may be used to determine whether a particular project is consistent with a general plan. A project's inconsistency with a general plan does not itself mandate a finding the project will have a significant effect on the environment (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1207 [31 Cal.Rptr.3d 901]), and we can only speculate as to the ways in which the Receptor Thresholds might be applied when assessing plan consistency. (See *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 172–174 [188 Cal.Rptr. 104, 655 P.2d 306] (*Pacific Legal Foundation*) [issue of whether certain CEQA guidelines were valid was not a ripe controversy for purposes of declaratory relief because parties were inviting the court "to speculate as to the type of developments for which access conditions might be imposed, and then to express an opinion on the validity and proper scope of such hypothetical exactions" and it was "sheer guesswork to conclude that the Commission will abuse its authority by imposing impermissible conditions on any permits required"].) While we do not rule out the possibility that the Receptor Thresholds might be used by an agency for such a purpose, District has not provided us with a concrete example of such a use and we do not rely on this hypothetical purpose in deciding, as we discuss below, that the Receptor Thresholds are not invalid on their face.

E. Conclusion and Remedy

■ We have concluded a local agency might permissibly apply the measurements contained in the Receptor Thresholds to an environmental review conducted under CEQA in certain cases, even though the Receptor Thresholds cannot be used to require an EIR or the implementation of mitigating measures based solely on the impact the existing environment will have on future users or occupants of a project. CBIA argues that notwithstanding these permissible uses, the Receptor Guidelines must be set aside in their entirety because the District did not adopt them for the reasons now articulated. District, on the other hand, urges us to leave the Receptor Thresholds in place so they can be utilized when appropriate.

The Receptor Thresholds are simply numbers indicating when a project will ordinarily pose a risk to human health that will be deemed environmentally significant for CEQA purposes. CEQA requires or allows such an analysis with respect to the receptors of certain projects at various junctures in the environmental review process, but does not require such an analysis in other contexts. The Receptor Thresholds may be used by lead agencies to the extent permissible under CEQA, but any effort by an agency to require an EIR, mitigating measures, or other CEQA review under the Receptor Thresholds when one is not authorized would be subject to a strong legal challenge.

Because the Receptor Thresholds themselves may be used under certain circumstances consistent with CEQA, they are not “clearly erroneous and unauthorized” (*Building Association, supra*, 62 Cal.4th at p. 390) and need not be set aside in their entirety. However, the District Guidelines are misleading to the extent they contemplate an application of the Receptor Thresholds to evaluate the effect of the existing environment on all new receptors as a matter of course, a use that would be inconsistent with CEQA as interpreted by the Supreme Court in *Building Association, supra*, 62 Cal.4th 369.

We will remand the case to the trial court with instructions to partially grant CBIA’s petition for writ of mandate, and issue an order invalidating those portions of the District Guidelines suggesting that lead agencies should apply the Receptor Thresholds to routinely assess the effect of existing environmental conditions on future users or occupants of a project. The trial court may also consider and determine in the first instance the extent to which CBIA may be entitled to declaratory relief regarding the Receptor Thresholds and the limits to be placed upon their use. (Code Civ. Proc., § 1060.)

In a petition for rehearing, District argues writ relief is inappropriate because the District Guidelines are a nonbinding, advisory document and their review is premature given the lack of a specific controversy. We are not persuaded.

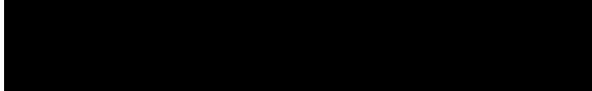
District relies on inapposite case law in which the courts declined to use the remedy of mandamus to set aside interim actions by an agency during a multilayered review process. (*California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676, 708–713 [175 Cal.Rptr.3d 448] [no present duty to redo preliminary funding plan]; *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1486 [75 Cal.Rptr.3d 393] [water assessment report providing information to be included in EIR was not final determination as necessary to obtain relief by mandamus].) The District Guidelines are not interim steps in a larger review

process; rather, they are interpretive guidelines for CEQA analyses promulgated by an air district that acts as either the lead agency or a responsible agency on projects within its jurisdictional boundaries.

For purposes of assessing the propriety of a writ of mandate, the District Guidelines are akin to the guidelines issued by the California Coastal Commission and challenged in *Pacific Legal Foundation, supra*, 33 Cal.3d at page 163. Those guidelines, though not binding on any agency, explained the commission's interpretation of the public beach access provisions of the California Coastal Act of 1976 (Pub. Resources Code, § 30000), and were asserted to be invalid on their face because they required property owners to dedicate easements giving beach access to the public as a condition of obtaining permit approval for proposed developments. Noting that the promulgation of the access guidelines was a quasi-legislative act reviewable by an action for declaratory relief or traditional mandamus (as opposed to administrative mandamus), the court went on to consider whether a ripe controversy existed. (*Id.* at p. 169.)

Turning to the question of whether the challenge to the California Coastal Commission's guidelines was ripe, the court applied a standard used by the federal courts and considered "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." (*Pacific Legal Foundation, supra*, 33 Cal.3d at p. 171, italics omitted.) It concluded the facial challenge to the guidelines was not ripe: "Although it may be predicted with assurance that some of the plaintiff landowners will eventually wish to make improvements on their property, it is sheer guesswork to conclude that the Commission will abuse its authority by imposing impermissible conditions on any permits required. The guidelines are not mandatory. *They do not require the Commission to impose access conditions in any particular circumstances, but rather adopt a flexible approach: the Commission is to determine the appropriateness of access exactions on a case-by-case basis.*" (*Id.* at p. 174, italics added.)

Unlike the California Coastal Commission guidelines at issue in *Pacific Legal Foundation*, the District Guidelines do not call for the Receptor Thresholds to be applied to projects on a case-by-case basis. Instead, they suggest a routine analysis of whether new receptors will be exposed to specific amounts of toxic air contaminants. Given the clarity of the Supreme Court's decision that such an analysis oversteps the bounds of CEQA except in specified circumstances (*Building Association, supra*, 62 Cal.4th at p. 392), the issue is fit for judicial determination. The ripeness 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." (*Pacific Legal Foundation, supra*, 33 Cal.3d at p. 170.)



F. Attorney Fees

After the trial court initially entered judgment in favor of CBIA and granted its petition for writ of mandate directing District to set aside its approval of the Thresholds, it awarded CBIA attorney fees under Code of Civil Procedure section 1021.5. Under that statute, which codifies the private attorney general doctrine, attorney fees are available “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.”

Although we reversed the initial judgment in CBIA’s favor and accordingly reversed the trial court’s award of attorney fees, CBIA has now prevailed in part on one of the issues it raised in this proceeding. Partially successful plaintiffs may recover attorney fees under Code of Civil Procedure section 1021.5. (*Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1345 [39 Cal.Rptr.3d 550].)

 We agree with CBIA that its claim for attorney fees under Code of Civil Procedure section 1021.5 should be considered by the trial court in the first instance. (*Arden Carmichael, Inc. v. County of Sacramento* (2000) 79 Cal.App.4th 1070, 1079 [94 Cal.Rptr.2d 673] [“Whether a party is entitled to an award of attorney fees under the private attorney general statute is an issue best decided in the first instance in the trial court”]. The trial court should determine CBIA’s entitlement to attorney fees on appeal and the amount of any such fees (including fees for proceedings in the Supreme Court), in addition to the fees it awards, if any, for the litigation in the trial court. (See *Bjornestad v. Hulse* (1991) 229 Cal.App.3d 1568, 1598–1599 [281 Cal.Rptr. 548].)⁴

DISPOSITION

The trial court’s judgment entered on March 12, 2012, which granted CBIA’s petition for writ of mandate and directed District to set aside its approval of the Thresholds in their entirety, is reversed, consistent with our prior opinion in this case. The case is remanded to the trial court for further

⁴ CBIA’s request for judicial notice, filed April 22, 2016, is denied as unnecessary to our analysis. District’s request for judicial notice filed on May 6, 2016, in support of its opposition to CBIA’s request for judicial notice, is denied as moot.

[REDACTED]

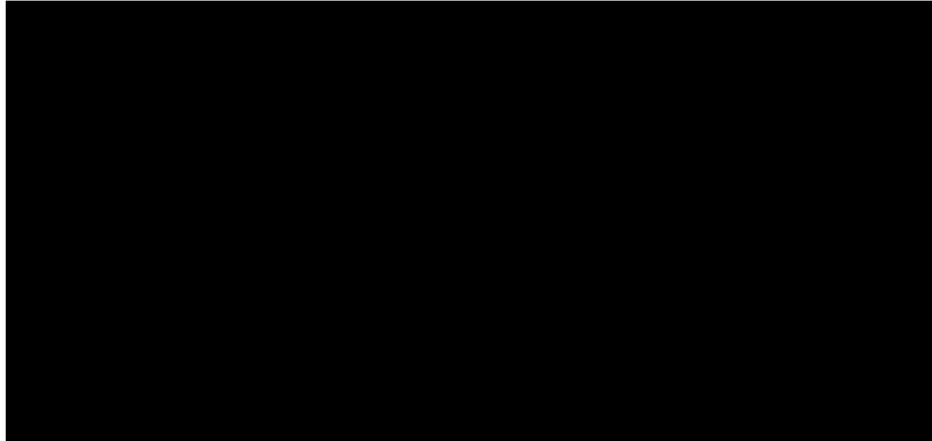
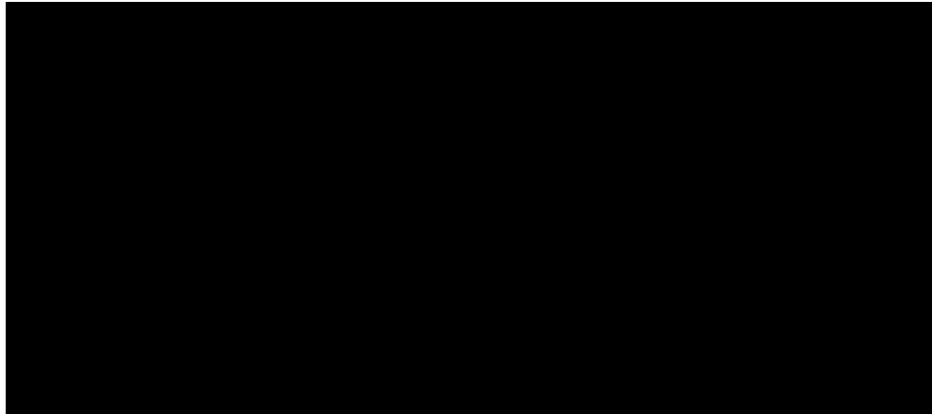
action consistent with this opinion and the Supreme Court's decision in *Building Association, supra*, 62 Cal.4th 369, including but not limited to the issuance of an order partially granting CBIA's petition for writ of mandate. The trial court shall also consider CBIA's request for attorney fees under Code of Civil Procedure section 1021.5 in light of the proceedings in the trial court and on appeal. The parties shall bear their own costs on this appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

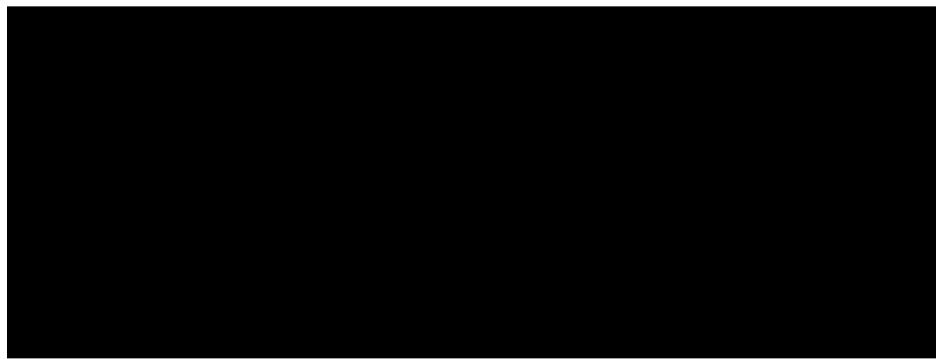
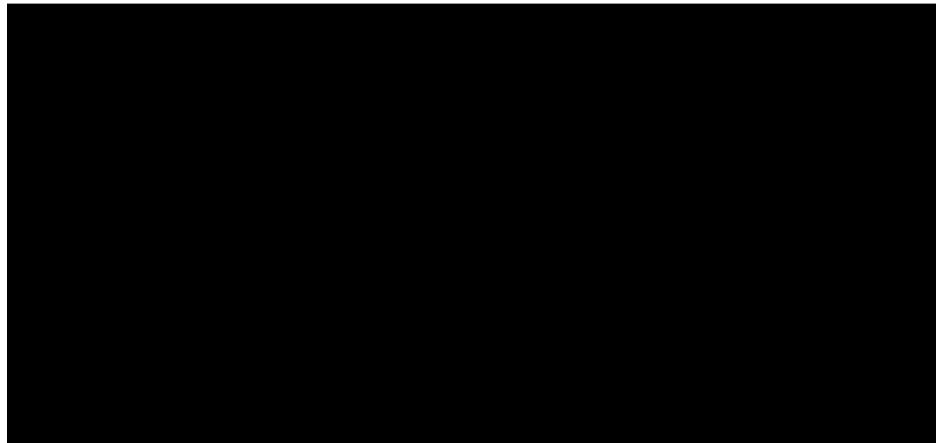
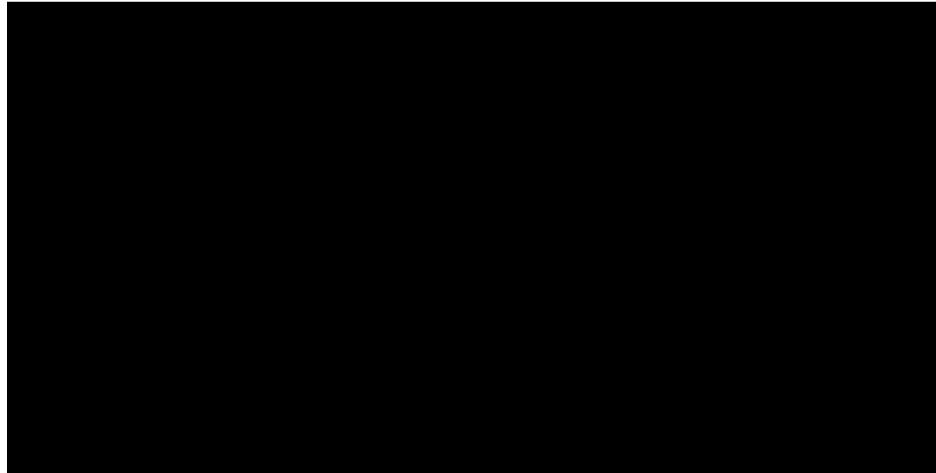
Jones, P. J., and Bruiniers, J., concurred.

A petition for a rehearing was denied September 9, 2016, and the opinion was modified to read as printed above.

[No. B264619. Second Dist., Div. Four. Aug. 30, 2016.]

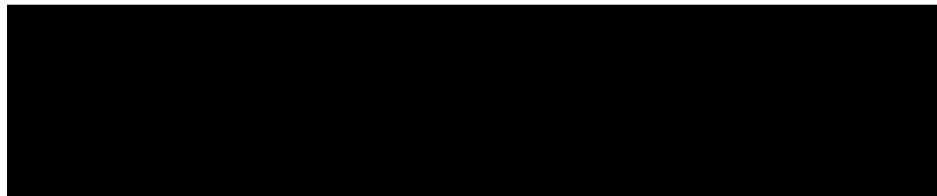
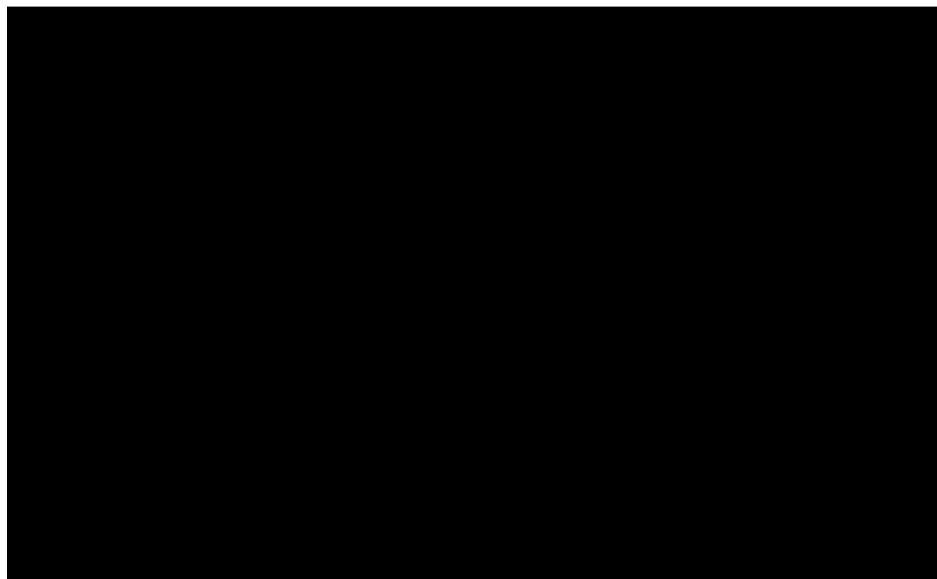
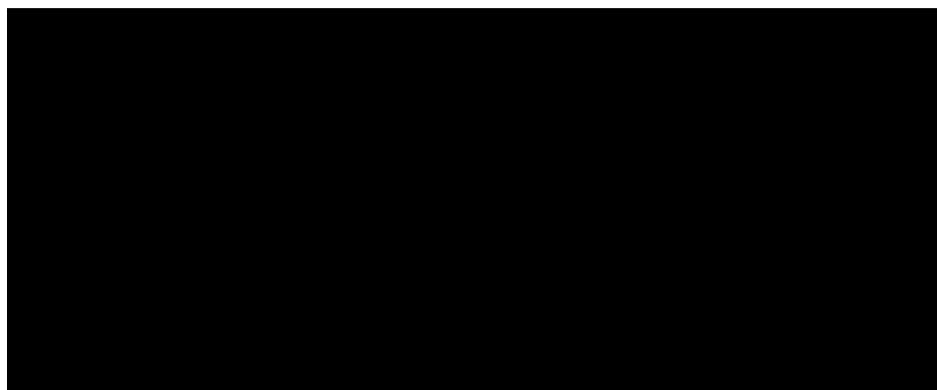
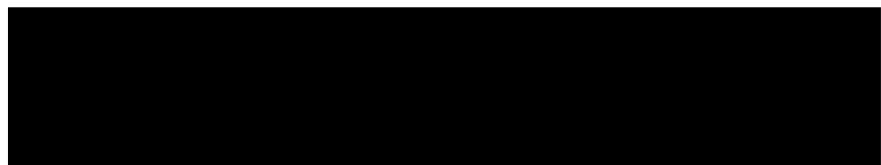
ROYAL ALLIANCE ASSOCIATES, INC., Plaintiff and Appellant, v.
SANDRA L. LIEBHABER et al., Defendants and Respondents.





1094





OPINION

COLLINS, J.—Appellant Royal Alliance Associates, Inc., a securities brokerage firm, petitioned to confirm an arbitration award recommending expungement of an allegation of misconduct from the record of one of its employees, Kathleen J. Tarr. The individual who made the allegation of misconduct, Sandra Liebhaber, petitioned to vacate the same arbitration award. Liebhaber argued that the arbitrators violated the rules applicable to the arbitration and refused to hear evidence she sought to introduce and cross-examination she sought to elicit. The Financial Industry Regulatory Authority, Inc. (FINRA), under whose auspices and rules the arbitration at issue was performed, also petitioned to vacate the award on similar grounds.

The trial court denied Royal Alliance's petition to confirm the award and granted Liebhaber's and FINRA's petitions to vacate, ruling that the arbitrators exceeded their powers and that Liebhaber's rights were substantially prejudiced by the arbitrators' misconduct and refusal to hear material evidence. Royal Alliance appealed, and we affirm. The arbitrators denied Liebhaber a full and fair opportunity to introduce and challenge evidence material to the expungement proceedings to which she was a party. The arbitrators' refusal to hear Liebhaber's evidence and cross-examination deprived Liebhaber of a fair hearing and substantially prejudiced her rights within the meaning of Code of Civil Procedure section 1286.2.

BACKGROUND**I. Underlying Action**

Royal Alliance is a securities broker-dealer. It employed Tarr as a financial advisor from July 2002 to July 2010. Liebhaber was a client of Royal Alliance who obtained financial advice from Tarr in 2007.

Royal Alliance is a member of FINRA, a self-regulatory organization (15 U.S.C. §§ 78c(a)(26), 78s(b)) that is “‘‘responsible for regulatory oversight of all securities firms that do business with the public; professional training, testing and licensing of registered persons; [and] arbitration and mediation’’ [citation]’’ of disputes that arise between investors and securities firms. (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1128 [146 Cal.Rptr.3d 173]; see also 72 Fed.Reg. 42169, 42170 (Aug. 1, 2007).) In its capacity as a self-regulatory organization, FINRA has promulgated a variety of rules governing the conduct of its members and persons associated with them. (See FINRA Rules, rule 0140(a).) Royal Alliance and Liebhaber both agreed to be bound by FINRA's rules,

including those pertinent to dispute resolution. We granted Royal Alliance's request for judicial notice of several FINRA rules and related materials.

In May 2013, Liebhaber filed a statement of claim against Royal Alliance with FINRA. Liebhaber alleged that Tarr sold her "illiquid, high-risk investments" that were "inappropriate and unsuitable" for her individual retirement account. Liebhaber further claimed that Royal Alliance was negligent, breached its fiduciary duty to her, and violated state securities laws. She sought \$325,000 in compensatory damages.

Liebhaber and Royal Alliance agreed to submit to binding arbitration of Liebhaber's claims "in accordance with FINRA By-Laws, Rules, and Code of Arbitration Procedure." Liebhaber and Royal Alliance ultimately settled the case for \$30,000 after an arbitration panel was convened but before an arbitration hearing was held.

II. *Expungement Proceedings*

In accordance with FINRA rules and regulations, Liebhaber's allegations against Tarr were documented in FINRA's Central Registration Depository (CRD), an electronic database containing "information reported in connection with the registration or licensing of brokers and dealers and their associated persons, including disciplinary actions, regulatory, judicial, and arbitration proceedings" (15 U.S.C. § 78o-3(i)(1)(A) & (i)(5).) (*Lickiss v. Financial Industry Regulatory Authority, supra*, 208 Cal.App.4th at p. 1128.) Information contained in the CRD is accessible to securities firms and regulators. Certain customer complaints and allegations of misconduct documented in the CRD also are available to the public via FINRA's "BrokerCheck" website. Liebhaber's allegations against Tarr were publicly accessible and remained so after the case was settled.

After Liebhaber's claims were settled, Royal Alliance requested that the arbitrators keep the case open because it intended to seek expungement of Liebhaber's allegations from Tarr's CRD record. FINRA rules require requests for expungement to be presented to either a court of competent jurisdiction or a FINRA arbitration panel. (See FINRA Rules, rules 2080(a), 12805.) Royal Alliance submitted a request for expungement on behalf of Tarr to the previously convened FINRA arbitration panel on June 9, 2014. Liebhaber remained a party to the case, but Tarr was not named as a party.

On June 30, 2014, Liebhaber's counsel advised the arbitration panel that he did not intend to file a prehearing brief but planned to call Liebhaber and Tarr as witnesses at the arbitration hearing. The record does not indicate whether Royal Alliance or the arbitration panel responded to this advisement. Also absent is the written evidence the parties submitted prior to the hearing.

The three-member panel of arbitrators held a telephonic arbitration proceeding on August 12, 2014. Liebhaber and her counsel, Robert S. Banks, Jr., were on the call, as were Royal Alliance and its counsel, Kasumi L. Takahashi. Takahashi informed the arbitrators that Tarr was on the line as well; “[s]he’s here to offer any additional testimony and answer any questions that the panel may have of her”

Takahashi argued that expungement was warranted because Liebhaber’s allegations against Tarr were false. She contended that the investments Tarr recommended were suitable for Liebhaber, and Liebhaber’s alleged net losses could be attributed to her large withdrawals from her retirement account and “the 2008 market crash.” Takahashi also noted that a complaint similar to Liebhaber’s previously had been expunged from Tarr’s record.

At the conclusion of her argument, Takahashi informed the arbitrators that Tarr had “a couple things that she would like to say to the panel before we kick it over to the claimant’s counsel.” The presiding arbitrator said that Tarr could speak, and Liebhaber’s counsel did not object. No oath was administered to Tarr, who presented a lengthy narrative description of her interactions with and advice to Liebhaber. Tarr also noted that she was “the daughter and granddaughter of ministers” and emphasized the “vigorous” nature of her opposition to Liebhaber’s allegations. No one interrupted Tarr with questions or objections. When Tarr concluded her remarks, Takahashi informed the panel that Royal Alliance had nothing further to present.

In his response argument, Banks contended that Royal Alliance failed to show that Liebhaber’s complaints against Tarr were false or factually impossible. He also emphasized the importance of making complete (i.e., not expunged) CRD and BrokerCheck records available to brokerage firms and the general public.

At the conclusion of his argument, Banks told the arbitrators, “I guess I would like to ask some questions of Ms. Tarr and I would also like to ask some questions of Ms. Liebhaber so that you can have a little bit more information before you make the decision that they’re asking you to make.” Takahashi objected to “counsel’s proposed procedure for this hearing.” She argued, “This is a hearing on a request for expungement, it’s not a hearing on the merits of the case. The underlying case was settled. The only question before the panel right now is whether or not the claim should be expunged based on the falsity of allegations, so I would request that we not hear from the claimant at this time and that we have a chance to rebut the opposition.”

The presiding arbitrator commented, “I believe Ms. Tarr didn’t say anything substantive that is not already on the record on her behalf with respect

to the declaration. I listened carefully to Mr. Banks and I think he, based on the documents that I've seen, has covered all the important points. [¶] I don't see that any testimony as such is necessary, setting aside whether it's proper and has not been in effect perhaps prepared for by everybody here, so I'm inclined to think that we should leave it at that, unless Mr. Banks has further argument by himself and go from there." He then asked for input from his fellow panel members. One of them commented that she would like to hear from Liebhaber and Tarr. She thought it was "important to hear the questioning," and commented that "the guidelines are pretty clear that we're supposed to be looking at everything because this was a settled case, and that the more information we have, the easier it is for us to make what I would consider to be a fair and well reasoned decision regarding expungement."¹ She then added, "[t]hat's just my thought as long as we're not going to be here for another two hours."

The presiding arbitrator responded, "Well, how can we make sure we're not going to be here for another two hours? That's the problem. [¶] I appreciate your comments and I think that's in the best of all possible worlds how it should be." The third arbitrator then commented that she agreed with the presiding arbitrator. "[W]ith the greatest respect, I think that allowing claimant's counsel to question Ms. Tarr is out of order, and . . . I do think that that's not the purpose of this hearing, and if it is and the panel needs to be corrected on that, because some of the—this is kind of a new process that has not been well defined, then we can be corrected on that, but I would be very comfortable with the information, and I'm comfortable with us asking Ms. Tarr questions, but I am uncomfortable with claimant's counsel cross-examining her in any way." The second arbitrator stated that she was "good with that." The presiding arbitrator then denied Banks's "request to take testimony from the claimant and to allow questioning by counsel of the respondent."

Banks stated for the record that he "must vigorously object to the panel's denying me an opportunity to question Ms. Tarr about the very events that

¹ The "guidelines" the arbitrator mentioned are not regulations or rule interpretations promulgated through formal administrative procedures. They consist of a numbered list that appears on a FINRA webpage entitled "Notice to Arbitrators and Parties on Expanded Expungement Guidance" and within FINRA's "Expungement Training" materials. In both places, the list reads as follows: "It is important to allow customers and their counsel to participate in the expungement hearing in settled cases if they wish to. Specifically, arbitrators should: 1) allow the customer and their counsel to appear at the expungement hearing; 2) allow the customer to testify at the expungement hearing; 3) allow counsel for the customer or a *pro se* customer to introduce documents and evidence at the expungement hearing; 4) allow counsel for the customer or a *pro se* customer to cross-examine the broker and other witnesses called by the party seeking expungement; and 5) allow counsel for the customer or a *pro se* customer to present opening and closing arguments if the panel allows any party to present such arguments."

she is asking you to expunge her record on.” He further stated that he “had a number of questions for Ms. Tarr that went into how she came to meet Ms. Liebhaber, what advice she gave her, questions about the suitability of the investments, whether she considered certain factors about these investments she was recommending, how much time she spent giving her the advice she gave her and what she told her about whether she should take this early retirement at age 47.” The presiding arbitrator thanked Banks for his comments and asked Takahashi to proceed with her rebuttal, which consisted primarily of argument that Banks’s comments were not relevant to the issue of expungement.

After the arbitrators asked a few questions, Banks asked the presiding arbitrator if he could “have a few words, please?” Takahashi objected, and the presiding arbitrator sustained her objection after confirming that the other panel members did not want any more information.

The presiding arbitrator thanked counsel for “the very high degree of advocacy on both sides” and indicated that the panel intended to commence deliberations. Banks asked if he could make his record, and despite the presiding arbitrator’s response that “I don’t think there’s any necessity on my behalf to have it on the record here,” Banks commented, “I feel like I have not been given a full and fair opportunity to respond to this, the claims that have been made in the hearing.” Banks continued, “my client is here prepared to testify, there have been statements about expungements previously granted, information has been admitted about expungements that have been denied, and I think that those are all important matters, but if you don’t—if you won’t let me talk about them, I won’t.” The presiding arbitrator asked the others for their thoughts, and one of them said to Banks, “I think that you may add more information in your mind’s eye, but again, I don’t think it’s going to dramatically impact my part, my participation in the deliberations, and really with a lot of respect I say that to you.” The third arbitrator echoed these comments, adding, “we’ve followed the process and the procedure and the rule as it’s stated and I’m very confident that—and I do appreciate, Mr. Banks, how strongly you feel opposing respondent’s request for expungement, but I’m confident that we’ve allowed all the information that we need to make a good decision.”

The arbitration panel issued an award recommending expungement on September 10, 2014. The panel, tracking the language of FINRA Rules, rule 2080, found that Liebhaber’s “claim, allegation, or information” against Tarr was “factually impossible or clearly erroneous; and [¶] The claim, allegation, or

information is false.”² The panel cited several reasons for its findings, including the sizable difference between the damages Liebhaber alleged (\$325,000) and the amount she accepted from Royal Alliance to settle her claims (\$30,000). The panel concluded the amount of the payment reflected a business decision by Royal Alliance rather than Liebhaber’s actual net out-of-pocket losses. The panel also made the following findings:

“In late 2007, Claimant [Liebhaber] opened an Individual Retirement Account with Respondent [Royal Alliance] with an initial deposit of \$315,000.00. Claimant was approximately 47 years of age. Non-party Kathleen Tarr was her broker of record. Stating that her investment objectives were long-term growth and income, with a moderate investment risk, Claimant purchased four separate variable annuities and a real estate investment trust (‘REIT’) paying over 6% per annum. Almost 15% of her investable monies remained in cash. [¶] Claimant stated in her Statement of Claim that these investments were not suitable for her. The statement of non-party Kathleen Tarr was that the annuities were invested in a broad-based portfolio which matched Claimant’s investment objectives and risk tolerance. *This information was not disputed by Claimant.* [¶] Claimant did not add any additional monies to her IRA. Claimant regularly received or took distributions from her IRA. Claimant sold one variable annuity in December 2011. [¶] At the time of the expungement hearing, non-party Kathleen Tarr stated that it was her understanding and belief that Claimant still owns the same three variable annuities as well as the REIT. *This information was not disputed by Claimant. No other evidence or information regarding suitability was offered by Claimant.*

“Respondent argued that any losses incurred by Claimant were ‘paper’ losses due to the economic downturn of 2008–2009. By continuing to hold her assets, Respondent argued that Claimant no longer has incurred losses, and, to the contrary, has benefited from the upturn in the economy. *This argument was not disputed by Claimant.*

“The Panel finds that the statements offered by non-party Kathleen Tarr during the telephonic hearing were credible. The Panel finds that the

² FINRA Rules, rule 12805(c) requires arbitrators presiding over expungement proceedings to “Indicate in the arbitration award which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement order and provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case.” The pertinent Rule 2080 grounds are “(A) the claim, allegation, or information is factually impossible or clearly erroneous; [¶] (B) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or [¶] (C) the claim, allegation, or information is false.” (FINRA Rules, rule 2080(b)(1).)

investments were suitable for Claimant, and that the claim or allegation of unsuitability is clearly erroneous.

“The Panel finds that based upon the documents described above, the statements and other information presented at the telephonic hearing, and the Settlement Agreement, Claimant’s argument that the \$30,000.00 [settlement] payment reflected [net out-of-pocket] losses is not true. *In addition, there is no documentation or other evidence to support a claim that Claimant suffered losses as a result of non-party Kathleen Tarr’s actions, or Respondent’s actions or inactions.*” (Italics added.)

The panel charged Royal Alliance with all applicable fees. (See FINRA Rules, rule 12805(d).)

III. Petitions to Confirm and Vacate

FINRA Rules, rule 2080(a) requires parties seeking expungement of customer complaints from a CRD record to “obtain an order from a court of competent jurisdiction directing such expungement or confirming an arbitration award containing expungement relief.” (FINRA Rules, rule 2080(a).) In accordance with this rule, Royal Alliance filed a petition under Code of Civil Procedure section 1285³ to confirm the arbitration award. Royal Alliance included with its petition the parties’ signed consent forms agreeing to arbitration and a copy of the expungement award. Pursuant to FINRA Rules, rule 2080(b), parties “seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents unless this requirement is waived.” Royal Alliance named both Liebhaber and FINRA as respondents in its petition.

In her answer opposing the petition, Liebhaber requested that the award be vacated pursuant to sections 1286.2 and 1286.4. She asserted three grounds for vacation: “(a) Liebhaber’s rights were substantially prejudiced by misconduct of the arbitrators; (b) the arbitrators exceeded their powers in denying Liebhaber’s request to present evidence at the hearing; and (c) Liebhaber’s rights were substantially prejudiced by the refusal of the arbitrators to hear evidence material to her claims.” Liebhaber attached several exhibits to her filing, including her statement of claim, a transcript of the arbitration hearing, Tarr’s BrokerCheck report, and FINRA publications titled Neutral Corner, Dispute Resolution Expungement Arbitrator Training Manual, and Notice to Arbitrators and Parties on Expanded Expungement Guidance.

In her accompanying memorandum, Liebhaber argued that the arbitration panel “failed to hold an adequate hearing on expungement in violation of

³ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

FINRA Rules, rule 12805 by refusing Liebhaber’s request to testify, and to cross-examine the broker Tarr.” She further contended that the arbitrators “allowed Royal Alliance to present its case for expungement in its entirety” but did not allow her to question either of the witnesses she wanted to call, herself and Tarr. Liebhaber emphasized that the arbitrators’ award repeatedly stated that she failed to offer evidence or dispute Royal Alliance’s evidence, and contended that “no evidence was presented or information not disputed [sic] because the arbitrators did not allow Ms. Liebhaber to present any evidence at the hearing despite her appearance and multiple requests to do so.”

FINRA also opposed Royal Alliance’s petition and sought to vacate the arbitration award. FINRA took “no position on the merits of the underlying case,” but “oppose[d] expungement of the arbitration from FINRA’s regulatory database because the arbitrators failed to follow FINRA rules governing such expungements,” specifically rules 2080 and 12805. FINRA argued that the expungement hearing “was fatally defective because Tarr, the broker seeking expungement, was permitted to testify unsworn without cross examination, while her customer Liebhaber, who opposed expungement, was denied the right even to speak, with or without cross examination. As a result, the award’s findings were not properly made under FINRA Rule[s, rule] 2080 (which governs arbitrator-ordered expungements).” FINRA further contended that the arbitrators exceeded their powers by violating applicable FINRA rules, and substantially prejudiced Liebhaber by disallowing her testimony.

In reply, Royal Alliance argued that Liebhaber could not establish substantial prejudice because hearings need not include an opportunity to present live testimony and Liebhaber failed to take advantage of the opportunity to submit written statements. It further contended that Liebhaber failed to demonstrate that cross-examination of Tarr would have changed the outcome of the hearing, and that neither FINRA’s nor Liebhaber’s interests were affected by the award. Royal Alliance also refuted Liebhaber’s and FINRA’s contentions that the arbitrators violated FINRA rules and exceeded their powers.

The trial court held a hearing on the petitions on May 18, 2015. The court indicated at the outset that its tentative decision was to vacate the award. It explained, “Not only did they [the arbitrators] not permit live testimony, but they also permitted Ms. Tar[r] to testify unsworn. She got to go into the fact that her father was a minister. She got to talk about what a good person she was and all that. Ms. Liebhaber’s attorney didn’t get a chance to ask her questions. Ms. Liebhaber didn’t even get a chance to testify. Somehow that just doesn’t sound right, does it?”

Royal Alliance denied that Tarr was “offered as a witness to give testimony un-rebutted,” claiming that “[s]he was there to answer questions posed if any

by the arbitrators.” It also argued that Liebhaber had “no substantial rights in the outcome” of the expungement hearing, since her claims already had been resolved. Royal Alliance additionally asserted that the arbitration award satisfied the requirements of FINRA Rules, rule 12805, and contended that “[i]f FINRA’s position is there needs to be live testimony in hearings like that, they need to amend their rule because the rule doesn’t require that.”

Liebhaber argued that she had an “absolute interest” in the expungement proceedings, because the award deemed her complaints against Tarr false and therefore found her “essentially to have been a liar without anyone hearing from her or giving her a right to cross-examine the principle [sic] witness against her, which is a basic fundamental due process right.” She further argued that she was “actually representing the interests of FINRA and the general public” by attempting to ensure that Tarr’s CRD and BrokerCheck reports were accurate. In her view, “if she’s not permitted to cross-examine the broker, then the CRD system—this whole system becomes a farce.” FINRA likewise contended that it had an interest in the proceedings, namely “protecting the integrity of the CRD system and the information contained in it.” It further argued that the arbitrators violated FINRA Rules, rule 12805 by not allowing Liebhaber to testify or cross-examine Tarr, despite having advance notice that she wished to do both.

The trial court ultimately adopted its tentative ruling and vacated the arbitration award “on the ground that Liebhaber’s rights were substantially prejudiced by misconduct of the arbitrators, the arbitrators exceeded their powers, and Liebhaber’s rights were substantially prejudiced by refusal of the arbitrators to hear evidence material to the controversy.” The court found that the arbitrators violated FINRA Rules, rule 2080 “by allowing Ms. Tarr to provide an unsworn statement in support of expungement while also preventing Liebhaber’s attorney from cross-examining Ms. Tarr in order to determine if the requirements of Rule 2080 were met.”

Royal Alliance timely appealed. (See § 1294, subds. (b) & (c); *Cinel v. Christopher* (2012) 203 Cal.App.4th 759, 765–766 [136 Cal.Rptr.3d 763].)

DISCUSSION

I. General Arbitration Principles⁴

■ “Title 9 of the Code of Civil Procedure, as enacted and periodically amended by the Legislature, represents a comprehensive statutory scheme

⁴ Security brokerage agreements involve interstate commerce and therefore are governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.). (*Mastick v. TD Ameritrade, Inc.* (2012) 209

regulating private arbitration in this state. (§ 1280 et seq.) Through this detailed statutory scheme, the Legislature has expressed a ‘strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.’ [Citations.]” (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 [10 Cal.Rptr.2d 183, 832 P.2d 899] (*Moncharsh*).) Accordingly, “it is the general rule that parties to a private arbitration impliedly agree that the arbitrator’s decision will be both binding and final.” (*Ibid.*) Likewise, “it is the general rule that, ‘The merits of the controversy between the parties 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.” (*Id.* at p. 11.)

■ “On the other hand, arbitration procedures that interfere with a party’s right to a fair hearing are reviewable on appeal.” (*Hoso Foods, Inc. v. Columbus Club, Inc.* (2010) 190 Cal.App.4th 881, 888 [118 Cal.Rptr.3d 594].) “Precisely because arbitrators wield such mighty and largely unchecked power, the Legislature has taken an increasingly more active role in protecting the fairness of the process. (*Moncharsh, supra*, 3 Cal.4th at pp. 12–13.)” (*Azteca Construction, Inc. v. ADR Consulting, Inc.* (2004) 121 Cal.App.4th 1156, 1165 [18 Cal.Rptr.3d 142].) Indeed, one of the reasons “why we tolerate the risk of an erroneous decision” by arbitrators is the existence of statutes permitting judicial review of the fairness of the arbitration process. (*Moncharsh, supra*, 3 Cal.4th at p. 12.)

One such statute is section 1286.2, which enumerates “grounds which will justify vacating an arbitration award.” (*California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 944 [75 Cal.Rptr.2d 1].) Section 1286.2 provides in pertinent part that a trial court “shall vacate” an arbitration award if it finds that “[t]he rights of the party were substantially prejudiced by misconduct of a neutral arbitrator”; “[t]he arbitrators exceeded their powers

Cal.App.4th 1258, 1263 [147 Cal.Rptr.3d 717].) However, the parties sought confirmation and vacation of the arbitration award in California state court pursuant to the California Arbitration Act (CAA). (See § 1280 et seq.) “[T]he presence of interstate commerce [is] not sufficient, by itself, to make the FAA’s procedural provisions, including its provisions regarding judicial review (9 U.S.C. §§ 10, 11), applicable in California state courts. This is so because a state court applies its own procedural law—here, the procedural provisions of the CAA—absent a choice-of-law provision expressly mandating the application of the procedural law of another jurisdiction.” (*Mave Enterprises, Inc. v. Travelers Indemnity Co.* (2013) 219 Cal.App.4th 1408, 1429 [162 Cal.Rptr.3d 671]; see also *SWAB Financial v. E*Trade Securities, LLC* (2007) 150 Cal.App.4th 1181, 1195 [58 Cal.Rptr.3d 904] [noting the FAA “does not preempt California’s statutory grounds for vacating an arbitration award”].) We accordingly consider the matter under the CAA, including the provisions governing judicial review, namely section 1286.2. (*Mave Enterprises, Inc. v. Travelers Indemnity Co., supra*, 219 Cal.App.4th at p. 1430.)

and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted”; or “[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators . . . to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.” (§ 1286.2, subd. (a)(3), (4), (5).) The party seeking to vacate an arbitration award bears the burden of establishing that one of the six grounds listed in section 1286.2 applies and that the party was prejudiced by the arbitrator’s error. (See *Comerica Bank v. Howsam* (2012) 208 Cal.App.4th 790, 826 [145 Cal.Rptr.3d 795].)

We review the trial court’s order vacating the arbitration award de novo. (*SWAB Financial, LLC v. E*Trade Securities, LLC, supra*, 150 Cal.App.4th at p. 1196.) We review for substantial evidence any determinations of disputed factual issues. (*Ibid.*)

II. Analysis

A. Violation of the forum rules is not necessary for prejudice.

The parties devote a substantial portion of their briefing to the questions of which portions of the FINRA Code of Arbitration Procedure for Customer Disputes apply, what the applicable provisions require, and whether the arbitrators complied with these requirements.⁵ Prior to oral argument, we asked the parties to be prepared to discuss whether “a finding of substantial prejudice within the meaning of Code of Civil Procedure section 1286.2, subdivision (a)(5) [can] be made absent a finding that the rules of the arbitral forum were violated.” All three parties addressed this issue at oral argument.⁶

Royal Alliance maintained that a party’s rights can never be prejudiced—and therefore an arbitral award can never be vacated under section 1286.2, subdivision (a)(5)—if the rules of the arbitral forum are followed. We disagree.

■ The CAA, under which Royal Alliance sought confirmation of the expungement award, “seeks to enhance both the appearance and reality of

⁵ The parties are in agreement only that FINRA Rules, rules 2080 (“Obtaining an Order of Expungement of Customer Dispute Information from the Central Registration Depository (CRD) System”) and 12805 (“Expungement of Customer Dispute Information under Rule 2080”) apply. They dispute the meaning and breadth of those rules, as well as the applicability of other rules contained in the FINRA Code of Arbitration Procedure for Customer Disputes.

⁶ None argued that the federally applicable FINRA rules should be given supremacy or precedence over state statutes or decisional law.

fairness in arbitration proceedings.” (*Ovitz v. Schulman* (2005) 133 Cal.App.4th 830, 853 [35 Cal.Rptr.3d 117].) To that end, it provides the basic parameters of arbitration proceedings unless the parties specifically agree otherwise; “such parameters include limited judicial review of the arbitration award.” (*Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 705 [132 Cal.Rptr.2d 250].) Sections 1285 and 1286.2, respectively, govern the confirmation and vacation of arbitration awards. Unlike sections 1281.6, 1282, 1282.2, and 1283.8, these sections are not by their terms modifiable or avoidable by consent of the parties. Indeed, courts have characterized section 1286.2, subdivision (a)(5) as 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 v. Superior Court* (1993) 18 Cal.App.4th 427, 439 [22 Cal.Rptr.2d 376] (*Hall*) [discussing § 1286.2, subd. (e), the predecessor statute to § 1286.2, subd. (a)(5)]; see also *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524, 529 [100 Cal.Rptr.3d 531].) Section 1286.2, subdivision (a)(5) does not mention forum rules, or require courts to make a finding that such rules were violated before assessing prejudice and vacating an award. The effectiveness of this “safety valve” and other CAA provisions designed to ensure fairness would be substantially reduced if a party’s rights could be prejudiced only in proceedings in which an explicit rule of the forum was violated.

Accordingly, we find it unnecessary in this case to resolve the parties’ substantial disagreements regarding the scope of (and degree of arbitrator compliance with) the FINRA rules. The pertinent question for us is not what the FINRA rules provided or whether the arbitrators adhered to them; it is whether the trial court correctly concluded that the arbitrators prevented a party from fairly presenting its case and prejudiced her rights as a result. (*Hall, supra*, 18 Cal.App.4th at p. 439.) We therefore focus our analysis on whether the trial court properly vacated the award under section 1286.2, subdivision (a)(5).

B. *The arbitrators refused to hear evidence material to the controversy.*

■ Section 1286.2, subdivision (a)(5) provides that the trial court “shall vacate” an arbitration award if “The rights of the party were substantially prejudiced by . . . the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.” The statute thus presents a two-part inquiry: (1) Did the arbitrators refuse to hear evidence material to the controversy or engage in other conduct contrary to the provisions of the CAA? (2) If so, were the rights of the party seeking to vacate the award substantially prejudiced? We consider the threshold inquiry regarding the arbitrators’ conduct first.

■ Section 1286.2, subdivision (a)(5) includes “refusal of the arbitrators to hear evidence material to the controversy” among the grounds for vacating an arbitration award. Another provision of the CAA, section 1282.2, subdivision (d), provides that, unless they agree otherwise, “[t]he parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed. On request of any party to the arbitration, the testimony of witnesses shall be given under oath.” Section 1282.2, subdivision (d) is incorporated into section 1286.2, subdivision (a)(5) by the phrase “other conduct of the arbitrators contrary to the provisions of this title.” Both statutes codify within the CAA the fundamental principle that “[a]rbitration should give both parties an opportunity to be heard.” (*Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 689 [57 Cal.Rptr.2d 867].) The parties may be heard on the papers rather than at a live hearing (*Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal.App.4th 1096, 1105 [47 Cal.Rptr.2d 650]), but the opportunity to be heard must be extended to all parties equitably. That requirement was violated here. Both parties to the expungement were permitted to submit written evidence, but only Royal Alliance was given the opportunity to offer oral evidence at the expungement proceeding. The arbitrators barred Liehaber from doing so.

The arbitrators also foreclosed Liehaber’s efforts to question Tarr. Regardless of whether the FINRA rules applicable to expungement hearings expressly contain or somehow incorporate the right to cross-examination, section 1282.2, subdivision (d) “entitles a party to cross-examine witnesses if they appear at a hearing.” (*Schlessinger v. Rosenfeld, Meyer & Susman, supra*, 40 Cal.App.4th at p. 1106; see § 1282.2, subd. (d).) Liehaber was a party to the proceeding, and Tarr appeared at opposing party Royal Alliance’s behest to “offer any additional testimony” for the arbitrators. Although she did not technically “testify” for purposes of California law, as she was not under oath (see § 17, subd. (b)(5)(B)), Tarr appeared and acted as a witness by submitting oral evidence for the arbitrators’ consideration. (Cf. § 1282.2, subd. (d) [suggesting that a person may be a witness during an arbitration without being sworn: “On request of any party to the arbitration, the testimony of witnesses shall be given under oath.”].) Yet the arbitrators denied Liehaber any opportunity to question Tarr.

■ Although section 1282.2, subdivision (d) also provides that “rules of evidence and rules of judicial procedure need not be observed,” the procedural flexibility of the arbitral forum does not override participants’ fundamental, common law right to a fair proceeding. (See *Graham v. Scissor-Tail*,

Inc. (1981) 28 Cal.3d 807, 826, fn. 23 [171 Cal.Rptr. 604, 623 P.2d 165].) It is one thing to establish reasonable time limits for the parties' presentation and rebuttal of evidence, which is well within an arbitrator's discretion. It is another to curtail one party's oral presentation and exploration of evidence because the arbitration panel does not want "to be here for another two hours." (Cf. *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 290–291 [77 Cal.Rptr.3d 305] [finding reversible error where trial judge "display[ed] ill-disguised impatience" with a litigant, "repeatedly threaten[ed] a mistrial if the proceedings were not concluded quickly enough," and "abruptly ended the trial before [the litigant] had finished his presentation"].) Liebhaber initiated the proceedings that culminated in Tarr's expungement request and was named as a party to the expungement proceedings; she had an interest in the outcome of the proceedings and the right to be treated fairly and in accordance with statutory law during their pendency.

C. *Liebhaber's rights were substantially prejudiced.*

The second question presented by section 1286.2, subdivision (a)(5) is whether the rights of a party to the arbitration "were substantially prejudiced." This prejudice criterion was satisfied here.

■ "Where, as here, a party complains of excluded material evidence, the reviewing court should generally focus first on prejudice, not materiality." (*Hall, supra*, 18 Cal.App.4th at p. 439.) A party's mere disappointment with an arbitration decision is not sufficient to prove substantial prejudice. (*Taheri Law Group, A.P.C. v. Sorokurs* (2009) 176 Cal.App.4th 956, 964 [98 Cal.Rptr.3d 634].) "To find substantial prejudice the court must accept, for purposes of analysis, the arbitrator's legal theory and conclude that the arbitrator might well have made a different award had the evidence been allowed." (*Hall, supra*, 18 Cal.App.4th at p. 439.) The prejudice query under section 1286.2, subdivision (a)(5) is not, as Royal Alliance suggests, "ultimately a question of the sufficiency of evidence," an inquiry generally outside the permissible scope of review of arbitration awards. Rather, it is an examination of the proffered but rejected evidence to determine the impact of its omission under the theory adopted by the arbitrators.

The arbitrators' legal theory in this case was that Liebhaber's contentions were false and clearly erroneous because Royal Alliance and Tarr said they were, and Liebhaber failed to refute these claims or offer any evidence to the contrary. However, the arbitrators did not afford Liebhaber the opportunity to present evidence orally, despite extending such an opportunity to Royal

Alliance. Although the arbitrators told Liebhaber that her oral evidence and proposed cross-examination were unlikely to “dramatically impact” their deliberations, they nonetheless relied on the absence of such evidence to support their ruling, mentioning the inadequacy of Liebhaber’s presentation at least four times in the written award. The arbitrators also relied on the credibility of the statements Tarr made at the hearing, even though they acknowledged that “Ms. Tarr didn’t say anything substantive that is not already on the record on her behalf with respect to the declaration.” Accordingly, we conclude that “the arbitrator[s] might well have made a different award” (*Hall, supra*, 18 Cal.App.4th at p. 439) if they had allowed Liebhaber to tell her side of the story or question Tarr’s.

Royal Alliance correctly notes that the arbitration panel received documentary evidence from both sides. It fails to acknowledge, however, that only Liebhaber was deprived of the opportunity to supplement that cold record with contemporaneous oral comments. The arbitrators permitted Royal Alliance to present Tarr’s oral statements, deemed them credible, and relied on them to conclude that she recommended appropriate investments for Liebhaber. But the arbitration panel could not fully weigh the credibility of Tarr’s statements due to the absence of cross-examination; “[o]ne cannot “consider” what one has refused to “hear.”” (*Burlage v. Superior Court, supra*, 178 Cal.App.4th at p. 531.) During the expungement proceedings, Liebhaber’s counsel placed on the record several lines of questioning he intended to explore with Tarr: “how she came to meet Ms. Liebhaber, what advice she gave her, questions about the suitability of the investments, whether she considered certain factors about these investments that she was recommending, how much time she spent giving her the advice she gave her and what she told her about whether she should take this early retirement at age 47.” All of these areas of inquiry were aimed at the ultimate question of whether expungement was warranted because Liebhaber’s complaints against Tarr were false or erroneous, and could well have affected the arbitrators’ perfunctory conclusion that “the statements offered by non-party Kathleen Tarr during the telephonic hearing were credible.” As Liebhaber argued to the trial court, she was not given the opportunity “to show to the panel that . . . what [Tarr] is saying is not exactly accurate.”

■ Simply put, the hearing was not fair. The arbitrators gave Royal Alliance an unfettered opportunity to bolster the written record but denied Liebhaber even a limited chance to do the same. Liebhaber’s rights as a party to the arbitration proceedings were substantially prejudiced within the meaning of section 1286.2, subdivision (a)(5), and the arbitration order was properly vacated as a result.

DISPOSITION

The judgment of the trial court is affirmed. Liebhaber and FINRA shall recover their costs on appeal.

Epstein, P. J., and Manella, J., concurred.

[No. A146277. First Dist., Div. Three. Aug. 30, 2016.]

In re C.B., a Person Coming Under the Juvenile Court Law.
THE PEOPLE, Plaintiff and Respondent, v.
C.B., 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, S237801.

[REDACTED]

[REDACTED]

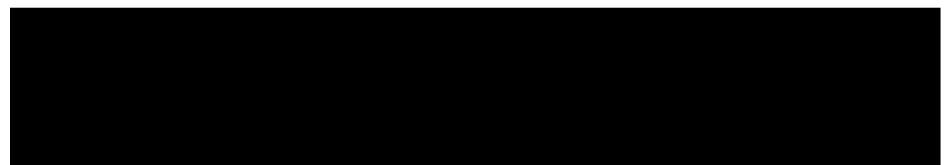
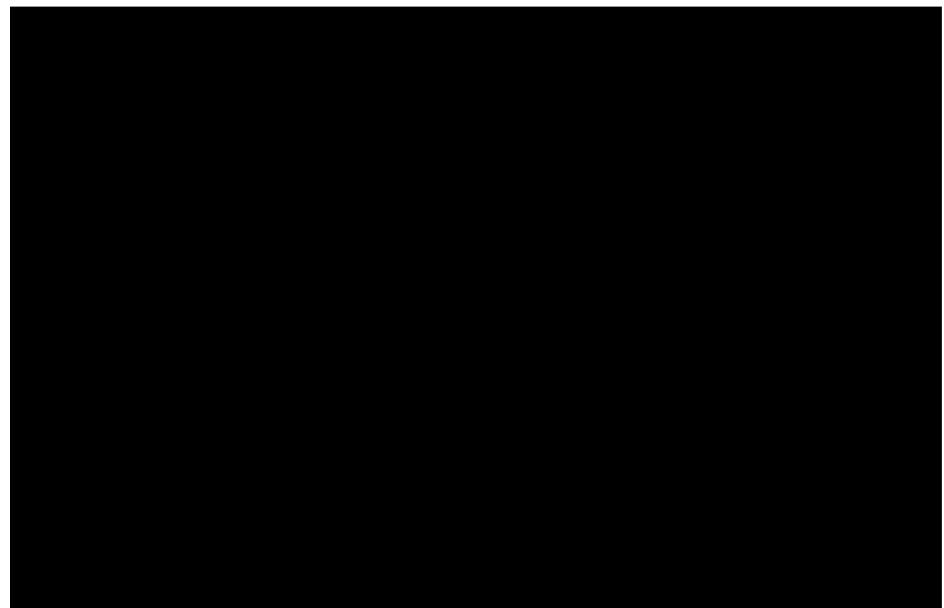
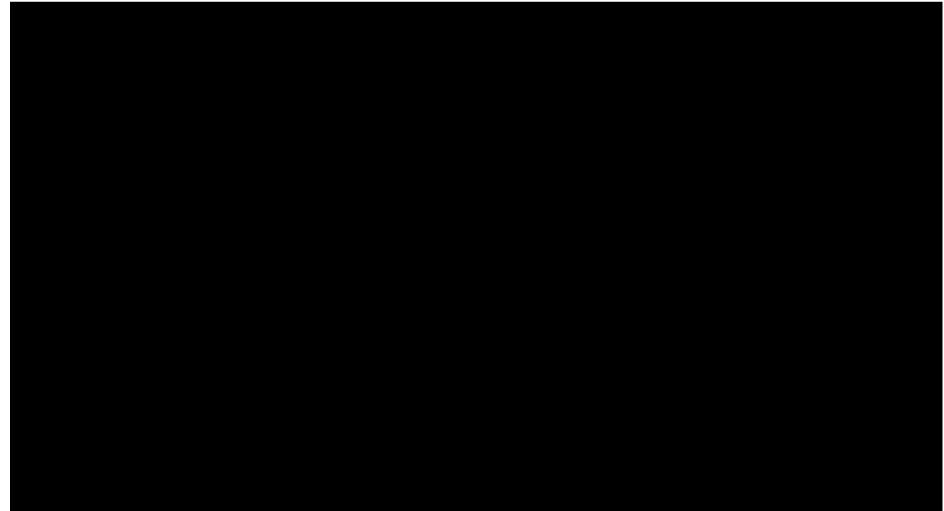
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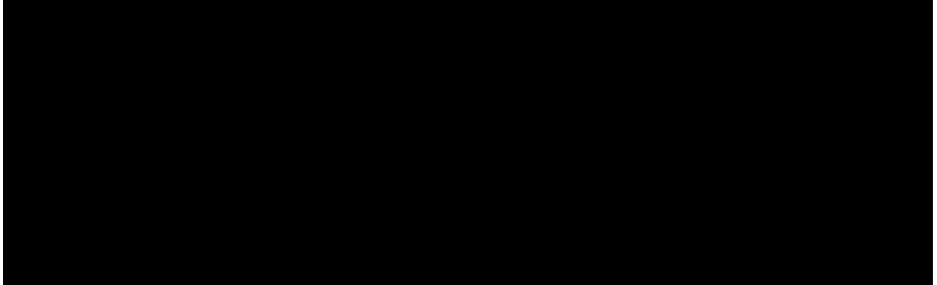
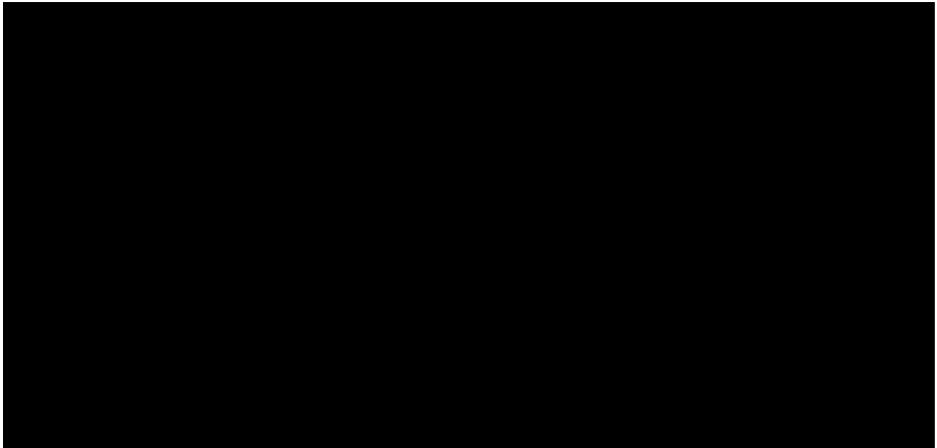
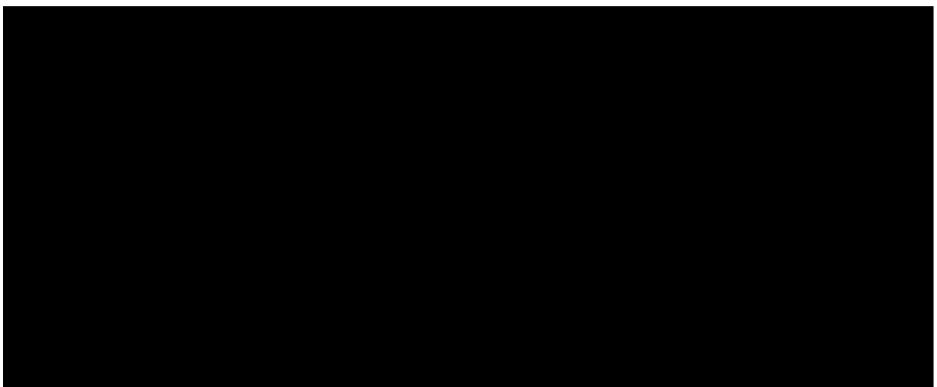
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COUNSEL

Anne Mania, 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 Aileen Bunney, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

JENKINS, J.—This is an appeal from a juvenile court order denying a request by defendant C.B. (minor) to expunge his DNA samples from the state’s database following the juvenile court’s grant of his simultaneous request to redesignate his admitted felony offense as a misdemeanor. Minor brought these requests under Penal Code section 1170.18, a measure enacted following passage of Proposition 47, the Safe Neighborhoods and Schools Act, which reduced the classification of certain crimes from felony to misdemeanor.¹ According to minor, his DNA samples should be expunged because, had his offense been classified as a misdemeanor at the time he

¹ Unless otherwise stated, all statutory citations herein are to the Penal Code.

admitted committing it, the juvenile court would have, in the first instance, lacked authority to order him to submit the samples.

However, as explained below, Proposition 47 construed in conjunction with the DNA and Forensic Identification Database and Data Bank Act of 1998 (DNA Database Act), section 295 et seq., supports the juvenile court's decision to deny minor's expungement request in this case. Moreover, and confirming this conclusion, our Legislature recently enacted Assembly Bill No. 1492 (2015–2016 Reg. Sess.) (Assembly Bill No. 1492), which clarifies that, pursuant to section 299, a trial court is not authorized to order expungement of a defendant's DNA sample when granting relief under section 1170.18 to redesignate a felony offense as a misdemeanor. Accordingly, we affirm the juvenile court's order.

FACTUAL AND PROCEDURAL BACKGROUND

On September 20, 2013, a petition was filed pursuant to Welfare and Institutions Code section 602, alleging that minor committed second degree robbery in violation of Penal Code sections 211 and 212.5 (count one), and first degree residential burglary in violation of sections 459 and 460, subdivision (a) (count two). This petition was amended on October 1, 2013, to add allegations that minor also committed felony grand theft from the person (§ 487, subd. (c)) (count three), and misdemeanor burglary (§§ 459, 460, subd. (a)) (count four).² On the same date, minor admitted the amended allegations (counts three and four) and the remaining allegations (counts one and two) were dismissed.

On October 15, 2013, the juvenile court adjudged minor a ward of the court with no termination date, ordered his out-of-home placement and, among other things, ordered him to submit DNA samples for the state DNA database.

On July 6, 2015, minor filed a petition for relief under section 1170.18, requesting that his felony grand theft adjudication be redesignated as a misdemeanor, that the order requiring submission of DNA samples be vacated, and that his DNA samples be expunged from the state DNA database. Following a hearing, on July 21, 2015, the juvenile court granted minor's request to redesignate his felony offense as a misdemeanor, but denied his requests to vacate the order to submit DNA samples and to

² According to the probation report, minor broke into an apartment in Concord and stole the resident's cell phone, wallet and Nintendo game. When leaving the apartment, minor was confronted by the resident, who began assaulting him. In response, minor brandished a knife in self-defense. Because the facts of this incident are not relevant to the sole legal issue raised on appeal, however, we provide no further details.

expunge his samples from the state DNA database. On September 14, 2015, minor filed a timely notice of appeal of this order.³

DISCUSSION

Minor raises one argument on appeal—to wit, that the juvenile court misconstrued Proposition 47 when finding that he was not entitled to have his DNA samples expunged from the state database after reclassifying his felony offense as a misdemeanor. The standard of review is not in dispute.

We review de novo questions of statutory or voter initiative interpretation. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1212 [246 Cal.Rptr. 629, 753 P.2d 585] [rules of statutory interpretation apply to voter initiatives]; *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173, 1176 [86 Cal.Rptr.2d 917].) The fundamental rule of statutory (or voter initiative) construction is that we must ascertain the intent of the drafters so as to effectuate the purpose of the law. (*Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 213 [105 Cal.Rptr.2d 407, 19 P.3d 1148].) “To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning.” (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [7 Cal.Rptr.2d 238, 828 P.2d 140].) “We do not, however, consider the statutory language in isolation; rather, we look to the entire substance of the statutes in order to determine their scope and purposes. [Citation.] That is, we construe the words in question in context, keeping in mind the statutes’ nature and obvious purposes. [Citation.] We must harmonize the various parts of the enactments by considering them in the context of the statutory framework as a whole. [Citation.] If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history.” (*People v. Cole* (2006) 38 Cal.4th 964, 975 [44 Cal.Rptr.3d 261, 135 P.3d 669].)

In this case, minor contends proper interpretation of Proposition 47 requires a trial court to expunge DNA samples submitted by a criminal defendant (including a juvenile) whose offense is reclassified from a felony to a misdemeanor pursuant to section 1170.18. Proposition 47, as mentioned above, “ ‘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.’ (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35 (Ballot Pamphlet).) One of those ‘nonserious and

³ On August 17, 2015, the juvenile court set aside the placement order and terminated minor’s probation as unsuccessful.

nonviolent property and drug crimes' is shoplifting, so long as the value of the stolen property is less than \$950. (See Ballot Pamphlet, *supra*, text of Prop. 47, § 5, p. 71.)" (*In re J.C.* (2016) 246 Cal.App.4th 1462, 1469 [201 Cal.Rptr.3d 731].) Minor, relying on a recent decision from the Court of Appeal, Fourth District, *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209 [189 Cal.Rptr.3d 907] (*Alejandro*), contends the juvenile court was required under Proposition 47 to grant his request to expunge his DNA record because, once his crime was reclassified as a misdemeanor, it was no longer a "qualifying offense" for purposes of the DNA Database Act. (See § 296, subd. (a).)

The People, to the contrary, contend, first, that *Alejandro* was wrongly decided and, second, that, even if correctly decided when published, *Alejandro* is no longer good law because, in enacting Assembly Bill No. 1492, the Legislature made clear that section 1170.18, properly read, does not authorize a trial court to expunge a defendant's DNA sample when granting a petition to redesignate the qualifying offense from felony to misdemeanor. We agree with the People's latter point and, thus, need not directly address the wisdom of *Alejandro*.

Turning first to the relevant statutory framework, section 1170.18 provides a procedure by which persons, like minor, found to have committed a felony, yet "who would have been guilty of a misdemeanor under [Proposition 47]" had it been in effect at the time of their offense, may request redesignation of the offense from felony to misdemeanor. (§ 1170.18, subd. (a).) Relevant here, section 1170.18, subdivision (f), provides that a person who has "completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act 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." Further, where the section 1170.18 applicant has satisfied the criteria in subdivision (f), the trial court "shall designate the felony offense or offenses as a misdemeanor." (§ 1170.18, subd. (g).)

There is no dispute in this case that minor satisfied the criteria in section 1170.18, subdivision (g), such that the juvenile court was required to (and did) redesignate his offense as a misdemeanor. The dispute, rather, centers around whether the juvenile court was required, in light of this redesignation, to order expungement of minor's DNA samples from the state database pursuant to section 299, the statute governing DNA record expungement. Part of the DNA Database Act, section 299 was amended in 2004 through passage of Proposition 69, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, which "substantially expanded the range of persons

who must submit DNA samples to the state's forensic identification database." (*Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1498 [71 Cal.Rptr.3d 125].) Persons qualifying under this act for submission of DNA samples include any person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense, or is found not guilty by reason of insanity of any felony offense, or any juvenile who is adjudicated under section 602 of the Welfare and Institutions Code for committing any felony offense; any adult person arrested for or charged with one of the enumerated felony offenses; any person, including any juvenile, required to register under section 290 or 457.1 because of the commission of, or the attempt to commit, a felony or misdemeanor offense; or any person, including any juvenile, who is housed in a mental health facility or sex offender treatment program after referral to such facility or program by a court after being charged with any felony offense. (§ 296, subd. (a).) The DNA submission requirements "shall apply to all *qualifying* persons regardless of sentence imposed . . . and regardless of disposition rendered or placement made in the case of juvenile who is found to have committed any felony offense . . ." (§ 296, subd. (b), italics added.)

■ Under section 299, a person whose DNA profile has been included in the state data bank "shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the databank program . . . if the person has no past or present offense or pending charge which qualifies that person for inclusion within the state's DNA and Forensic Identification Database and Databank Program and there otherwise is no legal basis for retaining the specimen or sample or searchable profile." (§ 299, subd. (a).) Further, under subdivision (f) of this statute, "[n]otwithstanding any other law," a judge is barred from relieving a person of his or her administrative duty to submit DNA pursuant to this chapter if the person has been found guilty or was adjudicated a ward of the court for a qualifying offense under section 296, subdivision (a), or pleaded no contest to one of these qualifying offenses. (§ 299, subd. (f), italics added.)

This provision, as it read at the time of minor's petition for relief, set forth a nonexhaustive list of three statutes pursuant to which a judge is prohibited from relieving a person of his or her duty to submit DNA for the state forensic identification DNA database—to wit, sections 17, 1203.4 and 1203.4a. (§ 299, former subd. (f).) Each of these three enumerated statutes is similar to section 1170.18 in that it provides postconviction relief from punishment or penalties to qualifying defendants by, for example, reclassifying a felony offense as a misdemeanor, or dismissing the information entirely upon successful completion of a probationary term. (See §§ 17 [authorizing a trial court, in its discretion, to treat a qualifying offense as either a felony or a misdemeanor], 1203.4, subd. (a)(1) [authorizing a trial court, in certain cases, to set aside a guilty verdict and "dismiss the accusations or information

against the defendant,” thereby releasing the defendant “from all penalties and disabilities resulting from the offense”], 1203.4a, subd. (a) [authorizing a trial court to, among other things, set aside a guilty verdict and dismiss the information against a misdemeanant who was not granted probation, has served his sentence, has not been charged with or convicted of a subsequent crime, and has, since judgment, lived “an honest and upright life”].)

In October 2015, Assembly Bill No. 1492 was signed by the Governor. Among other things, it amended section 299, subdivision (f) to include section 1170.18 in the nonexhaustive list of statutes that do *not* authorize a judge to relieve a person of his or her administrative duty to provide DNA. Thus, effective January 1, 2016, this provision reads: “*Notwithstanding any other law, including Sections 17, 1170.18, 1203.4, and 1203.4a*, a judge is not authorized to relieve a person of the separate administrative duty to provide . . . samples . . . required by this chapter if a person . . . was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in subdivision (a) of Section 296.”⁴ (§ 299, subd. (f), *italics added.*)

Notwithstanding the former or amended version of section 299, subdivision (f), minor contends a criminal defendant’s right to expungement of DNA records is triggered by a court’s redesignation of a criminal offense under Proposition 47 by way of another statute, section 1170.18, subdivision (k), which states: “Any felony conviction that is . . . designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes*, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction [for being a felon in possession of a firearm].” (§ 1170.18, subd. (k), *italics added.*) According to minor, this statutory command that his offense be considered a misdemeanor “for all purposes” requires expungement of his DNA samples because, under California law, juvenile delinquents are not required to submit DNA unless they are found to have committed a felony. Minor’s argument finds support in *Alejandro*, which held that a felony redesignated a misdemeanor pursuant to section 1170.18 “no longer qualifies as an offense permitting DNA collection” and, thus, is “outside the matters contemplated by the Penal Code DNA expungement statute.”⁵ (*Alejandro*, *supra*, 238 Cal.App.4th at p. 1229, *italics omitted.*)

⁴ There appears to be nothing in the legislative history of Assembly Bill No. 1492 explaining the Legislature’s intent with respect to this particular amendment. (See *In re J.C.*, *supra*, 246 Cal.App.4th at p. 1472.)

⁵ The *Alejandro* court reasoned: “Because the statute explicitly addresses what, if any, exceptions should be afforded to the otherwise all-encompassing misdemeanor treatment of the offense, and because only the firearm restriction was included as an exception, the enactors effectively directed the courts not to carve out other exceptions to the misdemeanor treatment of the reclassified offense absent some reasoned statutory or constitutional basis for doing so.” (*Alejandro*, *supra*, 238 Cal.App.4th at p. 1227, fn. omitted.)

We reject minor's analysis on several grounds. First, as the People (and the juvenile court) have noted, Proposition 47 nowhere mentions DNA expungement. Rather, it is completely silent with respect to the state-maintained DNA data bank. As such, we question minor's interpretation of Proposition 47 as requiring expungement whenever a court grants relief to a criminal defendant under section 1170.18. (See *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 350 [195 Cal.Rptr.3d 773, 362 P.3d 417] [courts are not “[o]rdinarily . . . free to add text to the language selected by the Legislature”].)

■ Further, the DNA sample submission requirement under the DNA Database Act does not necessarily hinge on whether a person is convicted of a felony or misdemeanor. Rather, under the relevant statutory language, the act's triggering point is when “[a]ny person, including any juvenile, . . . is convicted of or *pleads guilty or no contest to any felony offense.*” (§ 296, subd. (a)(1), italics added.) In addition, the act does not apply only to convicted felons, but extends to several categories of misdemeanants, including those required to register with law enforcement as sex offenders or arsonists (see § 296, subd. (a)(3)), a fact reflective of the measure's administrative—and nonpunitive—design of creating a state data bank to “to assist in the accurate identification of criminal offenders” (§ 295, subd. (d); see also § 295, subd. (b)(2) [“It is the intent of the people of the State of California, in order to further the purposes of [the act], to require DNA and forensic identification data bank samples from all persons, including juveniles, for the felony and *misdemeanor* offenses described in [section 296, subdivision (a)]” (italics added)]; *Good v. Superior Court*, *supra*, 158 Cal.App.4th at p. 1508 [“Proposition 69, immediately effective, listed felon and misdemeanor registrants as among those who qualified for DNA sampling. The requirement is not punitive, does not involve concepts of retroactivity or ex post facto implications, but is confined to a simple administrative identifying procedure akin to fingerprinting or keeping one's whereabouts known to law enforcement.”]; *People v. Travis* (2006) 139 Cal.App.4th 1271, 1295 [44 Cal.Rptr.3d 177] [DNA collection is “nonpenal”]). We thus find without legal support minor's assumption that reclassification of the offense underlying a conviction from a felony to a misdemeanor, in and of itself, triggers the right of a criminal defendant to have his or her DNA records expunged. (See *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 764 [274 Cal.Rptr. 787, 799 P.2d 1220] [when interpreting statutory language, courts must try to “reconcile or harmonize conflicting statutory provisions in an effort to give effect to all provisions if it is possible”].)

Indeed, and to the contrary, the DNA Database Act expressly limits the right to seek expungement to persons with “no past or present qualifying offense” whose cases fall within one of four legal categories: (1) following arrest no accusatory pleading is filed for prosecution or a qualifying charge is

dismissed prior to adjudication; (2) the qualifying conviction has been reversed and the case dismissed; (3) the defendant has been found factually innocent; or (4) the defendant has been found not guilty or acquitted of the qualifying offense. (§ 299, subd. (b)(1)–(4).) Here, minor, who admitted committing the qualifying offense, falls within none of the identified categories.

In addition, we find persuasive the decision relied upon below by the juvenile court, *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809 [29 Cal.Rptr.3d 59] (*Coffey*), which addressed whether the defendant, who pled guilty to a “wobbler” offense as a felony, was entitled to expungement of his DNA sample after the court reduced the charge pursuant to section 17, the so-called “wobbler” statute, and sentenced him to a misdemeanor.⁶ There, as here, the defendant claimed a right to expungement on the ground that “DNA sampling is not required or authorized for a misdemeanor offense.” (*Coffey*, at p. 818.) The defendant relied upon subdivision (b) of section 17, which reads: “When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison . . . or by fine or imprisonment in the county jail, it is a misdemeanor *for all purposes* under the following circumstances: [¶] (1) After a judgment imposing a punishment other than imprisonment in the state prison.” (Italics added.) Thus, as the *Coffey* court noted, under this provision, “if a judge sentences the defendant to a misdemeanor punishment, the defendant’s crime becomes a misdemeanor.” (*Coffey*, at p. 818, fn. 7.)

The *Coffey* court nonetheless rejected the defendant’s argument that his offense should be treated as a misdemeanor for purposes of DNA record expungement. The court reasoned that, “for purposes of the DNA Database Act, Coffey was convicted of a felony when he pled guilty to a wobbler offense as a felony. He was therefore subject to the DNA Database Act when his DNA samples were taken, and the collection of the samples was lawful [under section 296] Because the samples were lawfully collected, there is no constitutional right to their return.” (*Coffey, supra*, 129 Cal.App.4th at p. 823.)

According to the People, this analysis in *Coffey* resonates here, in that, like a felony reclassified as a misdemeanor under section 17, a felony reclassified as a misdemeanor under section 1170.18 remains a qualifying offense for purposes of the administrative duties set out in the DNA Database Act, such that the offender is not eligible for expungement on the basis of the reclassification. Minor, in turn, insists section 17 is distinct from section 1170.18 and, thus, irrelevant to the issue raised herein. He reasons that, when an offense is reduced to a misdemeanor under section 17, the offense is

⁶ A “wobbler” is an offense punishable in the court’s discretion as either a felony or a misdemeanor. (*Coffey, supra*, 129 Cal.App.4th at p. 812, fn. 2.)

deemed a misdemeanor for all purposes only going forward, yet when, as here, an offense is reclassified as a misdemeanor under section 1170.18, it is deemed a misdemeanor for all purposes, going forward *and* retroactively.

We agree with the People that *Coffey* is instructive here. As aptly explained by our colleagues in Division One of this District when recently addressing the identical legal issue: ‘Prior to the addition of section 1170.18 by Bill No. 1492, section 299(f) referred to sections 17, 1203.4, and 1203.4a. Section 17 governs ‘wobbler’ offenses, which are offenses that can be treated as felonies or misdemeanors in the discretion of the sentencing court. ([*People v. Lynall* [(2015)] 233 Cal.App.4th 1102, 1108 [183 Cal.Rptr.3d 129].) Subdivision (b) of section 17 dictates ‘[w]hen’ a wobbler is treated as a misdemeanor, including after a defendant has been sentenced to a punishment other than prison (*id.*, subd. (b)(1)), when a court declares a wobbler a misdemeanor upon granting probation (*id.*, subd. (b)(3)), and when the prosecutor designates the crime as such in a charging document (*id.*, subd. (b)(5)). In addition, under subdivision (c) of section 17, if a juvenile is committed to the Division of Juvenile Justice on the basis of a wobbler conviction, the violation is ‘thereafter . . . deemed a misdemeanor for all purposes’ following his or her discharge. Sections 1203.4 and 1203.4a govern the dismissal of charges following a successful completion of probation. (See, e.g., *Doe v. Harris* (2013) 57 Cal.4th 64, 72–73 [158 Cal.Rptr.3d 290, 302 P.3d 598].) These statutes have one thing in common. Their application generally results in the reduction of a felony conviction suffered by a defendant to something less serious—either a misdemeanor under section 17 or, in the case of sections 1203.4 and 1203.4a, dismissal altogether. The felony conviction necessarily required provision of a DNA sample, but the defendant would not have been required to provide a sample had the conviction been designated a misdemeanor from the outset or if there had been no criminal charges at all. *The unmistakable implication of the reference to these statutes in section 299(f) is that the section was intended to prohibit trial courts, when reducing or dismissing charges pursuant to the listed statutes, from also expunging the DNA record given in connection with the original felony conviction.*” (*In re J.C.*, *supra*, 246 Cal.App.4th at pp. 1472–1474, fn. omitted & italics added.)

Our colleagues went on to note that a conviction for a wobbler offense charged as a felony has “traditionally been regarded as a felony until the point in time at which the trial court’s sentencing decision converts it to a misdemeanor,” and is only deemed a misdemeanor for all purposes following the decision. (*In re J.C.*, *supra*, 246 Cal.App.4th at p. 1479.) Thus, “[i]f redesignation under section 1170.18 is similarly analogized to the treatment of wobbler offenses, the redesignation of a felony conviction would not justify DNA record expungement. Under section 299, subdivision (b), a person is entitled to expungement of his or her DNA record only ‘if the

person has no past or present offense or pending charge which qualifies that person for inclusion.’ (§ 299, subd. (a).) If a felony conviction redesignated as a misdemeanor pursuant to section 1170.18 is treated as a felony up until the time of redesignation, similar to a wobbler felony conviction under section 17, the defendant would continue to have a past qualifying conviction even after the redesignation. Under the terms of section 299, the defendant would not be entitled to expungement of his or her DNA record.” (*In re J.C.*, *supra*, at p. 1479.)

■ We agree with our colleague’s reasoning in this regard and, thus, conclude, like our colleagues, that section 1170.18 should be treated like section 17 for purposes of the DNA Database Act, with the effect that a felony reclassified as a misdemeanor under section 1170.18 remains a qualifying offense under the act, precluding the offender from obtaining additional relief in the form of expungement on the basis of such reclassification. (Accord, *Coffey*, *supra*, 129 Cal.App.4th at pp. 821–822 [§ 299, subd. (f), as enacted in 2004, “merely clarified existing law” that a defendant is not entitled to expungement of a DNA record when a wobbler conviction is reduced to a misdemeanor pursuant to § 17].) As stated above, the act is quite clear that a defendant, including a juvenile, becomes subject to the DNA submission requirement upon being “convicted of or plead[ing] guilty or no contest to any felony offense,” and “regardless of [the] disposition rendered or placement made in the case of juvenile who is found to have committed any felony offense.” (§ 296, subds. (a)(1), (b).) As such, the fact that an admitted felony offense is later reclassified as a misdemeanor does not change the offense’s status as a qualifying offense for purposes of the act.

■ Moreover, even before its recent amendment, section 299, subdivision (f), expressly stated that, *notwithstanding any other law*, a judge cannot relieve a defendant of the administrative duty to provide DNA for inclusion in the state’s DNA database. Given this particular language, we decline to read the more general language in section 1170.18, subdivision (k) that an offense reclassified as a misdemeanor must be treated as a misdemeanor “for all purposes” as a legislative grant of authority to a judge to disregard the restrictions placed upon his or her authority by section 299, subdivision (f). (See *Caffey*, *supra*, 129 Cal.App.4th at p. 823 [“since the definition and consequence of a ‘misdemeanor’ is a creation of the Legislature, the term ‘all purposes’ merely refers to the purposes delineated by the Legislature. And because the Legislature has determined that a defendant whose sentence is reduced to a misdemeanor under section 17, subdivision (b), *must* provide DNA samples (§ 296), it cannot be that a defendant is insulated from providing DNA samples merely because his sentence is reduced to a misdemeanor under section 17, subdivision (b)”].) Indeed, the law of statutory interpretation requires the opposite. (See *Ni v. Slocum* (2011) 196 Cal.App.4th 1636, 1647 [127 Cal.Rptr.3d 620] [The phrase “‘[n]otwithstanding any other

provision of law’’ generally expresses a legislative intent ‘‘‘to have the specific statute control despite the existence of other law which might otherwise govern’’’ and to ‘‘‘declare[] the legislative intent to override all contrary law.’’’].) The law of statutory interpretation also dictates that where, similar to here with section 17, subdivision (b), ‘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.’’ (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437 [35 Cal.Rptr.2d 155]; see also *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100 [183 Cal.Rptr.3d 362] [‘the language in [section 1170.18, subdivision (k)] that a conviction that is reduced to a misdemeanor under that section ‘shall be . . . a misdemeanor for all purposes’ is not significantly different from the language in section 17(b), which provides that after the court exercises its discretion to sentence a wobbler as a misdemeanor, and in the other circumstances specified section 17(b), ‘it is a misdemeanor for all purposes.’ (Italics added.) . . . [I]n construing this language from section 17(b), the California Supreme Court has stated that the reduction of the offense to a misdemeanor does not apply retroactively’’].)

Moreover, our interpretation of section 1170.18 is consistent with the goal of promoting harmony among different, but related, statutory schemes if reasonably possible. (See *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955–956 [184 Cal.Rptr.3d 60, 342 P.3d 1217].) As mentioned above, both Proposition 47 and Proposition 69 were intended to promote public safety. And while Proposition 47 does indeed serve the goal of reducing penalties for certain nonserious and nonviolent offenders, the electorate, when passing Proposition 69, specifically acknowledged the link between nonviolent convicted criminals and violent crime. To wit, as set forth in Proposition 69’s statement of purpose: ‘(d) Expanding the statewide DNA Database and Data Bank Program is: [¶] . . . [¶] (2) The most reasonable and certain means to solve crimes as effectively as other states which have found that the majority of violent criminals have nonviolent criminal prior convictions, and the majority of cold hits and criminal investigation links are missed if a DNA database or data bank is limited only to violent crimes.’ (Voter Information Guide, Gen. Elec. (Nov. 2, 2004) text of Prop. 69, p. 135.) By interpreting section 1170.18 as redesignating minor’s felony offense as a misdemeanor for all purposes going forward from the date of the court’s redesignation order (and, thus, not for the purpose of determining whether the offense qualifies for DNA submission under Prop. 69), we reconcile any potential tension or inconsistency between section 1170.18, on the one hand, and sections 296 and 299, on the other, while still advancing the measures’

common goals of promoting public safety, enhancing crime-solving capabilities, focusing prison spending on violent and serious offenses, and maximizing alternatives for nonserious, nonviolent crime. (See Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 47, at p. 38.)

■ We hasten to add that, if there was any doubt about the proper interplay between Proposition 47 and the DNA Database Act, it was recently laid to rest by the legislative amendment adding section 1170.18 to the nonexhaustive list of statutes identified in section 299, which, by statutory mandate, bar a trial court from relieving an otherwise qualified person from his or her administrative duty to submit DNA samples. This amendment clarified what was arguably ambiguous in the former statute—to wit, that the redesignation procedure under section 1170.18 does not give rise to a right to relief from the defendant's DNA submission obligations under section 299. As such, the legislative amendment confirms our interpretation of the statutory framework set forth above that expungement is not part of the relief available to criminal defendants under Proposition 47.⁷

Minor attempts to draw a distinction between the “administrative duty to provide [DNA samples],” referred to in the amended version of section 299, subdivision (f), and the requirement that the Department of Justice DNA Laboratory “expunge DNA . . . samples” under certain circumstances, referred to in section 299, subdivision (e), but not in section 299, subdivision (f). However, the same argument was discussed and rejected by our colleagues in *In re J.C.*: “The minor argues section 299(f) could not have been intended to affect a court’s duty to order expungement under section 299, subdivision (b) because section 299(f) speaks of ‘reliev[ing]’ a defendant of the ‘duty to provide’ a DNA sample, language that, as the minor argues,

⁷ Minor makes much of the fact that, when amending section 299, the Legislature referenced just one particular case, *People v. Buza* (2014) 231 Cal.App.4th 1446 [180 Cal.Rptr.3d 753], review granted February 18, 2015, S223698 (*Buza*), a decision regarding the proper scope of section 299 currently before the California Supreme Court for review. Section 299, subdivision (g) provides that “[t]his section shall become inoperative if the California Supreme Court rules to uphold the California Court of Appeal decision in [*Buza*] in regard to the provisions of Section 299 . . . , as amended by Section 9 of the DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Proposition 69, approved by the voters at the November 2, 2004, statewide general election, in which case this section shall become inoperative immediately upon that ruling becoming final.” As minor notes, the Legislature did not acknowledge, much less purport to overrule *Alejandro*, the decision discussed above holding that expungement is required when a criminal defendant’s request under section 1170.18 to reclassify a felony offense as a misdemeanor is granted. We decline to read any significance into the Legislature’s silence on this matter. (See *People v. Harrison* (1989) 48 Cal.3d 321, 329 [256 Cal.Rptr. 401, 768 P.2d 1078] [“The Legislature . . . is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof.”].) Moreover, *Buza* is inapposite. There, unlike here, the issue is the constitutionality of section 299 as it relates to expungement of DNA samples submitted by arrestees who are not thereafter convicted of a qualifying crime.

'applies to a situation where a person has yet to submit a sample.' As explained above, while we might agree in the absence of the statutory references to sections 17, 1203.4, and 1203.4a, the inclusion of those statutes makes sense only if section 299(f) is interpreted as precluding expungement when an originally qualifying offense is reduced to a nonqualifying offense in the course of judicial proceedings. We acknowledge the use of the phrase 'relieve . . . of the separate administrative duty to provide' is not an intuitive way to refer to expungement, but the language has been so understood at least since the issuance of *Coffey*, over 10 years ago." (*In re J.C.*, *supra*, 246 Cal.App.4th at p. 1475.)

■ We again agree with our colleagues' reasoning and adopt it for purposes of this case. Under a reasonable reading of section 299, considered in its entirety and as a whole, if a judge is not authorized to relieve a defendant of his or her administrative duty to submit DNA, the judge is not authorized to order the expungement of his or her DNA. (See also *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.*, *supra*, 51 Cal.3d at p. 764 [principles of statutory interpretation require courts to "reconcile or harmonize conflicting statutory provisions in an effort to give effect to all provisions if it is possible"].)

Finally, we turn to minor's argument that Assembly Bill No. 1492, enacted after entry of the challenged order, cannot apply retroactively to his case because it impermissibly amends section 299. (See *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1487 [76 Cal.Rptr.2d 342] ["the Legislature cannot indirectly accomplish . . . what it cannot accomplish directly by enacting a statute which amends the initiative's statutory provisions"].) According to minor, this bill "effectively amend[ed] Proposition 47 by creating a new exception to the treatment of reclassified crimes as misdemeanors." Or, "[s]aid another way, it authorizes the retention of DNA samples from reclassified offenders—something Proposition 47 prohibits by mandating that reclassified offenses be treated as misdemeanors for all purposes except firearm restrictions." We again disagree.

As our discussion from above makes clear, Assembly Bill No. 1492 did not amend section 1170.18. Rather, the bill clarified section 299 by adding section 1170.18 to the otherwise nonexhaustive list of statutes in section 299, subdivision (f) barring lower courts from excusing qualifying defendants from their administrative duty to submit DNA. Even assuming the former version of the statute was susceptible to minor's proposed interpretation (to wit, an interpretation omitting § 1170.18 from the list of statutes delineated therein), the fact that two equally reasonable interpretations exist merely confirms the statute's ambiguity and, thus, the impetus for its legislative amendment. (See *In re J.C.*, *supra*, 246 Cal.App.4th at p. 1479 [acknowledging two distinct, yet equally plausible, readings of the relevant statutes

governing DNA record expungement, to wit, one treating a redesignated conviction under § 1170.18 as a misdemeanor from the date of conviction, per *Alejandro*, and the other treating it as such from the date of sentence recall, per *Coffey* and § 17].)

■ Accordingly, we conclude the current version of section 299, subdivision (f), may be properly applied to this appeal regardless of the fact that the juvenile court order under challenge predated its amendment. (E.g., *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922 [44 Cal.Rptr.3d 223, 135 P.3d 637] [“A statute that merely clarifies, rather than changes, existing law is properly applied to transactions predating its enactment.”]; *Negrette v. California State Lottery Com.* (1994) 21 Cal.App.4th 1739, 1744 [26 Cal.Rptr.2d 809] [“An amendment which merely clarifies existing law may be given retroactive effect even without an expression of legislative intent for retroactivity.”].)

Thus, for all the reasons stated, we affirm the juvenile court’s order barring expungement of minor’s DNA samples from the state database following the reclassification of his offense as a misdemeanor.

DISPOSITION

The juvenile court order denying minor’s request for an order to expunge his DNA records from the state database is affirmed.

Siggins, J., concurred.

POLLAK, Acting P. J., Dissenting.—Because the retention of an individual’s DNA sample is not authorized based on an adjudication that the person committed a misdemeanor, and because Proposition 47 requires that offenses redesignated from felonies to misdemeanors under its provisions be treated as misdemeanors “for all purposes” except with respect to firearm restrictions, I believe that the minor (minor) is entitled to the expungement of his DNA sample from the state’s database.

“Proposition 47 enacted ‘‘the Safe Neighborhoods and Schools Act’’ (the Act), effective November 5, 2014. [Citation.] The Act changed portions of the Penal Code and Health and Safety Code to reduce various drug possession and theft-related offenses from felonies (or wobblers) to misdemeanors, unless the offenses were committed by certain ineligible offenders. [Citation.] . . . [¶] In addition to reclassifying certain felonies as misdemeanors, Proposition 47 also added section 1170.18 to the Penal Code.^[1] Section

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

1170.18 provides an opportunity for qualifying offenders who incurred their felony convictions before the effective date of the Act to benefit from the Act's reclassification provisions. . . . As to a person 'who has completed his or her sentence for a conviction' of a felony, subdivisions (f), (g), and (h) of section 1170.18 provide that the person may petition the court to have the felony conviction designated as a misdemeanor. [Citation.] The statute . . . provides that a felony conviction that is resentenced or designated as a misdemeanor '*shall be considered a misdemeanor for all purposes*' except with respect to firearm restrictions" (*Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1222–1223 [189 Cal.Rptr.3d 907], fns. & first italics omitted (*Alejandro*).)²

There is no dispute that minor's prior offense was properly designated a misdemeanor under section 1170.18, subdivision (g). And, as set out in footnote 2 above, subdivision (k) of section 1170.18 provides that "[a]ny felony conviction that is . . . designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes*, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction [for possession of a firearm].” (Italics added.)

The DNA and Forensic Identification Database and Data Bank Act of 1998 (§ 295 et seq.), as amended, is intended "to require DNA and forensic identification data bank samples from all persons, including juveniles, for the felony and misdemeanor offenses described in subdivision (a) of Section 296." (§ 295, subd. (b)(2).) Section 296, subdivision (a) specifies only felony offenses and misdemeanors that are sex or arson offenses.³ The collection of DNA samples from persons adjudicated to have committed any other misdemeanor, including shoplifting, is not authorized. "DNA sampling is not required or authorized for a misdemeanor offense" (*Coffey v. Superior*

² Proposition 47, an initiative measure, was adopted at the November 4, 2014 General Election. Section 1170.18 was included as section 14 of Proposition 47. Section 1170.18 provides in relevant part as follows: "(f) A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act 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. [¶] (g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor. [¶] . . . [¶] (k) Any felony conviction that is . . . designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6 [prohibited possession of a firearm]."

³ Subdivision (a)(1) and (2) of section 296 refer only to felonies. Subdivision (a)(3) of section 296 refers to felonies and misdemeanors requiring registration under section 290, for sex offenses, or section 457.1, for arson offenses.

Court (2005) 129 Cal.App.4th 809, 818,[29 Cal.Rptr.3d 59] (*Coffey*); see also *In re J.C.* (2016) 246 Cal.App.4th 1462, 1470 [201 Cal.Rptr.3d 731] (*J.C.*) [“Except as provided in section 296, subdivision (a)(3), persons convicted solely of misdemeanors are not required to provide DNA samples.”].)

In *Alejandro*, which was decided just days after the trial court’s order in this case, the court agreed that a person whose conviction is reduced from a felony to a misdemeanor under Proposition 47 is entitled to the expungement of his or her DNA from the database. (*Alejandro, supra*, 238 Cal.App.4th at pp. 1226–1230.) The court explained that section 1170.18, subdivision (k) “reflects the voters [intent that] the redesignated misdemeanor offense should be treated exactly like any other misdemeanor offense, except for firearm restrictions. Because the statute explicitly addresses what, if any, exceptions should be afforded to the otherwise all-encompassing misdemeanor treatment of the offense, and because only the firearm restriction was included as an exception, the enactors effectively directed the courts not to carve out other exceptions to the misdemeanor treatment of the reclassified offense absent some reasoned statutory or constitutional basis for doing so. [¶] At the time they enacted section 1170.18, the voters were presumed to have known of the existing statute authorizing DNA collection for felony, but not misdemeanor, offenders [citation], and yet they did not include DNA collection as an exception to the misdemeanor treatment of the offense. Thus, absent an intervening enactment providing otherwise, future offenders who commit a Proposition 47 reclassified misdemeanor offense will not be subject to DNA collection based solely on that offense.” (*Alejandro, supra*, at pp. 1227–1228, fn. omitted.) “[T]he voters did not intend that a reclassified misdemeanor offense be deemed a felony for purposes of retention of DNA samples.” (*Id.* at p. 1228.) If *Alejandro* was correctly decided and remains good law, minor is clearly entitled to expungement.

The Attorney General argues both that *Alejandro* was wrongly decided and that, in any event, a statutory amendment adopted subsequent to that decision requires a different result. The decision in *J.C.* does not adopt the first of these contentions but does agree as to the validity and effect of the statutory amendment.

The Attorney General contends that *Alejandro* was wrongly decided because section 299, rather than section 1170.18, subdivision (f), governs DNA expungement and section 299 does not provide for expungement in these circumstances. Section 299 authorizes the expungement of one’s DNA from the data bank if the person has not been proved to have committed an offense

justifying collection of the DNA sample.⁴ In *Alejandro, supra*, 238 Cal.App.4th at page 1228, the court held that “[t]he fact that reclassification of a felony to a misdemeanor is not among the grounds listed in section 299[, subdivision (b)] for DNA expungement does not convince us the remedy is unavailable for Proposition 47 reclassified misdemeanor offenses.” The court explained, “Section 299 provides for DNA expungement when a person ‘*has no past or present offense or pending charge which qualifies*’ that person for inclusion within the DNA data bank, and then lists several circumstances that provide the basis for an expungement request. [Citations.] The grounds for expungement listed in section 299 concern circumstances where an alleged offender is charged with an offense that qualifies for DNA collection, and then the case is not pursued or is dismissed, or the alleged offender is found not guilty or innocent. [Citation.] In these circumstances, the charged offense retains its qualification for DNA collection, but expungement of the DNA is warranted because the particular defendant is not guilty of that offense. In contrast here, under Proposition 47 *the reclassified misdemeanor offense itself no longer qualifies as an offense permitting DNA collection*. This circumstance is outside the matters contemplated by the Penal Code DNA expungement statute.” (*Alejandro*, at pp. 1228–1229, fn. omitted; see also *Coffey, supra*, 129 Cal.App.4th at p. 817 [rejecting Attorney General’s argument that § 299 is defendant’s “sole remedy” because it is the “only statute[] addressing the destruction, expungement, and retention of DNA samples and profiles collected under the DNA [and Forensic Identification Database and Data Bank Act of 1998].”].) I believe the reasoning in *Alejandro* is unassailable.

The Attorney General also argues that *Coffey* compels a contrary result and that *Alejandro* incorrectly distinguished that case. (*Coffey, supra*, 129

⁴ Section 299 has provided at all relevant times in part as follows: “(a) A person whose DNA profile has been included in the databank pursuant to this chapter shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the databank program pursuant to the procedures set forth in subdivision (b) if the person has no past or present offense or pending charge which qualifies that person for inclusion within the state’s DNA and Forensic Identification Database and Databank Program and there otherwise is no legal basis for retaining the specimen or sample or searchable profile. [¶] (b) Pursuant to subdivision (a), a person who has no past or present qualifying offense, and for whom there otherwise is no legal basis for retaining the specimen or sample or searchable profile, may make a written request to have his or her specimen and sample destroyed and searchable database profile expunged from the databank program if any of the following apply: [¶] (1) Following arrest, no accusatory pleading has been filed within the applicable period allowed by law, charging the person with a qualifying offense as set forth in subdivision (a) of Section 296 or if the charges which served as the basis for including the DNA profile in the state’s DNA and Forensic Identification Database and Databank Program have been dismissed prior to adjudication by a trier of fact; [¶] (2) The underlying conviction or disposition serving as the basis for including the DNA profile has been reversed and the case dismissed; [¶] (3) The person has been found factually innocent of the underlying offense pursuant to Section 851.8, or Section 781.5 of the Welfare and Institutions Code; or [¶] (4) The defendant has been found not guilty or the defendant has been acquitted of the underlying offense.”

Cal.App.4th 809; *Alejandro*, *supra*, 238 Cal.App.4th 1209.) In *Coffey*, the defendant was convicted of a “wobbler” that was charged as a felony, but after the defendant completed a successful probationary period was sentenced as a misdemeanor under section 17.⁵ The court rejected the defendant’s contention that his DNA should never have been collected because “[a]t the time the DNA samples were collected from Coffey, he had pled guilty to the charge of felony assault, and had not yet completed the requirements for reduction of the charge to a misdemeanor.” (*Coffey*, at p. 820.) The court also held that Coffey was not entitled to expungement because even though section 17, subdivision (b) made the offense a “misdemeanor for all purposes,” his plea to the offense as a felony was determinative of the right to enter his DNA into the data bank and section 17 rendered his offense a misdemeanor for all purposes only “*thereafter*, without any retroactive effect.” (*Coffey*, at p. 823.) In reaching this conclusion the court relied on the fact that section 299, subdivision (f) explicitly prohibited the court from relieving a person of the obligation to provide a DNA sample if found guilty of a qualifying offense, “[n]otwithstanding any other provision of law, *including [s]ection . . . 17.*”⁶ (*Coffey*, at p. 821.) “[B]ecause the Legislature has determined that a defendant whose sentence is reduced to a misdemeanor under section 17, subdivision (b), *must* provide DNA samples (§ 296), it cannot be that a defendant is insulated from providing DNA samples merely because his sentence is reduced to a misdemeanor under section 17, subdivision (b).” (*Coffey*, at p. 823.)

Alejandro correctly distinguished the circumstances in *Coffey*, where the defendant had pled guilty to the offense as a felony but at sentencing the offense was deemed a misdemeanor under section 17, from the situation in which a defendant’s offense has been reclassified as a misdemeanor pursuant to section 1170.18. Reclassification of a conviction under section 1170.18 is not analogous to reduction of charges under section 17. Wobbler offenses may be sentenced and classified as misdemeanors because the court determines in its discretion that the particular circumstances of a case justify

⁵ Section 17, subdivision (b) provides in relevant part: “When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.”

⁶ At the time, section 299, former subdivision (f) read as follows: “Notwithstanding any other provision of law, including Sections 17, 1203.4, and 1203.4a, a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required by this chapter if a person has been found guilty or was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in subdivision (a) of Section 296” (See Prop. 69, § 111.9, as approved by voters, Gen. Elec. (Nov. 2, 2004) eff. Nov. 3, 2004.)

treating the offense as less serious than a felony. Relevant factors in the exercise of that discretion are “‘the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.’” (*People v. Superior Court (Alvarez*) (1997) 14 Cal.4th 968, 978 [60 Cal.Rptr.2d 93, 928 P.2d 1171].) While the trial court sentencing a wobbler as a misdemeanor determined that “‘the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon’” (*People v. Park* (2013) 56 Cal.4th 782, 790 [156 Cal.Rptr.3d 307, 299 P.3d 1263]), it remains true that the person was found or pleaded guilty to the offense as a felony. In contrast, when the voters reclassified certain offenses as misdemeanors under Proposition 47, they changed the nature of those offenses in all cases from felonies (or wobblers) to misdemeanors. As explained in *Alejandro*, *supra*, 238 Cal.App.4th at page 1230, “distinct from wobbler offenses—the offenses now classified as misdemeanors for qualifying offenders under Proposition 47 have permanently been removed from the felony category and are no longer subject to DNA collection.” Moreover, as the court in *Alejandro* pointed out—correctly at the time— “[u]nlike the circumstances in *Coffey*, there is no statutory provision reflecting a Legislative or voter determination that a DNA sample should be retained for an offender whose offense has been designated a misdemeanor under Proposition 47.” (*Alejandro*, at pp. 1229–1230.)

The Attorney General argues that whatever the situation when *Alejandro* was decided, the law has been changed by an amendment to section 299, subdivision (f) that was enacted subsequent to that decision. The majority here adopts this argument. In the course of enacting alternative amendments to sections 298 and 299, one of which will become effective depending on how the Supreme Court rules on an appeal challenging the constitutionality of requiring a DNA sample from an individual on the basis of the person’s arrest, the Legislature inserted reference to section 1170.18 into section 299, subdivision (f). (Stats. 2015, ch. 487, § 4.) Thus, the provision quoted in footnote 6 above now begins, “Notwithstanding any other law, including Sections 17, 1170.18, 1203.4, and 1203.4a . . .” (§ 299, subd. (f), italics added.)

It is doubtful that this amendment bears upon the right to an expungement. Section 299, subdivision (f) precludes the court from “reliev[ing] a person of the separate administrative duty to *provide*” a specimen if found to have committed a qualifying offense. (Italics added.) Unlike all other subdivisions of section 299, which address the right to have one’s “DNA specimen and sample destroyed and searchable database profile expunged from the database program” (§ 299, subd. (a); see *id.*, subds. (b), (c)(1), (2), (d), (e)),

subdivision (f) refers to “provid[ing]” a sample and says nothing about expungement (§ 299, subd. (f)).⁷

Even accepting the Attorney General’s questionable premise that the amendment to section 299, subdivision (f) was intended to preclude expungement based on the reclassification of a felony as a misdemeanor pursuant to section 1170.18, I disagree with the Attorney General and my colleagues that the amendment would be valid. Although section 1170.18, subdivision (k)—part of Proposition 47—provides that offenses reclassified as a misdemeanor pursuant to section 1170.18 shall be treated as a misdemeanor for all purposes, the amendment to section 299, so construed, would treat a reclassified offense as a felony precluding expungement rather than as a misdemeanor entitling the defendant to expungement. Article II, section 10, subdivision (c) of the California Constitution requires that “[w]hen a statute enacted by the initiative process is involved, the Legislature may amend it only if the voters specifically gave the Legislature that power, and then only upon whatever conditions the voters attached to the Legislature’s amendatory powers.” (*People v. Armogeda* (2015) 233 Cal.App.4th 428, 434 [182 Cal.Rptr.3d 606].) Section 15 of Proposition 47 provides that “[t]he provisions of this measure may be amended by a two-thirds vote of the members of each house of the Legislature and signed by the Governor so long as the amendments are consistent with and further the intent of this act.”⁸ (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 15, p. 74.) An amendment is “‘a legislative act designed to change an existing initiative statute by adding or taking from it some particular provision.’” (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571 [107 Cal.Rptr.3d 265, 227 P.3d 858].) If the amendment to section 299 is construed to treat a reclassified offense as a felony rather than as a misdemeanor for the purpose

⁷ The opinion in *J.C.* acknowledges that the language of section 299, subdivision (f) “standing alone, appears to prohibit courts only from preventing the provision of a DNA sample, rather than prohibiting expungement of the record of a sample already provided.” (*J.C.*, *supra*, 246 Cal.App.4th at p. 1472.) However, the opinion then concludes that the provision was also intended to preclude expungement based on the inclusion in subdivision (f) of reference to sections 17, 1203.4 and 1203.4a that relate to offenses which in all events would require providing a DNA sample to the data bank. Whatever the logic of this inference, there is no suggestion that the language of subdivision (f) is ambiguous. “Providing” a DNA specimen obviously is not the same as “destroying” or “expunging” a specimen. In construing a statute, “[w]e look first to the words of the statute, ‘because the statutory language is generally the most reliable indicator of legislative intent.’” (*Klein v. United States of America* (2010) 50 Cal.4th 68, 77 [112 Cal.Rptr.3d 722, 235 P.3d 42].) “If the statutory language is unambiguous, ‘we presume the Legislature meant what it said, and the plain meaning of the statute governs.’” (*People v. Toney* (2004) 32 Cal.4th 228, 232 [8 Cal.Rptr.3d 577, 82 P.3d 778].) *J.C.* impermissibly rewrites the words of subdivision (f).

⁸ Assembly Bill No. 1492 (2015–2016 Reg. Sess.) was passed by the required two-thirds vote. (Assem. Weekly Hist. (2015–2016 Reg. Sess.) Feb. 4, 2016, p. 928.)

of determining the right to expungement, the amendment would be inconsistent with the intent of Proposition 47, and therefore invalid.

In *J.C.* the court found no inconsistency between this understanding of the amendment and the initiative, reasoning that Proposition 47 “does not clearly either require or prohibit expungement [of] the records of previously provided DNA samples.” (*J.C.*, *supra*, 246 Cal.App.4th at p. 1483.) However, section 1170.18, subdivision (k) provides that the redesignated offense shall be treated as a misdemeanor “for all purposes” and one such purpose clearly is determining whether the offender is entitled to have his or her DNA sample expunged from the data bank. The initiative explicitly excepted from “all purposes” the application of firearm restrictions but contains no such exception for application of the DNA sampling provisions. For those purposes, therefore, Proposition 47 requires the offense to be treated as a misdemeanor, requiring expungement. If the amendment to section 299, subdivision (f) is construed to prohibit expungement, the section would prohibit what Proposition 47 authorizes. So construed, the amendment therefore would be invalid. (*People v. Superior Court (Pearson)*, *supra*, 48 Cal.4th at p. 571.)

This conclusion is not at odds with the interpretation of section 17, as construed in *Coffey*, *supra*, 129 Cal.App.4th 809. As the court pointed out in *Alejandro*, when a defendant is sentenced for an offense pled as a felony but sentenced as a misdemeanor pursuant to section 17, it remains true that the defendant was found or pleaded guilty to a felony offense. In contrast, “offenses now classified as misdemeanors for qualifying offenders under Proposition 47 have permanently been removed from the felony category.” (*Alejandro*, *supra*, 238 Cal.App.4th at p. 1230.) Moreover, although *Coffey* did involve a request for expungement, the court’s analysis focused on the petitioner’s contentions that *taking* the DNA sample violated the petitioner’s Fourth Amendment rights and that a “conviction” under a wobbler did not occur until sentencing. As the Court of Appeal opinion states, *Coffey* “essentially argued that the collection of the DNA samples violated his Fourth Amendment rights because it was not authorized by the DNA Database Act. Although Coffey asserted that the proper remedy was expungement under section 299 . . . , in context he was merely attempting to justify a particular remedy by analogy, not undertaking to meet the prerequisites of section 299 or rely on its statutory authority.” (*Coffey*, *supra*, at p. 816.) In rejecting Coffey’s arguments, the Court of Appeal held that the “for all purposes” language in section 17 did not mean that the prior order under section 296 requiring the petitioner to *provide* a DNA specimen, correct when entered, should retroactively be determined to have been erroneous. This conclusion was consistent with prior Supreme Court decisions that section 17 applies only prospectively. (E.g., *People v. Feyrer* (2010) 48 Cal.4th 426, 439 [106 Cal.Rptr.3d 518, 226 P.3d 998] [“If ultimately a misdemeanor sentence is

imposed [pursuant to section 17, subdivision (b)], the offense is a misdemeanor from that point on, but not retroactively.”], superseded by statute on another ground in *People v. Park, supra*, 56 Cal.4th 782, 789, fn. 4.)

The opinion in *Coffey* did not suggest that a wobbler sentenced as a misdemeanor, though formerly a felony, should not be treated as a misdemeanor when relevant to a future application before the court. The petition before the court in *Coffey* challenged retroactively the validity of the order that required Coffey to provide his DNA sample. The court did not focus on whether the reduced classification of the offense should apply to a future application not based on a challenge to the validity of the prior order.

Unlike the application before the court in *Coffey*, minor’s request for expungement is not based on a challenge to the validity of the order that required him to provide his DNA sample. He does not seek to retroactively invalidate an order he acknowledges was correctly entered. Rather, he contends that although he was correctly ordered to provide the sample, now that his offense has been reclassified as a misdemeanor pursuant to section 1170.18 he no longer has been convicted of a qualifying offense and therefore he is entitled to have his specimen removed from the database. He does not seek retroactive application of section 1170.18 but prospective application to his request for expungement. The distinction parallels the distinction that has been made in interpreting section 17. The “for all purposes” phrase in section 17 does not mean that an enhancement in another case based upon the defendant having previously been convicted of a wobbler charged as a felony should be set aside when the wobbler offense is later sentenced under section 17 as a misdemeanor. (*People v. Park, supra*, 56 Cal.4th at p. 802 [“There is no dispute that, under the rule in [cases holding a wobbler to be a felony for all purposes unless reduced pursuant to section 17], defendant would be subject to the section 667(a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor.”].) However, the “for all purposes” requirement does mean that the offense cannot be used prospectively to impose a new enhancement based on the offense having previously been designated as a felony. (*Park*, at p. 804 [The “reduction of a wobbler to a misdemeanor under section 17(b) generally precludes its use as a prior felony conviction in a subsequent prosecution.”].) That is the same distinction that has been recognized in recent cases applying section 1170.18, rejecting applications to set aside enhancements previously imposed based on an offense that was formerly but is no longer classified as a felony,⁹ but holding that prospectively offenses reclassified under section 1170.18 cannot be treated as a felony to impose

⁹ Review in several such cases has been granted by our Supreme Court with briefing deferred pending resolution of a related question in *People v. Valenzuela* (2016) 244 Cal.App.4th 692 [198 Cal.Rptr.3d 276], review granted March 30, 2016, S232900.

new enhancements. (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 747 [201 Cal.Rptr.3d 198] [“Proposition 47 precludes the court from using [a conviction reclassified under its terms as a misdemeanor] as a felony merely because it was a felony at the time the defendant committed the offense.”].) Similarly, in the present case minor seeks only prospective application of section 1170.18.

Section 299, subdivision (a) provides that a person has the right to have his or her DNA specimen expunged from the data bank pursuant to the procedures specified in subdivision (b) “if the person has no past or present offense or pending charge which qualifies that person for inclusion within” the data bank. The reclassification of minor’s offense thus brings him or her within the scope of section 299, subdivision (a), even though the circumstances creating the right to expungement are not within those specified in section 299, subdivision (b). Both *Alejandro* and *Coffey* recognize that section 299 does not provide exclusive authority for removing a specimen from the data bank that does not belong there. (*Alejandro, supra*, 238 Cal.App.4th at pp. 1228–1229; *Coffey, supra*, 129 Cal.App.4th at p. 817.) When section 299 was originally enacted, the alternatives specified in subdivision (b) were virtually the only possible scenarios by which a person’s DNA sample could have been included in the data bank even though the person was not convicted of a qualifying offense. By changing what formerly was a qualifying offense into a nonqualifying offense, Proposition 47 has created a new situation in which this is now possible. There is no good reason why a person whose offense, by virtue of Proposition 47, has been determined to be a nonqualifying offense, should not be entitled to expungement in the same manner as those within the categories specified in subdivision (b).

The fundamental public policy that is relevant with respect to application of the DNA and Forensic Identification Database and Data Bank Act of 1998, as amended (§ 295 et seq.) is that the data bank should include DNA samples from persons committing felonies and certain specified misdemeanors and not from persons who have not committed any such offense. The situation would of course be different if section 296 required the inclusion of DNA from persons convicted of any misdemeanor, but that is not the law. That is why the interest in crime solving, the reason for the DNA data bank, provides no support for retaining the DNA of a person whose offense has been reduced to a misdemeanor under Proposition 47. Given the dichotomy drawn by the data bank statute between felonies and (most) misdemeanors, the implementation of the policy choice made by the Legislature dictates removal from the data bank of a DNA sample from a person who has committed what has now been classified as a (nonsex or arson) misdemeanor. The data bank statute reflects the policy determination that persons convicted of less serious offenses—most misdemeanors—need not have their DNA sample included in the data bank, and Proposition 47 has established that certain offenses previously

classified as felonies are less serious and are now misdemeanors for all purposes. No reason has been suggested why in light of these policies, DNA from persons convicted of a nonqualifying misdemeanor in the future should be excluded from the data bank, but DNA from persons previously convicted of the same offense should be retained in the data bank. Whatever ambiguity there may be in the meaning of section 299, subdivision (f), or uncertainty concerning the validity of the amendment to that provision, should be resolved in favor of upholding the policy decisions reflected in the data bank statute and in Proposition 47.

I therefore conclude that insofar as the denial of minor's request to expunge his DNA sample from the state data bank was based on the ground that the offense redesignated as a misdemeanor was previously a felony, the trial court erred in denying the request. Absent some other statutory basis for retention, minor's DNA sample should be expunged from the state data bank.

Appellant's petition for review by the Supreme Court was granted November 9, 2016, S237801.

[No. A146120. First Dist., Div. Three. Aug. 30, 2016.]

In re C.H., a Person Coming Under the Juvenile Court Law.

THE PEOPLE, Plaintiff and Respondent, v.
C.H., Defendant and Appellant.

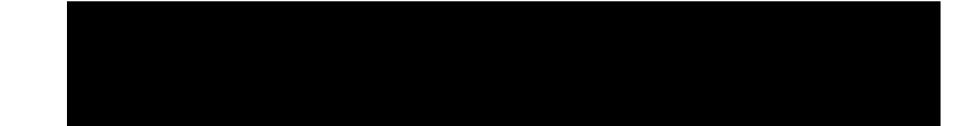
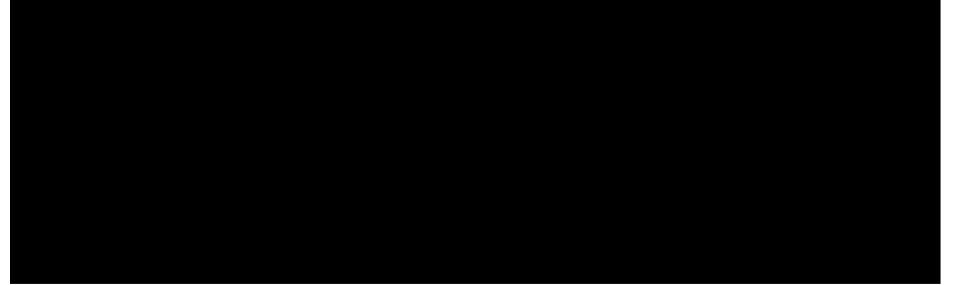
THE SUPREME COURT OF CALIFORNIA GRANTED REVIEW IN THIS MATTER
(see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) November 16, 2016, S237762.

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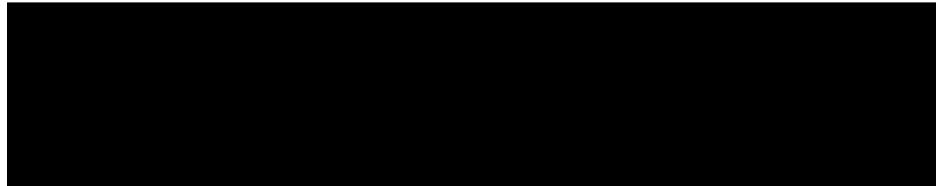
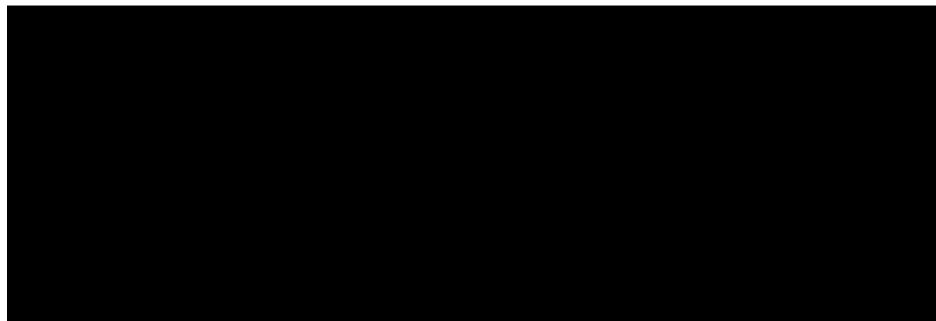
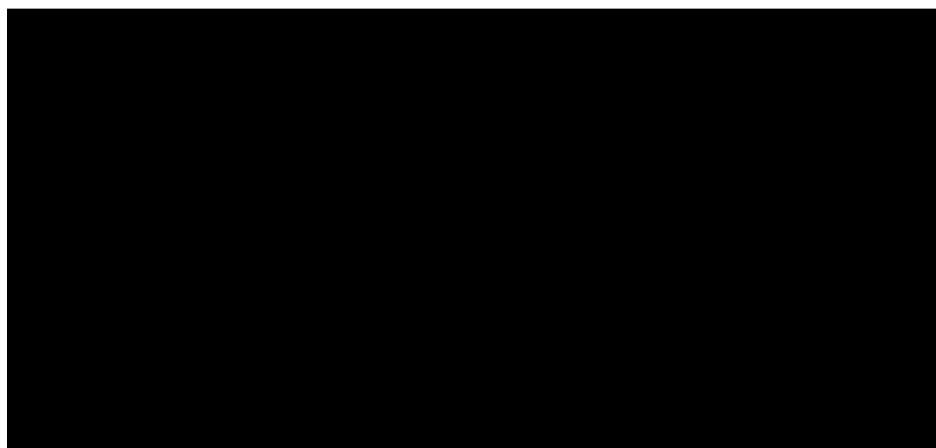
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COUNSEL

Patricia Noel Cooney, 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, Eric D. Share and Huy T. Luong, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

SIGGINS, J.—C.H. argues that following the reduction of his 2011 felony to a misdemeanor, the trial court was obligated to expunge a DNA sample he originally provided pursuant to Penal Code section 296.1.¹ His argument is premised upon his interpretation of Proposition 47, the Safe Neighborhoods and Schools Act, enacted by the voters in 2014. Proposition 47 permitted C.H. to petition the court to redesignate his felony as a misdemeanor, and provides that once redesignated his crime is a misdemeanor “for all purposes.” (§ 1170.18, subdivision (k).) Because misdemeanants are not required by law to provide a DNA sample for the state database, C.H. says his existing sample should be expunged because he is no longer a felon. We disagree.

Proposition 47’s directive to treat a redesignated offense as a misdemeanor “for all purposes” employs words that have a well-defined meaning and have

¹ All further statutory references are to the Penal Code.

never applied to alter a crime's original status. The provisions of Proposition 47 can be harmonized with our state's DNA collection law, Proposition 69, giving effect to each measure.² Moreover, if there is any fatal conflict between the text of the two measures, Proposition 69 controls because it is the more specific law. Finally, our interpretation gives effect to an underlying purpose of both measures to protect public safety. For these reasons, we affirm.

BACKGROUND

C.H. was arrested in early 2011 following his participation in a physical altercation with a loss prevention officer at a Kohl's department store who tried to detain him and one of his friends for shoplifting. C.H. successfully made off with a \$46 pair of jeans. He was charged with second degree robbery and assault with force likely to cause great bodily injury. The robbery and assault charges were dismissed after C.H. admitted a felony violation of section 487, subdivision (c), grand theft from a person.

At the 2014 general election, voters passed Proposition 47, the Safe Neighborhoods and Schools Act. (Statement of Vote, Gen. Elec. (Nov. 4, 2014) <<http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf>> [as of Aug. 30, 2016].) One of its provisions, section 1170.18, permits offenders adjudicated of felony grand theft to petition the court for redesignation of their crimes as misdemeanors. C.H. sought redesignation pursuant to section 1170.18, subdivision (f), and also expungement of his DNA records.³ The court redesignated C.H.'s felony as a misdemeanor but denied his request to expunge his DNA sample. C.H. appeals that denial.

DISCUSSION

A. *Statutory Analysis*

■ This case requires us to interpret and apply section 1170.18, part of Proposition 47, which allows offenders who have completed their sentences for certain felonies to apply to the court for designation of those felonies as misdemeanors. (§1170.18 subds. (a), (b) & (f).) Once an offense is designated a misdemeanor, section 1170.18 subdivision (k) requires that the crime "shall be considered a misdemeanor for all purposes" except for the prohibition on ownership of a firearm, which applies to felons and offenders convicted of

² Proposition 69 is the DNA Fingerprint, Unsolved Crime and Innocence Protection Act passed by the voters in the 2004 general election. It is codified in part 1, title 9, chapter 6 of the Penal Code, sections 295 through 300.4.

³ Appellant's request for judicial notice is granted.

specified misdemeanors. C.H. argues that because only felons and certain misdemeanor sex offenders are required by law to provide DNA under section 296, his DNA sample must be expunged and his profile removed from the state database because his redesignated crime is to “be considered a misdemeanor for all purposes.” Because the Penal Code provides a specific scheme for obtaining and expunging DNA, to address this argument we must consider whether section 1170.18 clearly specifies what must happen to an offender’s DNA sample and profile when a felony is reduced to a misdemeanor.

■ The principles for interpreting a proposition enacted by popular vote are the same as those used to interpret a statute enacted by our Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796 [156 Cal.Rptr.3d 307, 299 P.3d 1263] (*Park*).) “Initially, ‘[a]s in any case of statutory interpretation, our task is to determine afresh the intent of the Legislature by construing in context the language of the statute.’ [Citation.] In determining such intent, we begin with the language of the statute itself. [Citation.] That is, we look first to the words the Legislature used, giving them their usual and ordinary meaning. [Citation.] ‘If there is no ambiguity in the language of the statute, “then the Legislature is presumed to have meant what it said, and 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.”’” (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192–193 [96 Cal.Rptr.2d 463, 999 P.2d 686].)

■ All of Proposition 47, including section 1170.18, is silent on whether the redesignation of a felony as a misdemeanor requires that a defendant’s DNA be expunged. C.H. asserts the phrase “shall be considered a misdemeanor for all purposes” in section 1170.18, subdivision (k) compels the conclusion that it does. We disagree, and for several reasons, conclude that redesignation of an offense as a misdemeanor has no effect on previously obtained DNA.

■ First of all, the phrase “a misdemeanor for all purposes” has a well-defined meaning that does not relate back to alter a crime’s original status for events occurring before the crime was reduced to a misdemeanor. This language is identical to the language used in section 17 to describe the effect of a judicial declaration that a wobbler offense—which is punishable as a felony until designated a misdemeanor—is to be considered a misdemeanor. (§ 17, subd. (b)(3) [where a crime is a wobbler, “it is a *misdemeanor for all purposes . . . [¶] . . . [¶] . . . [w]hen . . . the court declares the offense to be a misdemeanor*” (italics added)]; see also *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100 [183 Cal.Rptr.3d 362] (*Rivera*) [noting how Prop. 47 borrowed § 17’s language].)

“[W]hen a wobbler is reduced to a misdemeanor [under section 17], the offense *thereafter* is deemed a ‘misdemeanor for all purposes . . . ?’” (*Park, supra*, 56 Cal.4th at p. 795, italics added; see *People v. Banks* (1959) 53 Cal.2d 370, 381–382 [1 Cal.Rptr. 669, 348 P.2d 102]; *People v. Pryor* (1936) 17 Cal.App.2d 147, 152 [61 P.2d 773].) Put differently, redesignation under section 17 makes the wobbler “a misdemeanor from that point on.” (*People v. Feyrer* (2010) 48 Cal.4th 426, 439 [106 Cal.Rptr.3d 518, 226 P.3d 998] (*Feyrer*); see *Feyrer*, at p. 442, fn. 8; *People v. Marshall* (1991) 227 Cal.App.3d 502, 504 [277 Cal.Rptr. 846] [redesignated offense is treated as a misdemeanor *after* redesignation]; *Gebremicael v. California Com. on Teacher Credentialing* (2004) 118 Cal.App.4th 1477, 1482–1483, 1487 [13 Cal.Rptr.3d 777] [same]; *People v. Camarillo* (2000) 84 Cal.App.4th 1386, 1390, 1394 [101 Cal.Rptr.2d 618] [same]; *People v. Rowland* (1937) 19 Cal.App.2d 540, 541–542 [65 P.2d 1333] [same].) Critically, however, this “misdemean[or] status [is] not . . . given retroactive effect.” (*People v. Moomey* (2011) 194 Cal.App.4th 850, 857 [123 Cal.Rptr.3d 749] (*Moomey*); *Feyrer*, at p. 439 [“the offense is [made] a misdemeanor from that point on, *but not retroactively*” (italics added)].)

In other words, a court’s declaration of misdemeanor status renders an offense a misdemeanor *for all purposes*, not *at all times*. Thus, a declaration that a wobbler is a misdemeanor does not “relate back” and alter that offense’s original status as a wobbler that is, by definition, to be treated as a felony until declared otherwise. For this reason, a court’s order declaring a wobbler to be a misdemeanor does not call into question a defendant’s burglary conviction for entering a building with intent to commit a felony (*Moomey, supra*, 194 Cal.App.4th at pp. 857–858), a defendant’s ineligibility for a diversionary drug sentence due to a prior felony (*People v. Marsh* (1982) 132 Cal.App.3d 809, 812–813 [183 Cal.Rptr. 455]), a defendant’s conviction for being a felon in possession of a firearm (*People v. Holzer* (1972) 25 Cal.App.3d 456, 460 [102 Cal.Rptr. 11], disapproved on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 860–862 [103 Cal.Rptr.2d 13, 15 P.3d 234]), or the imposition of a sentencing enhancement for a prior felony. (See *Park, supra*, 56 Cal.4th at p. 802 [“[t]here is no dispute that . . . defendant would be subject to the section 667(a) enhancement [for ‘serious’ felonies] had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor”].)

■ “It is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the

precise and technical sense which had been placed upon them by the courts.’” (*California Commerce Casino, Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, 1424 [53 Cal.Rptr.3d 626], quoting *City of Long Beach v. Payne* (1935) 3 Cal.2d 184, 191 [44 P.2d 305].) ■ Because “identical language appearing in separate statutory provisions should receive the same interpretation when the statutes cover the same or analogous subject matter” (*People v. Cornett* (2012) 53 Cal.4th 1261, 1269, fn. 6 [139 Cal.Rptr.3d 837, 274 P.3d 456]; see *People v. Lamas* (2007) 42 Cal.4th 516, 525 [67 Cal.Rptr.3d 179, 169 P.3d 102]), and because Proposition 47 and section 17 both address the effect to be given the redesignation of a felony (or a wobbler that starts out as a felony) as a misdemeanor, ■ we are presumptively obligated to construe the phrase “misdemeanor for all purposes” under Proposition 47 to mean the same as it does under section 17—namely, that a felony offense redesignated as a misdemeanor under Proposition 47 retains its character as a felony prior to its redesignation, and is treated as a misdemeanor only after the time of redesignation. This is precisely why the appeal of a redesignated offense under Proposition 47 lies with the Court of Appeal and not the appellate division—namely, because the redesignation does not retroactively convert the offense to a misdemeanor at the time of charging, which is the relevant point in time for determining where an appeal lies. (*People v. Lynall* (2015) 233 Cal.App.4th 1102, 1110–1111 [183 Cal.Rptr.3d 129]; *Rivera, supra*, 233 Cal.App.4th at pp. 1096–1097, 1099–1100.)

■ Our conclusion is also influenced by Proposition 69, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act. In section 296, subdivision (a)(1), Proposition 69 requires that “[a]ny person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense, . . . or any juvenile who is adjudicated under Section 602 of the Welfare and Institutions Code for committing any felony offense” is to provide fingerprints and samples of bodily fluids for DNA profiling purposes. Thus, the triggering event for the obligation to provide a sample for the state’s DNA database is a conviction or plea. For this reason we disagree with any notion that an application for expungement filed under section 1170.18 is seeking only prospective relief. Because the obligation to contribute DNA arises from a conviction or plea, the substance of an application for expungement under section 1170.18 must be predicated on the theory that redesignation as a misdemeanor relates back to change the nature of a previous plea or felony conviction *when it occurred*. But that, as explained above, is not the law.

■ Proposition 69 also specifies the circumstances under which DNA obtained for the database may be expunged. Section 299, subdivision (a)

allows expungement when “the person has no past or present offense or pending charge which qualifies that person for inclusion.” C.H. argues that, since there is no obligation on misdemeanants other than sex offenders to contribute to the DNA database, his sample should be expunged. But section 299, subdivision (b) permits persons who have “no past or present qualifying offense” to request expungement only if following arrest no accusatory pleading is filed for prosecution; a qualifying charge is dismissed prior to adjudication; the qualifying conviction has been reversed and the case dismissed; the defendant has been found factually innocent; or the defendant has been found not guilty or acquitted of the qualifying offense. (§ 299 subd. (b)(1)–(4).) This case does not fall within any of those circumstances.

Moreover, under Proposition 69 offenders may not be relieved of the obligation to provide a sample because the qualifying charge has been reduced under some other law. Section 299, subdivision (f) provides: “Notwithstanding any other law, including Sections 17, 1170.18, 1203.4, and 1203.4a, a judge is not authorized to relieve a person of the separate administrative duty to provide specimens, samples, or print impressions required by this chapter if a person has been found guilty or was adjudicated a ward of the court by a trier of fact of a qualifying offense as defined in subdivision (a) of Section 296, . . . or pleads no contest to a qualifying offense as defined in subdivision (a) of Section 296.”⁴

Thus, the specific provisions of Proposition 69 provide that an offender is obligated to provide a DNA specimen as a result of a conviction, guilty plea or no contest plea to a felony or a specified misdemeanor, specify the grounds upon which expungement is permissible; and provide that offenders are not to be relieved of the obligation to provide DNA because a felony is later reduced to a misdemeanor. In light of this specific statutory scheme it seems odd at best to conclude that Proposition 47’s general directive that a redesignated felony is “a misdemeanor for all purposes” compels expungement of DNA originally obtained as a result of a qualifying conviction or plea.⁵

⁴ Section 299 was recently amended to add section 1170.18 to the list of statutory offense reduction mechanisms that do not relieve an offender of the obligation to provide DNA. In our view, because section 299, subdivision (f) at all times specified it is to be given effect “notwithstanding any other law,” it is unnecessary to consider whether this recent amendment to Proposition 69 is a change or clarification of existing law, or is somehow impermissibly retroactive in operation.

⁵ We do not suggest that section 299 provides the exclusive basis to expunge DNA from the database. Obviously, in an appropriate case constitutional concerns may compel such a result. (Cf. *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809, 817 [29 Cal.Rptr.3d 59].)

To the extent there is any possible tension between section 1170.18 and sections 296 and 299, our job is to harmonize them where reasonably possible, reconciling inconsistencies and construing them to give force and effect to all of their provisions. (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955–956 [184 Cal.Rptr.3d 60, 342 P.3d 1217].) Our conclusion today does just that. Section 1170.18 redesignates C.H.’s felony to be a misdemeanor for all future purposes, while at the same time giving force to the mandates of sections 296 and 299 that provide offenders must contribute DNA to the state database upon conviction or plea and set forth the statutory basis for expungement.

But even if sections 1170.18 and 296 and 299 could not be reconciled in this way, we would read Proposition 69’s specific provisions to take precedence over Proposition 47’s general mandate that a redesignated crime is “a misdemeanor for all purposes.” (§ 1170.18, subd. (k).) “The rules we must apply when faced with two irreconcilable statutes are well established. ‘If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones [citation].’ [Citation] But when these two rules are in conflict, the rule that specific provisions take precedence over more general ones trumps the rule that later-enacted statutes have precedence. (See *People v. Gilbert* (1969) 1 Cal.3d 475, 479 [82 Cal.Rptr. 724, 462 P.2d 580] [‘It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment.’]; see *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1539 [246 Cal.Rptr. 823] [same]; see also Code Civ. Proc., § 1859 [‘when a general and particular provision are inconsistent, the latter is paramount to the former’].)’” (*State Dept. of Public Health v. Superior Court, supra*, 60 Cal.4th at pp. 960–961.) Thus, as the more specific laws addressing DNA collection and expungement, sections 296 and 299 trump section 1170.18 even though section 1170.18 is the later-enacted statute.

This result is also faithful to the public policy and purposes expressed in and supporting both initiative measures. Proposition 47 was declared by the voters 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, p. 70 <<http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf>> [as of Aug. 30, 2016].) It “[a]uthorize[s] consideration of resentencing for anyone who is currently

serving a sentence for any of the offenses listed herein that are now misdemeanors,” and makes clear that criminals convicted of violent crimes are not to benefit from its terms. (*Ibid.*) Moreover, the right to resentencing under Proposition 47 is qualified and “[r]equire[s] a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety.” (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, at p. 70.) So, although it permits redesignation of certain felonies as misdemeanors, Proposition 47 intends to do so in a way that does not “pose a risk to public safety.” But Proposition 47 includes no indication that it was also intended to affect the administrative requirements attendant to a felony conviction. (See *Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1510–1511 [71 Cal.Rptr.3d 125] [DNA sample collection is an administrative requirement not punishment].) Indeed, such a construction would be difficult to reconcile with Proposition 47’s aim to promote public safety while also reducing punishment for less serious offenses.

Proposition 69 is, if anything, even more facially motivated by concerns for public safety. It was enacted in recognition of a “critical and urgent need to provide law enforcement officers and agencies with the latest scientific technology available for accurately and expeditiously identifying, apprehending, arresting, and convicting criminal offenders and exonerating persons wrongly suspected or accused of crime.” (Voter Information Guide, Gen. Elec. (Nov. 2, 2004) text of Prop. 69, p. 135 <<http://vig.cdn.sos.ca.gov/2004/general/english.pdf>> [as of Aug. 30, 2016].) Expanding the state’s DNA database program was considered “[t]he most reasonable and certain means to accomplish effective crime solving in California, to aid in the identification of missing and unidentified persons, and to exonerate persons wrongly suspected or accused of crime.” (*Ibid.*) To that end, the voters did not intend to limit the collection of DNA to only offenders convicted of violent crimes. “The most reasonable and certain means to solve crime as effectively as other states which have found that the majority of violent criminals have nonviolent criminal prior convictions, and that the majority of cold hits and criminal investigation links are missed if a DNA database or data bank is limited only to violent crimes.” (*Ibid.*)

Thus, a concern of the voters in passing both Proposition 47 and 69 was the preservation and protection of public safety. Proposition 69 sought to enhance public safety by including within its scope nonviolent crimes. On the other hand, there is no expressed intent of the voters in Proposition 47 to limit or relieve felonies reclassified as misdemeanors from the obligation to contribute DNA, and that is no surprise; to do so would be inconsistent with the expressed policy objective in both measures to protect public safety.

For the foregoing reasons, we agree with the holding of our colleagues in Division One in *In re J.C.* (2016) 246 Cal.App.4th 1462 [201 Cal.Rptr.3d 731], and respectfully disagree with the courts who have held that redesignation of a felony as a misdemeanor under section 1170.18 requires expungement of an offender's DNA and DNA profile from the state database. (See *Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209 [189 Cal.Rptr.3d 907].) Redesignation of a felony to a misdemeanor under section 1170.18 does not require expungement.⁶

B. Equal Protection

C.H. also argues that retention of his DNA and DNA profile in the state database following the passage of Proposition 47 violates his right to equal protection under law prescribed in the state and federal Constitutions. (Cal. Const., art. I, § 7, subd. (a); U.S. Const., 14th Amend.) He argues that if Proposition 47 were in effect when he committed his crime, he would be under no obligation to submit a DNA sample. Thus, removal of his DNA from the state database is necessary as a matter of equal protection so he will be treated similarly to an offender who commits a crime after the initiative's enactment. We disagree. Retaining C.H.'s DNA and profile in the state database does not violate his rights to equal protection.

“Where, as here, a disputed statutory disparity implicates no suspect class or fundamental right, ‘equal protection of the law is denied only where there is no “rational relationship between the disparity of treatment and some legitimate governmental purpose.”’” (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881 [183 Cal.Rptr.3d 96, 341 P.3d 1075] (*Johnson*).) “‘The concept [of equal protection] recognizes that persons similarly situated with respect to the legitimate purpose of the law receive like treatment, but it does not . . . require absolute equality. [Citations.] Accordingly, a state may provide for differences as long as the result does not amount to invidious discrimination. [Citations.]’ [Citation] ‘Equal protection . . . require[s] that a distinction made have some relevance to the purpose for which the classification is made.’” (*People v. Cruz* (2012) 207 Cal.App.4th 664, 675 [143 Cal.Rptr.3d 742].)

There is a rational basis supporting the retention of DNA obtained from offenders convicted of felonies before Proposition 47 whose crimes have been

⁶ In light of our interpretation of these statutes, we need not address C.H.'s contention that Assembly Bill No. 1492 (2015–2016 Reg. Sess.) effected an unconstitutional amendment of Proposition 47.

reduced to misdemeanors. Proposition 69 declares that an expansive DNA database is: “(1) The most reasonable and certain means to accomplish effective crime solving in California, to aid in the identification of missing and unidentified persons, and to exonerate persons wrongly suspected or accused of crime; [¶] (2) The most reasonable and certain means to solve crime as effectively as other states which have found that the majority of violent criminals have nonviolent criminal prior convictions, and that the majority of cold hits and criminal investigation links are missed if a DNA database or data bank is limited only to violent crimes; [¶] (3) The most reasonable and certain means to rapidly and substantially increase the number of cold hits and criminal investigation links so that serial crime offenders may be identified, apprehended and convicted for crimes they committed in the past and prevented from committing future crimes that would jeopardize public safety and devastate lives; and [¶] (4) The most reasonable and certain means to ensure that California’s Database and Data Bank Program is fully compatible with, and a meaningful part of, the nationwide Combined DNA Index System (CODIS).” (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 69, p. 135 <<http://vig.cdn.sos.ca.gov/2004/general/english.pdf>> [as of Aug. 30, 2016].) Preserving the integrity and vitality of the state’s DNA database system provides a rational basis to retain the DNA and profiles of offenders who were convicted before enactment of Proposition 47, even if they would not be required to provide DNA if convicted after its effective date. It is reasonable to conclude that a more comprehensive database, with samples from more offenders, is a more effective and utilitarian database.

■ “To mount a successful rational basis challenge, a party must ‘‘negative every conceivable basis’’ that might support the disputed statutory disparity. (*Heller v. Doe* (1993) 509 U.S. 312,] 320 [125 L.Ed.2d 257, 113 S.Ct. 2637]; see [*People v. Turnage*[(2012) 55 Cal.4th 62,] 75 [144 Cal.Rptr.3d 489, 281 P.3d 464].) If a plausible basis exists for the disparity, courts may not second-guess its ‘‘wisdom, fairness, or logic,’’ and ‘‘the Legislature is afforded considerable latitude in defining and setting the consequences of criminal offenses.’’ (*Johnson, supra*, 60 Cal.4th at pp. 881, 887.)

Although courts “will not condone unconstitutional variances in the statutory consequences of our criminal laws, rational basis review requires that we respect a statutory disparity supported by a reasonably conceivable state of facts. ‘‘‘Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.’’’’ (*Johnson, supra*, 60 Cal.4th at p. 889.)

DISPOSITION

The order is affirmed.

McGuiness, P. J., and Jenkins, J., concurred.

Appellant's petition for review by the Supreme Court was granted November 16, 2016, S237762.

[No. B263965. Second Dist., Div. Four. Aug. 30, 2016.]

THE PEOPLE ex rel. MICHAEL N. FEUER, as City Attorney, etc., Plaintiff and Respondent, v.
FXS MANAGEMENT, INC., et al., Defendants and Appellants.

[REDACTED]

COUNSEL

Law Offices of Mieke Ter Poorten, Mieke Ter Poorten; Hobson Bernardino + Davis and Rafael Bernardino, Jr., for Defendants and Appellants.

Michael N. Feuer, City Attorney, Asha Greenberg, Assistant City Attorney, Anh Truong, Christian Commelin and Rahi Azizi, Deputy City Attorneys, for Plaintiff and Respondent.

OPINION

COLLINS, J.—

INTRODUCTION

In this nuisance abatement action, the People of the State of California (the People) filed an action against defendants and appellants FXS Management, Inc., which does business as “Weedland,” and its principal, Franky Silva. The People alleged that Weedland was an illegal medical marijuana business under the City of Los Angeles Municipal Code, and sought an injunction against the continuing operation of Weedland. Defendants argued that Weedland was a medical marijuana “collective,” and therefore did not fall under the limitations of the municipal code. The trial court found that Weedland did fall under the statute, and therefore that the People showed a likelihood of prevailing. The court issued a preliminary injunction, and defendants appealed.

We affirm. The applicable municipal code section broadly defines a “[m]edical marijuana business” as any location where medical marijuana is “distributed, delivered, or given away.” (L.A. Mun. Code, § 45.19.6.1.A.) Weedland is a location that distributes medical marijuana to its “members,” and is therefore a medical marijuana business as defined in the municipal code.

FACTUAL AND PROCEDURAL BACKGROUND

On May 21, 2013, the voters of the City of Los Angeles approved Proposition D, the Medical Marijuana Regulation and Taxation Ordinance, a ballot measure intended to regulate medical marijuana businesses. (See *Safe Life Caregivers v. City of Los Angeles* (2016) 243 Cal.App.4th 1029, 1037 [197 Cal.Rptr.3d 524] (*Safe Life Caregivers*).) Proposition D “repealed the existing sections of the municipal code relating to medical marijuana, and enacted new provisions.” (*Safe Life Caregivers*, at p. 1037.)

Proposition D provides that within the City of Los Angeles, it is “unlawful to own, establish, operate, use, or permit the establishment or operation of a medical marijuana business, or to participate as an employee, contractor, agent or volunteer, or in any other manner or capacity in any medical marijuana business.” (L.A. Mun. Code, § 45.19.6.2.A.) Proposition D broadly defines a “[m]edical marijuana business” as “[a]ny location where marijuana is cultivated, processed, distributed, delivered, or given away to a qualified patient, a person with an identification card, or a primary caregiver.”¹ (L.A. Mun. Code, § 45.19.6.1.A.)

In July 2014, defendants opened Weedland, which they characterize as a “medical marijuana collective” that “facilitates and coordinates medical marijuana transactions between its private members and caregiver members.” In early February 2015, two undercover Los Angeles Police Department officers visited Weedland twice and, after filling out Weedland paperwork and showing their identifications and medical marijuana recommendations, purchased marijuana during each visit.

On February 11, 2015, the People filed a complaint against defendants alleging violations of Proposition D.² The People requested a temporary restraining order or an order to show cause regarding a permanent injunction. (See L.A. Mun. Code, § 11.00(l) [allowing for abatement of a nuisance “by means of a restraining order, injunction or any other order or judgment in law or equity

¹ “ ‘Identification card’ means a document issued by the State Department of Health Services that . . . identifies a person authorized to engage in the medical use of marijuana and the person’s designated primary caregiver, if any.” (Health & Saf. Code, § 11362.7, subd. (g).)

² Angel Montes, Jr., the owner of the property where Weedland was located, was also named as a defendant in the complaint. Montes is not a party to the appeal.

issued by a court of competent jurisdiction”].) The People submitted evidence in support of their request, including declarations from the undercover officers who purchased marijuana from Weedland.

Defendants filed an opposition and a supplemental opposition that argued, in part, that because defendants operated a members-only medical marijuana “collective,” they did not operate a medical marijuana “business,” and therefore Proposition D did not apply to them.³ Defendants submitted evidence in support of their opposition, including declarations by defendant Franky Silva, who operates FXS Management, Inc., doing business as Weedland. Silva stated that Weedland “acquires . . . lawfully cultivated medical marijuana, possesses . . . lawfully cultivated medical marijuana and . . . distributes lawfully cultivated medical marijuana” to members who have a “valid California state medical marijuana identification card.” Silva explained that to his understanding, a “marijuana business” is a for-profit business open to all members of the public, and therefore Weedland, a not-for-profit, members-only “collective,” was not a “business” under the definition of Proposition D. Defendants’ attorney, Rafael Bernardino, submitted a declaration expressing a similar understanding about the differences between a medical marijuana “business” and a “collective.”

After a hearing, the court held that “Proposition D applies to marijuana collectives,” and that the People were “likely to prevail on [the] claim that Defendants are operating a marijuana business in violation of” Proposition D. The trial court issued a preliminary injunction barring defendants from operating Weedland “or any other medical marijuana business and/or collective” in the city.

Defendants timely appealed. (See Code Civ. Proc., § 904.1, subd. (a)(6).)

STANDARD OF REVIEW

■ “[W]hether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief.” (*White v. Davis* (2003) 30 Cal.4th 528, 554 [133 Cal.Rptr.2d 648, 68 P.3d 74].) When the plaintiff is a governmental entity seeking to enjoin illegal activity, a more deferential standard applies: “Where a governmental entity seeking to enjoin the alleged violation of an ordinance which specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits, a

³ Defendants’ additional arguments in their opposition are not relevant to this appeal and are not recounted here.

rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. If the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties.” (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72 [196 Cal.Rptr. 715, 672 P.2d 121], fn. omitted (*IT Corp.*); see *City of Corona v. AMG Outdoor Advertising, Inc.* (2016) 244 Cal.App.4th 291, 299 [197 Cal.Rptr.3d 563] (*City of Corona*)).

On appeal, factual findings made by the trial court must be accepted if supported by substantial evidence, the decision to issue a preliminary injunction is reviewed for an abuse of discretion, and questions of law are reviewed de novo. (*420 Caregivers, LLC v. City of Los Angeles* (2012) 219 Cal.App.4th 1316, 1331 [163 Cal.Rptr.3d 17].) “Because the propriety of the preliminary injunction in this case turns on a legal issue, the interpretation of a local ordinance, our review is de novo.” (*People ex rel. Feuer v. Nestdrop, LLC* (2016) 245 Cal.App.4th 664, 672 [199 Cal.Rptr.3d 871] (*Nestdrop*)).

DISCUSSION

■ When considering the meaning of a statute, we first examine the words themselves because “the statutory language is generally the most reliable indicator of legislative intent.” (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715 [3 Cal.Rptr.3d 623, 74 P.3d 726].) The parties agree that “[i]f the plain, commonsense meaning of a statute’s words is unambiguous, the plain meaning controls.” (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818 [31 Cal.Rptr.3d 591, 115 P.3d 1233].)

As noted above, Proposition D defines a “medical marijuana business” as “[a]ny location where marijuana is cultivated, processed, distributed, delivered, or given away to a qualified patient, a person with an identification card, or a primary caregiver.” (L.A. Mun. Code, § 45.19.6.1.A; see also *Nestdrop, supra*, 245 Cal.App.4th at pp. 668–670 [discussing the definition of a medical marijuana business under Prop. D].) Defendants state that Weedland “facilitates and coordinates medical marijuana transactions between its private members and caregiver members.” It “provides medical marijuana to . . . [m]embers who use medical marijuana to treat a number of serious and painful health ailments.” Silva’s declaration stated that Weedland acquires medical marijuana, possesses medical marijuana, and distributes medical marijuana to members who possess valid California state medical marijuana identification cards. Weedland, therefore, falls squarely under the definition of a medical marijuana business as defined in Proposition D, because it is a location where marijuana is distributed or delivered to persons with identification cards.

Defendants do not cite Proposition D’s definition of a “medical marijuana business” anywhere in their opening brief (and they did not file a reply brief). Defendants therefore do not argue that the definition in Los Angeles Municipal Code section 45.19.6.1.A does not apply to Weedland. Instead, they argue generally that a medical marijuana “business” is open to the public, while a medical marijuana “collective” only distributes marijuana to members. As a result, defendants argue, Weedland is not regulated by Proposition D, because “[n]owhere in [Proposition D] are ‘collectives’ defined or even mentioned.” Rather, defendants state that the People rely on an “unavailing circular argument: medical marijuana *collectives* cannot operate because medical marijuana *businesses* are not allowed to do so.” According to defendants, “the [People’s] argument boils down to an incorrect reading of business,” because a “person of common intelligence can and may reasonably interpret all of the statements” regulating medical marijuana in Los Angeles “as banning medical marijuana businesses but permitting medical marijuana collectives.”

Defendants’ argument is meritless.⁴ In support of their position, defendants cite a patchwork of nonbinding sources, such as the California Attorney General’s 2008 Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use and a December 21, 2011 letter from the California Attorney General to members of the Legislature requesting clearer legal parameters about “how, when, and where individuals may cultivate and obtain physician-recommended marijuana.” Because these sources reference medical marijuana “collectives,” defendants argue, Proposition D’s regulation of medical marijuana businesses does not apply to them.

■ California law allows “a city or other local governing body” to adopt and enforce “local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective.” (Health & Saf. Code, § 11362.83.) State law also allows “a city, county, or city and county [to adopt] ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.” (Health & Saf. Code, § 11362.768, subd. (f.) The California Supreme Court has made clear that municipalities such as the City of Los Angeles have the authority to prohibit the distribution of medical marijuana within their jurisdictions “by declaring such conduct on local land

⁴ We remind counsel that “[a]ttorneys are officers of the court and have an ethical obligation to advise the court of legal authority that is directly contrary to a claim being pressed.” (*In re Reno* (2012) 55 Cal.4th 428, 510 [146 Cal.Rptr.3d 297, 283 P.3d 1181]; see also Rules Prof. Conduct, rule 5-200(B), (C), (D) [a bar member may not “seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law,” “intentionally misquote to a tribunal the language of a book, statute, or decision,” or “cite as authority a decision that has been overruled or a statute that has been repealed”].) Defendants had an obligation to bring to the court’s attention the definition of “medical marijuana business” in the relevant municipal code section.

to be a nuisance, and by providing means for its abatement.” (*City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 762 [156 Cal.Rptr.3d 409, 300 P.3d 494] (*City of Riverside*).) Defendants present no authority supporting the suggestion that in implementing such regulations, a local jurisdiction is not free to define a medical marijuana “business” or “collective” or “dispensary” in whatever manner it deems appropriate.

Defendants attempt to distinguish *City of Riverside* by arguing that the zoning ordinances in that case “banned all three types of medical marijuana organizations: cooperatives, collectives, and dispensaries.” In fact, the ordinances at issue in *City of Riverside* stated that a “‘medical marijuana dispensary’” could be deemed a nuisance. (*City of Riverside, supra*, 56 Cal.4th at p. 740.) A medical marijuana dispensary, in turn, was defined as “[a] facility where marijuana is made available . . . in accordance with” the Compassionate Use Act of 1996, Health and Safety Code section 11362.5. (*City of Riverside*, at p. 740.) The Supreme Court noted that “the planning division of Riverside’s Community Development Department notified [a party in the case] by letter that the definition of ‘medical marijuana dispensary’ in Riverside’s zoning ordinances ‘is an all-encompassing definition, referring to all three types of medical marijuana facilities, a dispensary, a collective and a cooperative,’ and that, as a consequence, ‘all three facilities are banned in the City of Riverside.’” (*Ibid.*)

Here, Proposition D’s definition is similarly broad, because it defines a “medical marijuana business” as “[a]ny location where marijuana is cultivated, processed, distributed, delivered, or given away to a qualified patient, a person with an identification card, or a primary caregiver.” (L.A. Mun. Code, § 45.19.6.1.A.) Nothing in *City of Riverside* suggests that the definition in Proposition D excludes self-identified “collectives” from its definition. To the contrary, the broad interpretation of “medical marijuana dispensary” in the ordinance in *City of Riverside* demonstrates that an expansive definition of “medical marijuana business” within the municipal code fully accords with state law.

■ Furthermore, because the language defining “medical marijuana business” in Proposition D is clear, we do not need to resort to secondary sources in an effort to determine a meaning. “If the statutory language is clear and unambiguous our inquiry ends.” (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 [56 Cal.Rptr.3d 880, 155 P.3d 284].) Defendants have not cited any sources indicating that Proposition D’s definition of “medical marijuana business” means anything other than what it says. And defendants’ own statements about Weedland show that it falls under the definition of a medical marijuana business in Proposition D, because it is a location where marijuana is distributed, delivered, or given away to qualified patients or persons with relevant identification cards.

■ The People therefore have demonstrated a likelihood of prevailing on the merits, satisfying the first prong of the preliminary injunction test. We presume the existence of public harm, because “[w]here a legislative body has enacted a statutory provision proscribing a certain activity, it has already determined that such activity is contrary to the public interest.” (*IT Corp.*, *supra*, 35 Cal.3d at p. 70.) Defendants argue that the People are “not entitled to the rebuttable presumption because the ordinance in question does not address ‘collectives,’ only businesses.” For the reasons discussed above, we reject this argument.

Defendants may rebut the presumption of harm by showing that they would suffer grave or irreparable harm from the issuance of the preliminary injunction. (*IT Corp.*, *supra*, 35 Cal.3d at p. 70; *City of Corona*, *supra*, 244 Cal.App.4th at p. 299.) Defendants argue that the balance of harms weighs in favor of denying the injunction, because “[o]n the one hand the City offers a vague statute, which has never been challenged before, and no evidence of harm; on the other hand, the Collective offered real medical harm [*sic*] to approximately 2,300 Collective Members, and reliance on a statute that excludes collectives from enforcement.” Defendants also argue that an injunction would bar Weedland members “from being able to obtain medical marijuana as a medical treatment.”

Defendants have presented no evidence to indicate that medical marijuana patients who formerly received marijuana from Weedland are unable to receive marijuana from medical marijuana businesses within the City of Los Angeles that fall within the exceptions to Proposition D,⁵ or from medical marijuana businesses outside the city’s jurisdiction. To the contrary, the single declaration defendants submitted from a Weedland patron stated that she “visited several Medical Marijuana Collectives and chose [Weedland] due to their good service and concern for my medical situation.” The witness’s statements indicate that there are alternative sources of medical marijuana, and that the injunction will not bar her from receiving medical marijuana from other sources. Moreover, there is no statutory right to the purchase or sale of medical marijuana, and therefore local regulation of medical marijuana businesses cannot infringe upon any such right. (See *Safe Life Caregivers*, *supra*, 243 Cal.App.4th at pp. 1048–1049.)

Defendants argue that the injunction infringes constitutionally protected freedom of speech because it “prevent[s] the Collective from distributing and displaying information about medical marijuana therapy to its Members, on its premises.” They also argue that the injunction interferes with Weedland

⁵ Proposition D provides limited immunity for medical marijuana businesses registered in accordance with earlier applicable ordinances and in compliance with applicable tax requirements. (See L.A. Mun. Code, § 45.19.6.3.)

members' freedom of association. Defendants do not specify whether they contend that their state or federal rights are being infringed. Whatever their contention, the injunction does not limit defendants' speech or association, other than a requirement that Weedland remove signage from its property advertising its business. As the injunction does not limit defendants' speech or ability to associate with whomever they choose, it does not infringe on any such rights that may exist under the state or federal Constitutions. Moreover, Proposition D itself applies only to a "location where marijuana is cultivated, processed, distributed, delivered, or given away" (L.A. Mun. Code, § 45.19.6.1.A) and therefore does not inhibit communication of information about medical marijuana or the association of people interested in marijuana.

Defendants have not demonstrated that they would suffer grave or irreparable harm from the preliminary injunction. (*IT Corp., supra*, 35 Cal.3d at p. 72.) The trial court's issuance of the preliminary injunction was therefore warranted, and defendants have not demonstrated error on appeal.

DISPOSITION

The order is affirmed. The People shall recover their costs on appeal.

Willhite, Acting P. J., and Manella, J., concurred.

[No. C079513. Third Dist. Aug. 31, 2016.]

HARALD MARK GALZINSKI, Plaintiff and Appellant, v.
SAMUEL D. SOMERS, as Chief of Police, etc., Defendant and Respondent;
PAM SEYFFERT et al., Real Parties in Interest and Respondents.

[REDACTED]

COUNSEL

Harald Mark Galzinski, in pro. per., for Plaintiff and Appellant.

James Sanchez, City Attorney, and Katherine E. Underwood, Deputy City Attorney, for Defendant and Respondent and for Real Parties in Interest and Respondents.

OPINION

ROBIE, J.—In February 2011, plaintiff Harald Mark Galzinski submitted a citizen’s complaint to the Sacramento Police Department (the department) against three of the department’s officers related to the taking of biological samples from him following his arrest in December 2003. In July 2014, the department’s internal affairs division notified Galzinski that the division had “reviewed [his] complaint” but “no further action” would be taken on it because, “[b]ased upon the information [Galzinski] provided, the issues [he] raised pertain[ed] to points of law which should have been litigated during [his] criminal trial in 2005. Therefore, the proper venue for resolving [his] complaint would be through the appeals process.”

Galzinski sought a writ of mandate from the superior court to compel defendant Samuel D. Somers, Jr., Chief of the Sacramento Police Department, and three sergeants in the department’s internal affairs division (real parties in interest Pam Seyffert, Charles Husted, and Terrell Marshall)¹ to “properly investigate” his complaint and to “make official findings as to the validity of [his] allegations.” The superior court denied Galzinski’s petition, concluding that the department had “essentially” found the officers Galzinski accused of

¹ For convenience, we will refer to defendant and the three real parties in interest jointly as defendants.

misconduct were “‘exonerated’” and that, in any event, the department did not abuse its discretion “in responding to the complaint in the way that it did.”

■ On Galzinski’s appeal, we conclude the trial court erred in denying Galzinski’s petition. As we will explain, the procedure for addressing citizen complaints the department established and published obligated the department to conduct an investigation into the allegations of the complaint that was sufficient to allow the chief of police to make one of four possible findings, and the procedure obligated the chief of police to make one of those findings with respect to each of Galzinski’s allegations of misconduct. Defendants did not comply with these obligations, and Galzinski is entitled to a writ of mandate compelling defendants to perform their ministerial duty to satisfy the obligations imposed by the department’s published procedure. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Subdivision (a)(1) of Penal Code section 832.5 provides that “[e]ach department or agency in this state that employs peace officers shall establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public.” In compliance with this provision, the department has made available to the public a “Citizen Complaint procedure” brochure. According to that brochure, once a citizen complaint has been submitted to the department, “it may be investigated in one of two ways. It will either be forwarded to the employee’s supervisor for inquiry or to the Internal Affairs Division for investigation.” The brochure further explains that “[e]ach allegation is examined on its own merits” and “[t]he Chief of Police will render a finding in each case. There are four possible findings:

“Sustained: The investigation disclosed enough evidence to clearly prove the allegation.

“Not sustained: The investigation failed to reveal enough evidence to clearly prove or disprove the allegation.

“Exonerated: The act which proved the basis for the complaint did occur; however investigation revealed the act was justified, lawful and proper.

“Unfounded: The investigation has produced sufficient evidence to prove that the act or acts alleged did not occur. This finding shall also apply when individual personnel named in the complaint were not involved in an act that did occur.

“You will be notified of the finding in writing at the conclusion of the investigation.”

On February 8, 2011, Galzinski submitted a citizen’s complaint to the department against three officers related to his arrest in December 2003. Specifically, Galzinski complained that on the day of his arrest two of the officers had a nurse at the Sacramento County Jail collect biological samples from him without a warrant or probable cause. He further complained that none of the reports completed by the three officers explained or confirmed “why, where, when, how, and by who the evidence was collected, and the reason this information was expressly left out of [the] reports.” Finally, Galzinski complained that “[n]o receipt or documentation of the tests done [on the samples] and the results of such tests were []ever turned over to [him] at anytime.”

In August 2011, following a request made by Galzinski (which appears to have been in the form of an ex parte motion), Sergeant Husted notified Galzinski that his complaint had been received on February 24, 2011, and assigned to Sergeant Seyffert.

On May 28, 2014—more than three years after the department received Galzinski’s complaint—Galzinski wrote to Sergeants Husted and Seyffert, asking for notice of the disposition of his complaint or notice of when the investigation of his complaint would be concluded. By letter dated July 3, 2014, Sergeant Marshall notified Galzinski that the internal affairs division had “reviewed [his] complaint” but “no further action” would be taken on it because, “[b]ased upon the information [Galzinski] provided, the issues [he] raised pertain[ed] to points of law which should have been litigated during [his] criminal trial in 2005. Therefore, the proper venue for resolving [his] complaint would be through the appeals process.”²

In July 2014, Galzinski filed a verified petition for a writ of mandate in the Sacramento County Superior Court against Police Chief Somers as respondent, and Seyffert, Husted, and Marshall as real parties in interest, seeking to compel them to “properly investigate [his] citizen’s complaint . . . and/or make official findings as to the validity of [his] allegations.” In opposing

² The letter also stated that Galzinski’s complaint had been “placed in ‘suspension’ status pending the outcome of [his] criminal case,” but then inexplicably acknowledged that Galzinski’s “criminal case concluded on November 2, 2005, [when he was] found guilty and sentenced to prison”—more than five years *before* Galzinski submitted his citizen’s complaint to the department.

In their opposition to Galzinski’s writ petition in the superior court, defendants asserted that Galzinski’s complaint was placed in suspension until “all criminal appeals were exhausted,” which, in their view, occurred in April 2014, when the United States Supreme Court denied Galzinski’s petition for writ of certiorari.

Galzinski's petition, defendants argued that the department had complied with its duty under Penal Code section 832.5 to establish a procedure for the investigation of citizen complaints and to make a written description of that procedure available to the public. Defendants further argued that Galzinski was improperly seeking to control the internal affairs division's discretion to decide what action to take in response to his complaint. In reply, Galzinski argued that defendants had a ministerial duty to comply with the department's complaint procedure as described in the brochure made available to the public. More specifically, Galzinski argued that he was "not seeking to compel a particular finding," he was "merely seeking to compel a full and complete investigation of his factual allegations" and "a finding on these allegations made by the Chief of Police, as required by the [department's] own procedures."

At the hearing on Galzinski's petition, defense counsel "confirmed . . . that biological samples were collected from Galzinski without a warrant and test results were not provided to Galzinski." Nevertheless, counsel argued that "those acts were justified, lawful and/or proper" because no warrant was required, or, more precisely, because it was "unclear whether a warrant was required," and because, "assuming a duty to disclose the test results exist[ed], [that duty] belongs to the prosecuting attorney, not to the Department."

In April 2015, the superior court denied Galzinski's petition. The court first agreed with defendants that Galzinski had not shown the failure to comply with any duty imposed by Penal Code section 832.5, because "[t]here is no suggestion that the Department either lacks the required procedure or failed to make a written description available to the public." Next, noting that Galzinski's "real complaint concerns the adequacy of the Department's response" to his complaint, the court concluded that "[i]n essence, Galzinski complains about the manner in which the Department exercised its discretion to handle his complaint," but "mandate will not lie to compel the Department to exercise its discretion in a particular manner." Finally, addressing the argument in Galzinski's reply (set forth above) that he was seeking to compel defendants to follow the department's published complaint procedure, the court "assume[d] for purposes of this petition that the Department was . . . required to follow its own complaint procedure" and concluded that what Galzinski was seeking was "a writ of mandate directing the Department to render one of the precise findings required by its own complaint procedure." The court concluded Galzinski was not entitled to that relief for two reasons. First, based on defense counsel's argument at the hearing that the actions taken by the department with respect to the collection and testing of Galzinski's biological samples were justified, lawful, and/or proper, the court concluded that "although the Department did not use the magic words, it essentially found the officers against whom the complaint was filed were

'exonerated.' " Second, the court concluded that because Galzinski's complaint "was unique because it involved issues that either were raised or that could have been raised in both the underlying criminal trial and the various legal actions Galzinski brought after the criminal trial concluded," his complaint "required a unique response rather than one of the four responses enumerated in the Department's complaint procedure," and thus the court could not "say that the Department abused its discretion in responding to the complaint in the way that it did."

In May 2015, the court entered its judgment denying Galzinski's writ petition. Galzinski timely appealed.

DISCUSSION

On appeal, Galzinski contends the superior court improperly denied his writ petition because defendants had a ministerial duty to investigate his citizen's complaint and to render a finding on that complaint in compliance with the complaint procedure the department established and made public pursuant to subdivision (a)(1) of Penal Code section 832.5. In support of this argument, he cites *Gregory v. State Bd. of Control* (1999) 73 Cal.App.4th 584 [86 Cal.Rptr.2d 575] (*Gregory*) for the proposition that "'[a] public entity has a ministerial duty to comply with its own rules and regulations where they are valid and unambiguous'" and *Pozar v. Department of Transportation* (1983) 145 Cal.App.3d 269 [193 Cal.Rptr. 202] (*Pozar*) for the proposition that "a writ of mandate may be issued to compel a public agency to follow its own internal procedures." For the reasons that follow, we agree with Galzinski that the superior court erred.

■ "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . ." (Code Civ. Proc., § 1085, subd. (a).) Indeed, "[t]he writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law . . . upon the verified petition of the party beneficially interested." (Code Civ. Proc., § 1086.) In essence, "[m]andamus lies to compel the performance of a clear, present, and ministerial duty where the petitioner has a beneficial right to performance of that duty." (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1265 [4 Cal.Rptr.3d 536].) "A duty is ministerial when it is the doing of a thing unqualifiedly required." (*Redwood Coast Watersheds Alliance v. State Bd. of Forestry & Fire Protection* (1999) 70 Cal.App.4th 962, 970 [83 Cal.Rptr.2d 24].)

There is no dispute here that the department complied with its ministerial duty under Penal Code section 832.5, subdivision (a)(1) to "establish a

procedure to investigate complaints by members of the public against the personnel of the[] department[]” and to “make a written description of the procedure available to the public.” The question presented is whether defendants have a ministerial duty to *follow* that procedure, such that they can be compelled to perform that duty by a writ of mandate. Defendants contend the answer to this question is “no,” but they are wrong.

■ As Galzinski has argued, both in the superior court and this court, the court in *Gregory* held that “[a] public entity has a ministerial duty to comply with its own rules and regulations where they are valid and unambiguous.” (*Gregory, supra*, 73 Cal.App.4th at p. 595.) But defendants contend Galzinski “incorrectly relies upon *Gregory*,” because *Gregory* involved “duties . . . codified in the Government Code and the California Code of Regulations, not an internal policy,” and “[t]his is as far as *Gregory* goes.” As defendants put it, “*Gregory* does not hold that a public entity has a ministerial duty to comply with its own internal policies and procedures, the specifics of which are not mandated by statute or regulation.”

As Galzinski points out, however, defendants’ argument does not go far enough. In addition to citing *Gregory*, Galzinski has cited *Pozar* for the proposition that “a writ of mandate may be issued to compel a public agency to follow its own internal procedures.” But defendants do not mention *Pozar*, except to note that *Gregory* cited *Pozar*. Thus, they never address whether *Pozar* supports Galzinski’s argument that they have a ministerial duty to follow the citizen complaint procedure the department established and made available to the public pursuant to Penal Code section 832.5, subdivision (a)(1).

In fact, *Pozar* does support Galzinski’s argument. At issue in *Pozar* was whether Caltrans had a ministerial duty “to follow its published procedure for resolving discrepancies in bid figures.” (*Pozar, supra*, 145 Cal.App.3d at p. 270.) At the time, “[t]he form Caltrans supplie[d] for bids or proposals contain[ed] the following language as to discrepancies between per-unit and unit price totals: ‘In case of discrepancy between the item price and the total set forth for a unit basis item, the item price shall prevail, provided, however, if the amount set forth as an item price is ambiguous, unintelligible or uncertain for any cause, or is omitted, or is the same amount as the entry in the “Total” column, then the amount set forth in the “Total” column for the item shall prevail and shall be divided by the estimated quantity for the item and the price thus obtained shall be the item price.’” (*Id.* at p. 271.) The petitioner in *Pozar* had submitted a proposal on a contract for a highway construction project that included an estimated quantity of 90 tons of one required product, with a proposed unit price of \$20 per ton and a proposed total price of \$18,000. (*Id.* at p. 270.) As the appellate court observed, “One

of the figures [wa]s obviously incorrect. If the correct unit price [wa]s \$20, the total price would be \$1,800. If the \$18,000 total [wa]s correct, the correct unit price would be \$200 per ton.” (*Ibid.*)

Initially, Caltrans “[f]ollow[ed] its established practice and the provision [contained on the bid form and] calculated [Pozar]’s total bid using the per-unit price (\$20) times the estimated quantity (90 tons). Thus calculated, [Pozar]’s total bid was the lowest received. The bid was then referred to the Caltrans legal office for an opinion. The legal office concluded the entire bid was uncertain because of the discrepancy and that application of the item price priority rule would be arbitrary. Noting that the Caltrans engineer had estimated [the product] cost at \$300 per ton, the legal office concluded [Pozar] could not have intended to bid \$20 per ton and the total bid should include \$18,000 for [the product] and be \$1,705,980. Caltrans accepted the opinion and decided to award the contract to another bidder.” (*Pozar, supra*, 145 Cal.App.3d at p. 271.)

When the superior court denied him relief, Pozar petitioned for a writ of mandate from this court, and the court granted his petition and issued a peremptory writ of mandate without first issuing an alternative writ. (*Pozar, supra*, 145 Cal.App.3d at pp. 271–272.) As the court explained, “[t]his court has no power to direct the award of a public contract to any individual. [Citation.] We can, however, direct an agency to follow its own rules when it has a ministerial duty to do so or when it has abused its discretion. [Citation.] Here, . . . we are concerned with a ministerial duty. Caltrans’ own rules obligate it to accept the per-unit price in the absence of specified circumstances, none of which are here present. The per-unit price of \$20 is neither ambiguous, unintelligible, uncertain, nor otherwise within any exception to the rule.” (*Id.* at p. 271.)

■ *Pozar* thus stands for the proposition that a “published procedure” adopted by a public entity which provides that the public entity *will* do a certain thing (such as calculate, in a particular manner, a bid with an apparent discrepancy in it) *can* provide the basis for a ministerial duty that may be enforced by means of a writ of mandate. That proposition governs here, especially because (as we will explain hereafter) the department published the procedure here pursuant to a statutory mandate.

The facts here show that, in compliance with its duty under Penal Code section 832.5, subdivision (a)(1), the department established a procedure to investigate complaints by members of the public against the department’s personnel and made a written description of the procedure available to the public by means of a brochure. Under that procedure, as described in the brochure, a citizen’s complaint against a department employee “may be

investigated in one of two ways": "It *will* either be forwarded to the employee's supervisor for inquiry or to the Internal Affairs Division for investigation." (Italics added.) Additionally, out of "four possible findings," "[t]he Chief of Police *will* render a finding in each case": sustained, not sustained, exonerated, or unfounded. (Italics added.) Finally, the complainant "*will* be notified of the finding in writing at the conclusion of the investigation." (Italics added.)

As we see it, based on its plain, mandatory terms, the department's published procedure on handling citizen complaints against department personnel imposes a ministerial duty on the department and its personnel to do the following things:

- (1) A citizen's complaint must be forwarded to the supervisor of the employee who is the subject of the complaint or to the internal affairs division for investigation;³
- (2) An investigation of some sort must be conducted;
- (3) Following that investigation, the chief of police must render one of four possible findings: sustained, not sustained, exonerated, or unfounded;
- (4) The complainant must be notified in writing of the finding rendered at the conclusion of the investigation.

Under *Pozar*, just as Caltrans had a ministerial duty arising from the mandatory terms in its own published procedure "to accept the per-unit price in the absence of specified circumstances" (*Pozar, supra*, 145 Cal.App.3d at p. 271), defendants here had a ministerial duty arising from the mandatory terms in the department's published procedure to (1) forward Galzinski's complaint to either the supervisor of the employees who were the subject of the complaint or to the internal affairs division, (2) investigate the complaint, (3) render one of the four possible findings, and (4) notify Galzinski in writing of the finding rendered at the conclusion of the investigation.

Although *Pozar* alone is sufficient to support this conclusion, we find further support for it in the fact that the department imposed the foregoing

³ We do not find any legal significance in the fact that the procedure provides that a complaint will be forwarded to the employee's supervisor for "inquiry" or to the internal affairs division for "investigation." This is so because the procedure provides that both of these are "ways" in which the complaint will be "investigated." Furthermore, the statute that compelled the department to establish the procedure in the first place requires the establishment of a procedure "to investigate complaints." (Pen. Code, § 832.5, subd. (a)(1).) Thus, even an "inquiry" by an employee's supervisor must qualify as an "investigation."

obligations upon itself by establishing and publishing its procedure in fulfillment of the statutory duty imposed upon it by Penal Code section 832.5, subdivision (a)(1). It may be true that nothing in the statute required the department to use the mandatory terms the department used in its procedure. Nevertheless, having chosen to use those terms, the department cannot escape its obligation to follow those terms without defeating the very purpose of the statute pursuant to which the department acted in adopting the procedure in the first place. This is so because the statutory mandate requiring a police department to “establish a procedure to investigate complaints by members of the public against [the department’s] personnel” and to “make a written description of the procedure available to the public” would be meaningless if the department had no duty to *comply with its own published procedure*. Why publish a procedure if you have no obligation to follow it? To accept defendants’ argument that they had no duty to follow the mandatory terms of the department’s published procedure, because the terms of that procedure were not mandated by regulation or statute, would defeat the very reasonable and settled expectations of the public, who are the intended beneficiaries of Penal Code 832.5. That is a result we cannot countenance. Thus, we conclude defendants have a ministerial duty to follow the mandatory terms of the department’s published procedure for handling citizen complaints of police misconduct.

The next question is whether Galzinski has a right to the issuance of a writ of mandate compelling defendants to perform that ministerial duty with respect to his complaint. In his writ petition, Galzinski sought relief focused on the second and third obligations we have identified: specifically, he sought a writ of mandate compelling defendants to “properly investigate [his] complaint . . . and/or make official findings as to the validity of [his] allegations.” As we will explain, we conclude Galzinski is entitled to the relief he sought.

With respect to the second obligation imposed by the procedure—the obligation to investigate—Galzinski contends that defendants did *not* investigate his complaint; however, that does not appear to be true. Notably, the department’s published procedure does not require any particular type of “investigation.” To the contrary, the brochure notes that “[e]ach allegation is examined on its own merits” and only “[f]ormal investigations require investigators to contact all available witnesses, including police officers, examine any relevant physical evidence, and gather all information pertinent to each allegation made in the complaint.” The brochure does not provide that every complaint will receive a formal investigation. Thus, while the department and its personnel have a ministerial duty to conduct some sort of investigation into every citizen’s complaint, the procedure leaves it to the *discretion* of the department and its personnel to determine what *kind* of investigation is reasonably necessary in each case. (See *Elder v. Anderson* (1962) 205

Cal.App.2d 326, 331 [23 Cal.Rptr. 48] (“Discretionary acts are those wherein there is no hard and fast rule as to the course of conduct that one must or must not take”].) “A writ cannot be used to control a matter of discretion.” (*Excelsior College v. Board of Registered Nursing* (2006) 136 Cal.App.4th 1218, 1238 [39 Cal.Rptr.3d 618].) Still, “[a]lthough mandate will not lie to control a public agency’s discretion, that is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion.” (*Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799 [57 Cal.Rptr.2d 605].)

Here, it appears from the letter from Sergeant Marshall dated July 3, 2014, that Galzinski’s complaint was “reviewed” but “no further action” was taken on it because the internal affairs division determined that the complaint could be resolved “[b]ased upon the information [Galzinski] provided.” While we disagree with Galzinski that the mere review of the complaint constituted no investigation, we nonetheless conclude that by conducting no investigation of Galzinski’s allegations other than reviewing his complaint, defendants abused their discretion. This is so because a mere review of the complaint indisputably could not have sufficed to allow the chief of police to render one of the four possible findings required by the department’s published procedure.

Galzinski’s complaint had three aspects: First, he complained that biological samples were collected from him without a warrant or probable cause. Second, he complained that none of the reports completed by the three officers explained or confirmed “why, where, when, how, and by who the evidence was collected, and the reason this information was expressly left out of [the] reports.” Third, he complained that “[n]o receipt or documentation of the tests done [on the samples] and the results of such tests were []ever turned over to [him] at anytime.” The four possible findings on these allegations were sustained (“The investigation disclosed enough evidence to clearly prove the allegation”), not sustained (“The investigation failed to reveal enough evidence to clearly prove or disprove the allegation”), exonerated (“The act which proved the basis for the complaint did occur; however investigation revealed the act was justified, lawful and proper”), or unfounded (“The investigation has produced sufficient evidence to prove that the act or acts alleged did not occur”). The descriptions of the four possible findings provided in the department’s published procedure plainly imply that any investigation conducted will attempt to determine whether the facts alleged in the complaint are true, which can be the basis for a sustained or exonerated finding, or untrue, which is the basis for a unfounded finding. If the investigation does not disclose enough evidence to clearly prove the truth or falsity of the alleged facts, then the appropriate finding is not sustained. Here, the mere review of Galzinski’s complaint could not have provided the chief of police with any basis to find Galzinski’s factual allegations true or untrue, or with any basis to find that there was insufficient evidence to clearly prove

or disprove the allegations. Because the mere review of the complaint could not have sufficed to allow the chief of police to render one of the four possible findings required by the department's published procedure, defendants abused their discretion by conducting no further investigation of Galzinski's allegations other than reviewing his complaint. This provides a basis for issuance of the writ Galzinski sought from the superior court.

With respect to the third obligation imposed by the published procedure—the obligation of the chief of police to render one of the four possible findings—that obligation was not satisfied here because the chief of police rendered no finding. Rather, Sergeant Marshall merely declared in his letter dated July 3, 2014, that the issues Galzinski raised “pertain[ed] to points of law which should have been litigated during [his] criminal trial” and “[t]herefore, the proper venue for resolving [his] complaint would be through the appeals process.” This is not one of the four possible findings required by the department's procedure. Moreover, the superior court's conclusion that this disposition was “essentially” a determination that the officers against whom the complaint was made were “‘exonerated’” cannot be sustained. Under the department's procedure, exoneration is a finding that “[t]he act which proved the basis for the complaint did occur; however investigation revealed the act was justified, lawful and proper.” The conclusion that Galzinski should pursue his complaint in another venue was not, by any stretch of the imagination, a determination that the officers did what Galzinski accused them of doing, but they were justified in doing so; thus, it was not an exoneration. To the extent the superior court relied on arguments defense counsel made at the hearing on the writ petition to justify the actions of the accused officers to support the court's conclusion that the department had “essentially found the officers . . . were ‘exonerated,’” those post hoc arguments could not substitute for an actual, proper disposition of Galzinski's complaint by the department in accordance with the department's published procedure.

Furthermore, the assertion that Galzinski should have pursued the resolution of his complaint “through the appeals process” following his conviction on the charges for which he was arrested is simply wrong. The issue raised by Galzinski's citizen's complaint was not whether he was entitled to some relief from his criminal conviction because of the handling of the biological samples taken from him following his arrest. Obviously, that issue *would* have to be pursued in another venue. The issue raised by Galzinski's complaint was whether the officers he named in his complaint committed acts of misconduct by doing what he alleged they did—nothing more and nothing less. By requiring the department to establish and publish a procedure for investigating complaints of misconduct by department personnel, Penal Code section 832.5 provided Galzinski with the right to submit his complaint to the department and the right to have his complaint resolved by the department in

[REDACTED]

conformance with the terms of the procedure the department established and published. The department simply had no right to resolve Galzinski's complaint by essentially telling him he was in the wrong place, just as the superior court had no right to tell him that the officers were "essentially" "'exonerated'" because of defendants' post hoc justifications offered at the hearing on Galzinski's writ petition. Thus, the chief of police's failure to render one of the required findings as to each of Galzinski's allegations of misconduct also provides a basis for issuance of the writ Galzinski sought from the superior court.

For all of the foregoing reasons, we conclude the superior court erred in denying Galzinski's writ petition.

DISPOSITION

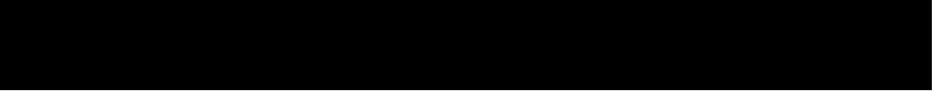
The judgment is reversed, and the case is remanded to the superior court with directions to enter a new judgment granting Galzinski's petition for a writ of mandate. Galzinski shall recover his costs on appeal (if any). (Cal. Rules of Court, rule 8.278(a).)

Hull, Acting P. J., and Butz, J., concurred.

[No. F069940. Fifth Dist. Aug. 31, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
DANIEL BLEA CRUZ, JR., Defendant and Appellant.





[REDACTED]

[REDACTED]

[REDACTED]

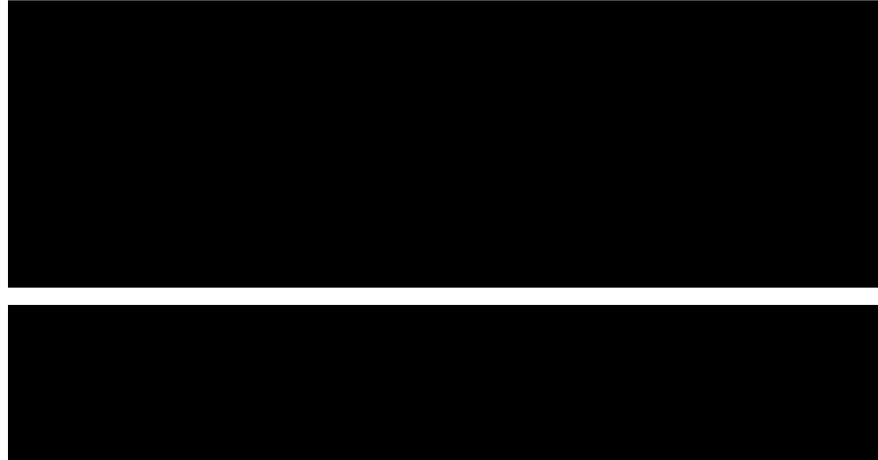
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COUNSEL

Audrey R. Chavez, 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, Kathleen A. McKenna and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

SMITH, J.—Daniel Blea Cruz, Jr., was convicted of three counts of committing a lewd act against a child under age 14 (Pen. Code, § 288, subd. (a)),¹ and sentenced to 105 years to life in prison. He argues in this appeal that the jury was given an erroneous instruction on the use of Evidence Code section 1108 evidence to show a propensity to commit sex offenses. He says the instruction had the effect of reducing the prosecution's burden of proving guilt beyond a reasonable doubt. Cruz also argues that, before accepting his admission of a prior conviction, the court failed to give him an adequate advisement of his rights, as required by *In re Yurko* (1974) 10 Cal.3d 857 [112 Cal.Rptr. 513, 519 P.2d 561] (*Yurko*).

We agree on both points and will reverse the judgment. We publish our discussion of the first point because the specific issue with the instruction appears to be novel and because a pattern instruction, CALJIC No. 2.50.01, is affected.

¹ Subsequent statutory references are to the Penal Code unless otherwise noted.

FACTS AND PROCEDURAL HISTORY

Cruz was arrested after one of the victims reported abuse to her grandmother. The district attorney filed an information charging him with committing violations of section 288, subdivision (a), with C.H. on February 19, 2013; with L.S. on September 17–18, 2012; and with D.R. on September 16–17, 2012. The information alleged that the current offenses had been committed against multiple victims. (§ 667.61, subd. (e)(4).) It also alleged that Cruz had two prior convictions: unlawful sexual intercourse with a minor (§ 261.5) and failing to stop at the scene of an accident in which someone had been injured or killed (Veh. Code, § 20001, subd. (a)).

The three victims, D.R., L.S. and C.H., testified at trial. D.R. testified that in September of 2012, when she was 13, she was living with her grandmother in Bakersfield. Cruz was D.R.’s aunt’s boyfriend. On September 17, D.R. was in her bedroom alone when Cruz entered. Cruz said he wanted the phone number of D.R.’s friend, L.S., and he would rape D.R. if she did not give it to him. He also told her to give him a hug. When he hugged her, he put his hands on her buttocks. She felt uncomfortable. At Cruz’s request, D.R. called L.S. to say L.S. should come to a party at Cruz’s trailer that night. L.S. said she would go.

D.R. became afraid while Cruz was in her room and she sent a text message on her iPad to her cousin, who was in the house. The message said to come upstairs because Cruz was “trying to do something” to D.R. The cousin and D.R.’s sister came in response to the message, and found D.R. lying in bed with Cruz standing beside the bed. D.R. did not tell anyone but her sister and cousin of these events because she was afraid. She also asked her sister not to tell. That night, D.R. wanted to send a message to L.S. to warn her, but D.R.’s grandmother had taken her iPad away. D.R. also called L.S.’s house, but L.S. was not home.

D.R. did not talk to L.S. again until a month or two later when she saw L.S. crying at school. L.S. said she had gone to Cruz’s trailer and he had raped her.

Later, D.R. told her friend C.H. what L.S. had said. C.H. revealed that Cruz had “been touching her in places she [didn’t] want to be touched.” That night, D.R. told her grandmother what had happened to her, L.S., and C.H. D.R. talked to the police the next morning.

L.S. testified that one day in September 2012 when she was 12 years old, D.R. called her on the phone. D.R. proposed that L.S. sneak out that night and meet up with Cruz to drink beer and smoke marijuana. L.S.

thought D.R. would be there too. Later that day, Cruz called L.S. and said he would pick her up. Around 10:00 p.m., L.S. climbed out her window and met Cruz near her house. D.R. was not with him. L.S. got in Cruz's car and he drove around for a while. Then he took her to his trailer. Inside, they went in his room and he approached her. She pushed him back, but he kissed her on her mouth, using his tongue. He also kissed her neck and stomach. He took her clothes off, kissed her breasts, and put his fingers inside her vagina. While doing these things, Cruz was “[j]acking himself off” through his underwear. Cruz and L.S. were in the trailer for a couple of hours. Then they put their clothes back on and he drove her home. She climbed in her window around 3:00 a.m. Until the police came to question her, L.S. did not tell any adults what had happened because she was afraid.

C.H. testified that in February 2013 she was 13 years old and living with her grandmother. Cruz was C.H.'s uncle. He came to the house one day when C.H. was in the kitchen and told C.H. to give him a hug. She did so, but testified she did not remember what happened next. The prosecutor showed her a police report to refresh her memory. C.H. then testified that, while hugging her, Cruz kissed her on the mouth, put his tongue in her mouth, moved his hands around her body, and tried to move her toward her bedroom. She said “no” and he walked away. After this, C.H. kept her younger brother with her when Cruz was around to avoid a repeat of his behavior, but she did not tell any adults because she was afraid.

C.H. testified that on February 19, 2013, a couple of weeks after this incident, she was sleeping in her grandmother's bedroom when Cruz woke her up. Again, she did not remember how he woke her up until after being shown the police report. Then she testified he woke her by touching her buttocks, breasts, and vagina. He began to remove his pants. C.H. pushed him away and said she was tired. Cruz went away. A couple of days later, the police questioned her about the incidents.

A parole officer testified that, from 2010 until the time of trial, Cruz was on parole as a high-risk sex offender and had a GPS unit attached to his ankle. A technician testified that data from Cruz's unit showed the unit was at D.R.'s address on September 17, 2012, from 6:29 a.m. to 8:21 a.m., 9:19 a.m. to 10:00 a.m., 1:45 p.m. to 2:33 p.m., and 3:49 p.m. to 4:39 p.m.

On the same date, Cruz's GPS device was near L.S.'s address from 10:30 to 10:34 p.m., and then at Cruz's address from 11:26 p.m. to 3:07 the following morning. At 3:14 a.m., the device went back to L.S.'s address and returned to Cruz's at 3:19 a.m.

On February 19, 2013, Cruz's GPS unit was at C.H.'s address from 1:47 p.m. to 3:00 p.m., 5:32 p.m. to 5:39 p.m., 6:00 p.m. to 6:03 p.m., and 7:08 p.m. to 7:31 p.m.

The jury found Cruz guilty of all three counts and found the multiple-victim allegation true. Based on a stipulation by Cruz, the court found true the allegation that he had a prior conviction of unlawful sexual intercourse with a minor. On the prosecution's motion, the court dismissed the allegation of a prior conviction of failing to stop at the scene of an accident.

The court sentenced Cruz as follows: On each count, Cruz received 15 years to life because of the multiple-victim special circumstance under section 667.61, subdivision (b), doubled for the prior strike under section 667, subdivision (e), plus five years under section 667, subdivision (a). The sentences were to be served consecutively. The total term imposed was 105 years to life.

DISCUSSION

I. *Jury instruction error*

■ Cruz argues that the court gave the jury an erroneous instruction regarding the use of evidence of his propensity to commit sex offenses. A trial court in a criminal case is required to give correct jury instructions on the general principles of law relevant to issues raised by the evidence. (*People v. Michaels* (2002) 28 Cal.4th 486, 529–530 [122 Cal.Rptr.2d 285, 49 P.3d 1032].) We review jury instructions under the *de novo* standard. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581 [36 Cal.Rptr.3d 340, 123 P.3d 614].)

■ As a threshold matter, the People argue that Cruz forfeited this issue by failing to object to the instruction at trial. Under section 1259, however, objection at trial is unnecessary if instructional error affected the defendant's substantial rights. It has been held that a defendant's substantial rights are affected if the instruction was reversibly erroneous. (*People v. Felix* (2008) 160 Cal.App.4th 849, 857 [72 Cal.Rptr.3d 947]; *People v. Mitchell* (2008) 164 Cal.App.4th 442, 465 [78 Cal.Rptr.3d 855].) As there is no other way of determining whether the instruction was reversibly erroneous, we will consider the merits of Cruz's contention despite the lack of objection.

The instruction given followed CALJIC No. 2.50.01 and stated:

"In determining whether defendant has been proved guilty of any sexual crime of which he is charged, you should consider all relevant evidence, including whether the defendant committed any other sexual crimes, whether

charged or uncharged, about which evidence has been received. The crimes charged in counts 1, 2, and 3 may be considered by you in that regard. [¶] . . . [¶]

“ ‘Sexual offense’ means a crime under the laws of a state or of the United States that involves any of the following: [A]ny conduct made criminal by Penal Code Sections 261.5 Subdivision (d), 12022.7 Subdivision (a), and 288 Subdivision (a). [¶] The elements of Penal Code Section 288 Subdivision (a) are set forth elsewhere in these instructions.

“If you find, by a preponderance of the evidence, that the defendant committed any such other sexual offense you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. [¶] If you find that the defendant had this disposition you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused. [¶] However, even though you find by [a] preponderance of the evidence that the defendant committed another sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes you are determining. [¶] If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes that you are determining. [¶] You must not consider this evidence for any other purpose.”

Other instructions reiterated that the reasonable doubt standard applied to the ultimate question of guilt.

Cruz maintains that the challenged instruction was erroneous because it told the jurors they could find charged offenses true by a preponderance of the evidence and then use those findings to infer that Cruz had a disposition to commit other charged offenses. We agree. As we will explain, the instruction was correct in stating that charged sex offenses can be used to show a propensity to commit other charged sex offenses, but incorrect in stating that a charged offense need be found true only by a preponderance of the evidence before it can be used for this purpose.

The purpose of the instruction was to allow the jury to apply Evidence Code section 1108, which made evidence of other sexual offenses committed by Cruz admissible to show a character trait for committing such offenses: “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.” (Evid. Code, § 1108, subd. (a).)

■ Section 1108 was added to the Evidence Code in 1995 (Stats. 1995, ch. 439, § 2, p. 3429) and, since then, courts have understood that it at least allows admission of evidence of *uncharged* sexual offenses to show a propensity to commit sexual offenses. (*People v. Fitch* (1997) 55 Cal.App.4th 172, 177–178, 181–182 [63 Cal.Rptr.2d 753]; *People v. Falsetta* (1999) 21 Cal.4th 903, 917–918 [89 Cal.Rptr.2d 847, 986 P.2d 182]; *People v. Reliford* (2003) 29 Cal.4th 1007, 1012–1013 [130 Cal.Rptr.2d 254, 62 P.3d 601] (*Reliford*); *People v. Villatoro* (2012) 54 Cal.4th 1152, 1160 [144 Cal.Rptr.3d 401, 281 P.3d 390] (*Villatoro*).) In 2012, our Supreme Court held that it also allows evidence of sexual offenses *charged in the current prosecution* to be used to show a propensity to commit *other* charged offenses in the same case. (*Villatoro, supra*, at p. 1164.)

One argument made by the defendant in *Villatoro* was that the instruction given to the jury did not “designate clearly what standard of proof applied to the charged offenses before the jury could draw a propensity inference from them.” (*Villatoro, supra*, 54 Cal.4th at p. 1167.) The defendant contended the jury could have used any standard. The Supreme Court disagreed, because the instruction given (a modified version of CALCRIM No. 1191) said, “[t]he People must still prove each element of every charge beyond a reasonable doubt and prove it beyond a reasonable doubt before you may consider one charge as proof of another charge.” (*Villatoro, supra*, p. 1167.) The pattern instruction, which referred only to the use of uncharged offenses to show propensity, stated that those uncharged offenses need be proved only by a preponderance of the evidence. (*Id.* at pp. 1167–1168.) Because the modified instruction stated instead that the reasonable doubt standard must be applied, “there was no risk the jury would apply an impermissibly low standard of proof.” (*Id.* at p. 1168.)

The instruction used in the present case, by contrast, expressly stated that the preponderance standard applied to the determination of whether Cruz committed charged and uncharged offenses for the purpose of deciding whether he had a propensity to commit sexual offenses. In this respect, the instruction followed the standard version of CALJIC No. 2.50.01. The current version of that pattern instruction, which has been updated since *Villatoro* was decided, reflects the *Villatoro* rule that charged offenses can be used to show propensity, but, unlike the instruction upheld in that case, it does not state that these offenses must be found beyond a reasonable doubt before they can be used for that purpose.²

In effect, the instruction given here told the jury it should first consider whether the offenses charged in counts 1, 2, and 3 had been established by a

² The current standard version of CALCRIM No. 1191 refers only to the use of uncharged offenses to show propensity.

preponderance of the evidence, while holding its ultimate decision on the same offenses in suspension. Then the jury was required to decide whether the preponderance finding showed a propensity, and whether this propensity, in combination with the other evidence, proved those offenses a second time, this time beyond a reasonable doubt.

We conclude the court was incorrect to instruct the jury in this way. *Villatoro* did not expressly hold that currently charged offenses must be proved beyond a reasonable doubt before they can be used to show a propensity under Evidence Code section 1108, but it strongly implied that rule. It relied on an instruction requiring such proof to refute the defendant's argument that there was a risk the jury applied an impermissibly low standard. (*Villatoro, supra*, 54 Cal.4th at pp. 1167–1168.)

■ It would be an exaggeration to say the task required of the jury by the instruction given in this case (and by the standard version of CALJIC No. 2.50.01 when charged offenses are offered to show propensity) was logically impossible. A robot or a computer program could be imagined capable of finding charged offenses true by a preponderance of the evidence, and then finding that this meant the defendant had a propensity to commit such offenses, while still saving for later a decision about whether, in light of all the evidence, the same offenses have been proven beyond a reasonable doubt. A very fastidious lawyer or judge might even be able to do it. But it is not reasonable to expect it of lay jurors. We believe that, for practical purposes, the instruction lowered the standard of proof for the determination of guilt. In our view, a jury instruction explaining the use of currently charged offenses to show propensity under Evidence Code section 1108 must resemble the instruction used in *Villatoro* in specifying that a currently charged offense must be proved beyond a reasonable doubt before it can be used as propensity evidence in support of another currently charged offense.

The People argue the instruction was correct because our Supreme Court upheld CALJIC No. 2.50.01 in *Reliford, supra*, 29 Cal.4th at page 1012. This argument overlooks the fact that *Reliford* involved the use of uncharged offenses to show propensity, not charged offenses, and therefore did not address the issue presented in this case. (*Id.* at pp. 1011–1012.) The People also cite *Villatoro, supra*, 54 Cal.4th at page 1160, but fail to explain its reliance on a modification to CALCRIM No. 1191 that expressly told the jury it must find charged offenses true beyond a reasonable doubt before using them as propensity evidence. (*Villatoro, supra*, 54 Cal.4th at p. 1167.) Finally, the People point out the jury was properly instructed that the charged offenses must be proved beyond a reasonable doubt before it could find Cruz guilty of them. We have already explained how the combination of that instruction with the preponderance instruction for charged offenses produced a hopeless muddle.

■ As our Supreme Court explained in *People v. Aranda* (2012) 55 Cal.4th 342, 365 [145 Cal.Rptr.3d 855, 283 P.3d 632], an instructional error that has the effect of lowering the reasonable doubt standard for guilt is one of the few errors deemed “structural” and therefore reversible per se. The *Aranda* court went on to hold that an erroneous reasonable doubt instruction was *not* reversible per se where it did not lower the prosecution’s burden of proof, even though it failed to satisfy a federal constitutional standard. (*Ibid.*) That type of error was subject to harmless error analysis under the standard of *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824]. (*Aranda, supra*, at pp. 365–367.)

■ The instruction given in this case, as we have said, presented the jury with a nearly impossible task of juggling competing standards of proof during different phases of its consideration of the same evidence. We think the ultimate effect is to lower the prosecution’s burden of proving guilt beyond a reasonable doubt. Consequently, we find the error to be reversible per se and need not conduct a *Chapman* analysis.

II. Yurko error*

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DISPOSITION

The judgment is reversed.

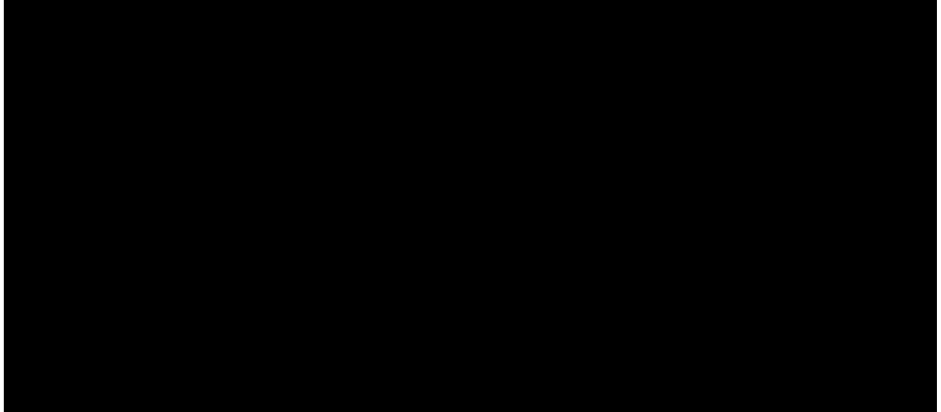
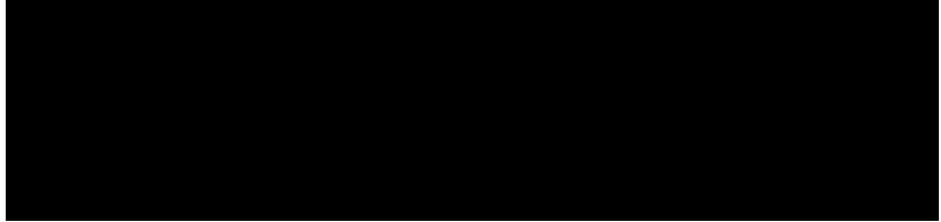
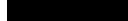
Detjen, Acting P. J., and Franson, J., concurred.

*See footnote, *ante*, page 1178.

[No. E064099. Fourth Dist., Div. Two. Aug. 31, 2016.]

THE PEOPLE, Plaintiff and Appellant, v.
STEVEN ANDREW ADELMANN, Defendant and Respondent.

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, S237602.



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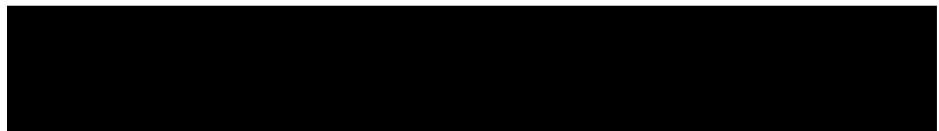
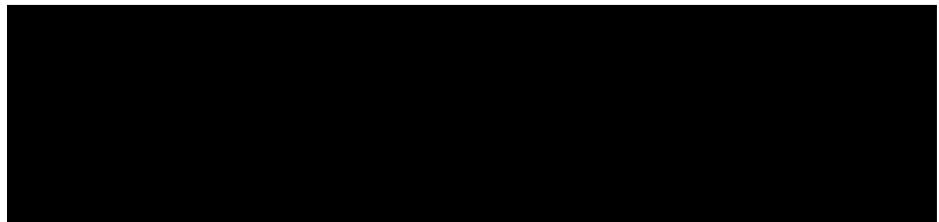
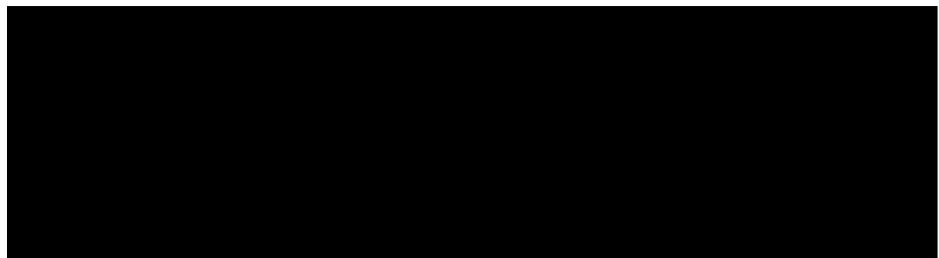
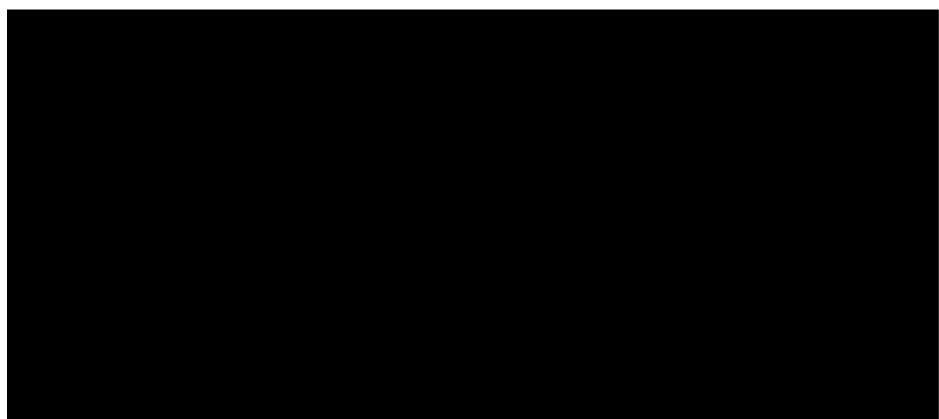
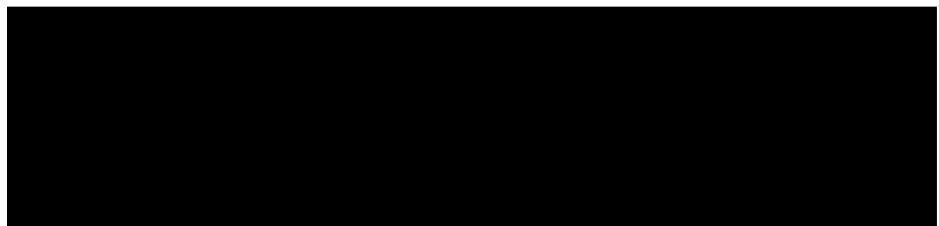
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COUNSEL

Michael A. Hestrin, District Attorney, Emily R. Hanks and Donald Ostertag, Deputy District Attorneys, for Plaintiff and Appellant.

Gene D. Vorobyov, under appointment by the Court of Appeal, for Defendant and Respondent.

OPINION**CODRINGTON, J.—****I****INTRODUCTION**

The People appeal from an order granting the petition of defendant Steven Andrew Adelmann to reduce his Health and Safety Code felony conviction to a misdemeanor pursuant to Penal Code section 1170.18.¹ After defendant was sentenced to probation by the Superior Court of the County of San Diego, the “entire jurisdiction” of his case was transferred under section 1203.9 to the Superior Court of the County of Riverside. The People contend defendant’s petition must be decided by the trial court in San Diego that originally sentenced defendant. (§ 1170.18, subds. (a) & (f).)

Based on established principles of statutory construction and considerations of judicial resources, we hold that the Riverside Superior Court has entire jurisdiction over defendant’s case and can decide defendant’s petition. Additionally, we hold that defendant waived his right to have his petition decided by the San Diego court.

II**FACTUAL AND PROCEDURAL BACKGROUND**

In 2012, defendant was charged in the County of San Diego with driving under the influence and for possession of cocaine and oxycodone. (Veh. Code,

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

§ 23152, subd. (a); Health & Saf. Code, § 11350, subd. (a.) Defendant pleaded guilty to both counts. Defendant also had a previous conviction in 2011 for intoxicated driving. On September 25, 2012, defendant was sentenced by the San Diego Superior Court to three years of formal probation, ending in September 2015. In December 2012, the San Diego Superior Court granted defendant's motion for the jurisdictional transfer of his probation case to Riverside County because he had changed his residence. (§ 1203.9.)

In January 2015, defendant filed a petition in the Superior Court of Riverside County to have his Health and Safety Code conviction reduced from a felony to a misdemeanor. (§ 1170.18, subd. (a).) At the hearing on the petition, defense counsel explained to the Riverside court he had initially tried to file the petition in San Diego but "the San Diego County Court Clerk rejected the filing and said they had no file. The whole matter was transferred to Riverside County." Defense counsel also stated he contacted the San Diego County Public Defender "who was assigned to the department in San Diego County handling Prop 47s. The public defender told me their department will not hear it. So that is the reason we eventually filed here in Riverside County because of the transfer."

The People did not object to the hearsay evidence offered by defense counsel about the procedures of the San Diego Superior Court or the public defender. The People did not argue that defendant was not eligible for resentencing as a misdemeanor. However, the People opposed defendant's petition based on the argument that the Riverside Superior Court lacked authority under section 1170.18 to decide the petition.

After the petition was granted by the Riverside judge, the district attorney appealed. The district attorney continues to challenge the authority of any judge of the Riverside Superior Court to rule on defendant's petition. We reject the People's appeal and affirm the trial court's grant of the petition.

III

DISCUSSION

This appeal involves the interplay between sections 1203.9 and 1170.18. Where a defendant receives a grant of probation, section 1203.9 delineates a "detailed process for the transfer of jurisdiction" and "jurisdiction rests exclusively in the county in which probation is granted until it is transferred." (*People v. Klockman* (1997) 59 Cal.App.4th 621, 627 [69 Cal.Rptr.2d 271].) Section 1203.9, subdivision (b), provides that, when a probationer's case is transferred to another county, "[t]he court of the receiving county shall accept the entire jurisdiction over the case effective the

[REDACTED]

date that the transferring court orders the transfer.” Conversely, once a case is transferred, the original court no longer has jurisdiction. As applied here, the San Diego court was the transferring court that transferred “entire jurisdiction” of defendant’s case to the Riverside court.

Section 1170.18, subdivision (a), provides a person currently serving a sentence for a felony conviction “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” (italics added) for a misdemeanor. Subdivision (f) of section 1170.18 provides a person who has completed his sentence or probation “may file an application *before the trial court that entered the judgment of conviction*” (italics added) in his case to have the felony conviction designated as a misdemeanor. Subdivision (l) of section 1170.18 further provides: “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.” Section 1170.18 makes no mention of jurisdiction.

Defendant was sentenced in San Diego to three years of probation, which he completed successfully in September 2015. At the time his sentence was imposed in San Diego in September 2012, he was living with his parents in Riverside County and working as a tile setter. For that reason, the San Diego probation department made a motion for jurisdictional transfer of his case to Riverside County. (§ 1203.9; Cal. Rules of Court, rule 4.530(a).) The motion was granted, causing the transferring court to “transmit any records of payments and the entire court file, except exhibits, to the receiving court within two weeks of the transfer order.” (Cal. Rules of Court, rule 4.530(g)(5).) Therefore, when defendant’s counsel first tried to file a petition in San Diego, he was informed the San Diego court could not accept the petition because it had no file for his case. Defendant’s only alternative was to file his petition in the Riverside court which had accepted “entire jurisdiction” in December 2012.

In spite of defendant’s inability to file his petition in San Diego County, the Riverside County District Attorney argues that section 1170.18 prohibits defendant from filing his petition in Riverside County. Defendant argues that, because “entire jurisdiction” over his case was transferred from San Diego to Riverside, defendant’s county of residence, the Riverside court should decide his petition. The People counter that, in spite of the “entire jurisdiction” language of section 1203.9, section 1170.18 requires the San Diego court, not Riverside, to decide the petition.

The legal commentators who are the authors of Sentencing California Crimes maintain that a defendant, like defendant here, whose probation case has been transferred under section 1203.9, and who seeks relief under section 1170.18,

should file the petition in the receiving county. Because the receiving county has exclusive jurisdiction over the case, the original sentencing judge is no longer available as a matter of law. Therefore, the request for relief may be handled by any judge appointed by the presiding judge. (§ 1170.18, subd. (l); Couzens et al., *Sentencing Cal. Crimes* (The Rutter Group 2016) § 25:11.)

Since the adoption of Proposition 47, only one published California case has addressed the interaction of sections 1203.9 and 1170. In *People v. Curry*, the First District Court of Appeal recently held that a defendant who was subject to PRCS (postrelease community supervision) under section 3460, not section 1203.9, was required to file a petition for reduction in the original sentencing County of Napa, not in Alameda County where her case had been transferred for PRCS. The *Curry* court adopted the distinction made by Couzens and Bigelow between persons on PRCS and persons whose case has been transferred under section 1203.09: “‘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.’” (*People v. Curry* (2016) 1 Cal.App.5th 1073, 1082 [205 Cal.Rptr.3d 328].) *Curry* does not apply here because it involved section 3460, not section 1203.9, which provides for the transfer of the “entire jurisdiction” of a case.

■ We also conclude that defendant can waive his rights under section 1170.18 to have his petition decided by a San Diego court. In addressing similar language in a statute for resentencing under Proposition 36, the court held that it is “clear that the initial sentencing judge shall rule on the prisoner’s petition. However, as with other rights, a defendant may waive the right for the petition to be considered by a particular judge.” (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1301 [155 Cal.Rptr.3d 856].) Applying the reasoning of *Kaulick* means a defendant seeking Proposition 47 relief may waive his right to be sentenced by a particular judge in a particular county, something he has done in this instance by filing his petition in Riverside Superior Court.

■ We briefly address the People’s arguments based on statutory construction. Statutory construction is subject to de novo review on appeal: “When interpreting a voter initiative, ‘we 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].) We first look “‘to the language of the statute, giving the words their ordinary meaning.’” (*Ibid.*) We construe the statutory language ‘in the context of the statute as a whole and the overall statutory scheme.’ (*Ibid.*) If the language is ambiguous, we look to ‘“other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.”’ (*Ibid.*)” (*People v. Marks* (2015) 243 Cal.App.4th

331, 334 [196 Cal.Rptr.3d 415].) “ ‘The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.’ ’ ” (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1099 [183 Cal.Rptr.3d 362].)

■ Statutory interpretation begins with an analysis of the plain meaning of the statute. If the statutory language is clear and unambiguous, courts must follow its usual, ordinary meaning. Where the language allows for more than one reasonable interpretation, “ ‘the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes.’ ” (*People v. Rivera, supra*, 233 Cal.App.4th at p. 1100; see *Mejia v. Reed* (2003) 31 Cal.4th 657, 663 [3 Cal.Rptr.3d 390, 74 P.3d 166].) The final step in statutory construction requires courts to apply “reason, practicality, and common sense to the language at hand.” (*Halbert’s Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239 [8 Cal.Rptr.2d 298].) Statutory language is not interpreted “ . . . in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment.” (*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].)

Section 1170.18, unlike section 1203.9 does not make any express mention of “entire jurisdiction.” There is no language, plain or otherwise, addressing whether a section 1203.9 transfer does not allow the court in the receiving county to decide a petition for resentencing. Nothing in the language of section 1170.18 mandates that a defendant must file in the court that entered the judgment when the “entire jurisdiction” over a case has been transferred to another court.

■ Instead the language in section 1170.18 is subject to a reasonable interpretation, using a construction that “ ‘ ‘best harmonizes . . . with related statutes.’ ’ ” (*People v. Rivera, supra*, 233 Cal.App.4th at p. 1100.) The court must give “ ‘ ‘a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity.’ ’ ” (*In re Reeves* (2005) 35 Cal.4th 765, 771, fn. 9 [28 Cal.Rptr.3d 4, 110 P.3d 1218].)

■ One of the stated objectives of Proposition 47 is to create a process for persons who have qualified felony convictions to obtain reclassification of the crime as a misdemeanor. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 70.) The People’s proposal that defendant must somehow compel the San Diego court to accept his petition—although entire jurisdiction over his probationary case has been transferred to Riverside—seems

wholly unfeasible and not an economical or practical use of judicial resources. Based on a practical, reasonable, commonsense analysis, allowing the court that currently has entire jurisdiction over a case to decide a section 1170.18 petition is the wisest and most appropriate policy. (*In re Reeves, supra*, 35 Cal.4th at p. 771, fn. 9.)

■ Our conclusions comport with the principle of the California Supreme Court that a specific statute should prevail over a general statute only when the two statutes are in actual conflict. (*People v. Price* (1991) 1 Cal.4th 324, 385 [3 Cal.Rptr.2d 106, 821 P.2d 610].) In this case, section 1203.9 is specific about jurisdiction; section 1170.18 is not. Our duty is “‘to harmonize statutes on the same subject . . . , giving effect to all parts of all statutes if possible’” “[Courts] will find an implied repeal ‘only when there is no rational basis for harmonizing the two potentially conflicting statutes . . . , and the statutes are ‘irreconcilable . . . and so inconsistent that the two cannot have concurrent operation.’”’’’’ (People v. Chenze (2002) 97 Cal.App.4th 521, 526 [118 Cal.Rptr.2d 362], citations omitted.) Affirming the lower court’s disposition does not create irreconcilable or inconsistent consequences. ■ By allowing the “concurrent operation” of both section 1203.9 and section 1170.18, a probationary defendant can waive his right to be resentenced by the same trial court and obtain expeditious relief in the court that has entire jurisdiction over his case.

IV

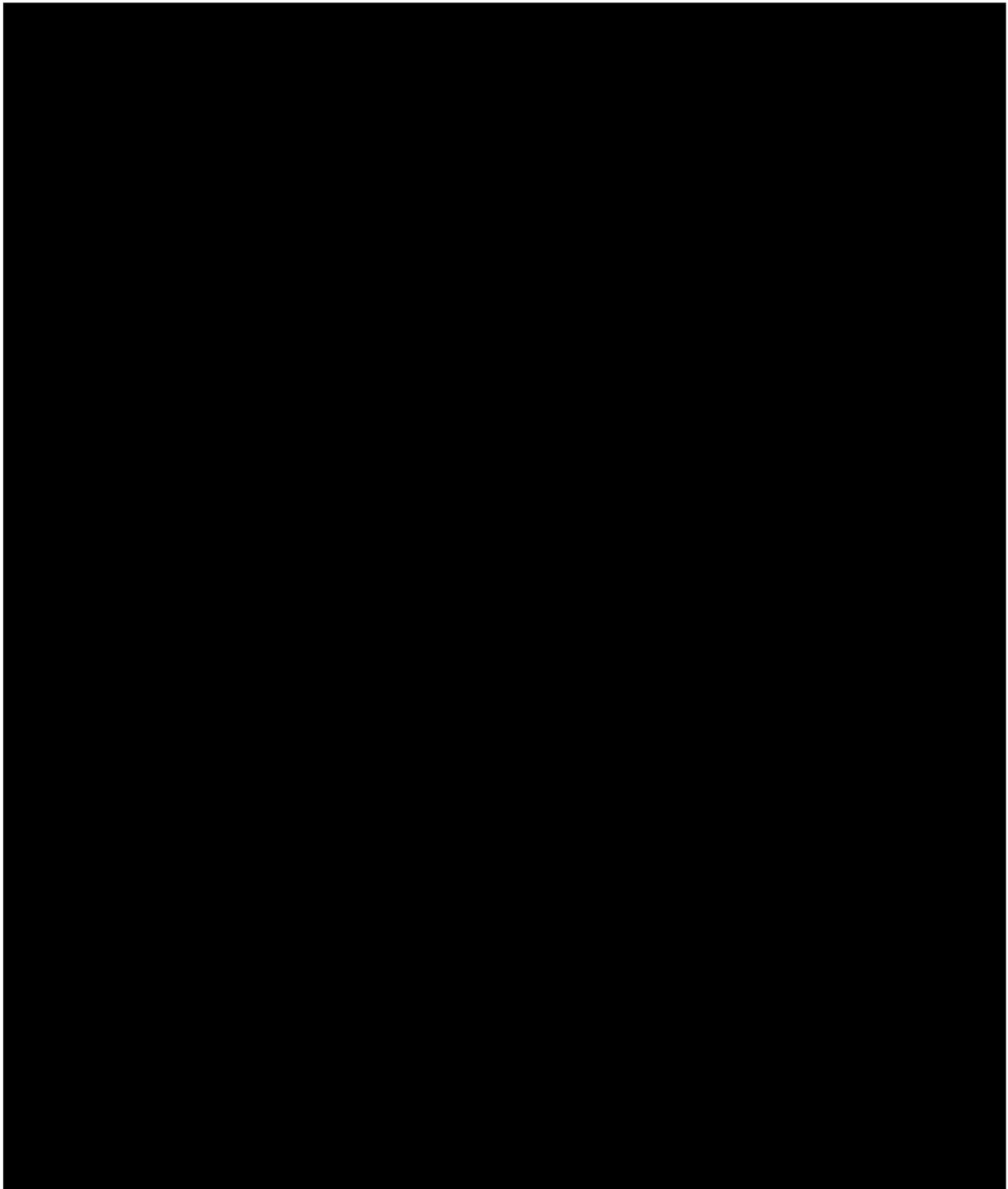
DISPOSITION

■ Under section 1203.9, the Riverside Superior Court has entire jurisdiction over defendant’s case, including the power to decide defendant’s section 1170.18 petition. We affirm the judgment.

Hollenhorst, Acting P. J., and Miller, J., concurred.

Appellant’s petition for review by the Supreme Court was granted November 9, 2016, S237602.

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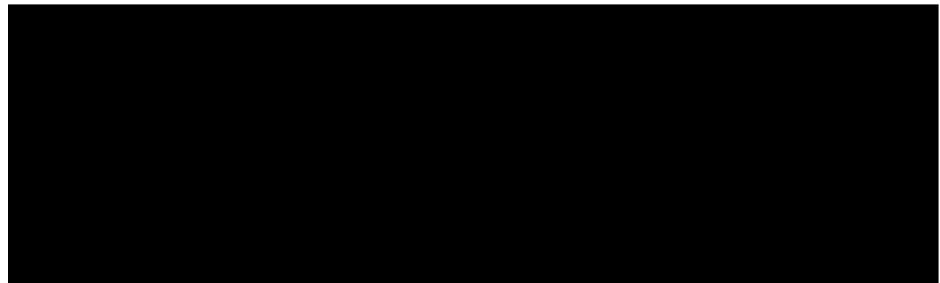
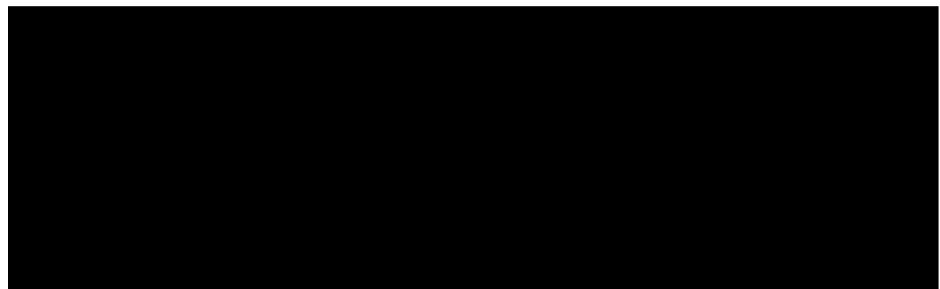
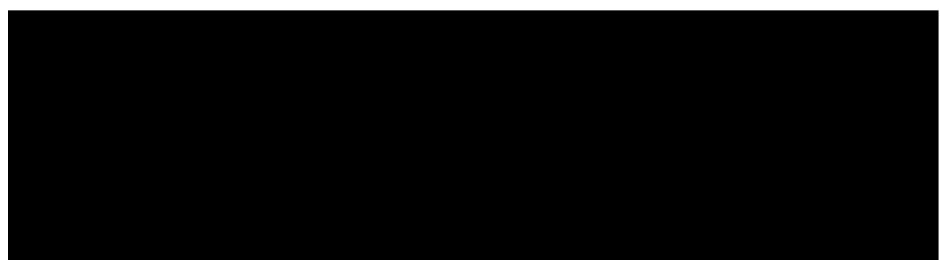
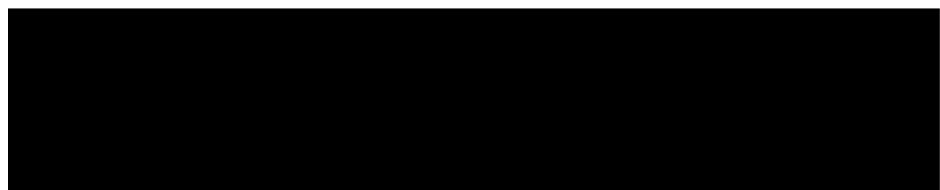
[No. B270094. Second Dist., Div. One. Aug. 31, 2016.]

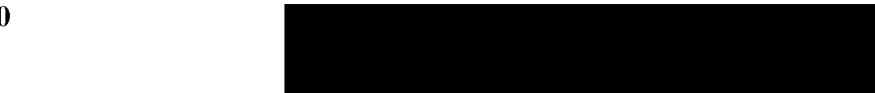
VISHVA DEV, M.D., INC., Plaintiff and Appellant, v.
BLUE SHIELD OF CALIFORNIA LIFE & HEALTH INSURANCE
COMPANY et al., Defendants and Respondents.

[REDACTED]

[REDACTED]

[REDACTED]





COUNSEL

Pick & Boydston and Brian D. Boydston for Plaintiff and Appellant.

Manatt, Phelps & Phillips, John M. LeBlanc, Jeffrey J. Maurer and Joanna S. McCallum for Defendants and Respondents.

OPINION

ROTHSCHILD, P. J.—Vishva Dev, M.D., Inc. (Dev), provided emergency medical services to two individuals who had health care coverage through Blue Shield of California Life & Health Insurance Company (Blue Shield Life) and one individual who had health care coverage through California Physicians Services, also known as Blue Shield of California (Blue Shield California). Dev submitted bills for its services for each of the individuals to their respective insurers. Blue Shield Life and Blue Shield California refused to pay or agreed to pay only a fraction of the amount billed, informing Dev of their decisions regarding each bill in written explanation of benefits (EOB) letters. Dev appealed each of those decisions, seeking to increase Blue Shield Life's and Blue Shield California's payments through those entities' internal review processes.

Blue Shield Life and Blue Shield California, however, continued to refuse to pay Dev's bills fully, and Dev filed a complaint asserting breach of contract and quantum meruit, the latter of which is at issue in this appeal. In response, Blue Shield Life and Blue Shield California filed a joint motion for summary judgment or summary adjudication on the ground that the two-year statute of limitations applicable to claims for quantum meruit began to run when Dev received the EOB letters, which were an unequivocal denial of payment. Because Dev filed suit more than two years after receiving those letters, Blue Shield Life and Blue Shield California argued, its claims for quantum meruit were time-barred. The trial court agreed, and granted the joint motion for summary adjudication. Dev contests the judgment on appeal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND**A. *The Parties***

Blue Shield Life is an insurance company licensed and regulated by the Department of Insurance and subject to the Insurance Code. It offers life and health insurance policies to residents of California.

Blue Shield California is a health care service plan, which is licensed and regulated by the Department of Managed Health Care, and offers health care coverage to California residents under managed care plans.

Dev is a California professional corporation owned by Dr. Vishva Dev, M.D., a cardiologist who renders emergency care to patients who present with an emergency medical condition at an emergency room where he practices. During the relevant time period, Dev did not have a contract with either Blue Shield Life or Blue Shield California.

B. *Services Provided*

On February 14, 2011, Dev provided emergency services to patient 8982, who was insured under a policy issued by Blue Shield Life. On June 11, 2012, Dev provided emergency services to patient 9025, who was also insured by Blue Shield Life. On August 5, 2012, Dev provided emergency services to patient 10481, who had coverage under a managed care plan issued by Blue Shield California.

C. *Billings and Internal Appeals*

Dev submitted bills to Blue Shield Life for its treatment of Patients 8982 and 9025.

1. *Patient 8982*

On March 8, 2011, Blue Shield Life sent Dev a written EOB explaining the amount Blue Shield Life would pay Dev for the services rendered to patient 8982. The EOB reflected that Dev billed \$24,610 for services and that Blue Shield Life's allowed amount was \$1,775.90, which would be applied to the patient's deductible with no remainder left to be paid by Blue Shield Life to Dev. On June 27, 2012, Dev filed an appeal to Blue Shield Life, demanding that the reductions "be reversed and an additional payment be made."

In response, Blue Shield Life sent Dev a form letter, dated July 5, 2012, acknowledging receipt of the appeal, and stating "[w]e will research your

appeal and issue a written determination, including the pertinent facts and an explanation of the determination, within 45 working days of the date the appeal was received.” On August 31, 2012, Blue Shield Life sent Dev a letter denying the appeal on the ground that it had been submitted after the 365-day filing limit set forth in Blue Shield Life’s appeal guidelines. Dev submitted a second appeal on January 15, 2013. On March 26, 2013, Blue Shield Life sent Dev a letter indicating that the review department had determined that Dev rendered emergency services, and, therefore, Dev would receive an amended EOB and payment of \$4,892.79, which was significantly less than the bill Dev submitted.

2. Patient 9025

On June 22, 2012, Blue Shield Life sent Dev a written EOB explaining the amount Blue Shield Life would pay Dev for the services rendered to patient 9025. The EOB reflected that Dev billed \$44,000 for the services rendered on June 11, 2012. Blue Shield Life’s allowed amount for emergency services was \$5,207, and \$1,648.78 would be applied to the patient’s deductible. The patient’s co-pay was \$1,245.38, and Blue Shield Life would pay Dev the remaining amount, \$2,312.04. On August 21, 2012, Dev submitted an appeal to Blue Shield Life. On October 2, 2012, Blue Shield Life denied the appeal and stated that it had paid the appropriate amount to Dev. Dev filed a second appeal on January 15, 2013. On March 26, 2013, Blue Shield Life denied the second appeal on the ground that it had been submitted more than 65 days after the initial denial. On August 14, 2013, Dev filed a third appeal. On August 20, 2013, Blue Shield Life sent a form letter acknowledging receipt and stating it would issue a written determination in 45 days. On October 10, 2013, Blue Shield Life upheld the denial.

3. Patient 10481

Dev submitted a bill for \$18,000 to Blue Shield California for treatment of patient 10481. On August 5, 2012, Blue Shield California sent Dev an EOB for services rendered, which reflected that its allowed amount was \$2,034, and that the entire amount would be applied to the patient’s deductible with no remainder left for Blue Shield California to pay Dev. On September 11, 2012, Dev submitted an appeal. On December 6, 2012, Blue Shield California sent a form letter acknowledging the appeal and stating that it would issue a determination within 45 days. On January 15, 2013, Dev submitted a second appeal. Blue Shield California sent Dev a denial letter on March 26, 2013, stating that it upheld its denial.

D. Proceedings Below

Dev filed this action on October 7, 2014, and a first amended complaint on March 12, 2015. On August 21, 2015, Blue Shield Life and Blue Shield

California filed a joint motion for summary judgment or summary adjudication alleging that Dev's claims for quantum meruit were barred by the two-year statute of limitations.¹ The trial court granted the motion on November 5, 2015, and subsequently entered judgment against Dev and in favor of Blue Shield Life and Blue Shield California. Dev timely appealed.

DISCUSSION

■ The statute of limitations for quantum meruit claims is two years. (Code Civ. Proc., § 339.) Generally, the statute of limitations commences when a party knows or should know the facts essential to the claim. (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 896–897 [218 Cal.Rptr. 313, 705 P.2d 886].) The sole issue in this case is when Dev knew or should have known the facts essential to its quantum meruit claim—that Blue Shield Life and Blue Shield California denied payment of Dev's medical bills for the emergency services performed for their insureds. Dev argues that the limitations period began to run at the end of the insurers' optional appeals process. Blue Shield Life and Blue Shield California argue that it began to run when they formally denied Dev's claims in writing in the original EOBs.

California courts have taken the latter approach in the case of homeowners insurance. For example, in *Prudential-LMI Com. Ins. v. Superior Court* (1990) 51 Cal.3d 674, 678 [274 Cal.Rptr. 387, 798 P.2d 1230], the California Supreme Court held that the statute of limitations begins to run once the insurer has issued an unequivocal denial of payment in writing. In that case, the insured brought an action against the insurer for bad faith denial of coverage of losses resulting from damage to the insured's property. The court reasoned that an unequivocal denial of payment in writing gave the insured knowledge of the facts essential to the insured's claim—bad faith denial of coverage—and, therefore, started the limitations period. (*Ibid.*)

Here, Dev received a written EOB notice for patient 8982 on March 8, 2011, which unequivocally stated that Blue Shield Life would not pay Dev's bill. Dev received a written EOB notice for patient 9025 on June 22, 2012, which unequivocally stated that Blue Shield Life would pay only a small portion of Dev's bill. Dev received a written EOB notice for patient 10481 on August 15, 2012, which stated that Blue Shield California would not pay

¹ Blue Shield Life and Blue Shield California also argued two alternative grounds for summary judgment or summary adjudication in their joint motion, which the trial court did not address in its judgment. Specifically they argued (1) Dev could not establish the elements of quantum meruit and (2) Dev had no right to payment in excess of amounts set forth in Blue Shield Life's contracts with its members. Because we affirm the trial court's judgment that Dev's claims for quantum meruit are time-barred, we need not address these alternative grounds.

Dev's bill. These EOBs all put Dev on notice that its claim for payments were being denied in part or in whole, which was the essential fact of Dev's quantum meruit claims. Dev filed this lawsuit on October 7, 2014, more than two years after receiving these notices. Its claims are, therefore, time-barred.

Dev argues, however, that its claims are not time-barred because its causes of action for quantum meruit did not accrue until the conclusion of its communications regarding its appeals of the EOBs with Blue Shield Life and Blue Shield California—March 26, 2013, as to patient 8982, August 20, 2013, as to patient 9025, and December 6, 2012, as to patient 10481. Dev also argues that even if they were time-barred, the insurers should be estopped from raising the statute of limitations defense because Dev reasonably relied on the appeals process to resolve any payment issues. Dev claims that the subsequent correspondence between the parties created an “expectation for compensation,” which undercut the denials contained in the EOBs, or rendered them equivocal.

Although there is no case regarding the effects of an internal, voluntary appeal process on the statute of limitations in the context of an insurer's denial of a medical provider's claims for payment, there are several cases in the home insurance context holding that an insurer's willingness to consider additional evidence, or provide a voluntary appeal process, after it had given unequivocal notice that a claim was rejected did not toll the limitations period. (See, e.g., *Singh v. Allstate Ins. Co.* (1998) 63 Cal.App.4th 135, 143–144 [73 Cal.Rptr.2d 546] (*Singh*) [fire insurance]; *Migliore v. Mid-Century Ins. Co.* (2002) 97 Cal.App.4th 592, 605 [118 Cal.Rptr.2d 548] (*Migliore*) [earthquake insurance].)²

For example, in *Singh*, the insureds (homeowners) argued that “there was a . . . period of equitable tolling because [the insurer] reconsidered their claim [of loss from fire damage].” (*Singh, supra*, 63 Cal.App.4th at p. 137.) The appellate court disagreed, concluding that “[t]he justifications for equitable tolling are absent, once the carrier has initially denied the claim. The policies supporting the shortened limitation period are then fully applicable, and no reason for further tolling exists.” (*Id.* at p. 142.)

Similarly, in *Migliore, supra*, 97 Cal.App.4th at page 605, the appellate court held that the insurer's letter refusing further payment on the homeowner insured's claim for earthquake damage was an “unequivocal denial” and, thus, began the statute of limitations period for suing under the policy, even

² There are also cases in the employment context holding that when an internal appeal process of employment termination is optional, it will not toll the statute of limitations for a wrongful termination claim. (See, e.g., *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 737–738 [17 Cal.Rptr.3d 374].)

though the letter invited the insured to submit additional information relevant to the claim and stated its “willingness to reconsider” based on new information.

■ Importantly, the language of the denial letter in *Singh*, which the plaintiffs claimed made it equivocal, is precisely the language used in Blue Shield Life and Blue Shield California’s EOBS, which Dev claims created an “expectation for compensation.” Specifically, the *Singh* court noted that “[insurer’s] letter told plaintiffs their claim was denied, but stated that, if plaintiffs had any further information they would like [the insurer] to consider, to bring the information to [its] attention.” (*Singh, supra*, 63 Cal.App.4th at p. 143.) Blue Shield Life’s and Blue Shield of California’s EOBS stated that “[i]f you have questions about your claim or your claim has been denied and you believe that additional information will affect the processing of your claim, you should contact [the] Customer Service Department. . . . [¶] . . . [¶] If you are not satisfied with [its] response to your inquiry, you may initiate an appeal in writing.” In *Singh*, the court concluded that “[t]he extension of a courtesy, to look at anything else that plaintiffs might have to offer, did not render the denial equivocal.” (*Ibid.*) That conclusion applies with equal force here where the plaintiff was a medical provider rather than the insured. The fact that Blue Shield Life and Blue Shield California provided an optional appeals process does not change the finality of their denial of Dev’s claims. Just as with the denial in *Singh*, the EOBS “could hardly be . . . more unequivocal denial[s]. There was nothing tentative or conditional about [them].” (*Ibid.*)

Moreover, under Dev’s theory, any party engaging in an insurance company’s optional appeal process could continuously toll the statute of limitations, thereby rendering it a nullity. (*Singh, supra*, 63 Cal.App.4th at p. 145 [“By the simple expedient of making many requests for reconsideration, claimants could extend the [limitations period] at will with successive periods of tolling.”].) As the Ninth Circuit explained: “Holding that [the insurer] may inadvertently extend the limitations period by answering claimants’ inquiries or by considering new information ‘would contravene a strong public policy to encourage an insurance company to reconsider its original denial when confronted with potentially new facts. If insurance companies were saddled with the situation that whenever [they] reconsidered an earlier decision it would inaugurate a new limitations period, companies would be reluctant to offer policy holders the luxury of a second evaluation.’” (*Wagner v. Director, Federal Emergency Management Agency* (9th Cir. 1988) 847 F.2d 515, 521.)

■ Finally, as to Dev’s argument that applying the statute of limitations to its case permits the “callous dumping of responsibility,” we note that California courts have consistently acknowledged both the harshness and the

necessity of the bar of the statute of limitations. As a matter of policy, this defense “operates conclusively across-the-board. It does so with respect to *all* causes of action, both those that do not have merit and also those that do. [Citation.] That it may bar meritorious causes of action as well as unmeritorious ones is the ‘price of the orderly and timely processing of litigation’ [citation]—a price that may be high, but one that must nevertheless be paid.” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 410 [87 Cal.Rptr.2d 453, 981 P.2d 79], fn. omitted.)

■ In sum, Dev had knowledge of the facts giving rise to its claim of quantum meruit when it received the EOBS, with their unequivocal denial of its bills, more than two years prior to filing this lawsuit. Dev engaged in a voluntary appeals process with Blue Shield Life and Blue Shield California, which did not change or undercut the EOBS’ denials of Dev’s claims. Accordingly, Dev’s quantum meruit claims are time-barred, and the trial court correctly entered judgment on that basis.

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal.

Johnson, J., and Lui, J., concurred.

Appellant’s petition for review by the Supreme Court was denied November 9, 2016, S237109.

[No. B264450. Second Dist., Div. One. Aug. 31, 2016.]

THE PEOPLE, Plaintiff and Respondent, v.
BRAYAN OCHOA, Defendant and Appellant.

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Marta I. Stanton, 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, Shawn McGahey Webb and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

ROTHSCHILD, P. J.—A jury found appellant Brayan Ochoa guilty of premeditated and deliberate attempted murder (count 1) and attempted extortion (count 2). Appellant argues that the evidence was insufficient to establish that he committed attempted extortion against the only victim identified in the information, and, in the alternative, that under Penal Code section 654,¹ the court erred in imposing consecutive sentences on the attempted extortion and attempted murder convictions. We reverse the judgment of conviction on count 2 and affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

In the summer of 2013, Mendeleyevic Martinez Santiago and Gabino Martinez worked at a food truck parked on a street in Hollywood. Santiago worked inside the truck while Martinez worked outside the truck, operating a grill and broiler.

At around 3:00 a.m. on July 6, 2013, while Santiago helped customers, appellant and a companion approached the food truck and knocked on the back door. When Santiago opened a small window in the door, appellant told Santiago that the food truck “belonged” to the Mara Salvatrucha street gang and that he was there to collect the “rent” from the truck owed to the gang.² Santiago informed appellant that he did not know anything about the “rent,” and told him to come back the next day to speak to the owner. Appellant responded that he would have “to collect” the money “his way” and then he walked away.

At the time appellant approached the truck, Martinez stood outside cleaning the broiler. From a distance of about 15 feet, Martinez saw appellant talk to Santiago, but he did not hear their conversation, nor did he know what they discussed. Martinez observed appellant walk away from the truck.³ Neither Martinez nor Santiago saw appellant with a weapon at that time.

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

² “Rent” is a protection fee that gangs collect from businesses that operate in the gang’s territory.

³ Martinez testified that about a month earlier appellant approached him while he was working at the grill outside the food truck. Appellant told Martinez that he had come to

Approximately five minutes after appellant's conversation with Santiago, he returned to the food truck. Martinez had his back turned and did not see appellant approach. Appellant tapped him on the shoulder. When Martinez turned around, appellant pointed a gun at him and, without speaking a word to Martinez, shot him in the face. Appellant fled on foot.⁴ Martinez survived and later identified appellant as his assailant.

An information charged appellant with attempted premeditated murder (§§ 664, 187, subd. (a)) of Martinez (count 1) and attempted extortion (§§ 664, 524) of Martinez (count 2). The information further alleged firearm, gang, and great bodily injury enhancements for both counts. During the trial at the end of the prosecution's case, appellant moved the court to dismiss the charges based on insufficient evidence. The court denied the motion. The jury convicted appellant of both counts and found the special allegations to be true. The trial court sentenced appellant to a total prison term of 52 years to life, consisting of an indeterminate term of 40 years to life (count 1) and a consecutive determinate term of 12 years (count 2).⁵

Appellant filed a timely appeal.

DISCUSSION

Sufficient Evidence Does Not Support Appellant's Conviction of Attempted Extortion from Martinez.

Appellant contends that the evidence does not show he tried to extort any property or money from Martinez, the only victim identified in count 2 of the information. We agree. "In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. ‘ ‘The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a

"collect the rent." Because Martinez did not understand what appellant was talking about, he told appellant to speak to the cashier in the truck. Then, when appellant approached the truck, Santiago told appellant to return the next day to talk to the owner.

⁴ Another employee of the food truck, Rigoberto Martinez, was cleaning the eating area outside the truck when the shooting occurred. To distinguish him from Gabino Martinez, we refer to Rigoberto Martinez by his first name, intending no disrespect. Rigoberto saw appellant speak to Santiago at the door of the food truck, but Rigoberto was too far from the truck to overhear the conversation. Rigoberto also witnessed appellant approach Martinez from behind, attract his attention and shoot him in the face.

⁵ The court imposed life with a minimum parole eligibility term of 15 years pursuant to the gang enhancement (§ 186.22, subd. (b)(5)), plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)) on count 1, and a consecutive determinate term consisting of the two-year middle term, plus a 10-year term for the gang enhancement on count 2. The court stayed sentences for the remaining enhancements.

reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”’” (*People v. Smith* (2005) 37 Cal.4th 733, 738–739 [37 Cal.Rptr.3d 163, 124 P.3d 730].)

■ “Extortion is the obtaining of property from another, with his consent . . . , induced by a wrongful use of force or fear” (§ 518.) Section 524 provides that attempted extortion is committed when a person attempts “by means of any threat . . . to extort money or other property from another.” “Fear, such as will constitute extortion, may be induced by a threat . . . [¶] . . . [t]o do an unlawful injury to the person or property of the individual threatened” (§ 519, subd. 1.) “The elements of the crime of attempted extortion are (1) a specific intent to commit extortion and (2) a direct ineffectual act done towards its commission.” (*People v. Sales* (2004) 116 Cal.App.4th 741, 749 [10 Cal.Rptr.3d 527].) By definition, therefore, if there is no attempt to compel the victim to consent to give up money or property, there can be no attempted extortion.

■ Here, there was no evidence that appellant specifically intended to extort anything from Martinez. Appellant approached Martinez from behind, tapped him on the shoulder, and when Martinez turned around, appellant shot him in the face. No words were exchanged between the men before the shooting, and there is no evidence that Martinez was aware of the demand for rent or the implied threat appellant made to Santiago. The fact that appellant carried out his threat to Santiago by shooting Martinez does not make Martinez the victim of *attempted extortion*—it makes Martinez the victim of the crime appellant committed in carrying out the threat—the attempted murder alleged in count 1. Likewise, that appellant had approached Martinez at the food truck the month before, stating that he had come to “collect the rent,” does not support the attempted extortion charge. Martinez did not understand what appellant was seeking, and appellant did not threaten Martinez at that time. Thus, there was no evidence presented at trial from which the jury could find that appellant attempted to extort money or property from Martinez.

■ The Attorney General asserts that sufficient evidence supports the attempted extortion conviction based on the theory that the food truck business was the victim of the extortion and that appellant intended to extort money from the “business via its employees, i.e., Santiago and [Martinez].” The information, however, did not identify the business (or its owner) as a victim of attempted extortion. Instead, the information identified Martinez as the *only* victim. And because the information misidentified the victim of the attempted extortion, it failed to provide appellant with legally sufficient notice

of the charge against him. “ ‘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’ ” (*People v. Anderson* (2006) 141 Cal.App.4th 430, 445 [45 Cal.Rptr.3d 910].) Moreover, “[i]t is fundamental that “[w]hen 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].)

Here, if the prosecutor intended to proceed on the theory that the food truck business was the target of the extortion, then the prosecutor should have amended the information during the trial to allege that appellant had attempted to extort from the owner of the business. “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” (§ 1009; see *People v. Graff* (2009) 170 Cal.App.4th 345, 361 [87 Cal.Rptr.3d 827] [amendment to the information can occur “at any stage of the proceeding, up to and including the close of trial”].) During the trial, the parties discussed the sufficiency of the evidence supporting the charges and enhancements in connection with appellant’s motion to dismiss and thus the prosecutor was aware of the deficiency of the charges during the trial. The prosecutor, nonetheless, failed to amend the information. And this court has no authority to order the amendment of the information on appeal. (*People v. Hamernik* (2016) 1 Cal.App.5th 412, 425 [204 Cal.Rptr.3d 649].) Reversal of the judgment of conviction on count 2 is required.⁶

DISPOSITION

The judgment of conviction on count 2, attempted extortion, is reversed. In all other respects, the judgment is affirmed. The trial court shall amend the

⁶ Appellant also argues that his consecutive sentences violated section 654’s prohibition against multiple punishments for the same act or omission. Because we reverse appellant’s conviction on count 2, we need not address his challenge to his consecutive sentences.

abstract of judgment accordingly, and forward the amended abstract to the Department of Corrections and Rehabilitation.

Chaney, J., and Lui, J., concurred.

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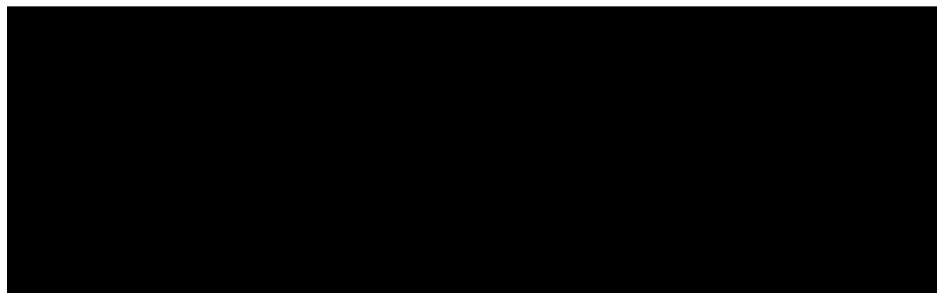
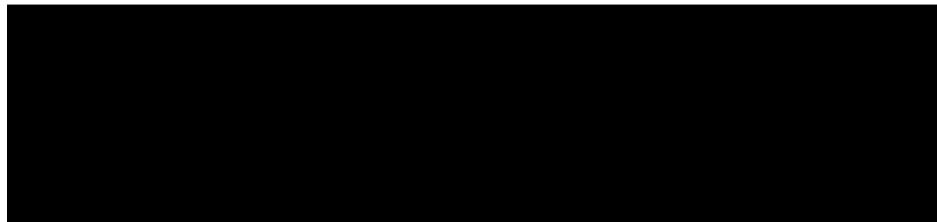
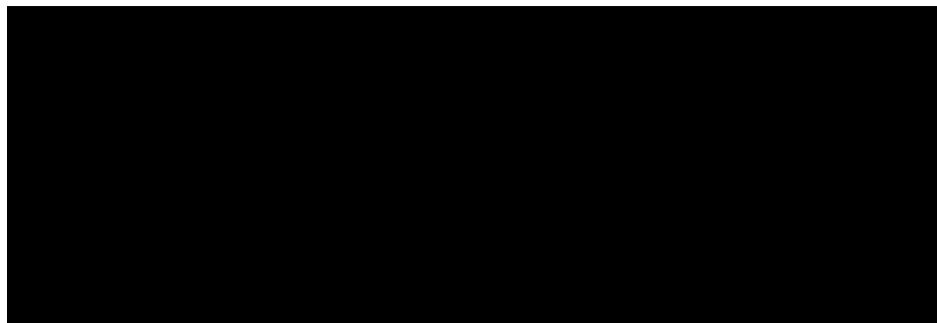
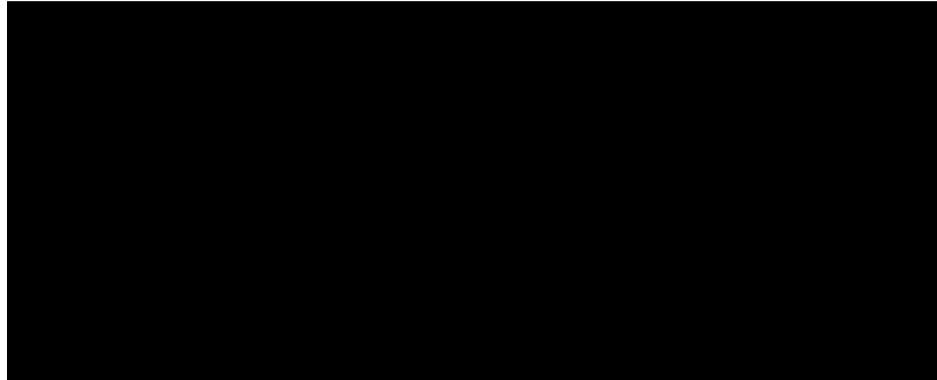
[No. A147570. First Dist., Div. Two. Aug. 31, 2016.]

PUBLIC UTILITIES COMMISSION, Petitioner, v.
THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent;
MICHAEL J. AGUIRRE, Real Party in Interest.

[REDACTED]

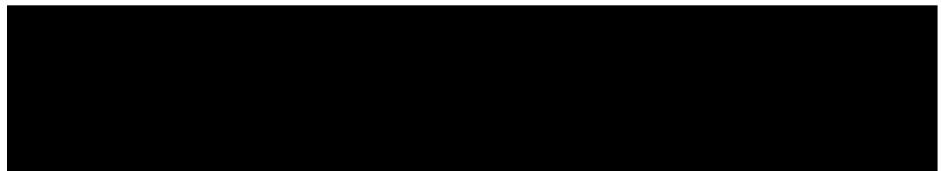
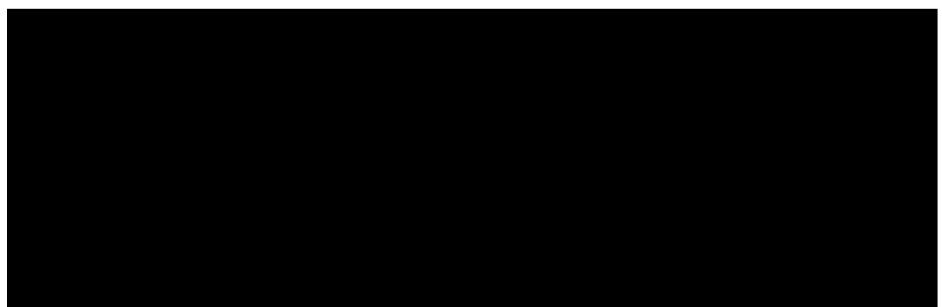
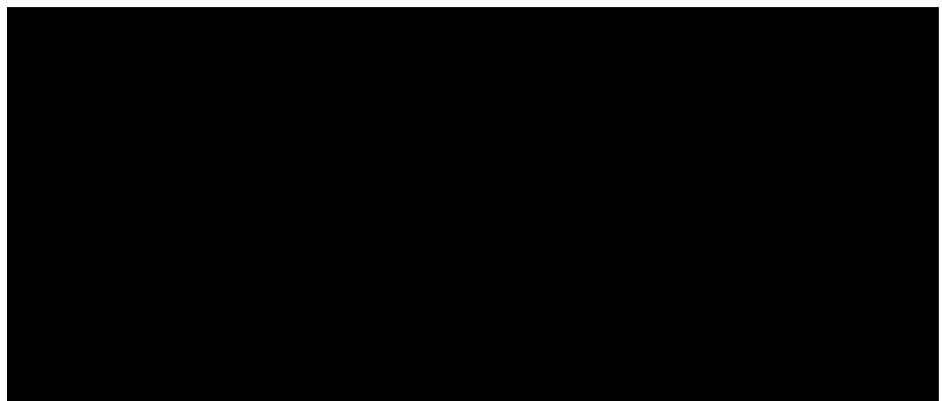
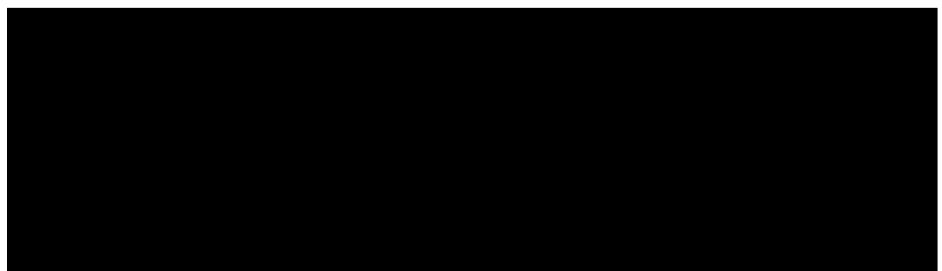
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COUNSEL

Arocles Aguilar, Laura Gasser, Mitchell Shapson and Jonathan C. Koltz for Petitioner.

No appearance for Respondent.

Michael J. Aquirre and Maria C. Severson for Real Party in Interest.

OPINION

MILLER, J.—This writ petition raises the narrow question whether a petition to compel the Public Utilities Commission (CPUC) to produce documents under the California Public Records Act (Gov. Code, § 6250 et seq.; PRA) can properly be filed in superior court, or whether Public Utilities Code section 1759 (section 1759) bars the superior court from exercising jurisdiction over such a lawsuit. We conclude the latter, and will issue a writ of mandate commanding the superior court to set aside and vacate its order overruling a demurrer on this ground and to enter an order sustaining the demurrer without leave to amend.

PROCEDURAL BACKGROUND

Real party in interest Michael J. Aguirre (Aguirre) filed a petition for writ of mandamus and complaint for injunctive and declaratory relief in San Francisco Superior Court against the CPUC for failing to comply with the PRA, Government Code sections 6250 through 6276.48 (Complaint). The superior court summarized the allegations in the Complaint, “The San Onofre Nuclear Generating Station was closed after it leaked radiation in 2012. The [CPUC] regulated the plant. Southern California Edison (SCE) and San Diego Gas and Electric Company (SDGE) owned the plant. The costs of the shutdown and loss due to the shutdown exceeded \$4 billion. The CPUC approved SCE assigning \$3.3 billion of these costs to utility ratepayers. This agreement was reached in a hotel room in Warsaw, Poland, at an *ex parte* meeting between former CPUC President Michael Peevey (‘Peevey’) and former SCE executive Stephen Pickett (‘Pickett’). The agreement was outlined on hotel stationary [*sic*]. The CPUC adopted the agreement, stopped investigating the plant’s closure and offered \$25 million to fund environmental research at the University of California.” Aguirre made PRA requests seeking the production of e-mails and other documents related to the CPUC’s investigation of the San Onofre Nuclear Generating Station shutdown and the settlement and meetings, as described above. Aguirre alleges, among other things, that the CPUC refused to produce records pursuant to certain PRA requests, including e-mails and writings of Peevey and current CPUC president Michael Picker “regarding the backroom plan to kill any CPUC investigation into who and what caused the unlicensed steam generators to be deployed at San Onofre and who permitted Edison to unlawfully charge Edison customers for them.”¹ The complaint requests orders requiring the

¹ Aguirre’s petition in the superior court also sought a declaration in what was in effect a second cause of action that the CPUC had failed to comply with Government Code section 995 requiring open meetings “because it is providing a criminal defense to unidentified current and former CPUC agents . . . without determining in a duly noticed public meeting that providing such a defense in a criminal matter would be in the best interests of the public entity” The

CPUC to produce writings called for under Aguirre's public records request Nos. 1386 and 1414, as described in the complaint.

The CPUC demurred on multiple grounds, including that under Public Utilities Code section 1759 the superior court has no subject matter jurisdiction over this matter, and that Aguirre had failed to exhaust his administrative remedies before filing the lawsuit. The superior court held multiple hearings on the demurrer, and permitted a second round of briefing. Although the CPUC steadfastly asserted that the superior court had no jurisdiction, it acceded to Aguirre's request for a continuance for the parties to meet and confer.²

Eventually the superior court overruled the CPUC's demurrer on these grounds, and the CPUC filed a petition for an extraordinary writ directing the trial court to vacate its order and sustain the demurrer.³ We issued an alternative writ directing the superior court to vacate its order or show cause why we should not issue a peremptory writ. On July 8, the superior court indicated that it would neither vacate the order nor show cause why a peremptory writ of mandate should not issue. We received full briefing and heard oral argument.⁴ We emphasize that the merits of Aguirre's Complaint are not before us, and in reaching our decision that the superior court had no jurisdiction, we do not address the merits of his underlying claims or his PRA request.

CPUC demurred on the ground that the superior court had no jurisdiction over the subject matter, and that Aguirre failed to state facts sufficient to state a cause of action. The superior court sustained the demurrer to this cause of action without leave to amend. This ruling is not before us, and we do not address it. For simplicity, when we refer to the trial court's ruling on the demurrer in this opinion, we are referring only to the PRA cause of action.

² Over the course of the hearings, the parties clarified the scope of the dispute, which we include by way of background only. The CPUC stated it had produced every record between the CPUC and Southern California Edison that Aguirre had asked for. In a "status update" filed after the meet and confer, Aguirre stated that documents withheld were based on two statutory exemptions to the PRA, Government Code sections 6255 (deliberative process) and 6254, subdivision (l) (correspondence with governor). At a subsequent hearing, Aguirre stated that 133 documents were at issue. Counsel for the CPUC stated that more than 1,300 documents had been released to Aguirre.

³ Originally the trial court issued a lengthy tentative ruling on November 5, 2015, sustaining the demurrer because the CPUC "established that the court does not have jurisdiction to hear the matter," citing section 1759 and *PegaStaff v. Public Utilities Com.* (2015) 236 Cal.App.4th 374, 383 [186 Cal.Rptr.3d 510] (*PegaStaff I*), and because the plaintiff "did not plead facts that he exhausted the administrative relief provided by defendant prior to filing the instant suit."

⁴ We have jurisdiction to review the superior court order overruling the demurrer and asserting subject matter jurisdiction under Code of Civil Procedure sections 1085 and 1103 and *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893 [55 Cal.Rptr.2d 724, 920 P.2d 669] (*Covalt*).

DISCUSSION

In reviewing a demurrer, we assume the truth of all properly pleaded and judicially noticeable material facts within the complaint, but not “‘ ‘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].) Whether the superior court has jurisdiction over this action against the CPUC is a question of law which we review de novo. (*Disenhouse v. Peevey* (2014) 226 Cal.App.4th 1096, 1102 [172 Cal.Rptr.3d 549] (*Disenhouse*)).

A. *Statutory Limitations on Jurisdiction in CPUC Matters*

■ The origins and broad authority of the CPUC are well known and have been described by our Supreme Court: “The [CPUC] is a state agency of constitutional origin with far-reaching duties, functions and powers. (Cal. Const., art. XII, §§ 1–6.) The Constitution confers broad authority on the commission to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures. (*Id.*, §§ 2, 4, 6.)” (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905 [160 Cal.Rptr. 124, 603 P.2d 41].)

In *PegaStaff I, supra*, 236 Cal.App.4th 374, we recently described the limitations on jurisdiction in cases where the CPUC is a party. “[P]ursuant to its plenary authority under article XII, section 5 of the state Constitution ‘to establish the manner and scope of review of commission action in a court of record,’ the Legislature has explicitly restricted the jurisdiction of the superior court in cases involving the CPUC” (*Id.* at p. 383.) We then went on to cite section 1759, which was at issue in *PegaStaff I* and is at the heart of this case. It provides: “(a) No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court. [¶] (b) The writ of mandamus shall lie from the Supreme Court and from the court of appeal to the commission in all proper cases as prescribed in Section 1085 of the Code of Civil Procedure.” (§ 1759.)

■ In *PegaStaff I*, plaintiff PegaStaff sued the CPUC, claiming, among other things, that article 5 of the Public Utilities Code was unconstitutional. Article 5 required the CPUC to take steps to implement the goals of encouraging and developing the use of women, minority and disabled-veteran-owned business enterprises within the public utility sector. (*PegaStaff I, supra*, 236 Cal.App.4th at pp. 377, 381.) PegaStaff sought a declaration that

the provisions of article 5 were unconstitutional, and an injunction against their enforcement by the CPUC. (*PegaStaff I, supra*, at p. 384.) In concluding that the superior court did not have jurisdiction over the CPUC because of section 1759, we wrote that section 1759 “mak[es] plain that a duty set forth in law *is* an official duty. Nothing about that language suggests that a law must first be found constitutional or otherwise valid in order to be a source of the CPUC’s ‘official duties.’ So long as a law was validly enacted by the Legislature, any duties such statute imposes on the CPUC are ‘official duties’ within the meaning of section 1759, and the superior courts lack jurisdiction to interfere with the duties it imposes.” (*PegaStaff I*, at p. 385.)

B. The Public Records Act

■ The PRA was modeled on the federal Freedom of Information Act (5 U.S.C. § 552 et seq.) for the purposes of giving members of the public access to information possessed by public agencies. (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425 [121 Cal.Rptr.2d 844, 49 P.3d 194] (*Filarsky*).) In enacting the PRA, the Legislature declared that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” (Gov. Code, § 6250.) To that end, the PRA establishes a statutory scheme under which a state agency must respond to a request for public records, either by complying with the request or by notifying the requestor that records are not subject to disclosure and providing the reason why. (See Gov. Code, §§ 6253–6254; *Filarsky, supra*, 28 Cal.4th at p. 425.)

■ It is undisputed that the PRA applies to the CPUC.⁵ The CPUC is specifically listed in the PRA as being one of the state agencies that “shall establish written guidelines for accessibility of records” under the PRA. (Gov. Code, § 6253.4, subd. (a).) In turn, the CPUC has set forth its written procedures for PRA requests in its general order No. 66-C.⁶ (See *Resolution Authorizing Disclosure of Records the Investigation of Two Sacramento Regional Transit District Rail Incidents Involving Fatalities* (Dec. 21, 2005) Cal.P.U.C. Res. No. L-487 [2015 Cal.P.U.C. Lexis 804 at p. *3] [“The Commission has . . . implemented its responsibility under Cal. Gov’t. Code § 6253.4(a), by adopting guidelines for public access to Commission records. These guidelines are embodied in G.O. 66-C”].)

The PRA also establishes “specific procedures for seeking a judicial determination of a public agency’s obligation to disclose records in the event

⁵ Government Code section 6252, subdivision (f) defines “[s]tate agency” under the PRA, and Government Code section 6253 requires “state or local agenc[ies]” to comply with the PRA and sets forth “agency duties.”

⁶ On our own motion, we take judicial notice of general order No. 66-C as an official act of the CPUC, a state agency. (Evid. Code, § 452, subd. (c).)

the agency denies a request by a member of the public.” (*Filarsky, supra*, 28 Cal.4th at p. 426.) These procedures are set forth in sections 6258 and 6259 of the Government Code.

Government Code section 6258 states that “Any person may institute proceedings for injunctive or declarative relief or writ of mandate *in any court of competent jurisdiction* to enforce his or her right to inspect or to receive a copy of any public record or class of public records under [the Act]. The times for responsive pleadings and for hearings in these proceedings shall be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time.” (Italics added.)

■ Government Code section 6259 describes the process of judicial review in detail, and begins with a specific reference to the superior court: “(a) Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so. The court shall decide the case after examining the record *in camera*, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and any oral argument and additional evidence as the court may allow.” If the court finds that the decision to refuse to disclose was not justified under Government Code sections 6254 or 6255, which describe the “exemption of particular records” to disclosure and the “justification for withholding records,” respectively, the court orders the records disclosed; if the court determines otherwise, the court returns the records to the public official and issues an order supporting the decision not to disclose. (See Gov. Code, § 6259, subd. (b).)

■ Government Code section 6259, subdivision (c) provides that a superior court order directing disclosure or supporting the public official’s decision refusing disclosure is reviewable by “petition to the appellate court for the issuance of an extraordinary writ,” and sets out the time requirements for seeking such relief, as well as the grounds for seeking a stay of relief and the availability of contempt of court for failure to obey the order of the court. The statute also provides for court costs and reasonable attorney fees to a prevailing plaintiff, and the possibility of court costs and reasonable attorney fees to the public agency if the plaintiff’s case is clearly frivolous. (*Id.*, subd. (d).)⁷

⁷ In *Filarsky, supra*, 28 Cal.4th 419, the City of Manhattan Beach (City) denied a PRA request made by a member of the public. After the individual stated his intent to file a judicial proceeding under Government Code section 6258, but before he had actually done so, the City filed an action for declaratory relief under Code of Civil Procedure section 1060 for the

C. *Jurisdiction to Enforce a PRA Action Against the CPUC*

The CPUC demurred to the Complaint on the ground that section 1759 divested the superior court of jurisdiction.

We are aware of no published cases that have addressed the precise issue before us. In a closely analogous case regarding another sunshine-type ordinance in the Government Code that also imposes duties on the CPUC, our colleagues in the Fourth District held in *Disenhouse, supra*, 226 Cal.App.4th 1096 that section 1759 divested the superior court of jurisdiction to review claims that CPUC was not complying with the Bagley-Keene Open Meeting Act (Gov. Code, § 11120 et seq.; Bagley-Keene). Similar to the PRA, the intent of Bagley-Keene is “that actions of state agencies be taken openly and that their deliberation be conducted openly.” (Gov. Code, § 11120.) And like the PRA, Bagley-Keene applies to the CPUC. (*Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 797 [3 Cal.Rptr.3d 703, 74 P.3d 795].) In *Disenhouse*, an individual filed a complaint and then an application for an injunction requiring a CPUC meeting to be opened to the general public. The superior court denied the injunction and entered a judgment of dismissal on the ground that it had no jurisdiction under section 1759. In upholding the superior court’s decision, the Court of Appeal in *Disenhouse* applied the “long-standing rule requiring us to construe the

purpose of ascertaining that it was not obligated to disclose records to the petitioner under the PRA. The member of the public demurred to the complaint, but the trial court overruled the demurrer and granted declaratory relief to the City. Our Supreme Court in *Filarsky* held that the PRA does not authorize a public agency to initiate an action under Government Code sections 6258 and 6259 to determine its obligations to disclose documents to a member of the public, and that a declaratory relief action filed under Code of Civil Procedure section 1060 to determine whether an agency must publicly disclose records is also impermissible. In so holding, our Supreme Court described Government Code sections 6258 and 6259 as “special statutory procedures governing a judicial proceeding” arising under the PRA (*Filarsky*, at p. 428), and explained how they provide “protections and incentives for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure” (*id.* at p. 427), and how they differ in many ways from “ordinary declaratory relief actions” (*id.* at p. 428). Our Supreme Court held that the trial court “should have sustained petitioner’s demurrer to the complaint on the grounds that (1) Government Code sections 6258 and 6259 set forth the exclusive means under *these circumstances* for litigating of the question whether the requested records must be disclosed, (2) litigation of the matter pursuant to those provisions is the more appropriate procedure for granting effective relief, and (3) those provisions do not authorize the city to initiate a judicial proceeding to determine its obligation to disclose public records that have been requested pursuant to the [PRA].” (*Id.* at p. 435, italics added.) In describing the limited nature of its holding, the court said that it had “no occasion to decide” other issues that the case did not present, such as whether a public agency would be authorized to seek disclosure of records in the possession of another public agency, or whether a third party had the right to seek a judicial ruling precluding the disclosure of documents pursuant to the PRA. (*Filarsky, supra*, at p. 431.) Nor did the Supreme Court in *Filarsky* address the issue before us, which is whether the superior court has jurisdiction in the first instance to resolve a PRA dispute by a member of the public addressed to the CPUC.

[Bagley-Keene] Act and section 1759 ‘in a manner which harmonizes their language and avoids unnecessary conflict.’ (*Waters v. Pacific Tel. Co.* (1974) 12 Cal.3d 1, 11 [114 Cal.Rptr. 753, 523 P.2d 1161].)’ (*Disenhouse, supra*, at p. 1102.) That entailed construing the judicial enforcement provisions of the state’s open meeting law (Gov. Code, § 11130.3, subd. (a)) in light of section 1759, subdivision (b). Government Code section 11130.3, subdivision (a) provides that interested persons could “commence an action by *mandamus*, injunction, or declaratory relief” for the purposes of stopping or preventing violations of the open meeting law. (Italics added.)

The Court of Appeal in *Disenhouse* had little difficulty concluding that the two statutes could be harmonized and that the superior court did not err in dismissing the case: “Our task is straightforward in this case because a mandamus action may be brought against the commission in the Supreme Court or the Court of Appeal in appropriate cases (§ 1759, subd. (b)), and a mandamus action is one of the available means of enforcing the [open meeting act]. (Gov. Code, §§ 11130, subd. (a), 11130.3, subd. (a).)” (*Disenhouse, supra*, 226 Cal.App.4th at p. 1102.)

In so concluding, the court in *Disenhouse* made clear that its holding did not “effectively exempt” the CPUC from the reach of the open meeting act. (*Disenhouse, supra*, 226 Cal.App.4th at p. 1102.) “Rather, it respects both the Legislature’s aims in placing limits on judicial review of commission actions as well as the Legislature’s aims under the [open meeting] Act.” (*Ibid.*)

■ We conclude that the duty to comply with the PRA is unquestionably an “official duty” of the CPUC. (*PegaStaff I, supra*, 236 Cal.App.4th at pp. 384–385.) A “*writ of mandate in any court of competent jurisdiction*” is one of the statutory means available to enforce the PRA (Gov. Code, § 6258, italics added), and a “*writ of mandamus*” may be brought against the CPUC in the Supreme Court or the Court of Appeal in appropriate cases under section 1759, subdivision (b).⁸ Indeed, in the matter before us, Aguirre asserts in his Complaint that the superior court “has jurisdiction under Govt. Code § 6258.”

■ As in *Disenhouse*, our limited holding does not exempt the CPUC from the requirements of the PRA, or limit Aguirre from seeking judicial relief to enforce his rights under the PRA. He simply may not seek that relief at the superior court. Our holding respects the mandate of section 1759, subdivision (b).

⁸ A writ of mandate is the same as a writ of mandamus. (See Black’s Law Dict. (10th ed. 2014) p. 1105.)

In opposition to the writ, Aguirre does not cite our decision in *PegaStaff I*, let alone distinguish it.⁹ The two cases he cites in opposition do not support

⁹ In overruling the demurrer, although the superior court cited *PegaStaff I*, it appeared to mistakenly rely on inapposite language from an entirely different decision captioned *PegaStaff v. Pacific Gas & Electric Co.* (2015) 239 Cal.App.4th 1303 [192 Cal.Rptr.3d 614] (*PegaStaff II*), and then attribute that language to *PegaStaff I*. It compounded the error by referring to *PegaStaff II*'s citation to *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 281 [115 Cal.Rptr.2d 874, 38 P.3d 1098] (*Hartwell*), as if it, too, had been cited in *PegaStaff I*. No doubt recognizing the error, Aguirre, in opposing the writ, does not address the trial court's reasoning or address any of these cases discussed by the superior court in its written order; he simply quotes verbatim from the trial court order.

Neither *Hartwell* nor *PegaStaff II* involved lawsuits against the CPUC. They are part of a line of cases which concern third party lawsuits against a CPUC-regulated utility, rather than against the CPUC itself. In *PegaStaff II*, we addressed to what extent section 1759 bars jurisdiction in superior courts in actions filed against regulated utilities and the “ ‘potential conflict’ ” between section 1759 and Public Utilities Code section 2106, which permits a private right of action against regulated utilities. (*PegaStaff II, supra*, 239 Cal.App.4th at p. 1315.) In *PegaStaff II*, we concluded that the superior court had jurisdiction in a case against Pacific Gas & Electric Company challenging its minority enterprise program. In so holding, we discussed and applied the test developed in *Covalt, supra*, 13 Cal.4th 893 in actions against regulated utilities. As we described: “In *Covalt*, the Supreme Court ‘established a three-part test to determine whether an action is barred by section 1759: (1) whether the commission had the authority to adopt a regulatory policy; (2) whether the commission had exercised that authority; and (3) whether the superior court action would hinder or interfere with the commission’s exercise of regulatory authority.’ ”” (*PegaStaff II, supra*, 239 Cal.App.4th at p. 1315.) “The issue in *Covalt* was whether section 1759 barred a superior court action for nuisance and property damage allegedly caused by electric and magnetic fields from power lines owned and operated by a public utility. [Citation.] The court, considering the third prong of the test, concluded that a superior court verdict for plaintiffs would be inconsistent with the PUC’s conclusion ‘that the available evidence does *not* support a reasonable belief that 60 Hz electric and magnetic fields present a substantial risk of physical harm, and that unless and until the evidence supports such a belief regulated utilities need take no action to reduce field levels from existing power lines.’ [Citation.] [¶] Since *Covalt* was decided, courts have had repeated occasion to apply the test it established.” (*PegaStaff II, supra*, 239 Cal.App.4th at pp. 1315–1316.)

Hartwell was one of those cases: a lawsuit was brought by a resident against water providers who were regulated by the CPUC and against nonregulated water providers and industrial defendants who were not regulated by the CPUC. The nonregulated water providers and industrial defendants claimed that section 1759 applied to preempt superior court actions against them as well as the CPUC regulated utilities. Their claim was in part based on the contention that the statutory language in section 1759 does not distinguish between utility and nonutility parties to a lawsuit. Our Supreme Court found this argument meritless, and rejected it for many reasons. Quoting from the Court of Appeal decision in *Hartwell* with approval, the Supreme Court in *Hartwell* wrote, “Section 1759 provides that no trial level court may “review, reverse, correct, or annul” or “enjoin, restrain, or interfere with” the PUC in its performance of its duties. By no stretch of language or logic does this mean that trial courts may not decide issues between parties not subject to PUC regulation simply because the same or similar issues are pending before the PUC or because the PUC regulates the same subject matter in its supervision over public utilities. . . . [¶] We agree.” (*Hartwell, supra*, 27 Cal.4th at p. 280.) It was in this context that the Supreme Court in *Hartwell* wrote that “when read in context with the entire regulatory scheme, section 1759 must be read to bar superior court

his position that the superior court is empowered to adjudicate his present claims against the CPUC.¹⁰ Instead, Aguirre focuses on the fact that Government Code section 6259 refers to PRA proceedings in superior court, and concludes that this must trump any other statutory provision such as section 1759, subdivision (b).

■ This is not persuasive. First, Government Code section 6258 describes a PRA challenge being brought in “any court of competent jurisdiction.” This phrase implies the existence of a writ proceeding in a court *other* than the superior court. ■ Second, by its nature, the broad limitation on jurisdiction in section 1759, subdivision (a) will sometimes result in depriving the superior court of jurisdiction it might otherwise have as a court of general jurisdiction had the party been other than the CPUC. (See Cal. Const., art. VI, § 10.) This is so even where there is a statute that explicitly provides for relief in a superior court. For example, in *Independent Laundry v. Railroad Com.* (1945) 70 Cal.App.2d 816 [161 P.2d 827] (*Independent Laundry*), a landlord sued its tenant, the gas company, and the Railroad Commission (the predecessor to the CPUC)¹¹ in superior court. The lawsuit sought declaratory relief under Code of Civil Procedure section 1060, which provided then, as now, that an action could be brought “in the superior court for a declaration of . . . rights and duties.” At issue was whether the superior court had jurisdiction over the Railroad Commission in light of former section 67 of the Public Utilities Act, the predecessor to section 1759.¹² In affirming the trial court order sustaining a demurrer without leave to amend and granting a motion for judgment on the pleadings on jurisdictional grounds, the court in *Independent Laundry* made the point that despite the existence of Code of Civil Procedure section 1060, that “section does not enlarge the jurisdiction of the superior court as to parties and the subject matter, so that if the commission or the subject matter of this action is not within the jurisdiction of the superior court, section 1060 will not confer such jurisdiction.” (*Independent Laundry, supra*, 70 Cal.App.2d at p. 821.) The same can be said in the matter before us. The fact that Government Code section 6259 refers to

jurisdiction that interferes with the PUC’s performance of its *regulatory* duties, duties which by constitutional mandate apply only to regulated utilities,” and a lawsuit against nonregulated defendants was not barred by section 1759. (*Id.* at pp. 280–281.)

¹⁰ The only case authority Aguirre cites in its favor, let alone addresses, is *In re Application of Mills Sing* (1910) 14 Cal.App. 512, 513 [112 P. 582] (habeas corpus petition that construes “section 26 of the juvenile court law”) and *Meyer v. Board of Trustees* (1961) 195 Cal.App.2d 420, 430 [15 Cal.Rptr. 717] (mandamus action to compel a school board to reinstate a teacher; interpreting a section of the Ed. Code). Aguirre attempts to distinguish *Disenhouse*, but not convincingly.

¹¹ See *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1037 [44 Cal.Rptr.3d 644, 136 P.3d 178] (Railroad Commission was administrative predecessor of CPUC).

¹² See *PegaStaff I, supra*, 236 Cal.App.4th at page 385.

the superior court in connection with actions under the PRA does not enlarge jurisdiction in the superior court when the case is against the CPUC.

Aguirre also contends that the Legislature did not intend that section 1759 remove jurisdiction from the superior court in PRA cases, because there is a particular provision of the PRA (Gov. Code, § 6253.4) that requires the CPUC to comply with the PRA, and this must be “paramount” to the “general provisions” of section 1759. Aguirre asserts that “[t]his interpretation is reinforced by the Constitutional mandate that statutes shall be ‘narrowly construed if it limits the right of access,’ ” citing California Constitution, article I, section 3, subdivision (b)(2).

We are not persuaded. Article I, section 3, subdivision (b)(1) of the California Constitution states that the “people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” Article I, section 3, subdivision (b)(2) of the California Constitution, relied on by Aguirre, is a rule of construction, and states in part: “A statute . . . including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.”

■ Aguirre has not shown how section 1759 limits any right of access. The CPUC is required to comply with the PRA, whether review is in the superior court or the appellate court in the first instance. If there is a dispute as to whether the CPUC has complied with the PRA, filing an action against the CPUC in an appellate court, as required by section 1759 and contemplated as a possibility by Government Code section 6258, will not limit the public’s right to access to the documents. Aguirre’s attempt to argue otherwise is not based on section 1759, but on the CPUC’s own administrative procedures for making and responding to PRA requests, as set forth in general order No. 66-C. But this is entirely separate from whether the superior court enforces a PRA request, rather than an appellate court in the first instance.

Aguirre also contends that original appellate jurisdiction over PRA claims cannot have been intended and will not work because the appellate court would not be able to review any documents withheld by the CPUC in camera to determine whether a statutory exemption is valid. This argument is without merit; neither Government Code section 6258 nor section 1759 compels this conclusion. Aguirre’s theory is that withheld documents would be considered “new evidence” under Public Utilities Code section 1757, subdivision (a), which states that “[n]o new or additional evidence shall be introduced upon review by the court.” But as the CPUC points out, if the CPUC denied a PRA

request for documents, it would have reviewed the applicable records in reaching its decision, which would thus make them part of the CPUC's official record subject to review before a Court of Appeal (see Pub. Util. Code, § 1706); and if the record did not contain the documents, the CPUC might leave itself open for reversal for lack of substantial evidence to support its decision (Pub. Util. Code, § 1757.1, subd. (a)(4) [court may reverse commission when order "is not supported by the findings"]).

Much of Aguirre's opposition to the writ petition argues the merits of his PRA request, including several pages that intersperse photographs of the key individuals involved and reproductions of handwritten notes and e-mails right into the text. As we indicated at the outset, we are not reaching any decision on the merits of the PRA request, and the merits do not inform our decision as to subject matter jurisdiction.

D. *Exhaustion of Administrative Remedies*

Because we conclude that the superior court had no jurisdiction other than to sustain the demurrer without leave to amend under section 1759, we do not need to address the other ground for this writ petition—Aguirre's failure to exhaust administrative remedies.¹³

DISPOSITION

The superior court is directed to sustain the demurrer without leave to amend and is prohibited from conducting any further proceedings in this matter. Let a peremptory writ of mandate issue directing respondent superior court to set aside and vacate its February 9, 2016, order overruling petitioner's demurrer to real party in interest's claim under the Public Records Act, and to thereafter enter a new order sustaining the demurrer without leave to amend. The previously issued stay shall dissolve upon issuance of the remittitur. (Cal. Rules of Court, rules 8.272(b)–(d), 8.490(d).)

Richman, Acting P. J., and Stewart, J., concurred.

On September 9, 2016, the opinion was modified to read as printed above. The petition of real party in interest for review by the Supreme Court was denied November 22, 2016, S237199.

¹³ "When remedies before an administrative forum are available, a party must in general exhaust them before seeking judicial relief." (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 609 [110 Cal.Rptr.3d 718, 232 P.3d 701].)

[No. B270503. Second Dist., Div. Four. Sept. 1, 2016.]

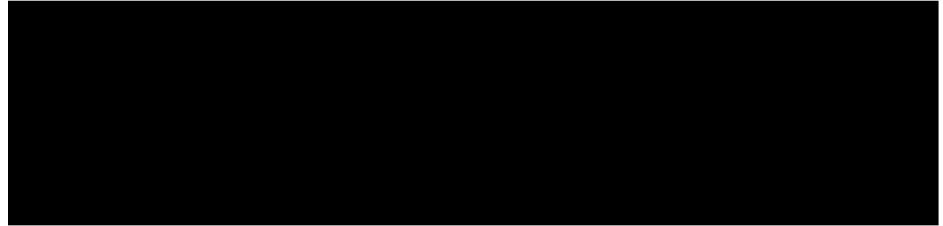
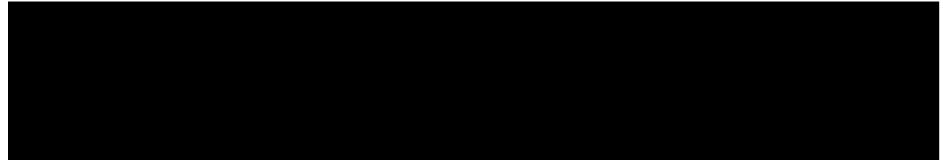
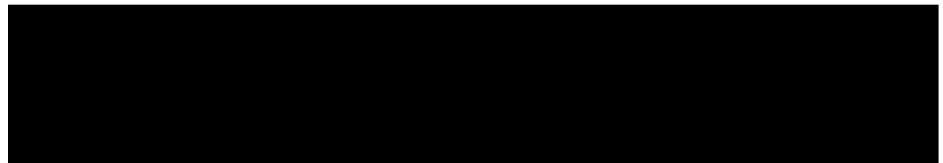
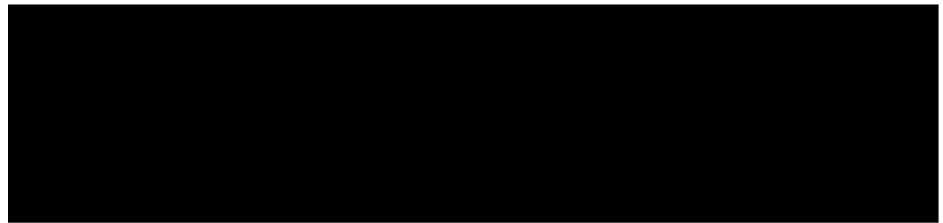
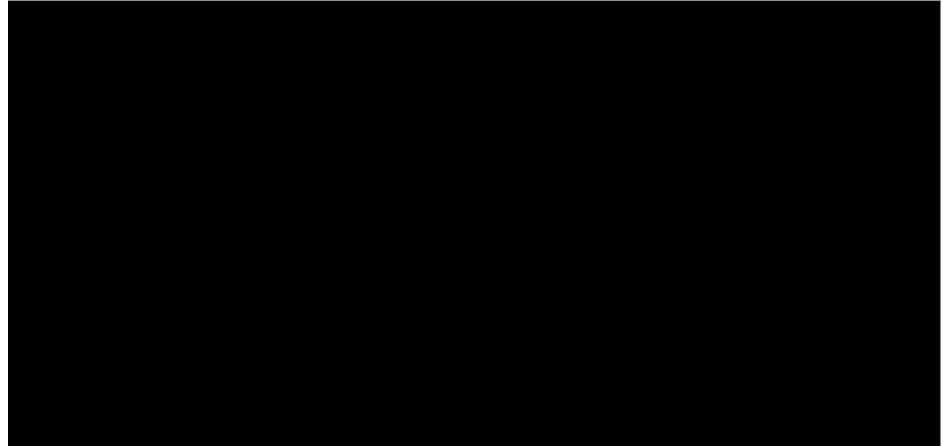
TERENCE WILLIAM HOPKINS, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, APPELLATE
DIVISION, Respondent;
THE PEOPLE, Real Party in Interest.

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 16, 2016, S237734.

[REDACTED]

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[REDACTED]



[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

COUNSEL

Ronald L. Brown, Public Defender, Albert J. Menaster, Jordana Mosten and Dylan Ford, Deputy Public Defenders, for Petitioner.

No appearance for Respondent.

Michael N. Feuer, City Attorney, Debbie Lew, Assistant City Attorney, and Rick V. Curcio, Deputy City Attorney, for Real Party in Interest.

OPINION

WILLHITE, J.—In 2014, the California Legislature enacted a statute, Penal Code section 1001.80,¹ authorizing a trial court to grant pretrial diversion to a defendant charged with a misdemeanor if the defendant was, or currently is, a member of the United States military and suffers from sexual trauma, traumatic brain injury, posttraumatic stress disorder (PTSD), substance abuse, or mental health problems as a result of his or her military service.² The purpose of the pretrial diversion program is to allow veterans who are suffering as a result of their service to get the services they need and also help them be more easily employed by keeping convictions off their records if they successfully complete the program.

The question presented in this writ proceeding is whether Vehicle Code section 23640, which prohibits pretrial diversion in any case charging a violation of Vehicle Code section 23152 or 23153 (a DUI case),³ precludes

¹ Further undesignated statutory references are to the Penal Code.

² Section 1001.80 provides in relevant part: “(a) This chapter shall apply whenever a case is before a court on an accusatory pleading alleging the commission of a misdemeanor offense, and both of the following apply to the defendant: [¶] (1) The defendant was, or currently is, a member of the United States military. [¶] (2) The defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her military service. . . . [¶] (b) If the court determines that a defendant charged with an applicable offense under this chapter is a person described in subdivision (a), the court, with the consent of the defendant and a waiver of the defendant’s speedy trial right, may place the defendant in a pretrial diversion program, as defined in subdivision (k). [¶] (c) . . . If the defendant has performed satisfactorily during the period of diversion, at the end of the period of diversion, the criminal charges shall be dismissed.”

³ Vehicle Code section 23640 provides in relevant part: “(a) In any case in which a person is charged with a violation of Section 23152 or 23153, prior to acquittal or conviction, the court shall neither suspend nor stay the proceedings for the purpose of allowing the accused person to attend or participate, nor shall the court consider dismissal of or entertain a motion to dismiss the proceedings because the accused person attends or participates during that suspension, in any one or more education, training, or treatment programs, including, but not limited to, a driver improvement program, a treatment program for persons who are habitual

the trial court from placing in a pretrial diversion program a defendant in a DUI case who would otherwise qualify for pretrial diversion under section 1001.80. Based on the rules of statutory construction, the language of section 1001.80 and Vehicle Code section 23640, and the legislative history of section 1001.80, we conclude that Vehicle Code section 23640 does not bar pretrial diversion for veterans or active duty members of the military who meet the criteria of section 1001.80 and are charged in a DUI case.

We note that on the day this case was argued before this court, our colleagues in the Fourth Appellate District, Division One, filed an opinion reaching the opposite conclusion. (*People v. VanVleck* (2016) 2 Cal.App.5th 355 [205 Cal.Rptr.3d 839] (*VanVleck*).) We urge the Legislature to act by amending section 1001.80 to express its intent with regard to military diversion in DUI cases.

BACKGROUND

Petitioner Terence William Hopkins was charged with misdemeanor counts of driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a), and driving while having 0.08 percent or more, by weight, of alcohol in his blood in violation of Vehicle Code section 23152, subdivision (b). The incident leading to the charges occurred on August 21, 2015. He pled not guilty, and moved for military diversion under section 1001.80.

In support of his motion for diversion, Hopkins provided letters from Pamela Davis, a clinical social worker for the Department of Veterans Affairs (the VA), and Dr. Benjamin Shapiro, a psychiatrist for the VA.

Ms. Davis stated that Hopkins served in the United States Navy Reserve, and was activated from October 19, 2007, to November 10, 2008. He completed a combat tour in Afghanistan and was a military police officer in an internment facility that housed Taliban and Al Qaeda prisoners. Ms. Davis stated that Hopkins was exposed to significant trauma during his service, and had service-connected PTSD. She noted that Hopkins began mental health services at the VA in May 2015, and was under the care of a psychiatrist. She also stated that Hopkins was referred to the “Addictive Behaviors Clinic” at the VA, where he will participate in a 16-week program and will be drug tested and breathalyzed on a regular and random basis.

Hopkins provided two letters from Dr. Shapiro. In the first, dated September 10, 2015 (a few weeks after the incident that led to the charges being filed

users of alcohol or other alcoholism program, a program designed to offer alcohol services to problem drinkers, an alcohol or drug education program, or a treatment program for persons who are habitual users of drugs or other drug-related program.”

against Hopkins), Dr. Shapiro stated that Hopkins had been under his care since April 2015. Hopkins had informed Dr. Shapiro that he had developed a problem with binge alcohol addiction, and they had been establishing a plan for treatment for substance abuse just before Hopkins's DUI incident. Dr. Shapiro also reported that Hopkins had remained sober since the incident. In the second letter, dated November 5, 2015, Dr. Shapiro stated that Hopkins's alcohol dependence arose due to active PTSD, which is a common consequence of combat exposure. He reported that Hopkins had moved into recovery from his addiction successfully, and he anticipated that Hopkins would maintain his sobriety due to his commitment to his family and his future.

The People opposed Hopkins's motion on the ground that Vehicle Code section 23640 precludes diversion in any DUI case, citing *People v. Weatherill* (1989) 215 Cal.App.3d 1569 [264 Cal.Rptr. 298] (*Weatherill*). In that case, Division Seven of this district addressed whether a diversion statute applicable to misdemeanor defendants with cognitive developmental disabilities (§ 1001.21) applied when the defendant was charged with DUI. The majority (over a dissent by Johnson, J.) held that Vehicle Code former sections 23202 and 23206 (renumbered as Veh. Code, §§ 23640, 23600)⁴ precluded application of section 1001.21 in such a case.

In reply, Hopkins argued that section 1001.80, which was enacted in 2014, governed over the earlier-enacted Vehicle Code section 23640, and that excluding DUI cases from the military diversion statute was contrary to the language and purpose of section 1001.80. He contended that *Weatherill* did not require a different result since, unlike the present case, the diversion statute in that case was enacted before the Vehicle Code statute.

In ruling on Hopkins's motion, the trial court noted it was undisputed that Hopkins met the criteria to qualify for diversion under section 1001.80. However, the court found that the fact that section 1001.80 was enacted after Vehicle Code section 23640 was not dispositive because repeals by implication are disfavored (citing *People v. Siko* (1988) 45 Cal.3d 820, 824 [248 Cal.Rptr. 110, 755 P.2d 294]). It also found that a specific statute such as Vehicle Code section 23640 prevails over a general diversion statute (citing *Weatherill, supra*, 215 Cal.App.3d at pp. 1577–1578). Therefore, the court concluded that diversion under section 1001.80 was barred by Vehicle Code section 23640, and denied Hopkins's request.

Hopkins filed a petition for writ of mandate with the Appellate Division of the Los Angeles Superior Court, challenging the trial court's determination

⁴ Vehicle Code former sections 23202 (which applied to pretrial diversion) and 23206 (which applied to postconviction diversion) were repealed and reenacted as Vehicle Code sections 23640 and 23600 by Statutes 1998, chapter 118, sections 60, 64, 84, pages 770, 772.

that it had no discretion to order pretrial diversion under section 1001.80. He asked the appellate division to issue a writ of mandate directing the trial court to vacate its December 18, 2015 order denying Hopkins's request for diversion and to exercise its discretion to determine whether he should be granted diversion under section 1001.80. On January 26, 2016, the Appellate Division summarily denied the petition, citing Vehicle Code section 23600,⁵ subdivision (a), and *Weatherill, supra*, 215 Cal.App.3d at pages 1572–1573. Hopkins then filed the instant petition in this court, requesting that we issue a writ of mandate directing the Appellate Division of the Los Angeles Superior Court to issue a writ of mandate directing the trial court to vacate its December 18, 2015 order finding that Hopkins is ineligible for diversion under section 1001.80, and to exercise its discretion to determine whether diversion should be granted. We issued an order to show cause to the Appellate Division of the Los Angeles Superior Court, ordering it to show cause why a peremptory writ of mandate should not issue directing it to vacate its order denying Hopkins's petition for writ of mandate and to make a new and different order granting the petition. We also ordered all proceedings in the trial court stayed pending further order of this court.

DISCUSSION

■ Here we are faced with two seemingly inconsistent statutes: section 1001.80, which would allow the court in this case to place Hopkins in a pretrial diversion program, and Vehicle Code section 23640, which would prohibit the court from doing so. The California Supreme Court recently reiterated the approach a court must take when faced with potentially inconsistent statutes. “ ‘A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. [Citations.] This rule applies although one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject.’ [Citation.] Thus, when ‘two codes are to be construed, they “must be regarded as blending into each other and forming a single statute.” [Citation.] Accordingly, they “must be read together and so construed as to give effect, when possible, to all the provisions thereof.” [Citation.]’ ” [Citation.] Further, “ “[a]ll presumptions are against a repeal by implication. [Citations.]” [Citation.] 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.’ ” ’ ” [Citations.]” (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955–956 [184 Cal.Rptr.3d 60, 342 P.3d 1217] (State Dept.).)

⁵ Clearly, this was a typographical error.

■ The Supreme Court cautioned that “the requirement that courts harmonize potentially inconsistent statutes when possible is not a license to redraft the statutes to strike a compromise that the Legislature did not reach.” (*State Dept.*, *supra*, 60 Cal.4th at p. 956.) It explained that “[t]he cases in which we have harmonized potentially conflicting statutes involve choosing one plausible construction of a statute over another in order to avoid a conflict with a second statute.” (*Ibid.*)

With the Supreme Court’s instructions in mind, we begin by examining the text of the two statutes at issue in the present case.

■ Section 1001.80 states that “[t]his chapter shall apply whenever a case is before a court on an accusatory pleading alleging the commission of a misdemeanor offense,” and the defendant is a former or current member of the military who may be suffering from service-related trauma, PTSD, substance, or mental health issues. (§ 1001.80, subd. (a), italics added.) It gives the court authority to place the defendant in a pretrial diversion program “[i]f the court determines that a defendant charged with an applicable offense under this chapter is a person described in subdivision (a).” (§ 1001.80, subd. (b).) There is no ambiguity in this language: “whenever” a qualified defendant is charged with “a misdemeanor offense,” the court may place the defendant in a pretrial diversion program.

■ Vehicle Code section 23640 is equally unambiguous. It states that a court shall not grant pretrial diversion “[i]n any case in which a person is charged with a violation of Section 23152 or 23153.” (Veh. Code, § 23640, subd. (a), italics added.)

The People contend the two statutes may be harmonized because section 1001.80 is permissive, i.e., the court may, but is not required to, place a qualified defendant in a pretrial diversion program. Thus, the People argue, the court may choose to deny a qualified defendant pretrial diversion for a number of reasons, including because he or she is “statutorily ineligible for diversion because he [or she] committed DUI, a disqualifying offense.” But that construction of section 1001.80 is not a plausible construction of the statute’s unambiguous language, which authorizes the court to grant pretrial diversion “whenever” a defendant who meets the criteria set forth in the statute is charged with a misdemeanor offense. Instead, the People’s attempt to harmonize rewrites section 1001.80 to add an additional criterion not found in the express language, i.e., that the defendant cannot be charged with a misdemeanor DUI offense. But, as the Supreme Court instructs, the requirement to “harmonize potentially inconsistent statutes when possible is not a license to redraft the statutes.” (*State Dept.*, *supra*, 60 Cal.4th at p. 956.)

■ Based on the express language of the statutes, we conclude that section 1001.80 and Vehicle Code section 23640 cannot be reconciled with respect to defendants in DUI cases who meet the stated criteria under section 1001.80.⁶ Therefore, we must look to the rules that apply when courts are faced with two irreconcilable statutes: “‘If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation], and more specific provisions take precedence over more general ones [citation].’ [Citation.] But when these two rules are in conflict, the rule that specific provisions take precedence over more general ones trumps the rule that later-enacted statutes have precedence. [Citations.]” (*State Dept.*, *supra*, 60 Cal.4th at pp. 960–961.)

The People contend that the timing of the enactments is not relevant here because Vehicle Code section 23640 is a specific statute and section 1001.80 is a general statute, and therefore Vehicle Code section 23640 controls. In making this argument, the People quote the majority opinion in *Weatherill*: “When a general statute conflicts with a specific statute the specific statute controls the general one. [Citations.] The referent of ‘general’ and ‘specific’ is subject matter. Thus, in the instant case, the subject matter of . . . section 1001.21 is misdemeanor diversion. That section, applying as it does to all misdemeanors, even felonies reduced to misdemeanors, comprehends hundreds of misdemeanors in scores of codes and is therefore a general statute. [¶] By contrast, the subject matter of [former] section 23202 is driving-under-the-influence diversion. It applies to a single type of conduct and comprehends only two offenses, sections 23152 and 23153. [Former s]ection 23202 is a specific statute and controls, to the extent of their inconsistency, the general statute, . . . section 1001.21.” (*Weatherill*, *supra*, 215 Cal.App.3d at pp. 1577–1578.)

The court in *VanVleck* agreed with the majority’s analysis in *Weatherill*. (*VanVleck*, *supra*, 2 Cal.App.5th at pp. 363–364.) We respectfully disagree. As Justice Johnson pointed out in his dissent in *Weatherill*, “[i]t can be contended just as forcefully that Vehicle Code [former] section 23202 contains a general provision prohibiting diversion for any defendant in [DUI] cases while . . . section 1001.20 et seq. focus specifically on [developmentally disabled] defendants and authorize diversion for this specific class of defendants no matter what misdemeanor they are charged with.” (*Weatherill*, *supra*, 215 Cal.App.3d at p. 1582 (dis. opn. of Johnson, J.).)

■ Put another way, “[i]t is the general rule that where the general statute standing alone would include the same matter as the special act, and

⁶ We note that the majority in *Weatherill* came to the same conclusion regarding Vehicle Code former section 23202 (now Veh. Code, § 23640) and section 1001.21, the developmentally disabled diversion statute. (*Weatherill*, *supra*, 215 Cal.App.3d at p. 1577.)

thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment.’” (*People v. Gilbert* (1969) 1 Cal.3d 475, 479 [82 Cal.Rptr. 724, 462 P.2d 580], italics added.) Here, the “matter” covered by section 1001.80 is a specific diversion program applicable only to certain qualifying defendants who are or were members of the United States military, applicable “whenever” a qualifying defendant is charged with a misdemeanor. With that focus, section 1001.80 is clearly more specific than Vehicle Code section 23640, which purports to preclude diversion for all defendants charged with a specific crime (driving under the influence). On the other hand, with a different focus—looking only to the offense with which a defendant is charged—Vehicle Code section 23640 appears to be more specific, because it applies only to driving under the influence whereas section 1001.80 applies to all misdemeanors. In short, unless we are prepared to make an arbitrary choice of focus, the general-versus-specific rule of statutory construction gets us nowhere.

Since the rule that a specific statute controls a general statute does not assist us in this case, we must apply the rule that “‘later enactments supersede earlier ones.’” (*State Dept., supra*, 60 Cal.4th at p. 960.) There is no question that section 1001.80 is the later enactment; it was enacted in 2014 (Stats. 2014, ch. 658, § 1), while Vehicle Code section 23640 was enacted in 1998 (Stats. 1998, ch. 118, § 84, p. 772), and its predecessor, Vehicle Code former section 23202 was enacted in the 1981–1982 Regular Session (see *Weatherill, supra*, 215 Cal.App.3d at p. 1574). Thus, we conclude that section 1001.80 supersedes Vehicle Code section 23640 to the extent that the latter statute prohibits pretrial diversion for defendants who meet the criteria set forth in section 1001.80, subdivision (a).

■ Unlike the court in *VanVleck*, we find that the legislative history of section 1001.80 supports our conclusion that the Legislature intended section 1001.80 to apply in DUI cases. (See *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321 [74 Cal.Rptr.3d 891, 180 P.3d 935] [“In construing statutes, ‘our fundamental task is “to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.” . . . Ultimately we choose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute.’”].)

In *VanVleck*, the court observed that the legislative history “does not mention or resolve the conflict with [Vehicle Code] section 23640’s ban on diversion for driving under the influence offenses. However, we presume the

Legislature was aware of the *Weatherill* decision and its interpretation of [Vehicle Code] section 23640 when it enacted the military diversion statute. (*People v. Hernandez* [(1988)] 46 Cal.3d [194,] 201 [249 Cal.Rptr. 850, 757 P.2d 1013].) Had the Legislature intended to depart from the conclusion in *Weatherill* and create an exception to [Vehicle Code] section 23640, it could have easily done so by stating the military diversion statute authorizes pretrial diversion for defendants charged with violations of [Vehicle Code] sections 23152 and 23153.” (*VanVleck, supra*, 2 Cal.App.5th at p. 364.)

We disagree with the *VanVleck* court’s analysis.

■ First, we question whether the presumption that the Legislature was aware of statutes and prior judicial decisions and enacted the new statute in light of those statutes and decisions applies when the new statute being interpreted directly conflicts with existing law. (See, e.g., *McLaughlin v. State Bd. of Education* (1999) 75 Cal.App.4th 196, 213 [89 Cal.Rptr.2d 295] [“unlike cases where lawmakers can be presumed to borrow from existing law to supply omitted meaning to later enactments, the presumption that one legislates with full knowledge of existing law is not conclusive, and not even helpful, in cases where a later enactment directly conflicts with an earlier law”].) Indeed, we have found no prior case that has applied the presumption in such a case.

Second, even if the presumption were appropriate in a case involving directly conflicting statutes, “ ‘ “[t]he presumption of legislative acquiescence in prior judicial decisions is not conclusive in determining legislative intent. . . . ‘Legislative silence after a court has construed a statute gives rise at most to an arguable inference of acquiescence or passive approval. . . . But something more than mere silence is required before that acquiescence is elevated into a species of implied legislation [Citations.] In the area of statutory construction, an examination of what the Legislature has done (as opposed to what it has left undone) is generally the more fruitful inquiry.’ ” [Citations.]’ ” (*People v. Morante* (1999) 20 Cal.4th 403, 429 [84 Cal.Rptr.2d 665, 975 P.2d 1071].) And what the Legislature has done in this instance is enact a statute that expressly applies “*whenever* a case is before a court on an accusatory pleading alleging the commission of a misdemeanor offense.” (§ 1001.80, subd. (a), *italics added*.)

Finally, even though, as the *VanVleck* court observes, the legislative history does not expressly mention Vehicle Code section 23640’s ban on pretrial diversion in DUI cases, there are strong indications that the Legislature

intended the military diversion program to apply in all misdemeanor cases, including DUI cases.

Senate Bill No. 1227, which was enacted as section 1001.80, was authored by Senator Loni Hancock, the chair of the Senate Committee on Public Safety. An analysis of the bill by that committee explained the importance of creating a diversion program specifically for military veterans: “California has nearly two million military veterans living in the state, more than any other state in the country. Many of these veterans suffer from service related trauma, such as Post Traumatic Stress Disorder, or Traumatic Brain Injury. Unfortunately, some veterans find themselves entangled in the criminal justice system.” (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1227 (2013–2014 Reg. Sess.) Apr. 8, 2014, p. 4.) The analysis noted that although specialized courts have been effective in connecting veterans to services they need, those courts are post-plea, probationary programs. Therefore, they fail to provide an important benefit of pretrial diversion programs: diversion programs, if successfully completed, “ensure that the participant is able to avoid the consequences of a conviction (such as difficulty in finding a job or securing housing).” (*Id.* at p. 5.)

According to the analysis, existing diversion programs are inadequate because “[t]he goal is to not just put [veterans suffering from trauma] in any program but to get them in a program that is used to dealing with the issues that a veteran may have.” (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1227 (2013–2014 Reg. Sess.) Apr. 8, 2014, p. 5.) To that end, under the bill, the court is encouraged to work with the VA to develop the appropriate treatment, using established treatment programs with experience in dealing with the type of trauma the veteran has suffered. The analysis concluded: “The point of the diversion program will be to get help for veterans who may be suffering as a result of their service. This will allow them to not only get the proper services but also allow them to be more easily employed in the future by keeping the crime off their record if they complete their diversion program successfully.” (*Ibid.*)

That this specialized diversion program was intended to apply in all misdemeanor cases with qualified defendants, including DUI cases, is strongly indicated by how the existing law and the proposed law were described in the analysis of Senate Bill No. 1227. The analysis acknowledged that “[e]xisting law provides for diversion of *non-DUI* misdemeanor offenses,” citing sections 1001 et seq. and 1001.50 et seq. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1227 (2013–2014 Reg. Sess.) Apr. 8, 2014, p. 2, *italics added.*) But no such qualifier was used when describing the offenses that would be eligible for the new diversion program. Instead, the analysis stated that the bill would create a new diversion program to apply

when a qualified member or former member of the military “is accused of a misdemeanor or jail felony.”⁷ (*Ibid.*)

This failure to expressly exempt DUI cases in section 1001.80 stands in stark contrast to prior actions by the Legislature with respect to other diversion programs. As the majority in *Weatherill* noted, after Vehicle Code former section 23202 was enacted, “when the Legislature enacted or reenacted diversion programs, e.g., Penal Code section 1001 et seq. (Stats. 1982, ch. 42) and Penal Code section 1001.50 et seq. (Stats. 1982, ch. 1251), in order to avoid the risk of implied repeal, it specifically exempted all driving-under-the-influence charges.” (*Weatherill, supra*, 215 Cal.App.3d at pp. 1579–1580.) That the Legislature did not do so here supports our conclusion that it did not intend that Vehicle Code section 23640 would bar pretrial diversion under section 1001.80 in DUI cases.

The Senate Appropriations Committee Fiscal Summary of the bill also supports our conclusion that the Legislature intended section 1001.80 to apply in DUI cases. (Sen. Appropriations Com., Fiscal Summary of Sen. Bill No. 1227 (2013–2014 Reg. Sess.) Apr. 28, 2014.) That summary compares the diversion program to be created by Senate Bill No. 1227 to the existing “post-plea probationary programs for current or former members of the military [determined by the court to be suffering from service-related trauma, substance abuse, or mental health problems] convicted of criminal offenses who would otherwise be sentenced to county jail or state prison.” (*Id.* at p. 1.) It explains that “[t]his bill seeks to offer comparable treatment programs *prior* to prosecution to similarly affected current and former members of the military who have been charged with misdemeanor or jail felony offenses.”⁸ (*Ibid.*)

In other words, the Legislature sought to provide pretrial diversion to military veteran defendants who would be eligible for postconviction probationary programs. Those postconviction probationary programs for military veterans were first authorized in 1982 under former section 1170.8 (Stats. 1982, ch. 964, § 1, p. 3466), which was renumbered the following year as section 1170.9 (Stats. 1983, ch. 142, § 121, p. 373). Section 1170.9 provides, in relevant part: “(a) In the case of any person convicted of a criminal offense

⁷ As introduced, the bill applied to misdemeanors and felonies punishable under section 1170, subdivision (h). (Sen. Bill No. 1227 (2013–2014 Reg. Sess.) as introduced Feb. 20, 2014.) The California District Attorneys Association opposed the bill unless it was amended to exclude felonies, and the bill ultimately was so amended. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1227 (2013–2014 Reg. Sess.) Apr. 8, 2014, p. 5; Assem. Amend. to Sen. Bill No. 1227 (2013–2014 Reg. Sess.) Aug. 4, 2014.)

⁸ See footnote 7, *ante*.

who could otherwise be sentenced to county jail or state prison and who alleges that he or she committed the offense as a result of sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from service in the United States military, the court shall, prior to sentencing, make a determination as to whether the defendant was, or currently is, a member of the United States military and whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her service. . . . [¶] (b)(1) If the court concludes that a defendant convicted of a criminal offense is a person described in subdivision (a), and if the defendant is otherwise eligible for probation, the court shall consider the circumstances described in subdivision (a) as a factor in favor of granting probation. [¶] (2) If the court places the defendant on probation, the court may order the defendant into a local, state, federal, or private nonprofit treatment program for a period not to exceed that period which the defendant would have served in state prison or county jail, provided the defendant agrees to participate in the program and the court determines that an appropriate treatment program exists.”

Although Vehicle Code section 23600, the postconviction counterpart to Vehicle Code section 23640, prohibits courts from staying or suspending the pronouncement of sentencing of any defendant convicted of a DUI offense, it does not prohibit the court from sentencing a defendant to probation for such an offense. Thus, a current or former service member who qualifies under section 1170.9 may be ordered into a postconviction probationary program even if he or she was convicted of a DUI offense. Given that the Legislature intended to provide pretrial diversion to similarly situated military veteran defendants, it stands to reason that it intended that a current or former service member who qualifies under section 1001.80 may be granted pretrial diversion even if he or she is charged with a DUI offense.

■ In short, we find the legislative history supports our conclusion that, by enacting section 1001.80, the Legislature impliedly repealed Vehicle Code section 23640 to the extent it prohibits pretrial diversion for defendants who meet the qualifications of section 1001.80, subdivision (a). Accordingly, we grant Hopkins’s petition.

DISPOSITION

The order to show cause is discharged. Let a peremptory writ of mandate issue directing the Appellate Division of the Los Angeles Superior Court to

vacate its January 26, 2016 order denying Hopkins's petition for writ of mandate, and to make a new and different order granting the petition.

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

The petition of real party in interest for review by the Supreme Court was granted November 16, 2016, S237734.

