Filed 7/25/12 Toyota Motor Credit v. Pacifica Systems Integration Group CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

TOYOTA MOTOR CREDIT CORPORATION, Plaintiff and Respondent, v. PACIFICA SYSTEMS INTEGRATION GROUP, Defendant and Appellant.	B228518 (Consolidated with B230282) (Los Angeles County Super. Ct. No. BC418252)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry A. Green, Judge. Affirmed.

Law Offices of Barry K. Rothman, Barry K. Rothman and Gordon J. Zuiderweg for Defendant and Appellant.

Paul Hastings, Donna M. Melby, Paul W. Cane, Jr., and Cameron W. Fox for Plaintiff and Respondent.

Pacifica Systems Integration Group (Pacifica) appeals from the following trial court orders: (1) the April 28, 2010, sanctions order striking the fourth cause of action for interference with contract and the fifth cause of action for inducing breach of contract from Pacifica's first amended cross-complaint (FACC) based upon party misconduct; (2) the September 1, 2010, order striking Pacifica's second, third, fourth, fifth, and seventh affirmative defenses set forth in Pacifica's answer based on the same party misconduct; (3) the September 10, 2010, order granting the motion for summary judgment brought by Toyota Motor Credit Corporation (TMCC) on TMCC's complaint for declaratory relief; and (4) the November 17, 2010, order granting TMCC's motion for attorney fees and costs.

Regarding the sanctions orders, we conclude that the trial court did not abuse its discretion in finding that Pacifica improperly threatened key third party witnesses and sanctioned Pacifica accordingly. As for TMCC's motion for summary judgment, it was undisputed that Pacifica violated its contract with TMCC, giving TMCC the right to terminate for cause. Alternatively, TMCC had the unilateral right to terminate the agreement for convenience. Thus, TMCC was entitled to judgment. Finally, the trial court did not abuse its discretion in awarding approximately half of the attorney fees TMCC requested.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

TMCC is part of Toyota Financial Services Corporation. It uses temporary, or contingent, workers to supplement its regular staff. These temporary workers are employees of their respective temporary staffing companies, but assist with various TMCC projects and tasks. Several companies, including Pacifica, provided TMCC with temporary personnel on an as-needed basis.

Barry Aerabi (Aerabi) is Pacifica's president.

B. The Contract and Payment Terms

On September 2, 2005, TMCC and Pacifica entered into a master services agreement (the MSA). The MSA provided for, and incorporated, statements of work (SOWs) that described the services to be provided. From September 2, 2005, to January 16, 2008, the parties executed a new SOW for each individual worker placed at TMCC. There were 50 such placements, and thus 50 executed SOWs, each signed by Aerabi and an officer or manager of TMCC. In January 2008, TMCC and Pacifica entered into SOW 51, which was a "master" SOW to govern the placement of all workers for that year. By its terms, it could be, and later was, extended for an additional year by a formal, signed amendment.

As is relevant to the issues in this appeal, the key provisions of the MSA and SOW 51 were:

1. In the MSA, Pacifica "represent[ed], warrant[ed,] and covenant[ed] to [TMCC] that [Pacifica] ha[d] complied and will comply with all Laws and regulations applicable to [Pacifica]." In a similar vein, SOW 51 required Pacifica to comply with "all provisions of the California Labor Code and of the labor laws of any other state in which any Contingent Workers perform functions for TMCC," as well as all applicable laws in "paying . . . wages . . . to . . . any . . . Contingent Workers supplied to TMCC."

2. TMCC was entitled to "terminate th[e] Agreement or any [SOW]" if Pacifica "commit[ted] a material breach . . . of th[e] Agreement or any [SOW]" that was not or could not be cured within 15 days.

3. Alternatively, TMCC, "in its sole discretion," could terminate the MSA "for convenience and without cause by giving 20 days notice to [Pacifica] specifying the date upon which such termination [would] be effective."

4. The MSA provided that Pacifica would transmit invoices to TMCC and that TMCC would pay them "within 45 days of receipt" of the invoice. This was known as the "net 45" term.

5. The MSA could "not be modified or amended except by a written agreement signed by an authorized representative of each Party."

6. Finally, at paragraph 14.11, the MSA provided for the prevailing party to recover reasonable attorney fees.

C. Pacifica Bounces Payroll Checks

In mid-April 2009, three Pacifica employees assigned to work at TMCC (Joy Miller (Miller), Danielle Baker (Baker), and Mark Lawrence (Lawrence)) contacted TMCC junior staffer Megan Phares (Phares) with a complaint that their recent payroll checks from Pacifica had bounced. Miller and Baker shared with Phares copies of e-mails in which Aerabi admitted that these payroll checks had bounced. Baker and Lawrence told Phares that these were not isolated problems; Pacifica had earlier failed to make payroll to other employees.

Concerned by this news, Phares sent an e-mail to all Pacifica workers at TMCC asking if they had received from Pacifica all wages due to them, so that she could determine if the complaint she received was limited to the three. Baker, Miller, and Lawrence confirmed (again) that they had not received all wages due, and another employee responded similarly.

Specifically, Miller's paycheck for work performed from March 22, 2009, through April 3, 2009, was due on April 10, 2009. But that paycheck bounced because Pacifica did not have enough money in its bank account. Pacifica did not issue a new paycheck to Miller until three days later (April 13, 2009). That new paycheck included an extra $500, which Pacifica then deducted out of her net wages in her next paycheck, on April 24, 2009. In his deposition, Aerabi characterized the $500 in the April 13, 2009, check as an "overpayment" that Pacifica was correcting. Miller never authorized Pacifica to take that deduction.

D. TMCC Terminates the MSA for Cause

In light of Pacifica's violation of California law, and the MSA as a result, TMCC terminated the MSA. On April 29, 2009, TMCC gave written notice to Pacifica that it was terminating the MSA for cause (effective May 3, 2009) due to Pacifica's breach of the MSA and SOW 51.

On May 1, 2009, Pacifica wrote to TMCC, complaining generally about the termination. Pacifica did not deny that it had violated the law or offer an excuse. Rather, it took issue with the fact that Phares had e-mailed Pacifica's workers to advise them of the termination. As to Phares's actions, Pacifica asked to trigger the MSA's dispute resolution provision.

E. Rather Than Fight, TMCC Decides to Terminate for Convenience

TMCC responded to Pacifica on May 4, 2009. It reiterated its right to terminate the MSA for cause, but stated, alternatively, that it was electing to terminate for convenience. TMCC set a June 29, 2009, termination date, giving Pacifica nearly 60 days' notice, rather than the 20 days' notice required by the MSA.

F. Pacifica's Response

Again Pacifica protested. On May 7, 2009, Pacifica responded, arguing that the termination for convenience was invalid because it gave Pacifica too much (more than 20 days') advance notice.

Later, Pacifica asserted that the bounced payroll checks were actually TMCC's fault because TMCC had allegedly paid Pacifica's invoices late. In support, Aerabi produced a May 14, 2008, e-mail exchange with Phares (the Phares e-mail) regarding changes that Aerabi wanted to make in presenting his invoices.

Here is what occurred in 2008: Phares e-mailed Aerabi when she learned from TMCC finance administrator Andrea Heard (Heard) that Aerabi had asked Heard how to get paid faster. Aerabi responded to Phares, writing that while there was "not any issue with [TMCC's] processing of Pacifica's invoices," he asked if he could write "net 15" on them. Phares believed that Aerabi wanted to modify his invoices to prompt accounts payable to issue checks faster. She also understood that words on an invoice would have no effect on TMCC's contractual responsibilities. In response to Aerabi's request, she replied: "Sure, you can put that on your invoices."

In 2009, Pacifica claimed that the 2008 Phares e-mail had amended the MSA's payment term from "net 45" to "net 15." Pacifica further contended that TMCC had been

in breach of that purported "net 15" payment term for the entire year since the Phares e-mail.

On May 20, 2009, Pacifica threatened to remove all of its workers from TMCC the next day if TMCC did not acquiesce to its demand for a long-term contract for expanded services. TMCC refused. On May 21, 2009, Pacifica removed all of its employees from TMCC.

TMCC and Pacifica never resolved their dispute regarding TMCC's termination of the MSA.

G. Some Workers Return to TMCC; Others Seek New Assignments Through Pacifica

In the days after Pacifica removed its workers, 28 of the 36 Pacifica workers assigned to TMCC chose to continue their assignment with TMCC by seeking new employment with other vendors who still conducted business with TMCC. Pacifica blamed TMCC for its workers' resignations and claimed that TMCC had interfered with alleged contracts it had with its workers.

For the most part, Pacifica pointed to an April 29, 2009, e-mail that Phares had sent to Pacifica's workers. That e-mail provided: "[TMCC] has chosen to terminate its contract with Pacifica . . . effective May 3, 2009. . . . [¶] Please note that you do have two options: [¶] 1. Continue your assignment at [TMCC] as a W2'd employee of [a] new supplier; or [¶] 2. Continue to work for Pacifica but not on assignment at [TMCC]. [¶] If you wish to continue your employment with Pacifica, please contact them immediately regarding assignments they may have for you at other clients."

H. The Pleadings

To resolve the parties' dispute over the termination of the MSA, TMCC filed a complaint for declaratory relief on July 21, 2009. Specifically, TMCC sought a declaration that TMCC was entitled to terminate the MSA for cause and that the termination for cause was valid. TMCC also sought a declaration, in the alternative, that it was entitled to terminate the MSA for convenience and that the termination was valid.

Pacifica answered the complaint, raising various affirmative defenses. It also filed a cross-complaint against TMCC.

TMCC filed a demurrer to the cross-complaint, which the trial court sustained with leave to amend. Pacifica then filed the FACC. TMCC again demurred. Following the trial court's order sustaining in part and overruling in part TMCC's demurrer, the remaining causes of action included breach of contract, intentional interference with contractual relations, inducing breach of contract, and breach of the covenant of good faith and fair dealing. The tortious interference with contract and inducing breach of contract claims (interference cross-claims) focused primarily on Phares's April 29, 2009, e-mail alerting the workers to their options, which Pacifica contended had interfered with alleged contracts that it said it had with its 28 former workers.

TMCC apparently never filed an answer to the FACC.

I. Pacifica's Letter to the 28 Former Workers

On January 13, 2010, Pacifica sent to each of the 28 former workers who chose to stay at Pacifica an unsolicited letter: "[Y]ou breached your agreement with [Pacifica] by illegally terminating your contractual relationship with [Pacifica], and then continuing your identical assignment for [TMCC] through a service provider other than Pacifica. Your breach of contract has damaged [Pacifica]. [Pacifica] has causes of action against you and can bring a lawsuit against you for damages."

The letter also issued an ultimatum: If the workers did not want to be sued, they had to "assign any causes of action/claims [they] may have [had] against [TMCC] in regard to the circumstances surrounding [their] May 2009 breach of contract with [Pacifica]."

J. The Workers Contact TMCC

Four of the workers immediately contacted (and forwarded the letters to) TMCC, seeking guidance.

One day after sending the letters, Aerabi called at least four workers and discussed the letter. Aerabi admitted that he knew one worker was in the middle of a divorce and "didn't want to get involved with hiring a lawyer and being sued and getting involved in

a legal process." Aerabi also spoke to two other workers, who called him for an explanation. One worker, confused, asked Aerabi to explain what the letter was. Aerabi refused to provide the worker any further explanation, telling him to "Read it. It's self-explanatory." Another worker called Aerabi and stated that he "did not understand the letter." Aerabi again refused to provide any reassurance or clarification, stating, "The letter is what it is. Read it. It is what it is, and it says what it's intended to say."

At his deposition, Aerabi denied feeling any regret for sending the letters because they were "part of me getting my rights. How can I regret that?"

K. Aerabi's Deposition Testimony

Aerabi admitted in his deposition that he sent the letter to all former workers that TMCC had allegedly taken away from him.

Aerabi further stated Pacifica did not have contracts with 20 of the 28 former workers. Those persons simply had one- and two-paragraph offer letters (that the workers did not sign) that were silent on the issues of resignation and future employment. As for the eight workers with whom Pacifica did have employment contracts (the so-called "corp-to-corp agreements"), those agreements did not restrict them from terminating the agreement to work for another staffing company.

L. TMCC's Motion for Sanctions

Upon learning of Pacifica's letter, TMCC promptly moved the trial court to sanction Pacifica for threatening the 28 former workers. According to TMCC, the workers were crucial third party witnesses; only they could provide key testimony as to whether TMCC's actions influenced them to resign from Pacifica. TMCC asked the trial court either to dismiss Pacifica's entire FACC or, at a minimum, dismiss the interference cross-claims on which the former workers were key witnesses.

Pacifica opposed TMCC's motion, arguing that the motion was unsupported by evidence, the letter Pacifica sent does not constitute "'misconduct' by Pacifica," and case law did not support TMCC's motion.

After conducting a lengthy hearing, the trial court granted TMCC's motion. In so ruling, the trial court found no support for Pacifica's contention that the 28 former

workers had breached contracts with Pacifica. When the trial court asked Pacifica's counsel about the fact that Pacifica could not identify any contractual provision that would give rise to grounds for suit, Pacifica's counsel conceded that there was no such restriction, arguing only that an implied covenant of good faith and fair dealing bound the workers not to quit.

Significantly, the trial court noted that Pacifica had not acted alone in sending the letter; its litigation counsel helped orchestrate the threatening letters. The trial court believed that counsel's role made the conduct even worse.

In spite of the foregoing, the trial court denied TMCC's request to strike Pacifica's entire cross-complaint; instead, it granted only a limited sanction: It struck just the interference cross-claims on the grounds that Pacifica had seriously injured TMCC's ability to defend against them.

M. The Trial Court Strikes Certain Affirmative Defenses

In July 2010, Pacifica attempted to examine one of TMCC's witnesses in a deposition about the stricken cross-claims. TMCC filed a second motion for sanctions, seeking to strike Pacifica's affirmative defenses to the extent they were based on the same facts and issues as the already-stricken cross-claims (the second motion). TMCC also moved for judgment on the pleadings as to those affirmative defenses on the ground that the facts alleged did not state a defense to the complaint. The motions were set for hearing on September 1, 2010.

At the hearing, the trial court gave Pacifica another opportunity to identify a legitimate basis for its threat to sue the 28 workers. Although Pacifica's counsel argued that the nonsolicitation provision in the eight corp-to-corp agreements "could serve as" a basis for the threat, the trial court rejected that theory because Pacifica's threat was unrelated to the newly identified nonsolicitation provision, which purported only to restrict the workers (and only eight of them) from soliciting Pacifica's clients for one year after discharge.

After oral argument, the trial court granted TMCC's second motion for sanctions and took its motion for judgment on the pleadings off calendar as moot.

N. Summary Judgment

Later, the trial court granted TMCC's motion for summary judgment on its complaint as well as on the two remaining causes of action in Pacifica's cross-complaint. In so ruling, it declared that TMCC was entitled to terminate the MSA for cause. Alternatively, TMCC was entitled to terminate the MSA for convenience.

O. Attorney Fees and Costs

As prevailing party, TMCC moved for attorney fees ($481,250.15) and costs. On November 17, 2010, the trial court granted TMCC's motion for attorney fees in part, awarding it $250,000. It is unclear from the appellate record the amount of costs awarded to TMCC.

P. Appeal

Judgment was entered, and Pacifica's timely appeal ensued.

DISCUSSION

I. *Terminating Sanctions*

A. Standard of Review

We review the trial court's order striking the interference cross-claims and certain affirmative defenses for abuse of discretion. (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102.) In so doing, we keep in mind the trial "court's inherent power to curb abuses and promote fair process." (*Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288 (*Peat*).)

B. The Trial Court Did Not Err

Pacifica contends that the trial court erred in granting TMCC's motions for terminating sanctions. We cannot agree. The appellate record supports the trial court's conclusion that Pacifica seriously and without any justification threatened to sue unrepresented third party witnesses, thereby hurting TMCC's ability to prove its case. The 28 workers who received Pacifica's letter (some of whom participated in telephone conversations with Aerabi) were pivotal witnesses as they would have been the sole witnesses on whether TMCC induced or in any way affected each worker's decision to resign from Pacifica.

Worse, Pacifica's threat to the workers lacked any legal basis. In its letter, Pacifica informed the recipients that it "ha[d] causes of action against [them]" for "illegally terminating [their] contractual relationship with [Pacifica]," and could "bring a lawsuit . . . for damages." Yet, at the April 28, 2010, hearing, Pacifica's counsel twice conceded that there was no contractual provision prohibiting the workers from resigning and going to work for another staffing company. Even four months later, at the hearing on the second motion for sanctions, Pacifica was still unable to identify any legal basis for its threat.

And, the trial court carefully considered the issues and alleged misconduct. At the hearing on April 28, 2010, the trial court commented that the workers were the types of people for whom being threatened "with a lawsuit is a really serious thing." Later, at the hearing on September 1, 2010, the trial court reiterated how and why it was comfortable with the sanctions order: "I went back and reread all of this, which I have done many times [in cases] especially after I make a ruling that strikes something or that really takes away the rights of a litigant, then I go home and think about it for days and weeks afterward, but I haven't on this one. I am very comfortable with my ruling on this. [¶] . . . I have been doing this for 38 years. I was a lawyer for 20 years and I know what it means when one adverse party contacts witnesses from the other side and especially when the witnesses are—this is not meant as a put down—are not really super sophisticated types. [¶] I know what it means to be threatened with legal action and it has an enormously chilling effect and it's not a bell that can be unrung. No matter what you say to them, they are going to say, 'Yeah, but you know.' It's always in the back of their minds, so I have no problem with my ruling."

It follows that there was no abuse of discretion.

In urging us to reverse, Pacifica claims that there was insufficient evidence to support TMCC's motion for sanctions. As set forth above, adequate evidence supports the trial court's order.

Pacifica further argues that Pacifica did not engage in any misconduct. Again, the trial court acted well within its discretion in determining that Pacifica's January 13, 2010, letter was unwarranted, threatening, and inappropriate.

Moreover, Pacifica contends that TMCC's motions should have been denied because *Peat, supra*, 200 Cal.App.3d 272 and *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736 (*Slesinger*) are inapplicable to this case. We are not convinced. *Peat* simply affirmed the principle that California trial courts have the "inherent power to preclude evidence to cure abuses." (*Peat*, *supra*, at p. 286.) After all, courts need "to ensure . . . fair and orderly trial[s]" and thus have the power "to remedy . . . litigation abuse." (*Id*. at p. 289.) If a party "seriously damage[s]" an opponent's case, "the trial court may act to prevent the taking of an unfair advantage and to preserve the integrity of the judicial system." (*Ibid*.) *Slesinger* similarly held that California courts possess the power to dismiss an action for deliberate and egregious misconduct. (*Slesinger*, *supra*, at p. 761.) The reason is clear: to protect litigants' rights and restore fairness in the judicial system. (*Slesinger*, *supra*, at p. 762.)

Following *Peat* and *Slesinger*, the trial court exercised its inherent power to cure litigation abuse that would have given Pacifica an unfair advantage and infringed upon the integrity of our judicial system. Notwithstanding its characterization of what occurred, Pacifica deliberately sent a threatening letter, without any basis, to key third party witnesses. Under these circumstances, we find no abuse of discretion by the trial court.

Pacifica's claim that the trial court's order "far exceeded the legitimate scope of the motion" is confusing and does not make sense. It seems that Pacifica is arguing that the motion is not adequately supported by evidence relating to all 28 workers. But the motion did reference 28 workers, and attached to the motion was a copy of Aerabi's deposition transcript, in which he admitted that he had sent the threatening letter to all former Pacifica workers who continued their assignment at TMCC after May 1, 2009.

The fact that TMCC may never have filed an answer to the FACC does not compel a different result. Pacifica did not raise this argument below and is thereby

prohibited from raising it on appeal. (*Giraldo v. California Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251.)

Finally, as for the trial court's order striking certain of Pacifica's affirmative defenses, we find no error. The stricken affirmative defenses[1] relate to Pacifica's interference claims. They have nothing to do with TMCC's allegation in the complaint that it was contractually entitled to terminate the MSA when it learned that Pacifica was bouncing paychecks and making illegal wage deductions.

II. *Motion for Summary Judgment*

A. Standard of Review

We review the trial court's order granting TMCC's motion for summary judgment de novo. (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.)

B. The Trial Court Did Not Err

Pacifica argues that the trial court erred in granting TMCC's motion for summary judgment on its complaint. We disagree. It is undisputed that Pacifica bounced payroll checks and made an illegal deduction from Miller's paycheck. Thus, under the terms of the MSA, TMCC had a valid reason to terminate the parties' agreement for cause.

Even if it were disputed whether TMCC had a valid reason to terminate for cause, it is also undisputed that TMCC could terminate the MSA for convenience.[2] Relying upon *Siegel v. Lewis* (1946) 74 Cal.App.2d 86 (*Siegel*), Pacifica contends that TMCC could not terminate the MSA for convenience after it first attempted to terminate it for cause. *Siegel* does not stand for this proposition. *Siegel* held: "Once an option to terminate a contract is exercised, the contract is extinguished and discharged; it cannot

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[1] Although Pacifica contends on appeal that the trial court struck its second affirmative defense, the trial court's order indicates otherwise; only the third, fourth, fifth, and seventh affirmative defenses were stricken.

[2] Because we conclude that TMCC could validly terminate the MSA for convenience, we do not address Pacifica's claim that its breach of the MSA was excused by an alleged modification of or amendment to the MSA.

thereafter be revived by the other party through an offer to perform the act, the nonperformance of which gave rise to the option to terminate." (*Id*. at p. 91.) That holding has no bearing on the facts presented in this case.

For the same reasons, TMCC was entitled to summary judgment on Pacifica's FACC. Briefly, Pacifica asserted breach of contract and breach of implied covenant cross-claims. The breach of contract claim fails because TMCC was entitled to terminate the MSA, either for cause or for convenience. And, given the fact that, according to Pacifica, the breach of the implied covenant claim is subsumed by other claims, it cannot proceed for the reasons discussed above.

III. *Attorney Fees and Costs*

Pacifica contends that the trial court erred in awarding $250,000 in attorney fees to TMCC.

A. Standard of Review

We review the trial court's order for abuse of discretion. (*Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 621.) "An abuse of discretion is shown when the [attorney fee] award shocks the conscience or is not supported by the evidence." (*Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 549–550.)

B. The Trial Court Did Not Err

TMCC moved for attorney fees in the amount of $481,250.15 and costs in the amount of $18,034.25. After reviewing the parties' papers, including Pacifica's opposition to TMCC's motion and Pacifica's unopposed motion to tax costs, the trial court awarded TMCC $250,000 in attorney fees. In so ruling, the trial court noted that the case was a "difficult piece of litigation." TMCC's attorneys worked for "an awesome law firm" and performed "excellent quality of work." But the trial court also found many of the fees excessive and found many of the hours billed too high. Thus, it awarded a reduced fee award to TMCC. Given the trial court's comments and its reduction of attorney fees by nearly one-half, we find no abuse of discretion.

As for the costs award, Pacifica challenges on appeal part of the trial court's order awarding certain costs to TMCC.[3] Specifically, it objects to deposition costs ($590.47) and costs for models, blowups, and photocopies of exhibits ($344). It is unclear whether the challenged $934 in costs was actually awarded to TMCC. Pacifica moved to tax those costs, and TMCC did not oppose Pacifica's motion. According to Pacifica, those costs were awarded to TMCC; according to TMCC, the trial court struck those costs. Unfortunately, neither party provides us with an appellate record citation or a copy of the trial court's order ruling on Pacifica's motion to tax costs. Given the incomplete record and the parties' respective positions on the challenged $934, we presume the trial court did not award the $934 to TMCC. It follows that there is nothing for us to review.

DISPOSITION

The judgment is affirmed. TMCC is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ

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[3] In its respondent's brief, TMCC contends that Pacifica did not appeal TMCC's award of costs. We express no opinion on this issue.