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Attorneys for Respondent
BAKER COMMODITIES, INC.

BEFORE THE HEARING BOARD OF THE

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

In The Matter Of:

BAKER COMMODITIES, INC.,
[Facility ID No. 800016]

Petitioner,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,

Respondent.

Case No. 6223-2

BAKER COMMODITIES, INC.'S EXHIBITS IN SUPPORT OF OPPOSITION TO SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT'S (1) MOTION TO STRIKE PORTIONS OF BAKER'S PERMIT APPEAL and (2) MOTION IN LIMINE TO EXCLUDE EVIDENCE RELATED TO THE ORDER FOR ABATEMENT

Date: February 26, 2025
Time: 9:30 a.m.
Place: Hearing Board
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

EXHIBIT 1

BEFORE THE HEARING BOARD OF THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

IN THE MATTER OF

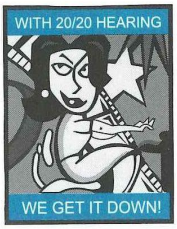
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,	)	
Petitioner,	)	
vs.	)	**CASE NO.** 6223-1
BAKER COMMODITIES INC.,	)	
Respondent.	)	

TRANSCRIPT OF PROCEEDINGS

DATE: Wednesday, April 19, 2023

REPORTER: Jennifer A. Hines, CSR No. 6029/RPR/CRR/CLR

LOCATION: 21865 Copley Drive
Diamond Bar, California 91765



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BEFORE THE HEARING BOARD OF THE

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

IN THE MATTER OF

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,	)	
PETITIONER,	)	
vs.	)	Case No. 6223-1
BAKER COMMODITIES INC.,	)	
RESPONDENT.	)	

TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, APRIL 19, 2023

9:03 A.M.

21865 COPLEY AVENUE
DIAMOND BAR, CALIFORNIA 91765

the potential odors will come from the trap grease. So it needs to be enclosed.

Q. Okay. So Baker let's just say gives up its permits, it's no longer rendering, it's no longer subject to Rule 415; right?

A. Yes.

Q. Okay. What's the authority, then, for saying that Baker has to enclose trap grease wastewater process?

A. Because they -- we have -- there are potential odors from the trap grease operations and it has been verified by the inspectors that there are odors and we need to enclose those parts.

Q. Okay. There's no rule that says that; is that correct?

A. Well, again -- what do you mean there's no rule that says what? To enclose the -- when it's something generates odor? Can you elaborate?

Q. Sure. I think we went over this at the beginning, but we talked about Rule 201 which says you permit equipment.

A. Yes.

Q. Then we talked about Rule 219 --

A. Yes.

Q. -- which has -- which is the exemption requiring

permits which has its own exemption in it that states that the District can require a permit for equipment --

A. Yes.

Q. -- when there's a Rule 402 nuisance, and you said that had to be a verified nuisance.

Is that correct?

A. Well, the inspector has been verified, yes.

Q. Well, under Rule 402, though, is it just the inspector verifies it or isn't there a process where you have to have so many complaints --

A. Yes.

MS. HSU: Objection. She's not an engineer, not a compliance staff.

MS. TABER: Well, she's attested to a provision in Rule 219 that talks about Rule 402. So that's why I'm just trying to understand that.

MS HSU: You're asking about the nuisance process in terms of compliance.

MS. TABER: Okay.

THE CHAIRWOMAN: I would agree with that, Ms. Taber.

BY MS. TABER:

Q. So let's look back at the list of facilities if we could, which -- let me see.

Do you happen to remember what number that is?

Tab 16, Exhibit I.

THE CHAIRWOMAN: The very last page.

BY MS. TABER:

Q. You have the list in front of you; right?

A. Yes.

Q. Okay. Now, do these facilities, do their wastewater treatment operations have to be enclosed?

A. I haven't been in this facilities, and I -- if a case by case needs to be evaluated, then based on the information, we can make the determination.

Q. Is the purpose of Rule 415 to reduce odors from trap grease?

A. This rule is applicable for the rendering operations.

Q. So the purpose of 415 is not to reduce odors from trap grease; isn't that correct?

A. Trap grease, they are -- there's exemption from -- in Rule 415 for trap grease.

Q. Okay. So if Baker gave up its rendering permit, all right, then Baker would be able to run its trap grease operation and it would not be subject to Rule 415; is that correct?

A. That is correct.

Q. Okay. Thank you.

THE CHAIRWOMAN: About how much longer do

you have, Ms. Taber?

MS. TABER: I might be almost done.

Can I take a couple minutes just to consult to see if there's anything else we would like to clarify?

MEMBER ALI: Just a comment. The gentle lady has to leave, so --

THE WITNESS: So if you can go until 12:00.

MEMBER ALI: -- I want to make certain we can get done today before she has to leave.

THE CHAIRWOMAN: Thank you for reminding me, Mr. Ali. You're correct.

THE WITNESS: Thank you.

THE CHAIRWOMAN: All right.

MS. TABER: We'll go ahead -- if we have any other questions, we'll just do it in re-direct.

THE CHAIRWOMAN: As long as it's before 12:00.

MS. TABER: I hope.

THE CHAIRWOMAN: Ms. Hsu.

MS HSU: Can we take -- I need 5, 10 minutes. They can confer -- before I do my re-direct. I want 5 or 10 minutes. Is that all right?

MS. TABER: Just so we can clarify about the witnesses, witness is in the middle of testifying, and I

implicating Rule 415.

The whole point is that if they somehow aren't doing rendering and have that portion modified and activated whatever term you use, then the meer trap grease operations are not subject to Rule 415. I think that's pretty clear in the rules.

If your witness felt the other way, I don't see the basis for that.

So I think that's a bit overbroad and harsh. It's kind of like you're really still nailing them on the rendering requirements which is not the propose of the proposed request.

So I think the better terminology is to simply say they would have to fully enclose or put in an enclosed system any and all wastewater treatment systems necessary for the trap grease operations to satisfy all applicable rules and laws.

And, again, applicable, whatever that may be. We don't have to pass that. But I don't think you should put that 415 reference in there because it's too harsh and takes away the whole purpose which is to get this out of 415 if they don't do rendering and activate.

Any comment?

MS. HSU: In terms of activation, that's why we have 9(c). I think that's what we're trying to

address what you are saying, that if they were to inactivate rendering, that they may not -- that's what where we are trying to address it.

MEMBER PEARMAN: I agree. That was probably while you were trying to give and take away. I think that's the wrong way, but I would say keep (c) in there, but I think we have to get 415 out. Because it just muddies the water for intentions here.

And then it looks like in item 9, we never discussed the cooking oil issue. And then when we go down, you -- 13, you talk about commencement operations as to condition 9 which is just trap grease. And then item 14 talks about commencement operations again. So I'm trying to find out first the used cooking oil process, the only reference is in 8. I don't see it discussed elsewhere. So am I missing something about your intentions as far as that's concerned?

MS HSU: No. That's correct. This way if they haven't done any of the enclosures per item 9, they could still operate their wastewater operations for rain water, wash down water and the cooking oil because there was a carve out in cooking oil in Rule 415. So we wanted to honor that and make that explicit in item 8

MR. PEARMAN: And do they need to notify you if they simply start the used cooking operations?

MS HSU: No. That was just -- no, they would not.

MEMBER PEARMAN: Okay. All right.

So then I'm going to try and figure out.

13 talks about relating to condition 9, trap grease prior to commencement of operations they shall notify you.

So if you don't have to be notified about the cooking oil, then what does 14 relate to unless it relates to the rendering? That's the only thing left.

MS HSU: That would be related to item number 9, so because 13 is just more -- we want to know that construction is complete and then when they commence operations.

MEMBER PEARMAN: Okay. So the distinction there is -- see, it says prior to commencement of operations in 13 then you talk about compliance with permits to construct and then you talk about operations again in 14. So it's kind of odd.

You're talking about construction notice, you wouldn't say prior to commencement of operations in 13. You'd say prior to commencing construction. So I'm kind of confused here why we have these two operation prior notices.

MS. HSU: I think -- it could -- it was

inartfully stated.

Basically we wanted to know when construction was complete and when they wanted to start operations because there could be a gap in time.

MEMBER PEARMAN: Okay. So prior to commencing operations, tell us when you finish construction. But then tell us before you start commencement again?

MS HSU: Correct.

MEMBER PEARMAN: Okay. And should this be stricken from both 13 and 14?

MS HSU: No. He should remain on. It's just a typo on 14. There's just an H that's not part of his e-mail address.

MEMBER PEARMAN: Okay. Okay. All right.

And what else did I have here.

And if I may, Madam Chair, I forgot to ask -- if I can ask Baker now just as we're discussing conditions -- maybe I'll ask Ms. Hsu first.

The May 18th timeframe, in 9(a) and 9(b), could you elaborate on that and why that's there, how you limited it, et cetera, et cetera.

MS HSU: We just believe approximately 30 days would be sufficient to -- to submit permit applications. They're welcome to submit it earlier. If

Ms. Taber?
MEMBER BERNSTEIN: So May 18th --
MS. TABER: Yes, thank you.
MEMBER BERNSTEIN: 4th of July?
MR. DWYER: Yes.
THE CHAIRWOMAN: All right. Mr. Balagopan, did you want to start deliberations?
MEMBER BALAGOPAN: Yes. After hearing all the testimonies and so forth, I am now -- I'm inclined to propose modification based on what Baker proposed and disregard the District's change for the modification.
I will go through the reasons why. I think the District said the plain meaning of the rule. The plain meaning of the rule is very clear, it's plain. In the rule in the staff report, it is plain as can be: Remove trap grease from PR 415, applicability; remove 2BEM 415 odor best management practice. That is in the 2017 staff report that was adopted by the governing board.
What the District chose to do in the opening statement is then -- I don't know why they did this, but they referred to the comment on page -- comment 18, page 833 of 415 staff report and as Exhibit 21 that Baker understood the trap grease was subject to 415.
That was based on early on discussion in the

rule in the proposed rule making. But as you can see in table P-1, the summary of changes, that was discarded. But the District has been disingenuous in saying hey, look. This is what they had submitted and they knew this. I think it's misleading.
This in my mind is really straightforward.
So we would ask and I think I'm jumping all over the place. We would ask to -- and I'll -- because I wrote it down, the order.
We would ask about the credibility of the manager was the manager, and I would defer to the permitting manager on permitting issues. I would defer to the process of the general manager on process issues. You know, and I think he testified there is vapors coming from the tank. I would -- the engineer wasn't sure. If you heard the testimony initially then she had to correct it that she -- yellow grease was being incinerated and then after that, it was corrected I think that it was as fuel.
So, again, I think it's very difficult sometimes for the permitting engineer to know all the nuances of the permitting at the facility. The people who do day-to-day operation are familiar with it.
But on the permitting side, yes. I think the facilities don't understand all the nuances of

permitting. You know, those issues of permitting and so forth. Yes, I would defer to that.
Now, the other -- the thing that I found is to -- the condition that the District proposes to submit applications all over again. You have to recall that this application was submitted, they were reviewed and approved and were sub- -- and the facility permit was issued in 2021 for the wastewater treatment operation.
Now, I want to clarify that. They are two different things: Trap grease and wastewater treatment. I think that's the proper way, not processing as per the rule.
Trap grease requirement is that -- the requirement in Rule 415 that was adopted was that you put it into -- into -- directly into the wastewater system and then everything else -- then you -- basically exempt of 415. However, 415 require -- the wastewater operation has to comply with 415, which is what the facility did. They submitted applications and they got the permit to operate to construct for the wastewater operation with the enclosure.
So the District would not have issued the permit to construct/permit to operate unless they had evaluated all the information in the application that was submitted and made the determination, yes, I think

if they do this and this as outlined in the permit, they would comply with rule -- the applicable rule.
So I think that to say now hey, you are then ordered abatement, I take offense at the fact that, you know, the order abatement is not a good tool. The order abatement is binding. It overrides the permits in a lot of cases when you issue an order of abatement for the condition may say some things but the order abatement may override for the duration of the order.
So the order is very clear, do not conduct any operation. What they're asking for is to conduct trap grease operation, wastewater operation and cooking grease.
So the rendering and they are -- and they have conditions which I thought -- which will reinforce the fact that they will not conduct rendering because the lines -- the gas lines to the cookers will be turned off and so that they -- they will be -- essentially without that, you cannot do any rendering.
So but regardless of that, the order is already there saying you cannot do rendering until you modify -- if you choose to modify. To submit application again -- I don't think -- realize what -- I said part of the reason why I ask the engineer, you know, what the permit, some of these permits, that

Is the board including those as well?
MEMBER BALAGOPAN: No. I think I only referred to Baker's -- you know, I --
MR. SOMASUNDARAM: Okay.
MEMBER BALAGOPAN: -- modification.
MR. SOMASUNDARAM: Understood. Thank you.
THE CHAIRWOMAN: Okay. Got it.
Anymore clarifications, questions? Okay.
MS HSU: If I may make a suggestion.
Would it be possible for us to see a Word version of all the changes? Like take a sort break and have the clerk have it before the vote is taken? There's been a lot of language --
THE CHAIRWOMAN: It's going to take her a while to do that.
MEMBER ALI: Yes.
THE CHAIRWOMAN: A while. Past 4:00.
THE CLERK: Yeah.
THE CHAIRWOMAN: Well past 4:00.
MS HSU: That was my suggestion. Thank you for entertaining.
THE CHAIRWOMAN: But I think if we -- if we read it, if it's read out loud, we'll all understand it.
MEMBER PEARMAN: I don't know. Is there some process we can ask send draft Minutes to the

parties before we finalize so that if they see that we really misspoke or we screwed up to check it out?
THE CHAIRWOMAN: We would have to come back.
MEMBER PEARMAN: No. We would -- no. I'd ask the clerk if that's a process that just informally you could do that to see --
THE CLERK: I mean we don't have a problem with giving you the draft conditions or what we think sending it to you. I just can't give it to you before you make a vote today.
That's my concern. I mean I can send it to you tomorrow or something like that. Because ultimately the vote is on the board.
MS HSU: Yeah. My point is more to make it clear, what the board was voting on. It would be -- have been helpful to have the entire language before us.
THE CHAIRWOMAN: It would be but I think at this point it's kind of unrealistic. So at the very least they're going to read the conditions, and I think everybody can understand them. They're pretty straightforward, I believe.
MEMBER BALAGOPAN: Yeah. I think I read it. I already read it.
MEMBER ALI: He's read it twice.
MEMBER BALAGOPAN: I'll read it again

because I'll change it probably. You know.
THE CHAIRWOMAN: Or one of us will. Or one of us will.
Okay. So. In the matter of.
MEMBER BALAGOPAN: Oh, I'm sorry.
In the matter of Baker Commodities, case number 6223-1, I move that we amend the abatement order as outlined --
THE CHAIRWOMAN: That we are finding good cause to -- do we need to --
MEMBER BALAGOPAN: Thank you. That we find good cause to modify the abatement order with the changes that was proposed by board members Mr. Pearman and myself.
MEMBER ALI: Second.
THE CHAIRWOMAN: There you go. Okay.
MEMBER ALI: Ali seconds.
THE CHAIRWOMAN: Any discussion on the motion?
Seeing none, Mr. Ali, how do you vote?
MEMBER ALI: Aye.
THE CHAIRWOMAN: Dr. Bernstein.
MEMBER BERNSTEIN: I do see Ms. Hsu's point, but at this point I'll vote aye.
THE CHAIRWOMAN: Mr. Pearman.

MEMBER PEARMAN: Aye.
THE CHAIRWOMAN: Mr. Balagopan.
MEMBER BALAGOPAN: Aye.
THE CHAIRWOMAN: I also vote aye.
And I am very happy to say that I think we have found some common ground and that we can not only abide by the District's desire to make sure that there are little if no emissions coming out of that facility, no odor issues coming out of that facility.
I am happy to believe that there's a good reason that we have good faith and a good faith effort here that there will be adherence to those conditions as these two fine gentlemen hammered out.
This was not something easy for anybody. I know that the concerns that came from the public, we're well aware of them. The concerns from our public representatives are -- whether it was local and or state, we needed to do what we needed to do. We needed to hammer it out. We needed to have every single comment that was said today be listened to by both sides, and I think we came to a very good conclusion that we will be able to have people come back to work, but it will be obviously within that limited range.
And if and when Baker does feel that they can comply with 415, then come back to us.

But we really do have very strict constraints on that. And I would definitely suggest that you have some good conversations with the engineers and the staff of the AQMD.

So I want to thank all of you, Ms. Hsu, Mr. Dwyer, Ms. Taber, and I know I'll mess up your name so I'm not even going to try.

But thank you to all of your staff and your witnesses.

So -- and my colleagues, thank you so much. We all worked real hard and thought long and hard on this. And like I said, it wasn't easy, but I think we got it done to the best of our ability. And I think that both sides should be happy with us.

Thank you and the matter is closed and we are adjourned.

MS HSU: Chair --

THE CHAIRWOMAN: Yes.

MS HSU: Sorry. I know you had wanted to ask one of the parties to draft the Proposed Findings and Decision.

THE CHAIRWOMAN: Yes. Yes, I do. And who's going to volunteer?

MR. SOMASUNDARAM: As the moving party, we would volunteer.

THE CHAIRWOMAN: Okay. Thank you.

MEMBER ALI: And just a reminder, Madam Chair, both of them are paying for the court reporter.

THE CHAIRWOMAN: Yes. I got agreement on that.

MEMBER ALI: And her happy hour. All right.

THE CHAIRWOMAN: Thanks again, everybody. Have a safe trip home .

(Whereupon, the proceedings concluded at the hour of 3:38 p.m.)

STATE OF CALIFORNIA.)
) SS
COUNTY OF LOS ANGELES)

I, JENNIFER A. HINES, Certified Shorthand Reporter qualified in and for the State of California, do hereby certify:

That the foregoing transcript is a true and correct transcription of my original stenographic notes.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this proceeding was taken; and furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of April, 2023.

JENNIFER A. HINES,
CSR No. 6029/RPR/CRR/CLR

EXHIBIT 2

Horwitz v. City of Los Angeles

Court of Appeal of California, Second Appellate District, Division One

December 15, 2004, Filed

B172053

Reporter
124 Cal. App. 4th 1344 *; 22 Cal. Rptr. 3d 295 **; 2004 Cal. App. LEXIS 2144 ***; 2004 Daily Journal DAR 14859; 2004 Cal. Daily Op. Service 11002

DAVID M. HORWITZ et al., Plaintiffs and Respondents, v. CITY OF LOS ANGELES, Defendant and Appellant; MEHR Z. BEGLARI et al., Real Parties in Interest and Appellants.

Subsequent History: Review denied by *Horwitz v. City of Los Angeles (Beglari), 2005 Cal. LEXIS 3170 (Cal., Mar. 23, 2005)*

Petition denied by *Adelman (Andrew A.) v. S.C. (Horwitz), 2007 Cal. LEXIS 424 (Cal., Jan. 17, 2007)*

Petition denied by *Horwitz (David M.) v. City of Los Angeles/(Beglari), 2009 Cal. LEXIS 5584 (Cal., June 17, 2009)*

Decision reached on appeal by *Beglari v. City of L.A., 2013 Cal. App. Unpub. LEXIS 3249 (Cal. App. 2d Dist., May 8, 2013)*

Prior History: [*1]** Superior Court of Los Angeles County, No. BC271518, David C. Velasquez, Judge.* (*Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.)

Disposition: Affirmed.

Case Summary

Procedural Posture

Appellant homeowner obtained a permit based on an erroneous calculation of the required front-yard setback, so that the house was 14 feet closer to the street than permitted by Los Angeles, Cal., Mun. Code § 12.07.01 C1. Respondent neighbors challenged the permit and ultimately obtained a judgment from the Superior Court of Los Angeles County (California) directing appellant City of Los Angeles to revoke the permits. Appellants sought review.

Overview

The Zoning Administrator found that the homeowner's addition encroached about 14 feet into the area of the required front-yard setback. The homeowner appealed to the Planning Commission, which rejected the Zoning Administrator's decision and ruled in favor of the homeowner on the setback issue. The trial court reviewed the administrative record, found that

the City prejudicially abused its discretion, in that it had not proceeded in the manner required by law, that its decision was not supported by the administrative findings, and that the findings were not supported by substantial evidence. The trial court commanded the City to revoke all of the homeowner's building permits and his certificate of occupancy. On appeal, the court affirmed. The court stated that the remodeled house did not conform to the mandatory requirements of the zoning ordinance, because the prevailing front-yard setback was miscalculated by the homeowner and mistakenly accepted by the City. Just as the City had no discretion to deny a building permit when an applicant complied with all applicable ordinances, the City had no discretion to issue a permit in the absence of compliance.

Outcome
The judgment was affirmed, and the neighbors were awarded costs of appeal.

Counsel: Rockard J. Delgadillo, City Attorney, Sharon Siedorf Cardenas, Assistant City Attorney, and Michael L. Klekner, Deputy City Attorney, for Defendant and Appellant.

Mark E. Baker for Real Parties in Interest and Appellants.

Paul, Hastings, Janofsky & Walker, Geoffrey L. Thomas and Jason M. Frank for Plaintiffs and Respondents.

Judges: Vogel, J.; Spencer, P. J., and Aldrich, J.*, concurred. (* Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.)

Opinion by: VOGEL **[*1347]**

Opinion

[296]** **VOGEL, J.**—A homeowner who remodeled his house obtained a permit based on an erroneous calculation of the required frontyard setback, so that the house, now completed, is 14 feet closer to the street than permitted by the governing sections of the Los Angeles Municipal Code. Neighbors objected, challenging the permit at the administrative level and in court, and ultimately obtained a judgment directing the City of Los Angeles to revoke the permits. The City and the homeowner appeal. We reject their claims **[***2]** of error and affirm the judgment.

FACTS

A.

Mehr and Vickey Beglari (collectively Beglari) own a house at 909 Greentree Road, in the Rustic Canyon area of Pacific Palisades. In 2000, Beglari (a contractor) decided to enlarge his home and submitted a series of plot plans and permit applications to the City of Los Angeles to obtain approval for an addition that dramatically reduced the frontyard setback, increased the height of the structure, and reduced the width of a side yard.

Several permits were issued to Beglari, including among others a permit issued in January 2001 by the City's Department of Building and Safety to authorize the construction of a 6,550 square-foot, two-story addition to Beglari's existing 2,000 square-foot house; a permit issued in November 2001 to authorize the movement of a side wall; and one issued in March 2002 to authorize an increase in the height of the driveway (by the addition of dirt) to raise the ground level so the roofline of the addition would not exceed height limits measured from ground level.

B.

On March 25, 2002, David Horwitz (and other nearby property owners included in our references to Horwitz) challenged **[***3]** the permits issued to Beglari by way of an appeal to the City's Board of Building and Safety Commissioners. Horwitz claimed (1) the height of Beglari's proposed addition was excessive, (2) the proposed addition would impermissibly reduce the frontyard **[**297]** setback because the prevailing frontyard setback had been incorrectly measured by Beglari, and (3) the enlarged residence would impermissibly reduce the size of the required side yards. [1]

[*4] [*1348]** On April 8 (while the just-mentioned administrative appeal was pending), Horwitz sued the City (and Beglari as real party in interest) for declaratory and injunctive relief, asking the court to compel the City to revoke Beglari's building permits and to issue a stop work order. The lawsuit repeated the claims asserted by Horwitz in his administrative appeal, and also alleged that judicial relief was necessary because the Board would not hear his appeal until May at the earliest, and that Beglari had rejected his request to voluntarily discontinue construction until the dispute was resolved. The City challenged all of the judges of the Los Angeles County Superior Court and the case was transferred to the Orange County Superior Court—which found that Horwitz had demonstrated a probability of success on the merits of his claim that Beglari's addition violated various zoning codes, but nevertheless refused to issue a preliminary injunction on the ground that Horwitz had not exhausted his administrative remedies and because construction was by then almost complete. At the same time, the court rejected Beglari's contention that Horwitz's claims were barred by laches, noting that “it **[***5]** appear[ed] that [Beglari] knowingly proceeded despite … objections [from Horwitz].”

C.

In July, the Board of Building and Safety Commissioners rejected Horwitz's challenges, and Horwitz then appealed to the City's Office of Zoning Administration. On August 19, while the

---

[1] Horwitz realized in August 2001 that the construction then underway on Beglari's property appeared to be too close to two streets, Greentree Road and Brooktree Road (Beglari's house is on the corner of those two streets). Horwitz contacted the City by telephone and by letters and tried to determine the basis for the City's authorization of the project. The City at first assured Horwitz that the project had been properly permitted and would comply with all applicable regulations, but later discovered that Beglari's project in fact failed to comply with various ordinances, including the height limitation for the area. At that point, the City gave Beglari the option of reducing the height of his house or raising the site by backfilling a driveway, and Beglari chose the latter option. When Horwitz and the other neighbors were unable to accomplish anything with the City through their informal efforts, they turned to the formal proceedings described in the text.

administrative proceedings were pending, the Department of Building and Safety issued a certificate of occupancy to Beglari.

(1) In September, Horwitz's appeal was heard by Zoning Administrator Lourdes Green, who (in October) rejected Horwitz's challenge to the height and side-yard determinations but agreed with Horwitz's challenge to the frontyard setback determination. The Zoning Administrator found that the formula for measuring frontyard setbacks for new construction is stated in section 12.07.01 C.1 of the Los Angeles Municipal Code, and noted that the only dispute is about the numbers used in the application of that formula to Beglari's lot. [2] In rough terms, the frontyard **[**298]** setback is determined by **[*1349]** measuring the distance from the property line at the street to the *closest existing building* on the subject lot, then measuring the same distance on qualifying adjacent lots (houses on the same **[***6]** street), then averaging those distances to arrive at the permissible post-construction setback for the subject lot. The issue before us turns on the meaning of *closest existing building*. According to a Senior Structural Engineer who is the Chief of the Department's Specialty Engineering Section, this measurement "typically" is the distance from the property line to the existing house. An attached garage is part of the house, but a detached garage is not; when there is a house with a detached front garage, the measurement is from the property line to the house, not from the property line to the detached structure that is closer to the street.

[*7]** Beglari considered four lots when he submitted his permit application: Lot 5 (Beglari's lot at 909 Greentree), Lot 4 (911 Greentree), Lot 3 (921 Greentree), and Lot 2 (925 Greentree). The dispute is about the setback measurement of Lot 4—which, when measured from the property line to the main house is 30.75 feet, but when measured to a detached garage is only 17.58 feet. Beglari, whose proposed plan obscured the fact that there was a detached garage on Lot 4, used the lower number which, when plugged into the formula, means his remodeled house encroaches 14 feet into the permitted setback area or, put the other way, that his permit allowed his remodeled house to be built 14 feet closer to the street than it would have been had he used the 30.75 feet measurement. Based on the evidence presented at the administrative hearing, the Zoning Administrator made these findings about the setback:

"*To the extent … the formula represents a mathematical equation where specific numbers are plugged in, there is … no ruling or discretion required of the Board*. The significance of this formula depends on the front yard depth of the lots which remain eligible for determining the **[***8]** front yard calculation. A discrepancy in the measurement, inclusion or exclusion of even one of the lots under review, can lead to a wholly different result in the determination of **[*1350]** the required front yard for a proposed project. *Thus, the most significant aspect of this [administrative appeal] rests solely on whether the front yard depth of … Lot 4[] to the*

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[2] As relevant, section 12.07.01 C.1 of the Los Angeles Municipal Code provides: "C. Area. No building or structure nor the enlargement of any building or structure shall be erected or maintained unless the following yards and lot areas are provided and maintained in connection with such building, structure or enlargement: [¶] 1. Front Yard. There shall be a front yard of not less than 20% of the depth of the lot, but such front yard need not exceed 25 feet; provided, however, that where all of the developed lots which have front yards that vary in depth by not more than ten feet comprise 40% or more of the frontage, the minimum front yard depth shall be the average depth of the front yards of each such lot. ***Where there are two or more possible combinations of developed lots comprising 40% or more of the frontage, each of which has front yards that vary in depth by not more than ten feet, the minimum front yard depth shall be the average depth of the front yards of that combination which has the shallowest average depth***. …" (Italics added.)

prevailing front yard calculation should have been measured to a detached garage or to the main building.

"***The Department acknowledged that it did not know originally that the garage in question was detached***. ***Had this been originally represented as such, the inference is that the front yard for such lot would have been measured to the main building on said lot, which had a deeper setback than the detached garage***. ***Thus, the resultant computation for the prevailing front yard setback would have been different from what was originally approved by the Department.*** "The Department noted that it questioned how the garage could be placed within the front yard of Lot 4. As a result, staff researched the 1950 Code in place at the time of the development of **[**299]** the street to find what provisions would **[***9]** have allowed such a garage to encroach into a front yard. … [¶] *The Department presented the Board with the concept referred to as 'in line' as a justification for determining that the detached garage did not encroach into the front yard*.[3] Under this determination and reasoning, the original prevailing front yard approved for the subject project[] would remain as approved. The Department further noted that it could find no provisions in the 1950 Code which would allow garages in the front yard. [Horwitz] contested this and pointed out that the 1950 Code reflected many of the same provisions and exceptions that exist in the current code, which allow for accessory buildings to be located in the front yard. This argument is valid as a review of the 1950 Code contains various provisions associated with these allowances. … [See, e.g., L.A. Mun. Code, § 12.22.12(a)(3).]

[*10]** "The [Board's] … assumption [was] that the Code that was to be reviewed [included] the provisions of the 1950 Code and the current Code regarding front yard prevailing setbacks and accessory buildings. … [T]he Board … rule[d] in favor of the Department[, and] made findings that[,] based on the 'in line' concept, the garage was not within the front yard and that based on its study of specific provisions of the Code, the Department had correctly applied and calculated the yard setbacks.

"The 1950 Code provisions [relied on by the Department] are not very illustrative of the 'in line' reasoning presented by the Department. ***No reference could be found in the Code that identifies the 'in line' concept***. ***Department staff noted that the 'in line' approach was in fact similar to the prevailing front yard setback approach. If this were the case, then it must [*1351]*** *be recognized that the thrust of the prevailing front yard setback is to create adequate setbacks for aesthetic purposes in single-family areas and to maintain deep setbacks if such is the prevailing pattern. If a pattern of deep setbacks exists, then logically the calculation should result in* **[***11]** ***a setback that is more in keeping with the existing setbacks and not one that allows for a substantial reduction in the front yard****.*

"***In this instance, [the] Department staff has indicated that it was not aware of any other situation which would result in a prevailing front yard setback being allowed to be measured to a detached accessory building***. No historic written documentation or Department policy establishing the use of the 'in line' concept to calculate required front yard was referenced by the Department staff. The Department used a situation that at best may be

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[3] The record does not include a definition of "in line," and it appears to us to be little more than the City's post hoc rationalization for its approval of the faulty information submitted by Beglari.

considered an anomaly to arrive at a conclusion which in fact would establish a new standard citywide for the measurement of prevailing front yard setbacks for lots with similar characteristics. Contrary to current practice, under this approach the accessory building, which is subordinate by definition to the main building, would be allowed to be the driving force in the calculation of prevailing front yard setback. Within this context, it must be concluded that the Department erred in arriving at this interpretation. [¶] Consequently, the Board also erred **[**300]** in sustaining the action of the Department **[***12]** to allow the measurement of the front yard on Lot 4 to be measured to the detached garage instead of to the main building as has otherwise been the practice." (Italics added.)

In short, the Zoning Administrator found that Beglari's addition encroaches about 14 feet into the area of the required frontyard setback.

D.

Beglari appealed to the Planning Commission, which held a hearing but took no new evidence (although the lawyers for all concerned parties were allowed to describe various events), then rejected the Zoning Administrator's decision and ruled in favor of Beglari on the setback issue. A final determination letter was issued in February 2003. The Planning Commission's findings, in their entirety, are nothing more than a list of the parties' arguments:

"Prevailing front yard setback … .

"• DBS [Department of Building and Safety] have [*sic*] its own options to address this;

"• Results can be radically different when measurements are taken from attached and/or detached structures;

[*1352] "• Landscaping obscures view of front yard setbacks of three of the four lots under consideration;

"• 'In-line' explanation is attempt to relate to prevailing setbacks;

[*13]** "• ***A conclusion could result in the demolition of 14 feet of the house;***

"• DBS has to be able to exercise discretion and interpret the LAMC for purpose and fairness;

"• BBSC [Board of Building and Safety Commissioners] did not abuse their [*sic*] discretion due to the LAMC being 'silent' on where measurements are taken from;

"• Disagree with Zoning Administrator's determination that BBSC erred in their [*sic*] decision due to a LAMC that lacks clarity on the matter;

"• Neighbors and neighborhood;

"• Encouraged them to 'pull together' and settle their differences;

"• Should not go home disappointed;

"• Organize and focus on what they ultimately want for the neighborhood;

"• Can consider standards for the neighborhood;

"• LAMC should be amended;

"• ***BBSC made a decision to a very specific case under very unique circumstances;***

"• ***Not setting a precedent City-wide;***

"• ***Precedent is a non-issue in this decision;***

"• Find Zoning Administrator did err in her decision that BBSC did err in its decision; and

"• Grant the appeal (passed unanimously)." (Italics added.)

[*1353] E.

In March, in the action he had filed when he sought injunctive **[***14]** relief to stop Beglari's construction, Horwitz filed an amended pleading in which he sought relief by way of administrative mandamus. (*Code Civ. Proc., § 1094.5*.) The City and Beglari answered, an administrative record was lodged, and a hearing was held, after which the trial court ruled that the sole issue was "whether the City correctly granted building permits and certificates of occupancy to [Beglari] based upon the City's calculation of the front yard setback." The trial court reviewed the administrative **[**301]** record, found the City had prejudicially abused its discretion in that it had not proceeded in the manner required by law, that its decision was not supported by the administrative findings, and that the findings were not supported by substantial evidence, explaining its ruling this way:

(2) "The City's use of the 'in line' theory of calculating [Beglari's] prevailing front yard set back is not supported by any reasonable interpretation of the Los Angeles Municipal Code. The court recognizes that the interpretation of the regulations and governing statutes used by the administrative agency charged with enforcing zoning laws is entitled to great weight and should be followed **[***15]** unless clearly wrong. Nevertheless, the ultimate interpretation of such regulations and statutes is a question of law[, and the] court is not bound by the construction given such law by the City. … 'If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.' [Citation.] Here, the words of section 12.07.01 [C.1] of the Zoning Ordinance are clear in stating the method by which the prevailing front yard setbacks are to be determined.

"The in line theory as an alternative method of calculating the prevailing front yard setback is not supported by any reasonable interpretation of the governing provisions of the Municipal Code. The City has no discretion to disregard what appears to be the clear meaning of section 12.07.01 [C.1] of the Zoning Ordinance. This section establishes the mathematical computation to be used in determining the prevailing front yard setback. Further, the restrictions on the location of accessory buildings, including detached garages, are inapposite to this computation. (See LAMC § 12.21 C.5(k), formerly § 12.22.12 of the 1950 **[***16]** Zoning Code.) ***[The City] concedes the in line theory of calculation was never previously applied to circumstances similar to those presented in the instant case, and [it] appears to this court to have been resorted to only to avoid a perceived unfair result to [Beglari].*** The analysis of [the] Zoning

Administrator[] appears to be correct and is the method historically and consistently used by the City since the enactment of the zoning ordinance." (Italics added.)

[*1354] A judgment granting Horwitz's petition for a writ of mandate was thereafter signed and entered, and a writ issued commanding the City to revoke all of Beglari's building permits and his certificate of occupancy. The City and Beglari appeal from the judgment.

DISCUSSION

I.

The City and Beglari contend the trial court erred by rejecting substantial evidence in the administrative record that supports the Planning Commission's decision. There are several problems with this contention.

(3) The Evidence. Because the trial court was acting on a petition seeking judicial review of an adjudicatory decision rendered by an administrative agency (*Code Civ. Proc., § 1094.5, subd. (e)*), the **[***17]** trial court was required to "scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision. In making these determinations, the [trial] court must resolve reasonable doubts in favor of the administrative findings and decision." **[**302]** (*Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 514 [113 Cal. Rptr. 836, 522 P.2d 12]*.) The "agency" in this case is the Department of Building and Safety, acting first through the Zoning Administrator, then through the Planning Commission, and at all times on behalf of the City of Los Angeles.

All of the evidence was presented to the Zoning Administrator, who ruled in favor of Horwitz. The Planning Commission, which took no new evidence, then ruled in favor of Beglari. It follows that the issue before the trial court was whether *the administrative record, in its entirety,* contained substantial evidence to support the Planning Commission's decision. [4]

[*18]** **(4) The Law.** Issues of law, including the interpretation of the Los Angeles Municipal Code, were before the trial court for de novo review, subject to the well-established rule that the Department's interpretation of the City's Municipal Code is entitled to respect unless that interpretation is clearly erroneous—and the same is true with regard to our review of the trial court's decision. (*Terminal Plaza Corp. v. City and County of San Francisco **[*1355]** (1986) 186 Cal. App. 3d 814, 825–826 [230 Cal. Rptr. 875]*; and see *Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 8 [78 Cal. Rptr. 2d 1, 960 P.2d 1031]*.) [5]

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[4] The City concedes this point in its opening brief, when it tells us that we "must examine ***the administrative record*** to determine whether there is substantial evidence to support the administrative decision and findings," and later that "the administrative decision is upheld if there is any substantial evidence ***in the record*** to support the findings." (Italics added.)

[5] The City's theory, that "in line" means the same as "prevailing setback," is pure nonsense—because it would mean there existed two different interpretations of the same language in the ordinance. As Horwitz aptly notes, if "in line" has any meaning at all, it is as a concept applied to the placement of accessory buildings, not to the determination of frontyard setbacks. And as the

[*19] II.**

(5) The City (joined by Beglari) contends the trial court exceeded its authority when it ordered the City to revoke the three permits issued to Beglari. Instead, claims the City, the trial court "should have remanded the matter back to the City to reconsider its action in light of the court's decision, which was to recalculate the front yard setback." This is so, says the City, because *Code of Civil Procedure section 1094.5* permits the court to order the City to reconsider its decision and to **[**303]** take further action, but prohibits the court from issuing a writ to "limit or control in any way the discretion legally vested" in the City. (*Code Civ. Proc., § 1094.5, subd. (f)*.) The City's argument misses the point—that (as the Zoning Administrator and the trial court both found) there is no discretion involved in the application of the formula to the measurements at issue in this case.

(6) Beglari's house must conform to the mandatory requirements of the zoning ordinance. [6] As explained above, the remodeled house does not **[*1356]** conform because the prevailing frontyard setback was miscalculated by Beglari and mistakenly accepted by the City. Just as the City has no discretion to deny **[***20]** a building permit when an applicant has complied with all applicable ordinances, the City has no discretion to issue a permit in the absence of compliance. (*Terminal Plaza Corp. v. City and County San Francisco, supra, 186 Cal. App. 3d at pp. 834–835*; *Gabric v. City of Rancho Palos Verdes (1977) 73 Cal. App. 3d 183, 190–192 [140 Cal. Rptr. 619]*.) It follows that Beglari's permits must be revoked.

It adds nothing to say, as **[***21]** does the City, that remand is necessary to permit it to recalculate the frontyard setback and allow it to then "exercise its discretion to remedy the situation once the proper calculations" are made. While we agree that the proper calculations have to be made, we do not see any basis in law, fact, or fairness to allow the City or Beglari to keep the improperly issued permits in place so that they become the foundation for the decisions that will thereafter have to be made. By parity of reasoning, we reject the City's conclusory assertion that the revocation of Beglari's permits leads "to absurd and inequitable results"—because the City does not say why that is so or why the result would be otherwise if the permits remained in place while the City recalculates the proper frontyard setback. As noted,

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Zoning Administrator noted in her decision, the Department staff conceded "that it was not aware of any other situation which would result in a prevailing front yard setback being allowed to be measured to a detached accessory building" which, if allowed, would "establish a new standard citywide for the measurement of prevailing front yard setbacks for lots with similar characteristics." We consider it noteworthy that, in granting Beglari's appeal from the Zoning Administrator's decision, the Planning Commission did not express any disagreement with the Zoning Administrator's findings but seemed to base its decision on a concern that any other result would be unfair to Beglari because he would have to demolish his house. If that is the case, it is an improper basis for the Planning Commission's decision as a matter of law and, possibly, as a matter of fairness. After all, it was Beglari who made the mistake and who refused to pause his construction while this dispute was resolved—and it is Horwitz and the other neighbors who now have a nonconforming house to look at, day in and day out. In any event, the Planning Commission's job is to apply the City's zoning ordinances as written and for the protection of all the residents of the City, not just the permitee. (*Terminal Plaza Corp. v. City and County of San Francisco, supra, 186 Cal. App. 3d at pp. 834–835*.)

[6] It is for this reason that all of the permits and the certificate of occupancy must be revoked, not just the one authorizing the erroneous frontyard setback. The permit authorizing the backfill of the driveway so the height restriction could be satisfied is invalid because the front of the house and part of the driveway both encroach into the frontyard setback area; the permit authorizing a wall within the side yard is affected because the wall encroaches into the frontyard setback area; and the certificate of occupancy cannot stand without the permits.

it seems far more fair and equitable to us to place the burden on Beglari to submit proper permit applications, and to prevent him from retaining some unstated and ephemeral benefit from the nonconforming permits issued in response to his substantially erroneous applications. [7] Under these circumstances, there is only one more thing to be said—that it is time for the City to amend **[***22]** the relevant portions of the Municipal Code.

[*1357]

DISPOSITION

The judgment is affirmed. Horwitz is awarded his costs of appeal.

Spencer, P. J., and Aldrich, J.,[*] concurred.

[*23]** The petition of real parties in interest for review by the Supreme Court was denied March 23, 2005.

End of Document

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[7] The cases relied on by the City, all of which involved decisions made in the exercise of discretion rather than a rote application of a formula to a set of numbers, are inapposite. (E.g., *Fascination, Inc. v. Hoover (1952) 39 Cal.2d 260 [246 P.2d 656]* [when a required hearing was not held, the proper remedy was to remand so it could be held and a decision made]; *Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th 1152 [56 Cal. Rptr. 2d 223]* [when a hearing was unfair because of a conflict of interest, the proper remedy is remand for new hearing followed by new decision].)

[*] Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

EXHIBIT 3

Key v. Tyler

Court of Appeal of California, Second Appellate District, Division Two

April 19, 2019, Opinion Filed

B283979

Reporter
34 Cal. App. 5th 505 *; 246 Cal. Rptr. 3d 224 **; 2019 Cal. App. LEXIS 358 ***; 2019 WL 1748577

SARAH PLOTT KEY, Plaintiff and Appellant, v. ELIZABETH PLOTT TYLER et al., Defendants and Respondents.

Subsequent History: Modified and rehearing denied by *Key v. Tyler, 2019 Cal. App. LEXIS 420, 2019 WL 2004555 (Cal. App. 2d Dist., May 7, 2019)*

Time for Granting or Denying Review Extended *Key v. Tyler, 2019 Cal. LEXIS 6221 (Cal., Aug. 12, 2019)*

Review denied by *Key v. Tyler, 2019 Cal. LEXIS 6402 (Cal., Aug. 21, 2019)*

Prior History: APPEAL from orders of the Superior Court of Los Angeles County, No. BP131447 **[***1]** , David J. Cowan, Judge.

Key v. Tyler, 2016 Cal. App. Unpub. LEXIS 4757 (Cal. App. 2d Dist., June 27, 2016)

Disposition: Reversed and remanded with directions.

Case Summary

Overview

HOLDINGS: [1]-*Code Civ. Proc., § 425.16*, the anti-SLAPP (strategic lawsuit against public participation) statute, applied to a trust beneficiary's petition to enforce the trust's no contest clause in relation to the trustee's judicial defense of a trust amendment; [2]-Under the second step of the anti-SLAPP procedure, the beneficiary adequately demonstrated a likelihood of success because the probate court's findings on undue influence were sufficient to show that the trustee lacked probable cause to defend the amendment.

Outcome

Reversed and remanded with directions.

Counsel: [*509] Grignon Law Firm, Margaret M. Grignon, Anne M. Grignon; Wershow & Cole and Jonathan A. Wershow for Plaintiff and Appellant.

Magee & Adler, Eric R. Adler; Murphy Rosen and Paul D. Murphy for Defendant and Respondent Elizabeth Plott Tyler.

Silas Isadore Harrington; Williams Iagmin and Jon R. Williams for Defendant and Respondent Jennifer Plott Potz.

Judges: Opinion by Lui, P. J., with Ashmann-Gerst and Hoffstadt, JJ., concurring.

Opinion by: Lui, P. J.

Opinion

[228]** **LUI, P. J.**—Sarah Plott Key (Key) appeals from orders of the probate court (1) striking her petition to enforce a no contest clause in a trust under the "anti-SLAPP" statute **[**229]** (*Code Civ. Proc., § 425.16*)[1] and (2) denying her motion to recover her attorney fees incurred in defending an earlier unsuccessful appeal filed by respondent Elizabeth Plott Tyler (Tyler). Key and Tyler are sisters and, along with the third sister, respondent Jennifer Plott Potz (Potz), are beneficiaries of a family trust (Trust) that their parents first created in 1999. Tyler was the trustee.

The Trust was purportedly amended in 2007 (2007 Amendment), substantially changing the beneficiaries' **[***2]** rights and effectively disinheriting Key. Key filed a petition in 2011 (Invalidity Petition) seeking a ruling that the 2007 Amendment was a product of undue influence by Tyler. The probate court granted that petition, and this court affirmed that ruling in a nonpublished opinion. (*Key v. Tyler* (June 27, 2016, B258055) (*Key v. Tyler I*).)

Following remand, Key filed a petition to enforce the Trust's no contest clause against Tyler (No Contest Petition), claiming that Tyler's judicial defense of the invalid 2007 Amendment implicated that clause. Citing the same section of the Trust that contains the no contest clause, Key also sought an award of her attorney fees on appeal, which she claimed she incurred while resisting Tyler's attack on the original Trust provisions.

Tyler responded with an anti-SLAPP motion. Tyler argued that Key's No Contest Petition arose from Tyler's protected litigation conduct under *Code of Civil Procedure section 425.16, subdivision (e)(3)*, and that Key could not **[*510]** show a likelihood of success on her No Contest Petition for a variety of reasons, including that Key, not Tyler, had initiated the proceedings challenging the validity of the 2007 Amendment. Tyler also opposed Key's request for attorney fees. **[***3]**

The probate court granted Tyler's anti-SLAPP motion and denied Key's motion for attorney fees. The court rejected Key's argument that the anti-SLAPP statute does not apply to petitions to enforce no contest provisions in probate court. The court also found that Key failed to show a probability of success on her No Contest Petition because Tyler's defense against the Invalidity

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[1] "SLAPP" is an acronym for "[s]trategic lawsuit against public participation." (*Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1109, fn. 1 [81 Cal. Rptr. 2d 471, 969 P.2d 564]*.)

Petition that *Key* filed was not an enforceable "direct contest" of the Trust. (*Prob. Code, § 21311*.)[2] With respect to the request for attorney fees, the court ruled that Key had failed to identify any statutory or equitable basis for the request.

We reverse both orders. We agree with the probate court (and with a recent decision by Div. Five of this district) that the anti-SLAPP statute applies to a petition such as Key's seeking to enforce a no contest clause. However, we conclude that Key adequately demonstrated a likelihood of success under the second step of the anti-SLAPP procedure. Tyler's judicial defense of the 2007 Amendment that she procured through undue influence meets the Trust's definition of a contest that triggered the no contest clause. And, under *sections 21310* and *21311*, that clause is enforceable against Tyler because the pleadings **[***4]** that Tyler filed defending the 2007 Amendment constituted a "direct contest" of the Trust provisions that the amendment purported to alter. (See *§ 21310, subd. (b)(5)*.) Key also provided sufficient evidence that Tyler lacked probable cause **[**230]** to defend the 2007 Amendment. (*§ 21311, subd. (a)(1)*.) The findings of the probate court concerning Tyler's undue influence, which this court affirmed, provide a sufficient basis to conclude that Key has shown a probability of success on her No Contest Petition.

The same section of the Trust that contains the no contest clause also provides that expenses to resist any "contest" or "attack" on a Trust provision shall be paid from the Trust estate. We conclude that this section provides Key with the contractual right to seek reimbursement of her attorney fees incurred in resisting Tyler's appeal of the probate court's ruling invalidating the 2007 Amendment. We therefore reverse the probate court's rulings and remand for the court to determine Key's reasonable attorney fees and for further proceedings on Key's No Contest Petition.
[*511]

BACKGROUND

1. *Facts Concerning Tyler's Undue Influence*[3]

Tyler, Key, and Potz are the daughters of Thomas and Elizabeth Plott, who owned a successful family nursing home business. **[***5]** Thomas and Elizabeth created the Trust in 1999 and amended it in 2002 and 2003. Thomas died in 2003. (*Key v. Tyler I, supra, B258055*.)

The Trust provided that, upon the death of the first spouse, the estate would be divided into three separate subtrusts: the survivor's trust; the marital trust; and the exemption trust. The marital trust and the exemption trust became irrevocable upon the first spouse's death, but the survivor's trust was revocable. The assets allocated to the three trusts were required to be

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[2] Subsequent undesignated statutory references are to the Probate Code.

[3] This factual summary is based primarily on the probate court's statement of decision dated April 25, 2014 (Statement of Decision), following the trial on Key's Invalidity Petition and on this court's prior opinion in *Key v. Tyler I, supra, B258055*. We cite that opinion pursuant to ***California Rules of Court, rule 8.1115(b)(1)***, which permits citation of nonpublished opinions when relevant under the doctrines of res judicata or collateral estoppel.

equivalent. As of January 2006, the Trust's assets were worth over $72 million.[4] (*Key v. Tyler I, supra, B258055*.)

Article 14 (Article 14) of the Trust contains a "Disinheritance and No Contest Clause" (No Contest Clause). That clause provides in pertinent part that, "if any devisee, legatee or beneficiary under this Trust … directly or indirectly (a) contests either Trustor's Will, this Trust, any other trust created by a Trustor, or in any manner attacks or seeks to impair or invalidate any of their provisions, … then in that event Trustors specifically disinherit each such person, and all such legacies, bequests, devises, and interest given under this Trust to that person shall be forfeited as though he or she had predeceased the Trustors without issue, and **[***6]** shall augment proportionately the shares of the Trust Estate passing under this Trust to, or in trust for, such of Trustors' devisees, legatees, and beneficiaries who have not participated in such acts or proceedings."

Following Thomas's death, Tyler, a lawyer, "actively sought to have Mrs. Plott amend the survivor's trust to effectively exclude Key." (*Key v. Tyler I, supra, B258055*.) Tyler was vice-president of operations for the nursing home business and was a principal and founding member of Tyler & Wilson, the law firm that provided legal services to the business. Mrs. Plott depended on Tyler for information related to the business and for legal advice. Mrs. **[**231]** Plott also was dependent on Tyler to carry on the family business, which Mrs. Plott **[*512]** considered her legacy. Tyler "exploited her knowledge of the family nursing home business to manipulate Mrs. Plott." (*Ibid.*)

Beginning in late 2006, Tyler actively participated in efforts to procure an amendment to the Trust that made significant changes to the distribution of the survivor's trust. Tyler controlled the communications concerning the amendment between Mrs. Plott and Allan Cutrow, her estate planning lawyer, and with his firm, Mitchell, Silberberg & **[***7]** Knupp (MSK). Tyler was the "gatekeeper between MSK and Mrs. Plott." Cutrow "was told to route all inquiries through Tyler & Wilson and not to contact Mrs. Plott directly." (*Key v. Tyler I, supra, B258055*.) Every meeting that Mrs. Plott attended with MSK concerning the 2007 Amendment was also attended by Tyler or by Tyler's associate. Tyler also "often created time pressure on Mrs. Plott by limiting Ms. Tyler's availability or intentionally shortening the time in which to have meetings, thus putting pressure on decisions to be made by Mrs. Plott."

During the drafting process, Tyler "actively revised" the 2007 Amendment, "directly instructing Mr. Cutrow to include specific language and percentages in the final document." The probate court found that there was "NO evidence that the [2007 Amendment] represents the desires or choices of Mrs. Plott." The court based that conclusion on the totality of the court's findings concerning Tyler's active procurement of the 2007 Amendment, "most importantly the lack of any evidence originating directly from Mrs. Plott without the participation or interference of Ms. Tyler."

The final 2007 Amendment unduly benefited Tyler. As amended in 2003, the Trust provided for an equal **[***8]** division of property between the three daughters. However, the 2007

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[4] As mentioned in *Key v. Tyler I, supra, B258055*, the family's nursing home business ultimately sold at a probate court auction for $55 million.

Amendment replaced the relevant provision of the Trust with a new distribution scheme that gave Tyler 65 percent of the business assets and Potz 35 percent. Key received a lump-sum gift of $1 million. (*Key v. Tyler I, supra, B258055*.)

The 2007 Amendment also gave Tyler all the contents of Mrs. Plott's residence, replacing a provision that personal property was to be split equally, or in "'such manner as [the children] shall agree.'" And the 2007 Amendment purportedly forgave a $2.5 million debt that Tyler owed to the marital trust, effectively giving Tyler a benefit of $1,666,666 and imposing a loss on Key of $833,333. (*Key v. Tyler I, supra, B258055*.) The 2007 Amendment included this loan forgiveness provision although Cutrow had told Mrs. Plott that the note was owned one-third by each daughter through the marital trust (which was irrevocable), and therefore could not be forgiven. The probate court found that there was "no competent evidence that Mrs. Plott wanted this term in the 2007 … Amendment."
[*513]

Mrs. Plott signed the 2007 Amendment on May 25, 2007. In 2010 she was diagnosed with dementia. She died on June 27, 2011. (*Key v. Tyler I, supra, B258055*.)

2. *Key's Invalidity Petition*

Key filed her Invalidity Petition on November 1, 2011. Tyler opposed **[***9]** the petition. In her capacity as trustee, Tyler filed a response and objections to the Invalidity Petition in which she argued that Mrs. Plott "was not susceptible to any undue influence of others" and that Mrs. Plott's "testamentary wishes were embodied in the 2007 Amendment."

Tyler appeared at the trial on the Invalidity Petition through counsel both individually and in her capacity as trustee. She **[**232]** filed some pleadings in both capacities. Following a 17-day trial, the probate court issued its 67-page Statement of Decision stating its findings and granting the Invalidity Petition. This court issued its opinion affirming that decision on June 27, 2016. (*Key v. Tyler I, supra, B258055*.)

3. *Tyler's Anti-SLAPP Motion*

Following remand, Key filed her No Contest Petition. Tyler responded with a motion to strike the entire petition under *Code of Civil Procedure section 425.16*, which the probate court heard on May 16, 2017.

The court ruled that the anti-SLAPP statute applies to actions to enforce a no contest clause. The court recognized that the anti-SLAPP procedure and a no contest enforcement action are in some ways "antithetical to one another." However, the court concluded that *Probate Code section 1000* makes the Code of Civil Procedure applicable to probate proceedings **[***10]** unless the Probate Code indicates otherwise, and there is "nothing in the no contest law, which says that it shouldn't be subject to the anti-SLAPP law."

With respect to the second step of the anti-SLAPP procedure, the court found that Key failed to meet her burden to show a probability of success on her No Contest Petition. The court concluded that Key could not enforce the Trust's No Contest Clause under *section 21311* because Tyler "did not file a direct contest. Rather, she defended against a petition that Ms. Key

filed." The court also found that Key had not shown that Tyler lacked probable cause to defend the 2007 Amendment, as *section 21311* requires. The court noted that the prior judge who decided the Invalidity Petition had "indicated that it was a difficult case to decide, which, itself, gives this court, which did **[*514]** not try the case, some pause as to whether—how much of a slam dunk it was or … how much the defense was without probable cause."[5]

4. *Key's Motion for Attorney Fees*

Following remand, Key also filed a motion for the attorney fees she incurred in defending Tyler's appeal of the probate court's decision granting her Invalidity Petition. The probate court heard that motion along with the anti-SLAPP motion.

The court **[***11]** denied the motion. The court concluded that Key failed to show a legal basis for a fee award under any of the grounds that she raised, including *Probate Code section 17211, subdivision (b)*; *Civil Code section 1717*; the "common benefit" theory; the court's inherent power; or *Code of Civil Procedure section 128.5*. With respect to *Civil Code section 1717*, which addresses attorney fees authorized by contract, the court acknowledged that "a trust is a kind of contract." However, the court concluded that the pleading on which Key prevailed was "not a breach of contract case. It was a trust case. It was that she exercised—or she could not prove that it was not without undue influence."

DISCUSSION

1. *The Anti-SLAPP Procedure*

(1) *Code of Civil Procedure section 425.16* provides for a "special motion to strike" when a plaintiff asserts claims 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." **[**233]** (*Code Civ. Proc., § 425.16, subd. (b)(1)*.) Such claims must be stricken "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Ibid.*)

Thus, ruling on an anti-SLAPP motion involves a two-step procedure. First, the "moving defendant bears the burden of identifying **[***12]** all allegations of protected activity, and the claims for relief supported by them." (*Baral v. Schnitt (2016) 1 Cal.5th 376, 396 [205 Cal. Rptr. 3d 475, 376 P.3d 604]* (*Baral*).) At this stage, the defendant must make a "threshold showing" that the challenged claims arise from protected activity. (*Rusheen v. Cohen (2006) 37 Cal.4th 1048, 1056 [39 Cal. Rptr. 3d 516, 128 P.3d 713]*.)
[*515]

Second, if the defendant makes such a showing, the "burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral, supra, 1 Cal.5th at p. 396*.) Without resolving evidentiary conflicts, the court determines "whether the plaintiff's showing, if accepted by the trier of fact,

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[5] By the time of the anti-SLAPP motion, the judge who had decided the Invalidity Petition, Judge Reva Goetz, had retired. The anti-SLAPP motion was heard by Judge David J. Cowan.

would be sufficient to sustain a favorable judgment." (*Ibid.*) The plaintiff's showing must be based upon admissible evidence. (*HMS Capital, Inc. v. Lawyers Title Co. (2004) 118 Cal.App.4th 204, 212 [12 Cal. Rptr. 3d 786]*.) Thus, the second step of the anti-SLAPP analysis is a "summary-judgment-like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal.4th 180, 192 [25 Cal. Rptr. 3d 298, 106 P.3d 958]*.) In this step, a plaintiff "need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a SLAPP." (*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal.4th 260, 291 [46 Cal. Rptr. 3d 638, 139 P.3d 30]*, quoting *Navellier v. Sletten (2002) 29 Cal.4th 82, 89 [124 Cal. Rptr. 2d 530, 52 P.3d 703]*.)

(2) *Code of Civil Procedure section 425.16, subdivision (e)* defines the categories of acts that are in "'furtherance of a person's right of petition or free speech.'" Those categories include "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, **[***13]** or any other official proceeding authorized by law," and "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." (*Code Civ. Proc., § 425.16, subd. (e)(1)–(2)*.) An appellate court reviews the grant or denial of an anti-SLAPP motion under the de novo standard. (*Park v. Board of Trustees of California State University (2017) 2 Cal.5th 1057, 1067 [217 Cal. Rptr. 3d 130, 393 P.3d 905]*.)

2. *The Enforceability of No Contest Clauses*

Both parties cite to the history of legislation governing no contest clauses for its relationship to the anti-SLAPP statute and for its relevance to determining whether the No Contest Clause is enforceable against Tyler. We therefore briefly describe pertinent portions of that history.

(3) A no contest clause operates as a disinheritance device: "'[I]f a beneficiary contests or seeks to impair or invalidate the trust instrument or its provisions, the beneficiary will be disinherited and thus may not take the gift or devise provided under the instrument.'" (*Donkin v. Donkin (2013) 58 Cal.4th 412, 422 [165 Cal. Rptr. 3d 476, 314 P.3d 780]* (*Donkin*), quoting *Burch v. George (1994) 7 Cal.4th 246, 265 [27 Cal. Rptr. 2d 165, 866 P.2d 92]*.) "Such clauses promote the public policies **[**234]** of honoring the intent of the donor and discouraging litigation by persons whose expectations are frustrated by the donative scheme of the instrument." (*Donkin, at p. 422*.)
[*516]

These policies are in tension with the policy interests of "avoiding **[***14]** forfeitures and promoting full access of the courts to all relevant information concerning the validity and effect of a will, trust, or other instrument." (*Donkin, supra, 58 Cal.4th at p. 422*.) The common law of California balanced these interests by permitting the enforcement of no contest clauses so long as they were "'not prohibited by some law or opposed to public policy.'" (*Ibid.*, quoting *In re Estate of Kitchen (1923) 192 Cal. 384, 388 [220 P. 301]*.) Because they cause a forfeiture, such clauses were strictly construed. (*Kitchen, at pp. 389–390*.)

The Legislature partially codified the law concerning no contest clauses in 1989. (*Donkin, supra, 58 Cal.4th at p. 422*.) Part of the codification included the establishment of a "safe harbor" declaratory relief procedure. (*Id. at p. 423, fn. 6*.) Using that procedure, a beneficiary could

"apply to the court for a determination whether a particular motion, petition, or other act by the beneficiary would be a contest within the terms of a no contest clause." (Former § 21305, subd. (a); Stats. 1989, ch. 544, § 19, p. 1825.) A no contest clause was not enforceable against such an application so long as it "did not require a determination of the merits of the motion, petition, or other act by the beneficiary." (Former § 21305, subd. (b); Stats. 1989, ch. 544, § 19, p. 1825.)

The statutory scheme governing no contest clauses became increasingly complex over the next several **[***15]** decades. (Donkin, supra, 58 Cal.4th at pp. 423–424.) The Legislature enacted amendments "specifically identifying various types of claims for which a safe harbor proceeding was expressly available and further identifying specific types of actions against which a no contest clause was not enforceable." (Id. at p. 423.) The complexity led to uncertainty, which also contributed to the number of safe harbor declaratory relief applications. The frequency of such applications "added an additional layer of litigation to probate matters, which undermined the goal of a no contest clause in reducing litigation by beneficiaries." (Id. at p. 424.)

In 2008 the Legislature adopted recommendations of the California Law Revision Commission (Commission) by repealing the law on no contest provisions and enacting a new set of statutes. (Donkin, supra, 58 Cal.4th at p. 426; Stats. 2008, ch. 174, §§ 1, 2, p. 567.) The new legislation simplified the regulatory regime by more narrowly defining the types of challenges that *could* be subject to a no contest clause, replacing "the existing 'open-ended definition of "contest," combined with a complex and lengthy set of exceptions.'" (Donkin, at pp. 425–426, quoting Recommendation: Revision of No Contest Clause Statute (Jan. 2008) 37 Cal. Law Revision Com. Rep. (2007) p. 392 (Commission 2007 Recommendation).) The new statutes precluded the **[***16]** enforcement of no contest clauses against an "indirect" contest (i.e., a contest **[*517]** that indirectly "'attacks the validity of an instrument by seeking relief inconsistent with its terms'"). (Donkin, at p. 424, quoting Johnson v. Greenelsh (2009) 47 Cal.4th 598, 605 [100 Cal. Rptr. 3d 622, 217 P.3d 1194]; see Donkin, at p. 426.) **[**235]** The new legislation also discontinued the safe harbor procedure. (Donkin, at p. 427.)

Under current law, a no contest clause is enforceable against a "direct contest that is brought without probable cause." (§ 21311, subd. (a)(1).) Section 21310, subdivision (b) defines a "direct contest." The definition includes a "contest that alleges the invalidity of a protected instrument or one or more of its terms" based upon the "revocation of a trust pursuant to Section 15401." (§ 21310, subd. (b)(5).) "Contest" is defined as "a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced." (§ 21310, subd. (a).) A "[p]leading" is further defined as a "petition, complaint, cross-complaint, objection, answer, response, or claim." (§ 21310, subd. (d).)

3. *The Anti-SLAPP Statute Applies to Key's No Contest Petition*

There is no dispute that Key's No Contest Petition arises from statements made "before a … judicial proceeding" and "in connection with an issue under consideration or review by a … judicial body." (Code Civ. Proc., § 425.16, subd. (e)(1)–(2).) Key's No Contest Petition challenges **[***17]** Tyler's judicial defense of the 2007 Amendment against Key's successful effort to obtain a declaration that the amendment was invalid. The No Contest Petition is based on the theory that Tyler's judicial defense of the 2007 Amendment contested the validity of the Trust provisions that the amendment purported to alter, therefore authorizing Tyler's

disinheritance under the Trust's No Contest Clause and *Probate Code sections 21310* and *21311*.

Thus, Key's No Contest Petition challenges Tyler's litigation conduct. That is necessarily so because *section 21310* specifically defines a "contest" as a "pleading filed with the court." Unless proceedings to enforce no contest provisions are excluded from the scope of the anti-SLAPP statute, Tyler has met her burden under step one of the anti-SLAPP procedure to show that Key's petition arises from protected conduct.

Key claims that the anti-SLAPP statute does not apply to petitions to enforce no contest clauses because the anti-SLAPP procedure is inconsistent with the probate statutes governing such clauses. Key points out that the purpose of the anti-SLAPP procedure is to weed out meritless claims arising from protected conduct by permitting a challenge to such claims at the beginning of a lawsuit. Such a challenge necessarily **[***18]** involves "an additional layer of litigation, with associated costs and delays." She argues that this **[*518]** additional litigation is inconsistent with the Legislature's intent to streamline the resolution of no contest petitions by eliminating the safe harbor procedure in the prior law.

Division Five of this district recently rejected a similar argument. In *Urick v. Urick (2017) 15 Cal.App.5th 1182 [224 Cal. Rptr. 3d 125]* (*Urick*), the court held that "the plain language of the anti-SLAPP statute applies" to petitions to enforce no contest clauses. (*Id. at p. 1186*.) The court concluded that, although "[t]here may be valid reasons to exempt enforcement of no contest clauses from the anti-SLAPP statute," it is for the Legislature to make that decision. (*Id. at p. 1195*.)

(4) We agree with the court in *Urick*. Unlike certain other kinds of actions, the anti-SLAPP statutory scheme does not create any exception to the anti-SLAPP procedure for actions to enforce no contest clauses. (See *Code Civ. Proc., § 425.17, subds. (b)–(c)* [establishing exceptions for **[**236]** actions brought in the public interest and for certain actions based upon commercial speech].) A judicial challenge to a trust or other protected instrument involves a "writing made before a … judicial proceeding." (*Code Civ. Proc., § 425.16, subd. (e)(1)*.) An action to enforce a no contest provision is necessarily based **[***19]** upon such conduct, and therefore falls within the express statutory definition of conduct that arises from protected petitioning conduct under step one of the anti-SLAPP procedure.

While Key presents reasonable arguments for why the anti-SLAPP statute should not apply to actions to enforce no contest provisions, those arguments are for the Legislature to consider. Key points out that, based upon the statutory definition of a "contest" as a "pleading," all actions to enforce no contest clauses will necessarily be subject to the anti-SLAPP procedure. While that is so, it is simply another way of saying that all actions to enforce no contest provisions arise from protected petitioning conduct. The protection of such conduct is of course one of the goals of the anti-SLAPP statute, which our Legislature has directed "shall be construed broadly." (*Code Civ. Proc., § 425.16, subd. (a)*.) In light of that legislative directive and the stated purpose of the anti-SLAPP statute, we cannot say that this result is so "absurd" as to be "'clearly contrary to the Legislature's intent.'" (*Urick, supra, 15 Cal.App.5th at p. 1195*, quoting *Cassel v. Superior Court (2011) 51 Cal.4th 113, 136 [119 Cal. Rptr. 3d 437, 244 P.3d 1080]*.)

Our Supreme Court rejected similar arguments in *Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal.4th 728 [3 Cal. Rptr. 3d 636, 74 P.3d 737]* (*Jarrow*) in holding that the anti-SLAPP statute applies to malicious prosecution actions. **[***20]** The court recognized that "*section 425.16* potentially may apply to every malicious prosecution action, because every such action arises from an **[*519]** underlying lawsuit, or petition to the judicial branch." (*Id. at pp. 734–735*.) Nevertheless, the court concluded that the "'plain language of the statute establishes what was intended by the Legislature.'" (*Id. at p. 735*, quoting *People v. Statum (2002) 28 Cal.4th 682, 690 [122 Cal. Rptr. 2d 572, 50 P.3d 355]*.) The court also noted that giving effect to the plain statutory language "accords with the Legislature's specific decision not to include malicious prosecution claims in the statutory list of actions to which '[t]his section shall not apply.'" (*Jarrow, at p. 735*, quoting *Code Civ. Proc., § 425.16, subd. (d)*.)

Key also argues that the "availability of the anti-SLAPP procedure may result in the filing of non-meritorious contest litigation" because an unsuccessful contestant can use an anti-SLAPP motion to "evade the consequences of a meritless contest." The conclusion is questionable because a meritless contest will still be actionable if there is evidence in the second step of the anti-SLAPP procedure showing that the contestant lacked probable cause to bring the contest. In any event, if the Legislature concludes that the anti-SLAPP procedure tilts the balance involved in the regulation of no contest clauses too **[***21]** far away from "discouraging litigation" and too far toward promoting "full access of the courts to all relevant information," it can change the law. (*Donkin, supra, 58 Cal.4th at p. 422*.)

Key also makes various statutory interpretation arguments that she claims the court in *Urick* did not consider. First, she points out that the court in *Urick* correctly noted that the "'general rules of the Code of Civil Procedure do not apply when the Probate Code provides special rules.'" **[**237]** (*Urick, supra, 15 Cal.App.5th at pp. 1194–1195*, quoting *Swaithes v. Superior Court (1989) 212 Cal.App.3d 1082, 1088–1089 [261 Cal. Rptr. 41]*; see *§ 1000*.)[6] She argues that the court in *Urick* incorrectly applied that rule because it mistakenly concluded that "no provision of the Probate Code has been shown to be inconsistent with the anti-SLAPP provisions." (*Urick, at p. 1195*.)

Key argues that *section 1022* creates such inconsistency. That section provides that "[a]n affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code." (*§ 1022*.) Key claims that this provision is inconsistent with the anti-SLAPP statute because, by implication, it precludes the use of affidavits in *contested* proceedings, and **[*520]** a contested anti-SLAPP motion involves the use of affidavits.[7] We do not find an inconsistency that would preclude the use of the anti-SLAPP procedure in probate matters. **[***22]**

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[6] *Section 1000, subdivision (a)* provides that, except to the extent that the Probate Code provides applicable rules, "the rules of practice applicable to civil actions … apply to, and constitute the rules of practice" in proceedings under the Probate Code. That subdivision also directs that "[a]ll issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions." (*Ibid.*)

[7] Our discussion of affidavits applies equally to declarations, which are the statutory equivalent of affidavits. (*Code Civ. Proc., § 2015.5*.)

Key cites *Estate of Bennett (2008) 163 Cal.App.4th 1303 [78 Cal. Rptr. 3d 435]* (*Bennett*) for the proposition that *section 1022* prohibits the use of affidavits for *any* contested motion under the Probate Code. We do not believe the holding in that case stretches that far.

In *Bennett*, the probate court granted a motion to set aside a settlement agreement on the ground that it was the result of fraud and duress and provided inadequate consideration. The court ruled on the parties' declarations, rejecting the respondent's argument that the motion involved "'factual issues which require determination after [a] full evidentiary hearing during which documentary evidence and testimony will have to be presented.'" (*Bennett, supra, 163 Cal.App.4th at p. 1307*.) The appellate court reversed. The court first noted that "[i]t has long been the rule" in probate matters that "'affidavits may not be used in evidence unless permitted by statute.'" (*Bennett, at pp. 1308–1309*, quoting *Estate of Fraysher (1956) 47 Cal.2d 131, 135, 301 P.2d 848]*.) The court rejected the petitioners' argument that *Code of Civil Procedure section 2009* provided authority to decide the motion based upon the declarations, interpreting *Probate Code section 1022* to authorize the use of declarations "only in an 'uncontested proceeding.'"[8] (*Bennett, at p. 1309*.)

The "contested proceeding" at issue in *Bennett* was a motion in which the *facts asserted in the declarations* were contested. It is logical to conclude that, **[***23]** by authorizing the use of affidavits in "uncontested proceeding[s]," *section 1022* is at least impliedly inconsistent with the use of affidavits to decide contested facts. However, the anti-SLAPP procedure does not require—or even permit—a court to decide contested facts based upon affidavits. Rather, like a motion for summary judgment, a motion to strike under the anti-SLAPP statute requires a court simply to determine whether the plaintiff's showing, "if accepted **[**238]** by the trier of fact," would be sufficient to sustain a favorable judgment. (*Baral, supra, 1 Cal.5th at p. 396*.) Such a decision must be made *without* resolving evidentiary conflicts. (*Ibid.*) *Section 1022* does not conflict with the use of affidavits in such a procedure, where the truth of the facts themselves are not contested.
[*521]

At a minimum, *section 1022* is not so clearly inconsistent with the anti-SLAPP procedure that one may infer from that section that the Legislature intended to exclude probate proceedings from the scope of the anti-SLAPP statute. *Section 1000, subdivision (a)* explains that the rules applicable to civil actions apply to probate proceedings "[e]xcept to the extent that this code provides applicable rules." The Probate Code does not itself provide rules for anything akin to an anti-SLAPP procedure, or indeed **[***24]** any other procedure for a preliminary determination of the strength of a petitioner's case prior to deciding disputed facts. Under *section 1000*, the absence of such rules in the Probate Code suggests that the anti-SLAPP statute should apply.

This conclusion is consistent with the widespread use of the summary judgment procedure in probate matters. Like the anti-SLAPP statute, the statute governing summary judgment motions specifically provides for the use of affidavits. (See *Code Civ. Proc., §§ 425.16, subd. (b)(2)*, *437c, subd. (b)(1)*.) And, like the anti-SLAPP statute, the summary judgment statute does not permit the determination of contested facts based upon the affidavits, but allows a motion to be

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[8] *Code of Civil Procedure section 2009* permits the use of affidavits for a number of purposes, including "upon a motion."

granted only if there is "no triable issue as to any material fact." (Code Civ. Proc., § 437c, subd. (c).) Despite Probate Code section 1022, summary judgment proceedings in probate court are commonplace. (See, e.g., Estate of Duke (2015) 61 Cal.4th 871, 877 [190 Cal. Rptr. 3d 295, 352 P.3d 863] [appeal from summary judgment in probate court]; Katzenstein v. Chabad of Poway (2015) 237 Cal.App.4th 759, 764 [188 Cal. Rptr. 3d 461] [probate court denied a motion for summary judgment and granted a motion for summary adjudication]; Estate of Molino (2008) 165 Cal.App.4th 913, 921 [81 Cal. Rptr. 3d 512] [appeal from a summary judgment entered by the probate court]; Estate of Myers (2006) 139 Cal.App.4th 434, 436 [42 Cal. Rptr. 3d 753] [same]; Estate of Coleman (2005) 129 Cal.App.4th 380, 385 [28 Cal. Rptr. 3d 282] [same]; Estate of Cleveland (1993) 17 Cal.App.4th 1700, 1703–1704 [22 Cal. Rptr. 2d 590] [same]; Estate of Lane (1970) 7 Cal.App.3d 402, 404 [86 Cal. Rptr. 620] [same]; see also Ross & Cohen, Cal. Practice Guide: Probate (The Rutter Group 2018) ¶ 15:228, p. 15-102 ["A motion for summary judgment may, in an appropriate **[***25]** case, be particularly attractive to will proponents facing a will contest"].)

Key presents another statutory interpretation argument based upon the wording of the anti-SLAPP statute itself. That statute states that a " **[**239]** cause of action against a *person*" arising from protected conduct is subject to a special motion to strike. (Code Civ. Proc., § 425.16, subd. (b)(1), italics added.) Key argues that this language limits the anti-SLAPP procedure to actions that are in personam in nature, making it inapplicable to actions under the Probate Code, which have the character of in rem proceedings. (See Estate of Wise (1949) 34 Cal.2d 376, 385 [210 P.2d 497] [an heirship decree is "'not against persons as such, but against or upon the thing or subject matter itself'"], quoting 11A Cal.Jur. (1934) § 73, p. 135.)
[*522]

This argument, while intriguing, reads too much into the use of the term "person" in the statute and ultimately is inconsistent with the purpose of the anti-SLAPP procedure. The anti-SLAPP statute itself does not distinguish between in rem and in personam actions. It requires only that a cause of action against a "person" arise from a protected "act of the person." An action can arise from the personal exercise of a protected constitutional right whether the action is intended to impose damages **[***26]** for an alleged tort or to adjudicate the person's right to property.

Actions to enforce no contest clauses illustrate the point. While such actions determine the right to inherit particular property, by definition they also challenge the exercise of a specific protected constitutional right—the right to petition the government through the courts. Protecting that right from lawsuits that threaten to chill its exercise is of course an expressed purpose of the anti-SLAPP statute. (Code Civ. Proc., § 425.16, subd. (a).) The threat of facing a petition seeking forfeiture of an inheritance is certainly capable of chilling resort to the judicial process; indeed, that is the point of a no contest clause.

Key's argument that the anti-SLAPP statute should not apply to probate proceedings because they are in rem in nature also ignores that actions under the Probate Code can include the prospect of significant personal damages based upon individual conduct. In particular, section 859 permits damages of "twice the value of the property recovered by an action under this part" as well as attorney fees following a finding that a "person" has disposed of a decedent's property "by the use of undue influence in bad faith or through the commission of **[***27]** elder or

dependent adult financial abuse." Such an action seeking individual damages cannot fairly be characterized as anything other than an action "against a person," regardless of whether the underlying probate proceedings are conceptually in rem. (See *Greco v. Greco (2016) 2 Cal.App.5th 810, 825–826 [206 Cal. Rptr. 3d 501]* [applying the anti-SLAPP statute to a probate petition that asserted a claim for misrepresentations by a trustee].)

Like the court in *Urick*, we "appreciate the strength of the argument" in favor of exempting actions to enforce no contest provisions from the scope of the anti-SLAPP statute. (*Urick, supra, 15 Cal.App.5th at p. 1186*.) However, the decision to create such an exemption involves policy judgments that are the province of the Legislature to make. None of Key's arguments provides a ground to ignore the plain language of the anti-SLAPP statute, which applies by its terms to an action such as this. We therefore conclude that Tyler met her burden under step one of the anti-SLAPP procedure to show that Key's No Contest Petition arises from protected conduct.
[*523]

4. *Key Has Sufficiently Shown a Probability of Success Under the Second Step of the Anti-SLAPP Procedure*

Having decided that Tyler has met her burden to show that Key's claim arises from protected conduct, we must determine **[***28]** whether Key has met her burden under step two of the anti-SLAPP procedure to show a probability that she will prevail on her No Contest Petition. We conclude that she has.

Tyler presents a number of legal challenges to the viability of Key's petition. First, Tyler argues that a "direct contest" under *section 21310* must involve conduct that *initiates* a judicial action to obtain "affirmative relief." Thus, she claims that her *defense* of the 2007 Amendment against Key's effort to invalidate it was not a direct contest challenging the validity of any Trust provisions. Second, she claims that she filed her pleadings defending the 2007 Amendment in her capacity as a trustee, and her conduct therefore does not meet the statutory definition of a contest as a "pleading filed with the court by a *beneficiary*." (*§ 21310, subd. (a)*, italics added.) Finally, she claims that her conduct **[**240]** in defending the 2007 Amendment was protected by the litigation privilege. We reject each of these legal arguments.

We also conclude that Key has provided adequate evidentiary support for the merits of her No Contest Petition. Tyler claims that Key did not support her anti-SLAPP opposition with admissible evidence. However, such evidence exists in **[***29]** the form of the probate court's Statement of Decision and this court's opinion affirming it. The facts established by those decisions are sufficient to show a probability of success on Key's petition.

A. *Tyler's judicial defense of the 2007 Amendment was a "direct contest" of the Trust provisions that the 2007 Amendment purported to replace*.

Tyler's defense of the 2007 Amendment clearly falls within the scope of the Trust's No Contest Clause. As discussed above, Article 14 of the Trust operates to "specifically disinherit" any "devisee, legatee or beneficiary" who "contests either Trustor's Will, this Trust, any other trust created by a Trustor, or in any manner attacks or seeks to impair or invalidate any of their provisions." By obtaining the 2007 Amendment through undue influence and then defending that amendment in court, Tyler sought to "impair" and "invalidate" the provisions of the original Trust

that the 2007 Amendment purported to replace. The No Contest Clause therefore disinherits Tyler if it is enforceable against her.

Under *section 21311*, the No Contest Clause was enforceable only if Tyler's conduct amounted to a "'[d]irect contest'" of the Trust brought **[*524]** without probable cause. *Section 21310* defines a "direct contest" as a contest that "alleges the invalidity of a protected **[***30]** instrument or one or more of its terms" based on certain enumerated grounds, including the "revocation of a trust pursuant to *Section 15401*."[9] (*§ 21310, subd. (b)(5)*.)

Tyler's defense of the 2007 Amendment, had it been successful, would have had the effect of revoking paragraph C of article four of the Trust, which the 2007 Amendment purported to replace. Although the 2007 Amendment was labeled an amendment, by making that change its effect was to revoke Key's right to inherit 33 1/3 percent of the estate through the residual Trust and to replace it with the right to inherit "the lesser of $1,000,000, or 5% of the then Survivor's Trust Estate less any amount owed on any outstanding promissory note in favor of the Surviving Trustor." (See *Key v. Tyler I, supra, B258055*.) The effect of this change is what matters, not the label attached to it. (See *Urick, supra, 15 Cal.App.5th at pp. 1187, 1197* [rejecting the argument that the trustee's petition to "reform the trust" did not seek to invalidate it, and concluding that the effect of her action "controls over the label that she gave to the remedy that she sought"].)

Tyler's pleadings defending the 2007 Amendment by "alleg[ing] the invalidity of a protected instrument" (i.e., the original Trust) therefore met the statutory definition of a direct **[***31]** contest. (*§ 21310, subds. (a)–(b)*.) Nothing in the language of *section 21310* or *21311* suggests that a direct contest is limited to an action that a **[**241]** beneficiary *initiates*. To the contrary: Pleadings amounting to a "contest" under *section 21310* can include responsive pleadings such as a "cross-complaint, objection, answer, [or] response." (*§ 21310, subd. (d)*.)

Nor is there any reason to assume that the Legislature intended such a limitation. As Key points out, a trustee does not need judicial assistance to alter the provisions of a trust through deceptive or manipulative conduct, such as a fraudulent revocation or, as here, an amendment obtained through undue influence. Because a trust is designed to be administered by a trustee outside of probate, any judicial contest concerning a trustee's improper attempt to alter the trust will ordinarily be initiated by a beneficiary who is adversely affected by the trustee's conduct. In that case, the trustee's defense of a bogus change presents no less a threat to the settlor's intent for the distribution of his or her property than a judicial contest initiated by a beneficiary who is unhappy with the original trust terms.
[*525]

This conclusion is also supported by the case law. In *Estate of Gonzalez (2002) 102 Cal.App.4th 1296 [126 Cal. Rptr. 2d 332]* (*Gonzalez*), a beneficiary presented a 1998 **[***32]** will for probate that he had obtained from his father through undue influence. The will purported to replace a 1992 will that contained a no contest clause. The appellate court concluded that, by offering the

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[9] *Section 15401* provides that a trust may be revoked by complying with any method provided in the trust instrument, or, unless the trust explicitly provides the only method of revocation, by delivering a writing signed by the settlor to the trustee. (*§ 15401, subd. (a)(1)–(2)*.) The power of revocation includes the power to modify. (*§ 15402*; *Heifetz v. Bank of America (1957) 147 Cal.App.2d 776, 781–782 [305 P.2d 979]*.)

1998 will to probate, the beneficiary brought a "contest" seeking revocation because "the 1998 will revoked all prior wills, including the 1992 will with the no-contest clause." (*Id. at p. 1303*.) Similarly, here, Tyler's attempt to enforce the 2007 Amendment that she obtained through undue influence amounted to a direct contest seeking revocation of the pertinent terms in the original Trust.[10]

The court in *Gonzalez* cited *Estate of Bergland (1919) 180 Cal. 629 [182 P. 277]*. In that case, a beneficiary unwittingly offered a forged will for probate that purported to supersede prior wills, one of which included a no contest clause. The court held that the daughter's attempt in good faith to probate the later will did not fall within the forfeiture clause. (*Id. at p. 634*.) However, the court also noted that, "[i]f an attempt were made *knowingly* to probate a spurious will of a later date which purported to distribute the testator's estate in a manner different from that of the genuine will, such an attempt would quite certainly come within **[***33]** the language of the forfeiture clause as an attempt to defeat the provisions of the will." (*Ibid.*, italics added.)[11]

[242]** That principle applies here. Tyler defended a spurious Trust amendment in court in an attempt to defeat the provisions of the original Trust. For purposes of enforcing the No Contest Clause, it does not matter that Tyler's attempt to enforce the spurious amendment through judicial proceedings began with a petition filed by Key.
[*526]

B. *Tyler defended the validity of the 2007 Amendment in her capacity as a beneficiary*.

Tyler's argument that she defended the 2007 Amendment only in her capacity as a trustee is contradicted by the record. Tyler submitted various trial pleadings, including her trial brief, "individually" and as the trustee. In addition, following the trial, Tyler submitted a 33-page "Request for Statement of Decision or, Alternatively, Objections to Proposed Statement of Decision." The document was signed by "Attorneys for Respondent Elizabeth Plott Tyler, *as an individual*," as well as by Tyler herself as "successor trustee In Pro Per." (Italics added.) The objections disputed the evidentiary basis for the probate court's undue influence findings by defending **[***34]** the fairness of the 2007 Amendment, attacking the bases for the court's conclusion that Plott was susceptible to undue influence, and defending the propriety of Tyler's conduct.

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[10] The trial court distinguished *Gonzalez* on the ground that it was decided before the change in the governing law in 2010. Tyler makes the same argument on appeal. However, the court's reasoning in *Gonzalez*—that judicial action to enforce a new instrument obtained through undue influence amounts to a "contest" challenging the validity of the original instrument—applies equally to the definition of a direct contest under current law. (*Gonzalez, supra, 102 Cal.App.4th at p. 1303*.)

[11] The holding in *Bergland* was incorporated into the initial 1989 legislation codifying the enforcement of no contest clauses. (See Recommendation Relating to No Contest Clauses (Jan. 1989) 20 Cal. Law Revision Com. Rep. (1990) pp. 12–13 (Revision Report); former *§ 21306*, added by Stats. 1989, ch. 544, § 19, p. 1825.) The Commission characterized *Bergland* as holding that "a no contest clause is not enforceable against a person who, in good faith, contests a will on the ground of … revocation by execution of a subsequent will." (Revision Report, at pp. 12–13 & fn. 9.) That description of the good faith exception presumes that revocation through an attempt to enforce a subsequent bogus instrument would otherwise trigger a no contest provision. In place of a good faith exception, the new legislative scheme provided that a no contest clause was not enforceable against contests based on forgery or revocation that were brought with *probable cause*. (See former *§ 21306*; Stats. 1989, ch. 544, § 19, p. 1825.)

More fundamentally, under the facts established by the prior trial Tyler's conduct benefited her personally to the detriment of her duties as a trustee. A trustee is obligated to deal impartially with beneficiaries. (§ 16003.) Tyler obtained a trust amendment through undue influence that revoked the bulk of the bequest to one of the beneficiaries—her sister Key. As this court found, the evidence at the trial "supports the trial court's finding that the [2007] Amendment is nothing but [Tyler's] desire to benefit herself." (*Key v. Tyler I, supra, B258055*.) And, as discussed below, the facts established by the prior proceeding are sufficient to support a prima facie case that Tyler defended the 2007 Amendment without probable cause to do so.

It is the effect of Tyler's conduct that establishes whether she defended the 2007 Amendment solely in her capacity as a disinterested trustee, not the titles on the pleadings that she filed. In *Urick*, the court concluded there was prima facie evidence that the trustee/beneficiary in that case (Dana) filed **[***35]** a reformation petition in her capacity as a beneficiary. The court noted that the "petition was consistent with the interests of Dana as a beneficiary, not with her fiduciary duties as a trustee to the beneficiaries." (*Urick, supra, 15 Cal.App.5th at p. 1196*.) Similarly, here, Tyler's defense of the 2007 Amendment was consistent with her own interests as a beneficiary, not with her duty as a trustee to deal impartially with Key. Her pleadings defending the 2007 Amendment therefore were sufficient to trigger enforcement of the No Contest Clause.

C. *The litigation privilege does not apply to actions to enforce no contest provisions*.

Civil Code section 47, subdivision (b) codifies a privilege that applies to a "publication or broadcast" made as part of a "judicial proceeding." (*Civ. Code, **[*527]** § 47, subd. (b)*.) The principal purpose of this litigation privilege is to "afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (*Silberg v. Anderson (1990) 50 Cal.3d 205, 213 [266 Cal. Rptr. 638, 786 P.2d 365]* (*Silberg*).)

[243]** The privilege applies to all tort actions except malicious prosecution. (*Silberg, supra, 50 Cal.3d at p. 216*.) Malicious prosecution actions are excluded because the "'policy of encouraging free access to the courts … is outweighed by the policy of affording redress for individual wrongs when the requirements **[***36]** of favorable termination, lack of probable cause, and malice are satisfied.'" (*Ibid.*, quoting *Albertson v. Raboff (1956) 46 Cal.2d 375, 382 [295 P.2d 405]*.)

(5) Key argues that the litigation privilege does not apply to actions to enforce no contest clauses because its application would nullify the statutory scheme permitting such actions. We agree.

Our Supreme Court has held that the litigation privilege does not apply to various proceedings in which its application would make more specific statutes "significantly or wholly inoperable." (*Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal.4th 1232, 1246 [63 Cal. Rptr. 3d 398, 163 P.3d 89]*.) For example, the privilege does not apply to prosecutions for perjury, subornation of perjury, false report of a criminal offense, and "'attorney solicitation through the use of "runners" or "cappers."'" (*Ibid.*) The court has recognized these exceptions because of the "'rule of statutory construction that particular provisions will prevail over general

provisions.'" (*Ibid.*, quoting *In re James M. (1973) 9 Cal.3d 517, 522 [109 Cal.Rptr. 89, 510 P.2d 33]*.)

Courts of Appeal have applied the same principle in other contexts where the privilege would abrogate statutes that specifically permit particular claims. In *Komarova v. National Credit Acceptance, Inc. (2009) 175 Cal.App.4th 324 [95 Cal. Rptr. 3d 880]*, the court held that the privilege did not apply to actions for violations of the *Rosenthal Fair Debt Collection Practices Act (Civ. Code, § 1788 et seq.)*. (*Komarova, at p. 330*.) The court concluded that, by prohibiting **[***37]** particular litigation activity in connection with debt collections, that act was more specific than the litigation privilege, and that applying the privilege would make the act "significantly inoperable." (*Id. at pp. 339–340*.)

In *Begier v. Strom (1996) 46 Cal.App.4th 877 [54 Cal. Rptr. 2d 158]* (*Begier*), the court applied a similar rationale in holding that the litigation privilege did not apply to making knowingly false police reports of child **[*528]** abuse. Such reports are covered by a specific statute (*Pen. Code, § 11172*), which imposes liability for damages caused by submitting knowingly false reports. (*Begier, at p. 884*.) The court concluded that applying the litigation privilege to that conduct would "essentially nullify the Legislature's determination that liability should attach." (*Begier, at p. 885*.)

Similarly, here, applying the litigation privilege to actions to enforce no contest provisions would nullify the specific Probate Code statutes governing the enforcement of such provisions. Because *section 21310* defines a "contest" as a "pleading," if the litigation privilege applied to actions to enforce no contest clauses the privilege would *always* provide a defense to conduct for which *section 21311* would otherwise permit a forfeiture. In this case, the specific statutes in the Probate Code prevail over the litigation privilege to "avoid rendering **[***38]** a statute meaningless and ineffective." (*Begier, supra, 46 Cal.App.4th at p. 885*.)

D. *Key provided sufficient evidence showing a probability that her petition will succeed*.

As discussed above, Tyler's pleadings defending the 2007 Amendment constituted **[**244]** a "direct contest" of the Trust under *section 21310, subdivision (b)*. Under *section 21311, subdivision (a)*, Key will prevail on her petition if Tyler brought the direct contest "without probable cause."

The parties have raised a threshold issue concerning who bears the burden of proof on the issue of probable cause under *section 21311*. The issue is apparently one of first impression. While the issue is not dispositive on this appeal, it will arise on remand and we therefore consider it.

i. *Key has the burden of proof to show that Tyler lacked probable cause to defend the 2007 Amendment*.

The general rule in a civil action is that a party has the burden of proof "as to each fact essential to his claim for relief." (*Estate of Della Sala (1999) 73 Cal.App.4th 463, 470 [86 Cal. Rptr. 2d 569]* (*Della Sala*).) This principle is embodied in *Evidence Code section 500*, which provides that, "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is

asserting." The Probate Code does not establish any contrary rule, and *Evidence Code section 500* therefore applies **[***39]** to probate actions under *Probate Code section 1000*. (*Della Sala, at pp. 469–470*.)

(6) The language of *section 21311* suggests that the absence of probable cause is an essential element of Key's claim. Under *section 21311, subdivision* ***[*529]*** *(a)*, a no contest clause may "*only* be enforced" against three specific categories of contests, including a "direct contest that is brought without probable cause." (*§ 21311, subd. (a)(1)*, italics added.) Thus, the statute requires proof that a particular contest falls within the limited class of contests that the law makes subject to no contest clauses.

This language is inconsistent with Key's argument that probable cause is an affirmative defense because it "is an exception to enforcement of a no contest clause." The Legislature could have used different language establishing a presumption that a direct contest is subject to a no contest clause "except for" a direct contest brought with probable cause. It did not do so. Instead, *section 21311, subdivision (a)(1)* makes the absence of probable cause a requirement for enforcement.

Placing the burden on the one seeking enforcement of a no contest clause is also consistent with the nature of the relief the moving party is requesting. The party attempting to enforce a no contest clause seeks forfeiture of a bequest that the decedent otherwise intended for the **[***40]** person who allegedly violated the clause. The "public policy to avoid a forfeiture" underlies the requirement that a no contest clause be strictly construed. (See *§ 21312*; Commission 2007 Recommendation, *supra*, 37 Cal. Law Revision Com. Rep. at p. 379.) A similar policy to keep the threat of forfeiture from inhibiting access to the courts underlies the probable cause requirement. (See Revision Report, *supra*, 20 Cal. Law Revision Com. Rep. at p. 11 ["In favor of a probable cause exception are the policy of the law to facilitate full access of the courts to all relevant information concerning the validity and effect of a will, trust, or other instrument, and to avoid forfeiture"].) That policy counsels in favor of placing the burden of proof on the party who is seeking the "harsh penalty" of forfeiture. (See Commission 2007 Recommendation, *supra*, at pp. 369–370.)

Evidence Code section 520 also supports assigning the burden of proof to the party who claims that a beneficiary brought a contest without probable cause to do so. *Section 520 of the Evidence Code* states that a "party claiming that a person is **[**245]** guilty of crime or wrongdoing has the burden of proof on that issue." The allegation that a person has pursued baseless litigation is an accusation of wrongdoing. (See *Western Land Office, Inc. v. Cervantes (1985) 175 Cal.App.3d 724, 740 [220 Cal. Rptr. 784]* ["A tenant who claims his landlord acted with a retaliatory motive accuses the landlord of wrongdoing" **[***41]** and therefore has the burden of proof on that issue under *Evid. Code, § 520*].)

In the similar context of malicious prosecution claims, the plaintiff has the burden to prove the defendant lacked probable cause to bring the underlying **[*530]** action. (*Parrish v. Latham & Watkins (2017) 3 Cal.5th 767, 771 [221 Cal. Rptr. 3d 432, 400 P.3d 1]* ["To establish liability for the tort of malicious prosecution, a plaintiff must demonstrate, among other things, that the defendant previously caused the commencement or continuation of an action against the plaintiff that was not supported by probable cause"]; *Kassan v. Bledsoe (1967) 252 Cal.App.2d*

810, 812 [60 Cal. Rptr. 799] ["The plaintiff in an action for malicious prosecution bears the burden of proving not only termination of the earlier proceedings in his favor, but also lack of probable cause on the part of defendants"].) Like a proceeding to enforce a no contest clause, a malicious prosecution action involves allegations of baseless litigation. And, like the probable cause element in *section 21311*, the requirement to prove the lack of probable cause in malicious prosecution actions exists to "avoid improperly deterring individuals from resorting to the courts for the resolution of disputes." (*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal.3d 863, 875 [254 Cal. Rptr. 336, 765 P.2d 498]*.)

Key cites *Estate of Peterson (1999) 72 Cal.App.4th 431 [85 Cal. Rptr. 2d 110]*, which contains language suggesting that, to escape a no contest provision, the "contestant" of a will must prove that he or **[***42]** she had probable cause to bring the contest. However, the case does not explicitly concern the allocation of the burden of proof. More important, the case was decided under the prior regulatory regime, which, as discussed above, created categories of exceptions to the general rule that no contest clauses are enforceable. The statute in place at the time provided that a "'no contest clause is *not enforceable* against a beneficiary to the extent the beneficiary, with probable cause, contests a provision that benefits'" persons in certain defined categories, including a person who drafted or transcribed the instrument. (*Id. at p. 434, fn. 3*, italics added.) The former statute identifying persons against whom a no contest provision is *not* enforceable might be consistent with an exception to enforceability that constitutes an affirmative defense; the current statute identifying the *only* contests that are subject to a no contest provision is more consistent with an element of a claim seeking to enforce such a provision.[12]

Key also argues that the burden of proof on the probable cause element should be placed on the person who brought a contest because that person will be better able to assess the "facts known **[***43]** to the contestant" at the time he or she filed the contest. (*§ 21311, subd. (b)*.) However, as Witkin **[**246]** notes, the **[*531]** "greater knowledge" factor in assigning the burden of proof "does not … apply with any consistency." (See 1 Witkin, Cal. Evidence (5th ed. 2012) Introduction, § 12, p. 22.) For example, that factor does not justify placing the burden on the defendant to prove probable cause in the analogous context of malicious prosecution actions. Nor does it apply in a probate action brought by a child omitted from a decedent's will. (See *Della Sala, supra, 73 Cal.App.4th at p. 467* [rejecting the argument that "the burden of proof regarding 'what "the decedent had in mind"' when executing a will that omits a living child should be borne by the estate or the beneficiary of the will, rather than by the omitted child 'who would not have been on the scene'"].)

We therefore conclude that Key has the burden of proof to show that Tyler brought her contest of the Trust without probable cause. Nevertheless, as discussed below, we also conclude that

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[12] Key also cites a comment by the Commission concerning the proposed legislative changes in 2008 stating that "[p]robable cause is not a *defense* to the enforcement of a no contest clause" under *subdivision (a)(2)* and *(3) of section 21311*. (Commission 2007 Recommendation, *supra*, 37 Cal. Law Revision Com. Rep. at p. 403, italics added.) That subdivision is not at issue here. We do not interpret the Commission's use of the word "defense" in describing the absence of an element in other provisions to be a description of the burden of proof applicable to the probable cause element in *section 21311, subdivision (a)(1)*.

Key sufficiently met her burden to show sufficient evidence supporting her petition in opposing Tyler's anti-SLAPP motion.

ii. *The probate court's findings concerning Tyler's undue influence are sufficient evidence of a probability* ***[***44]*** *of success*.

Tyler had probable cause to contest the Trust by defending the 2007 Amendment if, at the time she brought the contest, she knew facts that "would cause a reasonable person to believe that there [was] a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery." (*§ 21311, subd. (b)*.) In this case, the "requested relief" was a finding that the 2007 Amendment was valid.

(7) Key argues that the probate court's Statement of Decision granting Key's Invalidity Petition and this court's opinion affirming the probate court's decision are sufficient to support a prima facie showing that Tyler lacked probable cause to defend the 2007 Amendment. We agree.

Tyler argues that these decisions do not satisfy Key's burden to provide admissible evidence supporting a probability of success because the factual findings in those decisions establish only that the findings were made, not the facts themselves. Citing *Sosinsky v. Grant (1992) 6 Cal.App.4th 1548, 1564–1566 [8 Cal. Rptr. 2d 552]* (*Sosinsky*), Tyler asserts that a court "may take judicial notice only of the fact that the prior court made the findings in question, not of the truth of those facts."

We agree with the general legal proposition. As the court explained in *Sosinsky* ***[***45]*** , the effect of taking judicial notice of the *truth* of facts in a prior court decision would remove an issue of fact from the current dispute **[*532]** "without resort to concepts of collateral estoppel or res judicata that would litigate whether the issue was fully addressed and resolved." (*Sosinsky, supra, 6 Cal.App.4th at p. 1564*; see *Professional Engineers v. Department of Transportation (1997) 15 Cal.4th 543, 590 [63 Cal. Rptr. 2d 467, 936 P.2d 473]* [citing *Sosinsky* in explaining that "judicial notice of findings of fact does not mean that those findings of fact are true, but, rather, only means that those findings of fact were made"].)

However, this rule does not preclude Key from relying on the probate court's prior findings as support for the merits of her No Contest Petition because collateral estoppel *does* apply here. The probate court (and this court) may properly consider the probate court's prior findings on Key's Invalidity Petition for purposes of determining the collateral estoppel effect of those findings. (*Evid. Code, § 452, subd. (d)*; *Frommhagen v. Board of Supervisors (1987) 197 Cal.App.3d 1292, 1299 [243 Cal. Rptr. 390]* **[**247]** [court may take judicial notice of court records in ruling on an issue of res judicata].)[13]

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[13] Contrary to Tyler's argument, the Statement of Decision and this court's prior opinion are also both properly part of the record on this appeal. Tyler herself submitted those decisions in support of her anti-SLAPP motion. Key also filed a request for judicial notice of both decisions in support of her opposition to the anti-SLAPP motion. Tyler objected to Key's request for judicial notice, but only on the ground that "the court may take judicial notice only of the fact that the prior court *made* the findings in question, not of the truth or falsehood of those facts." The Statement of Decision and this court's prior opinion were before the trial court, and we therefore consider them as well.

Key also filed with this court a request for judicial notice of the entire record from the prior appeal. Tyler opposes the request and argues that Key submitted only the Statement of Decision and this court's prior opinion in support of her opposition to the anti-

a. *Key has properly raised collateral estoppel on appeal*

Tyler claims that Key did not argue the collateral estoppel effect of the Statement of Decision below, pointing out that "the phrase 'collateral estoppel' is never used in her underlying **[***46]** brief." However, Key did claim generally that "Tyler is *estopped* from denying her exercise of undue influence or claiming that she had any good faith belief or probable cause to believe that her objections to Ms. Key's petition to invalidate the 2007 amendment had a **[*533]** chance of success." (Italics added.) Citing the Statement of Decision and this court's prior opinion, she also argued that "Tyler is barred by the law of the case to deny that she exercised undue influence or to claim that she had probable cause to believe that she could prevail against Ms. Key. These matters have already been established and Tyler is bound by the adverse rulings made against her."

While these references did not identify the doctrine of collateral estoppel (or issue preclusion) by name, they were certainly sufficient to apprise Tyler and the trial court of the substance of Key's argument that Tyler is bound by the results of the prior trial. Thus, there is no unfairness in considering the argument on appeal. (See *Nellie Gail Ranch Owners Assn. v. McMullin (2016) 4 Cal.App.5th 982, 997 [209 Cal. Rptr. 3d 658]* [rule that theories not raised in the trial court cannot be asserted for the first time on appeal is based on fairness to the trial court and opposing litigants]; see also *Dakins v. Board of Pension Commissioners (1982) 134 Cal.App.3d 374, 387 [184 Cal. Rptr. 576]* [evidence of prior administrative **[***47]** findings that a police officer's injuries were "'work-related'" and counsel's arguments that the pension board should therefore consider the injuries as "'service-connected'" were sufficient to raise the issue of collateral estoppel].)

[248]** Moreover, the issue that Key has raised on appeal is whether the findings in the Statement of Decision and in this court's prior opinion are sufficient to support a prima facie claim that Tyler lacked probable cause to defend the 2007 Amendment. The *contents* of those decisions are not subject to dispute. No findings of fact were necessary in the trial court for this court to determine the issues that were litigated and decided in the prior trial based on the decisions themselves. (See *Duran v. Obesity Research Institute, LLC (2016) 1 Cal.App.5th 635, 646 [204 Cal. Rptr. 3d 896]* ["the appellate court has discretion to consider issues raised for the first time on appeal where the relevant facts are undisputed and could not have been altered by the presentation of additional evidence"].)[14]

SLAPP motion. However, Tyler's own notice of motion stated that her anti-SLAPP motion was based on the "files, records and pleadings of this action." (See *Larsen v. Johannes (1970) 7 Cal.App.3d 491, 496 [86 Cal. Rptr. 744]* ["The notice of motion indicated reliance upon all the files in this action, and the pleadings incorporating the documentation. This was sufficient to bring them before the court"]; *Roth v. Plikaytis (2017) 15 Cal.App.5th 283, 291–292 [222 Cal. Rptr. 3d 850]* [abuse of discretion for trial court to refuse to consider previously filed documents that were incorporated by reference in support of a motion for attorney fees].) We therefore grant Key's request for judicial notice of the record from the prior appeal. However, as discussed below, the Statement of Decision and this court's prior opinion are themselves sufficient to identify binding findings that support a prima facie case under the second step of the anti-SLAPP procedure.

[14] Tyler also argues that Key failed to show that collateral estoppel applied because she did not inform the trial court of the specific factual findings on which she relied and failed to offer the entire trial record to establish that the findings concerned issues that were actually litigated and necessarily decided. But Key did submit the Statement of Decision itself, which is relevant extrinsic evidence of the scope of the court's prior decision. (*McClain v. Rush (1989) 216 Cal.App.3d 18, 28 [264 Cal. Rptr. 563]*, citing 7 Witkin, Cal. Procedure (3d ed. 1985) Judgments, § 256, p. 694.) In some cases—such as *Santa Clara Valley*

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b. *The collateral estoppel effect of the Statement of Decision*

(8) Collateral estoppel (also known as issue preclusion) prevents relitigation of previously decided issues. (*Samara v. Matar (2018) 5 Cal.5th 322, 326–327 [234 Cal. Rptr. 3d 446, 419 P.3d 924]* (*Samara*).) Issue preclusion applies "'(1) after final adjudication (2) of an identical issue (3) **[***48]** actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.'" (*Id. at p. 327*, quoting *DKN Holdings LLC v. Faerber (2015) 61 Cal.4th 813, 825 [189 Cal. Rptr. 3d 809, 352 P.3d 378]*.) The doctrine of issue preclusion applies to final orders in proceedings under the Probate Code. (*Code Civ. Proc., § 1908, subd. (a)(1)*; *Conservatorship of Harvey (1970) 3 Cal.3d 646, 652 [91 Cal. Rptr. 510, 477 P.2d 742]*; *Noggle v. Bank of America (1999) 70 Cal.App.4th 853, 862 [82 Cal. Rptr. 2d 829]*.)

The identical issue requirement for issue preclusion addresses whether identical factual allegations are at stake, "not whether the ultimate issues or dispositions are the same." (*Lucido v. Superior Court (1990) 51 Cal.3d 335, 342 [272 Cal. Rptr. 767, 795 P.2d 1223]* (*Lucido*).) And the "'necessarily decided'" prong means only that "the issue not have been 'entirely unnecessary' to the judgment in the initial proceeding." (*Ibid.*)

Faced with a 67-page Statement of Decision containing a detailed collection of findings and an exhaustive discussion of the evidence underlying those findings, the definition of an "issue" for purposes of issue preclusion becomes important. Because the Statement of Decision and this court's prior opinion affirming that decision were the principal items of evidence that Key proffered to show a likelihood of success on her No Contest Petition, the nature of the facts that those decisions established is important to the outcome of Key's appeal. The collateral estoppel effect **[***49]** of those decisions is also likely to be an issue on remand. We therefore begin by **[**249]** explaining the methodology that we conclude is appropriate to analyze what binding "issues" those decisions determined.

(9) Not every interpretation of every item of evidence discussed in Judge Goetz's description of her findings is necessarily binding under the doctrine of issue preclusion. Only findings on issues that are "not … '… unnecessary'" to the court's decision are binding. (*Lucido, supra, 51 Cal.3d at p. 342* [fact that the prosecution failed to prove indecent exposure as a basis for a probation violation was "'necessarily decided'" even though a probation violation was established through other, admitted conduct].)

On the other hand, findings that were important to the court's decision may be binding even if they were not themselves dispositive of an ultimate legal **[*535]** issue. Some courts have suggested that findings are binding under the doctrine of issue preclusion only if they determine issues of "ultimate fact." (See, e.g., *California Logistics, Inc. v. State of California (2008) 161 Cal.App.4th 242, 249 [73 Cal. Rptr. 3d 825]* ["Under the doctrine of collateral estoppel or issue

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Transportation Authority v. Rea (2006) 140 Cal.App.4th 1303, 1311–1312 [45 Cal. Rptr. 3d 511] (which Tyler cites)—it is necessary to review the record to determine whether an issue has been litigated and decided. But that is not so here, where the probate court issued a lengthy and detailed Statement of Decision identifying its findings and explaining their basis in the evidence.

preclusion, when an issue of *ultimate fact* has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in **[***50]** a future lawsuit" (italics added)]; *Ion Equipment Corp. v. Nelson (1980) 110 Cal.App.3d 868, 881–882 [168 Cal. Rptr. 361]*; *King v. Timber Structures, Inc. (1966) 240 Cal.App.2d 178, 183 [49 Cal. Rptr. 414]*.) In some civil cases, courts have used the term "ultimate fact" while reciting the formulation of collateral estoppel as it is applied in criminal prosecutions. (See, e.g., *California Logistics, at p. 249*, citing *Ashe v. Swenson (1970) 397 U.S. 436 [25 L. Ed. 2d 469, 90 S. Ct. 1189]*; *Lucas v. County of Los Angeles (1996) 47 Cal.App.4th 277, 286 [54 Cal. Rptr. 2d 655]*, quoting *People v. Santamaria (1994) 8 Cal.4th 903, 912 [35 Cal. Rptr. 2d 624, 884 P.2d 81]* (*Santamaria*).)[15] Other cases have used the term to distinguish between factual findings on collateral evidentiary issues and findings that are relevant to the merits of the action. (See *Ion Equipment, at pp. 881–882* [prior finding concerning the admissibility of a tape recording].)

When used to characterize the importance of factual issues decided in a prior proceeding, the distinction between "ultimate" and "evidentiary" facts is unhelpful and potentially misleading. As the Restatement **[**250]** Second of Judgments explains: "The line between ultimate and evidentiary facts is often impossible to draw. Moreover, even if a fact is categorized as evidentiary, great effort may have been expended by both parties in seeking to persuade the adjudicator of its existence or nonexistence and it may well have been regarded as the key issue in the dispute. In these circumstances the determination of the issue should be conclusive whether or not other links in the **[*536]** chain had to be forged before the question **[***51]** of liability could be determined in the first or second action." (Rest.2d Judgments, § 27, com. j, p. 261.)

Under our Supreme Court's description of the elements of issue preclusion, the relevant distinction is not between "ultimate" and "evidentiary" facts, but between findings that are unnecessary to a decision on the merits and those that *support* that decision (i.e., are "not … unnecessary" to the court's decision). (See *Lucido, supra, 51 Cal.3d at p. 342*; *Samara, supra, 5 Cal.5th at p. 326*.) Factual findings can support a decision on the merits of a claim even if they do not themselves resolve an element of the claim. (See *Ayala v. Dawson (2017) 13 Cal.App.5th 1319, 1331 [220 Cal. Rptr. 3d 917]* [prior unlawful detainer proceeding necessarily decided the issue of title even though that issue is not ordinarily germane in such a proceeding]; *Greene v. Bank of America (2015) 236 Cal.App.4th 922, 934–935 [186 Cal. Rptr. 3d 887]* [magistrate's credibility finding at a preliminary hearing in a prior criminal case was binding, as the magistrate's probable cause determination was based on that finding].)

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[15] In the particular context of criminal prosecutions, the requirement that an issue concern an "ultimate fact" refers to the elements that must be proved in a second prosecution beyond a reasonable doubt. A finding in a prior prosecution showing that the state did not meet its burden to prove an issue beyond a reasonable doubt is not binding in a subsequent prosecution if that same issue need not be proved beyond a reasonable doubt in the subsequent prosecution. (See *Santamaria, supra, 8 Cal.4th at pp. 921–922*.) Thus, for example, evidence that a criminal defendant committed a prior crime may be admissible even if the defendant was acquitted of that crime because the prosecution would not have to prove that the defendant committed the prior crime beyond a reasonable doubt for evidence of the prior act to be admissible in a later prosecution for a different crime. (*Id. at p. 921*, citing *Dowling v. United States (1990) 493 U.S. 342, 349 [107 L. Ed. 2d 708, 110 S. Ct. 668]*.) And a jury's verdict rejecting a sentencing enhancement based upon personal use of a knife does not preclude a subsequent murder prosecution based upon a theory of knife use where such knife use need not be proved for a murder conviction. (*Santamaria, at pp. 921–922*.) As these decisions demonstrate, the concept of "ultimate fact" in this context is actually based on differences in the burden of proof rather than on some abstract measure of the degree of importance of prior factual findings.

With this discussion in mind, we consider the collateral estoppel effect of the probate court's order deciding Key's Invalidity Petition by identifying express findings in the Statement of Decision concerning issues that were actually litigated and that support the decision. In doing so, we do not attempt to distinguish between evidentiary **[***52]** and "ultimate" facts.

(10) The definition of probable cause in *section 21311, subdivision (b)* requires a court to consider what a "reasonable person" would believe based upon the "facts known to the contestant" at the time of filing a contest. The Statement of Decision contains a number of findings relating to the facts known to Tyler. These findings show that, at a minimum, the probate court's prior order on Key's Invalidity Petition established that:

Tyler knew that Mrs. Plott was dependent on her for important information related to the family nursing home business.

The probate court explained that Tyler "knew that Mrs. Plott was *dependent* on her, among others, and relied on her for information related to: [¶] 1) The business side of the business, [¶] 2) Regulatory implementation and assessment of risk management, and [¶] 3) For legal advice related to litigation as these issues pertained to the businesses."

Tyler knew that Mrs. Plott was vulnerable to Tyler's threat to quit if Tyler did not obtain control over the family businesses after Mrs. Plott's death.

The probate court found that Mrs. Plott was "*depending* on [Tyler] to carry on the family businesses which Mrs. Plott considered to be her legacy."
[*537]

*Tyler controlled **[***53]** the communications between Mrs. Plott and her estate counsel*.

The probate court found that "Tyler acted as a gatekeeper between MSK and Mrs. Plott, controlling Mrs. Plott's communications with MSK and their access to her." The court also found that "[a]ll affirmative **[**251]** communications addressing dispositive terms" of the 2007 Amendment came from Tyler, Tyler's associate under her direction, or "Tyler testifying [as] to what Mrs. Plott said."

Tyler actively participated in procuring the 2007 Amendment.

The probate court found that Mrs. Plott did not attend *any* meetings with MSK related to the 2007 Amendment that were not also attended by Tyler or Tyler's associate.

Although Mrs. Plott presented a strong personality, Tyler was able to overcome her will.

The probate court based this finding in part on Tyler's conduct in "[b]ossing her mother around and losing her temper," including using her "'scary, yelling tone.'" The court concluded that Mrs. Plott was "*vulnerable in the area of her business needs and dependence on … Tyler's assistance with them*." (Italics added.)

Tyler obtained undue benefits under the 2007 Amendment.

The probate court found that the 2007 Amendment made Tyler the beneficiary **[***54]** of all the contents of the Plotts' residence, which was "contrary to all dispositive terms previously

expressed by Mrs. Plott." The court also found that Tyler obtained an undue benefit from the 2007 Amendment "in that she was gifted business assets from the remainder of the Survivor's Trust in the amount of 65%," whereas the "prior testamentary plan called for the assets to be divided equally between the three daughters." And the court found that Tyler, "by manipulating how the business assets were allocated into the Survivor's Trust, ensured that the Survivor's Trust was valued in an amount that was out of proportion to the other trusts, thus increasing Ms. Tyler's interest in the overall Trust estate."

Mrs. Plott made testamentary gifts benefiting Tyler in the 2007 Amendment that Mrs. Plott knew were not hers to give.

The probate court found that a provision in the 2007 Amendment distributing promissory notes to Tyler and Potz had the effect of canceling those **[*538]** notes. As mentioned, at the time of trial, Tyler owed almost $2.5 million in principal and interest on one of those notes. The court found that Mrs. Plott "was aware that the notes were in the Marital Trust," which was irrevocable, "yet she included these **[***55]** in the [2007] Amendment anyway." As this court concluded, through this device Tyler "received a benefit of $1,666,666, and Key suffered a loss of $833,333." (*Key v. Tyler, supra, B258055*.)

Tyler's personal financial difficulties gave her the motive to unduly influence Mrs. Plott.

The financial difficulties included her default on her $2.5 million loan, on which she had made no payments since her father's death.

Tyler intentionally withheld relevant evidence.

Based upon evidence of Tyler & Wilson's document retention, the documents produced by Tyler & Wilson, and the documents produced by MSK, the probate court found that Tyler "intentionally did not produce relevant evidence in an effort to prevent relevant evidence from being discovered related to determining the validity of the [2007] Amendment." (See *Key v. Tyler I, supra, B258055* [Tyler "failed to produce e-mails to hide her involvement"].)

The probate court on remand may identify additional relevant facts established by **[**252]** the court's prior ruling under the issue preclusion principles discussed above. However, the findings summarized above alone are sufficient to support reversal.

A court could reasonably infer from these findings that Tyler acted *intentionally* in manipulating **[***56]** Mrs. Plott and in using "excessive persuasion" on her to obtain terms in the 2007 Amendment that were not the result of Mrs. Plott's free will. (*Welf. & Inst. Code, § 15610.70, subd. (a)*; see *Prob. Code, § 86*.) Indeed, this court previously drew such an inference from the evidence in affirming the probate court's invalidity ruling. In our prior opinion, we explained that "[i]t is reasonable to infer that Mrs. Plott allowed [Tyler] to have her way because [Tyler] threatened to quit and cause the family business to fail. Or [Tyler] made Mrs. Plott's life miserable, causing Mrs. Plott to sign the [2007] Amendment 'to keep peace'… . This is evidence of an overborne will that makes the transfer to [Tyler] unfair. [Tyler's] controlling and even threatening demeanor with her elderly parent, **[*539]** coupled with [Tyler's] personal involvement in drafting the [2007] Amendment, is evidence that the unequal division of assets

contemplated by the [2007] Amendment was *solely* [*Tyler's*] *plan, not Mrs. Plott's*." (*Key v. Tyler I, supra, B258055*, italics added.)

Based on these inferences, a court could find that a reasonable person in Tyler's position would *not* have believed there was a "reasonable likelihood" that the 2007 Amendment was valid. These findings are sufficient to meet Key's **[***57]** burden under step two of the anti-SLAPP procedure.

We emphasize that the probate court's prior order is not sufficient in itself to establish that Tyler lacked probable cause as a matter of law. The legal standard for invalidating an instrument based upon undue influence and the standard for finding a lack of probable cause to *believe* the instrument was valid are different. (See *Jarrow, supra, 31 Cal.4th at p. 742* [summary judgment in favor of the defense on an underlying claim does not establish lack of probable cause as a matter of law for purposes of a subsequent malicious prosecution action].)

The findings that the probate court made in issuing its prior order also do not establish the lack of probable cause as a matter of law.[16] Although the factual findings themselves are binding, the probate court in the prior trial was not asked to decide the issue of probable cause and therefore did not draw any inferences specifically related to that issue. However, the established facts are sufficient to establish at least a prima facie case that Tyler **[**253]** lacked probable cause.[17] **[*540]**

5. *Key Is Entitled to Her Legal Fees for the Prior Appeal*

Key raises various theories supporting her claim for attorney fees for the prior appeal **[***58]** and for her argument that the probate court erred in denying her motion for those fees. We need consider only one. The plain language of Article 14 of the Trust, as interpreted above, provides for payment of her litigation expenses in resisting Tyler's contest of the Trust provisions.

We reject Tyler's claim that Key did not argue below that the Trust "is contractually obligated to pay her fees." She made precisely that argument. In her motion for attorney fees, Key pointed out that a "trust agreement is a contract," and she identified the same language in Article 14 that she cites on appeal as the basis for a fee award. She then argued that she was entitled to her attorney fees under *Civil Code section 1717* because she had "prevailed in this action on the contract." Although in the probate court she cited the reciprocal attorney fee portion of *Civil*

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[16] On the other hand, we reject Tyler's argument that the probate court's findings establish the *presence* of probable cause as a matter of law. Tyler relies on comments that the trial court made during oral arguments on the Invalidity Petition to the effect that it was a "'very hard case'" and was "'not a clear-cut decision.'" The probate court's oral comments were not final findings and cannot impeach the court's subsequent written ruling. (*Silverado Modjeska Recreation & Park Dist. v. County of Orange (2011) 197 Cal.App.4th 282, 300 [128 Cal. Rptr. 3d 772]*; *Jespersen v. Zubiate-Beauchamp (2003) 114 Cal.App.4th 624, 633 [7 Cal. Rptr. 3d 715]*.) In its final Statement of Decision, the court found that the "evidence is substantial and overwhelmingly establishes that the 2007 … Amendment is the product of undue influence." The court also stated its conclusion that the evidence of undue influence would be sufficient under a "clear and convincing evidence" standard. In ruling on Tyler's anti-SLAPP motion, the probate court erred in taking judicial notice of the prior judge's oral comments without considering whether they contradicted the court's final, written decision.

[17] Because the preclusive effect of the probate court's order on Key's Invalidity Petition is sufficient to meet her burden under step two of the anti-SLAPP procedure, we need not consider the admissibility or probative value of the Statement of Decision apart from its relevance to the issues that were previously litigated and decided.

Code section 1717 as authorization for a fee award, that section also provides general authority for the enforcement of an attorney fee provision in a contract. Her argument below was sufficient to raise the issue for the probate court's consideration.[18]

In any event, as discussed below, Key's argument raises a legal issue concerning the interpretation of a trust instrument that does **[***59]** not depend upon any disputed facts. We may consider that argument for the first time on appeal. (Blech v. Blech (2018) 25 Cal.App.5th 989, 1000, fn. 31 [236 Cal. Rptr. 3d 430] (*Blech*).)

(11) "A declaration of trust constitutes a contract between the trustor and the trustee for the benefit of a third party. … The mutual consent of the parties to the express declaration of trust constitutes a contract between them, each having rights and obligations which may be enforced by the other and by the beneficiary designated in the contract." (Estate of Bodger (1955) 130 Cal.App.2d 416, 424–425 [279 P.2d 61].) Absent disputed extrinsic evidence, the interpretation of a trust instrument is an issue of law that we consider independently. (Blech, supra, 25 Cal.App.5th at pp. 1001–1002.) The parties do not identify any relevant extrinsic evidence here, and we therefore consider the interpretation of the Trust de novo.

As mentioned, Article 14 contains the Trust's no contest provision. After setting forth the terms of that provision, the article states that "[e]xpenses to resist any contest or attack [of] any nature upon any provision of this Trust **[*541]** shall be paid from the Trust Estate as expenses of administration." As discussed above, Tyler's defense of the 2007 Amendment amounted to a contest of the Trust provisions in her capacity as a beneficiary. Given the placement of this language **[***60]** at the conclusion of the Trust's No Contest Clause, it is clear that "expenses" in that context encompass **[**254]** litigation expenses, including attorney fees. Key incurred litigation expenses, including attorney fees on appeal, in "resist[ing]" Tyler's attack on the Trust.

The language in Article 14 authorizing the payment of expenses in resisting a contest is not limited to expenses of the trustee. As Key points out, reimbursement of a trustee's litigation expenses are addressed in a different provision of the Trust. We interpret the Trust's provisions as a whole and seek to avoid an interpretation that would make any provision surplusage. (See § 21121; Blech, supra, 25 Cal.App.5th at p. 1001; Estate of Lindner (1978) 85 Cal.App.3d 219, 225 [149 Cal. Rptr. 331].) Article 14 therefore authorizes reimbursement of Key's attorney fees in defending Tyler's contest, and the trial court erred in denying Key's motion.

(12) On remand, the probate court shall consider the reasonable amount of fees to award to Key under Article 14 for her defense of the prior appeal. Pursuant to that article, the fees are to be awarded "from the Trust Estate as expenses of administration." However, the trial court has discretion under principles of equity to direct that the beneficiary responsible for the expenses of the litigation be solely responsible for **[***61]** their reimbursement. (Estate of Ivey (1994) 22 Cal.App.4th 873, 883 [28 Cal.Rptr.2d 16] ["'Where the expense of litigation is caused by the unsuccessful attempt of one of the beneficiaries to obtain a greater share of the trust property, the expense may properly be chargeable to that beneficiary's share'"], quoting Fratcher, Scott on

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[18] We also reject Tyler's argument that Key's attorney fees motion was untimely. She made that argument below and the trial court implicitly rejected it by considering the motion on the merits. Tyler does not identify any abuse of discretion in that decision and we therefore will not reconsider it on appeal.

Trusts (4th ed. 1988) § 188.4, p. 69.) On remand the trial court should therefore consider whether Key's attorney fees should be paid only from Tyler's portion of the Trust estate (if any).[19]

DISPOSITION

The probate court's orders (1) striking Key's No Contest Petition under *Code of Civil Procedure section 425.16*; (2) awarding attorney fees to prevailing parties on their motion to strike under *Code of Civil Procedure section 425.16*; and (3) denying Key's motion for attorney fees on appeal are reversed. The case is remanded for further proceedings on Key's petition and for determination of Key's reasonable attorney fees in defending Tyler's appeal in *Key v. Tyler I, supra, B258055*. On remand, the trial court shall determine whether those fees are to be paid **[*542]** solely from Tyler's share of the Trust estate (if any). Key is entitled to her costs on this appeal.

Ashmann-Gerst, J., and Hoffstadt, J., concurred.

A petition for a rehearing was denied May 7, 2019, and the opinion was modified to read as printed above. Respondents' **[***62]** petition for review by the Supreme Court was denied August 21, 2019, S256393.

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[19] Tyler claims that any enforcement of the No Contest Clause should be against her portion of the survivor's trust only. We decline to decide that issue, which relates to the scope of permissible relief under Key's No Contest Petition rather than the probate court's decision granting Tyler's anti-SLAPP motion that is the subject of this appeal.

EXHIBIT 4

Kinda v. Carpenter

Court of Appeal of California, Sixth Appellate District

June 6, 2016, Opinion Filed

H040316

Reporter
247 Cal. App. 4th 1268 *; 203 Cal. Rptr. 3d 183 **; 2016 Cal. App. LEXIS 449 ***

MARGARET L. KINDA et al., Plaintiffs and Appellants, v. SCOTT CARPENTER, Defendant and Respondent.

Notice: CERTIFIED FOR PARTIAL PUBLICATION*

Prior History: **[***1]** Superior Court of Santa Cruz County, No. CV171252, Ariadne J. Symons, Judge.

Case Summary

Overview

HOLDINGS: [1]-In a commercial tenant's defamation case against the landlord under *Civ. Code, § 45a*, the trial court improperly excluded internet provider records pertaining to IP (Internet Protocol) addresses that would have supported a finding that the landlord posted critical online consumer reviews; [2]-The trial court treated the motion in limine like a motion for nonsuit when it should have limited its assessment to the initial authentication question of whether the documents were sufficient for the trier of fact to find that the writings were what they purported to be; [3]-The trial court improperly resolved inferences against the tenant when it excluded the evidence; for example, it seemed to disregard concessions by the landlord's counsel that the records tied the posts to the landlord's home and business network or routers.

Outcome
Reversed and remanded.

Counsel: The Law Offices of John A. Schlaff and John Alan Schlaff for Plaintiffs and Appellants.

Murchison and Cumming and Edmund Gerard Farrell for Defendant and Respondent.

Judges: Opinion by Grover, J., with Rushing, P. J., and Márquez, J., concurring.

Opinion by: Grover, J.

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* Pursuant to *California Rules of Court, rules 8.1105(b)* and *8.1110*, this opinion is certified for publication with the exceptions of part I.D. of the Background and parts II.D. and II.E. of the Discussion.

Opinion

[186]** **GROVER, J.**—Commercial tenants Artisan Fine Oriental Rug Care, Inc. (Artisan), and its owners Margaret L. Kinda and Aaron Kinda (plaintiffs) sought a temporary restraining order and preliminary injunction against their landlord Scott Carpenter (defendant). The dispute centered on plaintiffs' tenancy and defendant's alleged disruption of their business. Plaintiffs alleged several contract-related causes of action based on their lease. After plaintiffs obtained a temporary restraining order, three consumer reviews criticizing Artisan and Margaret Kinda appeared on the Internet site Yelp.com (Yelp) posted from different online aliases. Plaintiffs suspected defendant was responsible for the reviews and they amended the complaint to allege **[*1271]** defamation of Artisan and Ms. Kinda. Plaintiffs also **[***2]** obtained via subpoena information purporting to identify the Internet subscriber accounts linked to the Yelp reviews.

Defendant moved in limine to exclude the evidence related to the Yelp reviews on hearsay and authenticity grounds. The trial court granted defendant's motion and later granted a directed verdict for defendant on the defamation cause of action. A jury returned a unanimous defense verdict on the contract causes of action, which included a special verdict that although defendant had breached the lease agreement no damages resulted. The trial court deemed defendant the prevailing party and granted his request for attorney's fees.

Plaintiffs contend on appeal that the trial court erred in excluding the Yelp evidence and eliminating their defamation **[**187]** cause of action. Plaintiffs also contend that had the Yelp evidence been admitted, they would have established presumed damages, which would have altered both the jury's special verdict on the contract-based causes of action and the court's prevailing party determination for the attorney's fees award.

As we explain in the published portion of this opinion, the exclusion of the Yelp evidence and the resulting disposition of the defamation **[***3]** cause of action was error.[1] In the unpublished portion of this opinion, we conclude that in light of the erroneous exclusion of plaintiffs' evidence supporting the defamation cause of action, the determination of the prevailing party and award of attorney's fees likewise must be reversed. Although we do not agree with plaintiffs that a finding of defamation per se would have necessarily furnished **[*1272]** damages for the breach

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[1] Two weeks after oral argument and submission of the case (*Cal. Rules of Court, rule 8.256(d)(1)*), appellants filed a notice of settlement, indicating the case has settled, with dismissal conditional on the fulfillment of specified terms. The parties have not yet filed a stipulation for dismissal. A valid settlement between the parties renders the appeal moot to the extent that it "effectively extinguishes the judgment from which the appeal is taken," ending both the dispute and the possibility of further, effective relief from the court. (*Ebensteiner Co., Inc. v. Chadmar Group (2006) 143 Cal.App.4th 1174, 1180 [49 Cal. Rptr. 3d 825]*.) Nonetheless, "[d]ismissal of the action **[***4]** at this extraordinarily late stage of the proceedings based on settlement or stipulation of the parties is discretionary rather than mandatory." (*Bay Guardian Co. v. New Times Media LLC (2010) 187 Cal.App.4th 438, 445, fn. 2 [114 Cal. Rptr. 3d 392]*.) The appellate court has "inherent power to retain a matter, even though it has been settled and is technically moot, where the issues are important and of continuing interest." (*Burch v. George (1994) 7 Cal.4th 246, 253, fn. 4 [27 Cal. Rptr. 2d 165, 866 P.2d 92]*; see also *Cadence Design Systems, Inc. v. Avant! Corp. (2002) 29 Cal.4th 215, 218, fn. 2 [127 Cal. Rptr. 2d 169, 57 P.3d 647]* [after settlement, court may exercise discretion and "issue an opinion 'to resolve the legal issues raised, which are of continuing public interest and are likely to recur'"].) We find this appeal presents issues of public interest that promise to recur, specifically in the emerging realm of Internet-based communications, online aliases, and questions pertaining to the admissibility of such evidence at trial. We therefore retain jurisdiction in order to resolve the issues presented.

of contract cause of action, neither can we conclude that the outcome on the contract-based causes of action would have remained unaffected by the presentation of evidence on the alleged defamation. Accordingly, the judgment must be reversed.

I. BACKGROUND

A. *Landlord-tenant Dispute*

After defendant and his company, Monterey Bay Spice Company, Inc.,[2] bought the commercial building housing plaintiffs' rug cleaning business, a series of disputes developed in which plaintiffs complained that defendant's behavior interfered with their business operations and amounted to a campaign of harassment and retaliation. Plaintiffs **[***5]** claimed that defendant's conduct, which included construction and demolition on an adjoining section of the building, requests to enter and inspect the premises, service of multiple “pay rent or quit” and similar notices, and obstructing a designated parking space, interfered with plaintiffs' business and breached the implied and express covenants of their lease. Based on defendant's alleged failure to abate the noisy construction work, on June 1, 2011, Ms. Kinda sought and received a temporary restraining order enjoining defendant's construction activities exceeding a **[**188]** stated decibel level during business hours. Ms. Kinda later obtained a preliminary injunction related to the noise, and a second preliminary injunction related to defendant's requests to enter and inspect plaintiffs' business premises.

B. *Postings on Yelp*

Yelp is an Internet website that collects and publishes online consumer reviews of businesses. (*Bently Reserve LP v. Papaliolios (2013) 218 Cal.App.4th 418, 423 [160 Cal. Rptr. 3d 423]*.) On the day the temporary restraining order issued against defendant, a negative review of Artisan appeared on Yelp, followed by two more negative reviews on the following **[***6]** two days. Each review was attributed to a different online alias.

The first review, posted on June 1, 2011 by “thomas j” stated that Artisan provided the “[w]orst service I have ever experienced” and described in detail purported delays, a price increase, and a stain that appeared on his carpets after leaving them with Artisan. The next day, a review of Artisan by “Sandy Z” warned, “watch out for the angry Lady that works there” and stated, “I am lucky in that I had a taste of this cantankerous rug hut BEFORE I actually **[*1273]** brought my carpet in for cleaning.” The third review, by “chris s,” criticized Artisan's service as “unfriendly” and shared that a purported rip in his carpet was “actually made … worse” by Artisan's attempted repair. Ms. Kinda compared the reviews to Artisan's service records and did not find any jobs or customers that corresponded to the work described in the reviews. Ms. Kinda became suspicious that they were not legitimate after noting the three reviews were posted in the days immediately following issuance of the temporary restraining order.

Plaintiffs amended their complaint to add a cause of action for defamation as to Ms. Kinda and Artisan. They alleged that defendant, **[***7]** his company, and Does 1 through 10 “commenced a campaign of defamation” on or about June 1, 2011, against Ms. Kinda and Artisan “whereby

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[2] Monterey Bay Spice Company, Inc., settled with plaintiffs before trial and is not a party to the appeal.

they pretended to be customers of [p]laintiffs and published false statements online summarizing a fictional and disappointing experience with [p]laintiff's business." Citing *Civil Code section 45a*, Ms. Kinda and Artisan alleged that the statements were false and libelous on their face because the reviews subjected them to "ridicule and obloquy" and sought to injure their reputation in the fine rug cleaning and care industry by imputing a lack of integrity, professionalism, and competence. Defendant denied the allegations against him and specifically denied any responsibility for the Yelp reviews.

Plaintiffs tried to discover the identity of the person or persons responsible for the Yelp reviews. Plaintiffs subpoenaed Yelp! Inc. for business records and obtained the e-mail addresses and IP addresses[3] associated with the three reviews at issue. The "thomas j" and "Sandy Z" posts shared the same IP address, which was associated with an Internet account registered to Comcast Corporation (Comcast). The "chris s" post came from a different IP address associated with an AT&T Internet Services (AT&T) account.

[189]** Plaintiffs requested from Comcast and AT&T the subscriber information associated with the IP addresses at the time of the June 2011 Yelp posts. AT&T responded with the "IP Assignment Details" for the relevant time frame and IP address, as well as "Customer Account Details" for an inactive account that had been registered to "Scott D. Carpenter" and billed to an address in Santa Cruz, California. The address was the location of defendant's business offices at the time. Comcast eventually responded that due to its record retention system, it could not verify the IP address information for **[*1274]** any date before July 27, 2011, but Comcast provided the subscriber information for the IP addresses as of that date. The subscriber listed was Scott Carpenter. The service address for the subscriber account was defendant's home address.

In connection with this information and **[***9]** possible punitive damages on their defamation claim, plaintiffs sought an order to allow pretrial discovery on defendant's financial condition.[4] The judge who heard the motion found the IP address evidence to be circumstantial yet compelling. The court referred to the evidence as a "series of coincidences" whereby "the negative reviews on Yelp were traced to the defendant's internet protocol addresses." The court explained: "[A]lthough the defendant makes an interesting argument that it's not conclusively shown that Mr. Carpenter himself provided these reviews … , the circumstantial evidence in this case and the only reasonable interpretation that this Court comes to is that it is highly likely that the defendant is the one that is responsible for these reviews and it's not just a coincidence." The court granted the discovery motion but cautioned that any findings were "only for this motion for discovery" and were not to be viewed as binding on any trier of fact.

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[3] **[***8]** An IP address (Internet Protocol address) is a "'unique identifier'" that functions "'much like [a] Social Security number[] or telephone number[],'" each corresponding to "'a specific entity connected to the Internet.'" (*Kleffman v. Vonage Holdings Corp. (2010) 49 Cal.4th 334, 337 [110 Cal. Rptr. 3d 628, 232 P.3d 625]* (*Kleffman*), quoting *National A-1 Advertising, Inc. v. Network Solutions, Inc. (D.N.H. 2000) 121 F.Supp.2d 156, 159* (*National A-1*); see also ***U.S. v. Forrester (9th Cir. 2008) 512 F.3d 500, 510, fn. 5*** ["Every computer or server connected to the Internet has a unique IP address"].)

[4] *Civil Code section 3295* authorizes a court to order pretrial discovery of a defendant's financial condition if "the plaintiff has established that there is a substantial probability" of prevailing on the claim. It expressly provides that the order "shall not **[***10]** be considered to be a determination on the merits of the claim or any defense thereto and shall not be given in evidence or referred to at the trial." (*Civ. Code, § 3295, subd. (c)*.)

C. *Motions in Limine and Trial*

A different judge presided over pretrial motions and trial. Defendant moved in limine to exclude evidence of and reference to the Yelp posts on the grounds that the posts were inadmissible hearsay and unauthenticated. After hearing from counsel, the court dispensed with the hearsay argument and focused on what was termed authentication: "[Y]ou have to put on some sort of evidence that ties [the Yelp posts] to the defendant and authenticates it. [¶] … [¶] How are you going to tie it to the defendant, please?" Plaintiffs' counsel responded that the Yelp posts, memorialized as printouts of the online reviews, were "self-authenticating" under *Evidence Code section 1552*. To tie those reviews to defendant, plaintiffs would offer the subpoenaed records from AT&T and Comcast, authenticated by the respective custodians of records. Plaintiffs' counsel argued that by using the subpoenaed records, they could show sufficient circumstantial evidence from which the jury could reasonably infer that defendant posted the reviews.

Defendant's counsel **[***11]** disagreed, arguing that the subpoenaed documents "indicate that the users who posted these IDs accessed the internet and the **[*1275]** Yelp website using an IP address that was assigned to Scott Carpenter's routers, one at his home, one at his business," but that "there is absolutely no way of connecting the posts to a specific computer either in his home **[**190]** or his business or to a specific user." Defendant's counsel explained that "anyone on any computer within [defendant's] office would have the exact same IP address, no matter which computer was being used, as well as anybody who was using the computer at Mr. Carpenter's house at the time, anything posted is going to come back to the exact same IP address. … So you could have had a dozen employees all on the computer at the same time, one of whom may have posted this, but you can't identify who it is. Just the same as you can't say that somebody sat outside of his house and jumped on his internet connection, because they were unsecured."

Defendant's counsel urged it was insufficient to have merely the IP address of a router that was assigned to defendant's address, because "[w]hether that router was at his home at the time, whether or not, you know, **[***12]** a neighbor accessed it, whether or not, you know, somebody else was within distance … that's just what the circumstance[] was here. … [I]t does not come close to proving that it was Scott Carpenter himself [who] posted these reviews. And that's absolutely the first question that has to be answered in order to establish defamation."

The court stated that it would require expert testimony under *Evidence Code section 402* before allowing the Yelp evidence at trial and that it would not entertain argument on circumstantial evidence without having its concerns about authenticity addressed. Plaintiffs lodged the deposition testimony of their expert, Ron Herardian, and submitted supplemental briefing on the admissibility of the Yelp evidence. At the evidentiary hearing, the trial court remained skeptical that the evidence could tie the Yelp posts to defendant. The court noted the Comcast records only showed the relevant IP address assigned to Scott D. Carpenter as of July 27, 2011, more than one month after the Yelp reviews posted. The court rejected plaintiffs' assertion that Mr. Herardian's testimony could show the IP address assigned in late July 2011 was "more likely than not" the same as that assigned in June **[***13]** 2011.

The court identified a similar problem with the AT&T records showing Scott D. Carpenter's name and address in response to the subpoena requesting subscriber information linked to the IP

address at issue. Based on the appearance of the AT&T record, which referenced defendant's name in one place on the document, and dates of service and billing address in another, the court rejected plaintiffs' argument that the expert could interpret the record to show defendant was the subscriber with the IP address in question on the relevant date. The trial court also rejected plaintiffs' argument that deposition testimony, in which defendant acknowledged that the e-mail **[*1276]** address associated with the AT&T account belonged to defendant's former employee whose e-mail remained with the company after the employee left, remedied the foundational issues.

The trial court granted defendant's in limine motion, stating, “I'm keeping out all of these Yelp allegations. I don't find that you've met the foundational requirements for these matters.” It explained its reasoning as to the Comcast and AT&T records: “I'm not going to allow the Comcast records in. The custodian of records certifies them beginning July **[***14]** 27th, 2011, and we have no information before us about anything preceding that time. I do not agree that Mr. Herardian can make that leap. He certainly can explain things regarding access to routers and IP addresses and things like this, but the foundation still must be laid for the records. It could have been done, you just have the **[**191]** wrong witness, in this Court's opinion. … So I'm not going to allow any reference to the Comcast IP address, and therefore those two reviews from that time. [¶] Now, with respect to AT&T, I think there's the same foundation flaw. Your expert in his testimony said ‘I assumed that the billing address is the same as the service address.’ And I don't think one can assume such [an] important foundational fact. Looking at the deposition, Mr. Carpenter says, ‘I used to have an employee of this name and she had an email, and she hasn't worked for me in years, and we have changed our system since then.’ So I don't see that this deposition contains anything which surmounts the foundational gaps.”

After trial began, the court granted defendant's request for a directed verdict on the defamation cause of action based on a failure of evidence. The remaining causes **[***15]** of action for breach of contract, breach of the implied covenant of quiet enjoyment, and breach of the covenant of good faith and fair dealing were tried to the jury as discussed in greater detail below. The jury unanimously found for defendant on all three contract-based causes of action. On the verdict form for breach of contract, the jury marked that defendant violated the lease (“d[id] something that the contract lease prohibited him from doing”) as to each plaintiff, but found that no harm resulted.

D. *Trial of the Contractual Causes of Action*[*] [NOT CERTIFIED FOR PUBLICATION]

E. *Determination of Prevailing Party and Attorney's Fees Award*

Following the defense verdict and entry of judgment, defendant moved for attorney's fees and costs as the prevailing party under the contract. After **[*1277]** extensive briefing and argument over the course of two hearings, the trial court deemed defendant the prevailing party for all purposes. The court made several adjustments to defendant's total and denied defendant's request for a multiplier. The court awarded defendant a total of $219,086.00 in fees and costs.

II. DISCUSSION

[*] See footnote, *ante*, page ___.

Plaintiffs challenge the exclusion of the Yelp evidence on three grounds: (1) the basis **[***16]** for the ruling exceeded the grounds for relief stated in the motion; (2) the trial judge improperly reconsidered the previous ruling allowing financial discovery; and (3) the trial court applied the wrong standard in finding an absence of foundation for the records.

A. *The Trial Court Did Not Err in Ruling on Grounds Not Stated in Defendant's Motion in Limine*

Plaintiffs argue the trial court exceeded its jurisdiction when it ruled on defendant's motion based on grounds that were not stated in the moving papers. A basic tenet of motion practice is that the notice of motion must state the grounds for the order being sought (*Code Civ. Proc., § 1010*; *Cal. Rules of Court, rule 3.1110(a)*), and courts generally may consider only the grounds stated in the notice of motion (*Luri v. Greenwald (2003) 107 Cal.App.4th 1119, 1125 [132 Cal. Rptr. 2d 680]* (*Luri*)). For example, in *People v. American Surety Ins. Co. (1999) 75 Cal.App.4th 719, 726 [89 Cal.Rptr.2d 422]*, the appellate court rejected the argument that a surety's motion to vacate forfeiture of bail bond provided sufficient notice of a request for an extension of the statutory period following forfeiture, because the notice of motion to vacate made no reference **[**192]** to an extension being sought or the grounds for that relief.

The purpose of the notice requirements "is to cause the moving party to 'sufficiently define the issues for the information and attention **[***17]** of the adverse party and the court.'" (*Luri, supra, 107 Cal.App.4th at p. 1125*, quoting *Hernandez v. National Dairy Products (1954) 126 Cal.App.2d 490, 493 [272 P.2d 799]*.) Sometimes this purpose is met notwithstanding deficient notice. For example, it may be sufficient that the supporting papers contain the grounds for the relief sought, even if the notice does not. (*Luri, at p. 1125*; *366–386 Geary St., L.P. v. Superior Court (1990) 219 Cal.App.3d 1186, 1200 [268 Cal. Rptr. 678]*.) It also may be sufficient if the omitted issue, or ground for relief, was raised without objection before the trial court. (*Fredrickson v. Superior Court (1952) 38 Cal.2d 593, 598 [241 P.2d 541]* ["accepting petitioner's claim that the notice of motion was insufficient, the grounds were raised without objection in the trial court at the hearing on the motion"].)
[*1278]

Defendant's motion referenced only hearsay and authenticity as grounds for excluding the Yelp posts. Although the trial court's inquiry extended beyond those grounds, plaintiffs never objected to the broadened scope, and they had ample opportunity to respond to the grounds raised by the trial court. Unlike *Luri*, where by omitting the specific statutory grounds for relief a motion risked depriving the opposing party of the opportunity to provide relevant information in response (*Luri, supra, 107 Cal.App.4th at pp. 1125–1126*), plaintiffs here fully developed their opposition to the court's broadened inquiry in their supplemental memorandum and offer of proof.

These circumstances also are **[***18]** distinguishable from a ruling on a motion in limine that deprives the nonmoving party of any opportunity to address issues that were raised outside of the notice and motion. (*Cf. Blanks v. Seyfarth Shaw LLP (2009) 171 Cal.App.4th 336, 376 [89 Cal. Rptr. 3d 710]* [trial court erred in ignoring the grounds presented in the motion in limine and ruling on the ultimate issue of negligence without giving "the parties an opportunity to address the facts required to assess" that ultimate issue].) We conclude plaintiffs had a fair opportunity to brief and present their evidence in response to the court's extensive inquiry.

B. *The Trial Court Did Not Improperly Reconsider a Prior Court Ruling*

Plaintiffs argue that the trial court's inquiry into the Yelp evidence improperly functioned as a reconsideration of the issues previously decided by a different judge in plaintiffs' motion for financial discovery. *Code of Civil Procedure section 1008* places strict jurisdictional limits on a litigant's ability to seek reconsideration of a prior ruling. (*Code Civ. Proc., § 1008, subd. (a)* [application for reconsideration of prior, interim court order must be made within 10 days of entry of the order and be based "upon new or different facts, circumstances, or law"].) Any application for reconsideration must comply with the provisions of *section 1008* in order for the **[***19]** court to consider the request. (*Id.*, *§ 1008, subd. (e)*.)

Plaintiffs rely on two cases. *Curtin v. Koskey (1991) 231 Cal.App.3d 873 [282 Cal. Rptr. 706]* (*Curtin*) involved a judgment of dismissal for failure to prosecute, which the trial court granted only weeks after another judge in the same court granted the plaintiffs' request for preferential trial setting. The appellate court reversed, noting that "the considerations in a motion for preferential trial setting are the same as **[**193]** the considerations in a motion to dismiss," and depending on the basis for the first judge's ruling, the motion to dismiss actually should have been styled as a motion for reconsideration of the ruling on preferential trial setting. (*Id. at pp. 877–878*.) The second case, *Morite of California v. Superior Court (1993) 19 Cal.App.4th 485 [23 **[*1279]** Cal. Rptr. 2d 666]* (*Morite*), involved a writ proceeding concerning insurance coverage for individuals named as defendants in a related wrongful termination case. One judge stayed the insurance coverage action pending resolution of the related case. (*Id. at pp. 488–489*.) At a later status conference, a different judge set for trial certain causes of action in the coverage case. (*Id. at p. 489*.) The appellate court found that the second judge had "circumvented the jurisdictional limits of *section 1008, subdivision (e)* by consciously ignoring the stay order which had been entered by a predecessor judge of the same court" **[***20]** and entering an order that "does not specifically lift the stay … but, by implication, has the same [e]ffect." (*Morite, supra, at p. 492*.)

We do not find either case applicable here to the trial court's treatment of defendant's in limine motion relative to the earlier discovery ruling. In both *Curtin* and *Morite*, the later ruling imposed a course of action in direct conflict with the earlier ruling. In *Curtin*, the dismissal for failure to prosecute effectively overrode the granting of a preferential trial setting (*Curtin, supra, 231 Cal.App.3d at pp. 877–878*); in *Morite*, the setting of trial conflicted with the earlier stay (*Morite, supra, 19 Cal.App.4th at p. 492*). Plaintiffs fail to explain how the exclusion of the Yelp evidence effectuates a reconsideration, modification, or revocation of a prior order. (See *Code Civ. Proc., § 1008*.) The findings of the judge who granted financial discovery were expressly made "only for this motion for discovery" and carried no binding effect. That judge's observations about the circumstantial evidence in relation to the defamation cause of action did not limit a later court's ability to rule on admissibility of the same evidence at trial.

C. *The Trial Court Erred in Excluding the Yelp Evidence*

Plaintiffs argue that the trial court's exclusion of the Yelp evidence deprived them of **[***21]** the opportunity to present their defamation case to the jury, while defendant contends that plaintiffs effectively abandoned the defamation cause of action after the evidentiary ruling.

1. *Standard of Review*

Plaintiffs correctly state that if the trial court's ruling on a motion in limine precludes an entire cause of action, the ruling is subject to independent review on appeal as though the court had granted a motion for nonsuit. (*Dillingham-Ray Wilson v. City of Los Angeles (2010) 182 Cal.App.4th 1396, 1402 [106 Cal. Rptr. 3d 691]* (*Dillingham-Ray Wilson*); *Amtower v. Photon Dynamics, Inc. (2008) 158 Cal.App.4th 1582, 1595 [71 Cal. Rptr. 3d 361]* (*Amtower*).) Under those circumstances, the appellate court "review[s] the court's order de novo, examining the record in the light most favorable to the party offering the evidence." (*City of Livermore v. Baca (2012) 205* ***[*1280]*** *Cal.App.4th 1460, 1465 [141 Cal. Rptr. 3d 271]*.) That is, "all inferences and conflicts in the evidence must be viewed most favorably to the nonmoving party." (*Amtower, at p. 1595*.) Any significant error of law that prevented the nonmoving party from offering evidence to establish its case will warrant reversal. (*Kelly v. New West Federal Savings (1996) 49 Cal.App.4th 659, 677 [56 Cal. Rptr. 2d 803]* **[**194]** [error that results in denial of a fair hearing is reversible per se].) A motion for directed verdict, as was granted here, is subject to the same standard of review on appeal as a motion for nonsuit. (*County of Kern v. Sparks (2007) 149 Cal.App.4th 11, 16 [56 Cal. Rptr. 3d 551]*.) Both are ""'in the nature of a demurrer to the evidence, and [are] governed by practically the same rules, and **[***22]** concede[] as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom."'" (*Brassinga v. City of Mountain View (1998) 66 Cal.App.4th 195, 210 [77 Cal. Rptr. 2d 660]*, quoting *Estate of Lances (1932) 216 Cal. 397, 400–401 [14 P.2d 768]*.)

(1) We are not persuaded by defendant's argument that exclusion of the Yelp evidence on foundational grounds did not preclude plaintiffs from offering evidence regarding the alleged defamation. The tort of defamation "requires the intentional publication of a false statement of fact that has a natural tendency to injure the plaintiff's reputation or that causes special damage." (*Burrill v. Nair (2013) 217 Cal.App.4th 357, 383 [158 Cal. Rptr. 3d 332]*.) Here, the online reviews were the sole alleged source of defamation. Plaintiffs obtained, via subpoena, the IP addresses associated with the online posts, which information was authenticated by the Yelp! Inc. custodian of records. An IP address standing alone, however, is nothing more than a string of "'four sets of numbers separated by periods.'" (*Kleffman, supra, 49 Cal.4th at p. 337*, quoting *Kremen v. Cohen (9th Cir. 2003) 325 F.3d 1035, 1038*.) "'IP addresses function much like Social Security numbers or telephone numbers: each IP address is unique and corresponds to a specific entity connected to the Internet.'" (*Kleffman, at p. 337*, quoting *National A-1, supra, 121 F.Supp.2d at p. 159*.) But that entity cannot be identified without corresponding information from the Internet Service Provider **[***23]** responsible for assigning the IP address in question.

It is this corresponding information, the Comcast and AT&T records pertaining to the IP addresses, which was excluded and without which plaintiffs could not prove defamation. The trial court's statement following its ruling on the motion confirmed this: "I'm keeping out all of these Yelp allegations. I don't find that you've met the foundational requirements for these matters." Plaintiffs later asked the trial court to clarify the effect of the in limine ruling, and defendant urged he was entitled to a directed verdict on the defamation cause of action, which the trial court eventually granted.
[*1281]

These circumstances are analogous to cases in which the appellate court reviewed the exclusion of evidence on a motion in limine as it would a nonsuit. One such case is *R & B Auto*

Center, Inc. v. Farmers Group, Inc. (2006) 140 Cal.App.4th 327, 332 [44 Cal. Rptr. 3d 426] (*R & B Auto Center*), in which a used car dealership sued several insurer defendants after they sold lemon law insurance to the dealership and later denied the coverage. The appellate court found the trial court had made "numerous erroneous rulings" on motions in limine, the effect of which "largely gutted the dealership's case." (Id. at pp. 332–333.) For example, one in limine motion expressly **[***24]** sought to exclude "any evidence pertaining" to an unfair competition cause of action, and another sought to exclude the testimony of witnesses who also had been sold unusable coverage. (Id. at pp. 356–358.) The appellate court determined that granting these motions had the effect of "excluding nearly all **[**195]** of the evidence that would have shown the alleged pattern and practice underlying the unfair competition claim." (Id. at p. 358.) Had the witnesses been allowed to testify, "a trier of fact potentially could find [the defendant] engaged in unfair business practices" such that the trial court could not say, resolving all inferences and doubts in favor of the plaintiff, that judgment on the unfair competition cause of action was required as a matter of law. (Id. at p. 359.)

Although the trial court's exclusion of the Yelp evidence on foundational grounds was narrower than the multiple broad motions in limine granted in *R & B Auto Center*, the result here—a directed verdict on the defamation cause of action—had the same effect. (See R & B Auto Center, supra, 140 Cal.App.4th at p. 333 [cautioning against "wholesale disposition" of a case or causes of action through rulings on motions in limine].) Also instructive is Dillingham-Ray Wilson, supra, 182 Cal.App.4th at page 1401, in which the trial court ruled in limine to exclude the plaintiff **[***25]** from presenting its total cost claim of millions of dollars to the jury because its evidence on damages was insufficient and based on a theory not recognized in California. Applying independent review, the appellate court disagreed with the trial court's conclusions and remanded for trial on the excluded damages claims. (Id. at p. 1400; see also City of Livermore v. Baca, supra, 205 Cal.App.4th 1460 [trial court erred in excluding all evidence of severance damages in eminent domain challenge, requiring reversal].)

Defendant cites Katiuzhinsky v. Perry (2007) 152 Cal.App.4th 1288 [62 Cal. Rptr. 3d 309] (*Katiuzhinsky*) to argue that an abuse of discretion standard should apply. *Katiuzhinsky*, however, involved an in limine ruling that erroneously limited the plaintiffs' damages evidence to certain, discounted medical expenses, rather than allowing the jury to consider all the available evidence of medical expenses. (Id. at p. 1295.) As noted in *Dillingham-Ray Wilson*, abuse of discretion review is appropriate when, like in *Katiuzhinsky*, "an in limine ruling does not preclude an entire claim but instead limits the **[*1282]** evidence that will be offered to prove a claim." (Dillingham-Ray Wilson, supra, 182 Cal.App.4th at p. 1403.) The damages verdict in *Katiuzhinsky* was based on a partial presentation of the plaintiffs' medical bills, whereas here no evidence of Ms. Kinda and Artisan's defamation cause of **[***26]** action reached the jury. (Katiuzhinsky, supra, at p. 1291.)

We will independently review the granting of defendant's motion in limine, viewing the record in the light most favorable to plaintiffs and determining whether the evidence and inferences were sufficient to support a judgment in defendant's favor.

2. *The Trial Court's Analysis of Defendant's Motion*

Motions in limine are "designed to facilitate the management of a case, generally by deciding difficult evidentiary issues in advance of trial." (*Amtower, supra, 158 Cal.App.4th 1582, 1593*.) Their ""usual purpose … is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party."" (*Ibid.*) As we have explained, the use of the in limine process to dispose of a case or cause of action for evidentiary reasons triggers a more rigorous standard of review in which we consider whether the nonmoving party has had a full and fair opportunity to state all the facts in its favor. (*Id. at p. 1595*.) **[**196]** All inferences and conflicts in the evidence must be resolved in favor of the nonmoving party. (*Ibid.*) "No matter how logical a moving party's motion may sound, a judge generally should not be weighing the evidence on a motion in limine." (*R & B Auto Center, supra, 140 Cal.App.4th 327, 333*.)

The appellate court in *Amtower* examined the pitfalls that **[***27]** can result from "us[ing] the in limine process to examine the sufficiency of the evidence," including the loss of certain procedural protections provided by statutory motions or by trial on the merits. (*Amtower, supra, 158 Cal.App.4th at pp. 1593–1594*.) The court distinguished this nontraditional, nonstatutory use of in limine motions from traditional in limine motions, noting "[t]he risk of reversal arises when appellate courts are required to review a dispositive ruling on an in limine motion as if it were the product of a motion for nonsuit after opening statement." (*Id. at p. 1594*.) Thus, in *Amtower*, which arose out of the merger of two companies, the court upheld the trial court's dismissal of the plaintiff's cause of action for a section 11 federal Securities Act of 1933 (*15 U.S.C. § 77a et seq.*) violation on an in limine motion only after concluding, as a matter of law, that the plaintiff "could not have prevailed under any circumstances." (*Amtower, at p. 1595*.) The court reached this conclusion after reviewing the requirements of a section 11 claim and the plaintiff's concession that he had seen and read key disclosure statements—facts that "conclusively demonstrate[d] that plaintiff had actual knowledge" **[*1283]** of material omissions in the defendant's filing, triggering the one-year statute of limitations. (*Amtower, at p. 1596*.) Because the plaintiff did not **[***28]** file his complaint until "well over a year after he admittedly read all the pertinent documents," the court found that despite the disfavored use of a motion in limine to dispose of an entire cause of action, "the inescapable conclusion is that the section 11 claim was barred by the statute of limitations as a matter of law. There is no evidence that plaintiff could produce that would change this result. Accordingly, there was no issue for the jury to decide and the trial court properly dismissed the section 11 claim." (*Id. at pp. 1596–1597*.)

In contrast, plaintiffs here argue the trial court erred in analyzing the in limine motion by applying all possible inferences *against* plaintiffs as the nonmoving party, in effect circumventing the procedural protections that should have applied. (See *Amtower, supra, 158 Cal.App.4th at p. 1594*.) The issue presented to the trial court was the question of authenticity of the Comcast and AT&T records; the issue ultimately decided by the court was the sufficiency of evidence implicating defendant. The trial court failed to apply the appropriate standard, even as it considered the motion to be dispositive of the defamation cause of action.

Defendant's motion argued the Yelp posts, offered as webpage printouts, were "not authenticated" **[***29]** and plaintiffs had not identified a custodian from Yelp's records department to authenticate the documents. Plaintiffs responded that the Yelp web posts could be authenticated under *Evidence Code section 1552*, by which a printed representation of computer-generated information is presumed to be an accurate representation of that

information at the time it was printed. Plaintiffs' offer of proof also stated that Ms. Kinda and another individual would testify to having seen the reviews online.

(2) Our Supreme Court has explained that "[a]uthentication is to be determined by the trial court as a preliminary **[**197]** fact [*Evid. Code, § 403, subd. (a)(3)*] and is statutorily defined as 'the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is' or 'the establishment of such facts by any other means provided by law' [*§ 1400*]." (*People v. Goldsmith (2014) 59 Cal.4th 258, 266 [172 Cal. Rptr. 3d 637, 326 P.3d 239]* (*Goldsmith*).) "Authentication is essentially a subset of relevance." (*Id. at p. 267*.) The proof necessary for authentication depends on "the purpose for which the evidence is being offered" and requires a foundation of "sufficient evidence for a trier of fact to find that the writing is what it purports to be." (*Ibid.*) Critical to our analysis is the general admonition that "'[a]s long as the evidence **[***30]** would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.'" (*Ibid.*, quoting *Jazayeri v. Mao (2009) 174 **[*1284]** Cal.App.4th 301, 321 [94 Cal. Rptr. 3d 198]*.) Thus, in *Goldsmith*, the court concluded that the presumptions of authenticity under *Evidence Code sections 1552* and *1553* "partly, but not completely, supply the foundation for admission of" evidence generated by an automated traffic enforcement system. (*Goldsmith, at p. 268*.)

California courts have applied these authentication principles before and after *Goldsmith* to evidence from online and social media sources. For example, under *Evidence Code section 1552*, a printout of a purported gang roster was "presumed to be an accurate representation of the [w]eb page" that a witness testified to seeing and printing off of the Internet. (*People v. Beckley (2010) 185 Cal.App.4th 509, 517 [110 Cal. Rptr. 3d 362]*.) But the presumption did not extend to authenticate the *content*, which the court found required independent evidence of reliability and was inadmissible as evidence of gang membership. (*Id. at pp. 517–518*.) In *People v. Valdez (2011) 201 Cal.App.4th 1429 [135 Cal. Rptr. 3d 628]*, the court rejected the defendant's authentication challenge to the prosecution's introduction of a "MySpace social media Internet page," which the prosecution's gang expert had relied on. (*Id. at p. 1431*.) The court reasoned: "Although Valdez **[***31]** was free to argue otherwise to the jury, a reasonable trier of fact could conclude from the posting of personal photographs, communications, and other details that the MySpace page belonged to him. Accordingly, the trial court did not err in admitting the page for the jury to determine whether he authored it." (*Id. at p. 1435*.) The court emphasized that "the proponent's threshold authentication burden for admissibility is *not* to establish validity or negate falsity in a categorical fashion, but rather to make a showing on which the trier of fact reasonably could conclude the proffered writing is authentic." (*Id. at p. 1437*.) Similarly in *In re K.B. (2015) 238 Cal.App.4th 989, 997 [190 Cal. Rptr. 3d 287]*, the court found incriminating photographs from a cell phone, including website screenshots, were sufficiently authenticated, noting the "ultimate determination of the authenticity … is for the trier of fact, who must consider any rebuttal evidence and balance it against the authenticating evidence in order to arrive at a final determination … ."[9]

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[9] Courts in other jurisdictions have drawn similar conclusions. The Delaware Supreme Court in *Parker v. State (Del. 2014) 85 A.3d 682* addressed the authentication and admissibility of social media evidence, specifically Facebook posts. After surveying decisions in several **[***32]** states, the court concluded that a proponent seeking to introduce social media evidence "may use

[*1285]

[198]** Here, the trial court rejected *Evidence Code section 1552* and plaintiffs' proffer as a basis for authenticating the Yelp reviews, explaining its concern was not whether the Yelp posts could be authenticated under *section 1552* as writings that existed on the Internet under an alias, but whether the evidence would be sufficient to prove Ms. Kinda and Artisan's defamation claim. To this end, the trial court queried: "[B]efore it comes into evidence, you have to give me some connection that you can prove he posted **[***33]** them. If you can't do that, I'm not going to let it into evidence and we don't even have to have this discussion. [¶] [Plaintiffs' counsel:] Well, it's an issue of fact, Your Honor, and I think I can show that there's sufficient connect the dots—I mean what are the odds that somebody decided to drive over to his house, park in front of his house, and as the expert testified—[¶] [THE COURT:] If you don't choose to call the expert in a 402, then you're not getting any of this in. [¶] [Plaintiffs' counsel:] No, I can bring an expert in. I'm just—[¶] [THE COURT:] Yeah, you're going to have to. You need to understand that I am concerned about the authenticity of this, if that's the correct word. You have to tie it back to him. And unless somebody persuades me that there is sufficient evidence that ties it back to him, then it's not going to come in."

(3) This colloquy illustrates the trial court's treatment of the motion in limine like a motion for nonsuit, rather than limiting its assessment to the initial question of whether the documents were sufficient for the "trier of fact to find that the writing is what it purports to be." (*Goldsmith, supra, 59 Cal.4th at p. 267*.) "'A motion for nonsuit is a procedural device which **[***34]** allows a defendant to challenge the sufficiency of plaintiff's evidence to submit the case to the jury. [Citation.] Because a grant of the motion serves to take a case from the jury's consideration, courts traditionally have taken a very restrictive view of the circumstances under which nonsuit is proper. The rule is that a trial court may not grant a defendant's motion for nonsuit if plaintiff's evidence would support a jury verdict in plaintiff's favor.'" (*Atkinson v. Elk Corp. (2003) 109 Cal.App.4th 739, 747 [135 Cal. Rptr. 2d 433]*, quoting *Campbell v. General Motors Corp. (1982) 32 Cal.3d 112, 117–118 [184 Cal. Rptr. 891, 649 P.2d 224]*.)

Such use of the in limine proceeding is within the trial court's "'inherent power to control litigation and conserve judicial resources.'" (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc. (2009) 171 Cal.App.4th 939, 951 [90 Cal. Rptr. 3d 247]*; see *K.C. Multimedia, at p. 952* [citing use of motions in limine as "the functional equivalent" of dispositive orders at various stages of litigation]; *Amtower, supra, 158 Cal.App.4th 1582, 1595* ["In spite of the obvious drawbacks to the use of in limine motions to dispose of a claim, trial courts do have the inherent power to use them in this way"].) However, when used to foreclose a cause of action, the court must apply the restrictive standard of a nonsuit, interpreting the evidence most **[*1286]** favorably to plaintiffs' case and resolving **[**199]** all presumptions, inferences and doubts in favor of plaintiffs. (*Amtower, at p. 1595*.) The trial court here took the opposite approach. **[***35]**

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any form of verification available under [the Delaware Rules of Evidence]—including witness testimony, corroborative circumstances, distinctive characteristics, or descriptions and explanations of the technical process or system that generated the evidence in question—to authenticate a social media post," at which point "the trial judge as the gatekeeper of evidence may admit the social media post when there is evidence 'sufficient to support a finding' by a reasonable juror that the proffered evidence is what its proponent claims it to be." (*Id. at pp. 687–688*.) Ultimately, "the jury will then decide whether to accept or reject the evidence." (*Id. at p. 688*.)

3. *The Trial Court Improperly Resolved Inferences Against Plaintiffs*

(4) The Evidence Code defines an inference as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (*Evid. Code, § 600, subd. (b)*.) An inference is "not evidence but rather the result of reasoning from evidence. … 'It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists.'" (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles (2004) 117 Cal.App.4th 1138, 1149 [12 Cal. Rptr. 3d 493]* (*Fashion 21*), quoting *Wigodsky v. Southern Pacific Co. (1969) 270 Cal.App.2d 51, 55 [75 Cal. Rptr. 419]*.) **(5)** The record reflects several instances in which the trial court resolved doubts about the evidence against plaintiffs and allowed adverse inferences to control its findings as to foundation. This translated into an improper weighing of the evidence, a task that should have been left to the jury as trier of fact. (*Goldsmith, supra, 59 Cal.4th 258, 267* [conflicting inferences in evidence go to the document's weight, not its admissibility]; *Spolter v. Four-Wheel Brake Service Co. (1950) 99 Cal.App.2d 690, 693 [222 P.2d 307]* [which of two conflicting inferences shall reasonably be drawn from the evidence "is entirely a jury question"].)

Here, for example, the trial court appears to have disregarded defendant's counsel's statements at the motion hearing, which effectively conceded that the records subpoenaed from Yelp, Comcast, **[***36]** and AT&T tied the Yelp posts to defendant's home and business network or routers. Defendant's counsel at various points stated that "[t]he documents that were subpoenaed indicate that the users who posted these IDs accessed the [I]nternet and the Yelp website using an IP address that was assigned to Scott Carpenter's routers, one at his home, one at his business" and "[w]hether that router was at his home at the time, whether or not, you know, a neighbor accessed it, whether or not, you know, somebody else was within distance … that's just what the circumstance[] was here. Somebody was able to access his network." Defendant's counsel thus did not dispute the connection between the IP addresses and defendant's home and business accounts, but only whether Mr. Carpenter himself could be shown to have posted the reviews.

Later in addressing the temporal gap between the Yelp reviews and the earliest IP address that Comcast could produce, the trial court negatively inferred that because the Comcast record did not extend to the dates of the **[*1287]** postings, plaintiffs could not prove by a preponderance of the evidence that the reviews were in fact posted from defendant's Comcast account.[10] This conclusion ignored the **[***37]** positive inference that should have been drawn for plaintiffs from the fact that as of late July 2011, the Comcast record for the identical IP address provided by Yelp was assigned to defendant's account. Properly interpreting the evidence favorably to plaintiffs, out **[**200]** of the universe of IP addresses that could have been assigned to defendant by Comcast as of July 27, 2011, the one assigned to his account had been used to post two of the Yelp reviews less than two months earlier. Mr. Herardian's testimony supported this inference because it explained that a "sticky" IP address like that issued by Comcast

[10] We have found no suggestion by the court or the parties that the Comcast record itself, as certified by the custodian of records, was inadmissible. Nor was there any suggestion that the document's provision of defendant's name and home address as the subscriber to whom the IP address in question was assigned as of July 27, 2011, was ambiguous or not responsive to plaintiffs' subpoena.

continues to renew unless some intervening event of several days causes a new IP address to issue.

The trial court similarly resolved doubts about the AT&T record against plaintiffs and excluded the evidence **[***38]** for lack of foundation. The examination of plaintiffs' expert reveals the trial court's inferences regarding the AT&T evidence: “[Plaintiffs' counsel:] During the month of June 2011, who was that [IP address] account assigned to, according to this record from AT&T? [¶] [Mr. Herardian:] Scott D. Carpenter. [¶] [Plaintiffs' counsel:] Okay. Now, if you look at the top of that record—[¶] [THE COURT:] How do you tell that? [¶] [Mr. Herardian:] His name is right here under ‘Customer Name.’ [¶] [THE COURT:] Right. And that says ‘Billing Start Date: April 2001.’ [¶] [Mr. Herardian:] That would be most likely the time at which the service was established. [¶] [THE COURT:] How do you know that this is the record for June 3, 2011? Because someone told you it was; right? [¶] [Mr. Herardian:] For June 3rd, 2011? [¶] [THE COURT:] Yes. [¶] [Mr. Herardian:] It's my understanding this document was provided in response to a subpoena. [¶] [THE COURT:] Right. [¶] So somebody told you that, that's the only reason you know that; is that fair? [¶] [Mr. Herardian:] It's fair to assume that it's because that was the information asked for in the subpoena, yes. [¶] [THE COURT:] Okay. Somebody told you that. [¶] **[***39]** So he doesn't know that. Walk me through how you can tell that from this, [Plaintiffs' counsel]. [¶] [Plaintiffs' counsel:] Because they're responding to our subpoena and they're showing us who was assigned that IP address on that date. That's what we asked them for. And if you look at the top of that page, it shows you that Scott Carpenter was assigned that IP address from February 6th, 2011, to at least August 26th, 2011. [¶] [Defendant's counsel:] I'm going to object to the characterization that it was assigned. My reading of this document shows that his billing address is listed there. I'm not sure that the document says what **[*1288]** counsel purports it to say. [¶] [THE COURT:] Yes. [¶] And in this gentleman's deposition, he said he just assumed that the billing address and the service address were the same, as I recall. Yes. He is just assuming they're the same.”

The trial court's scrutiny of whether the AT&T record indicated defendant on the account to which the IP address was assigned is perplexing because, on its face, the AT&T record contains enough information for a jury to reasonably infer defendant was the account holder, and defendant's counsel had already conceded the AT&T record **[***40]** linked the third Yelp post to defendant's office router or network. The record itself provides two sets of information: The “IP Assignment Details” show the IP address, provided by Yelp, assigned to the username “eviek@sbcglobal.net” for the date range February 6th, 2011, to August 26th, 2011. The “Customer Account Details” show Scott D. Carpenter's name and account information, including billing dates, billing address, and the “Member ID” for the account: “eviek@sbcglobal.net.” The underlying record established the address listed was defendant's business address and the “eviek” member ID and e-mail address had been assigned to one of defendant's employees and had remained in effect when the employee left the company.

[201]** Defendant's counsel also conceded the connection, albeit in the context of arguing the insufficiency of the evidence: “[A]nyone on any computer within [defendant's] office would have the exact same IP address, no matter which computer was being used … . So you could have had a dozen employees all on the computer at the same time, one of whom may have posted this, but you can't identify who it is.” Plaintiffs' counsel also made an offer of proof, stating “in

case there's any issue **[***41]** about the fact that these accounts actually belonged to Mr. Carpenter, he acknowledged at his deposition that … the AT&T account is his account."

In light of these foundational facts, the inference that the billing address and physical location were the same is equally if not more plausible than the inference that they were different. Although not binding on the trier of fact, the rationale for granting the discovery motion earlier in the case, based on the court's "reasonable interpretation" of the circumstantial evidence, provides an example of how the issue could be, and in fact was, resolved in plaintiffs' favor.

There is no indication that the trial court found the AT&T record was not authentic or did not respond to the subpoena. The record was, therefore, admissible, and any dubious or conflicting inferences to be drawn would "'go[] to the document's weight as evidence, not its admissibility.'" (*Goldsmith, supra, 59 Cal.4th 258, 267*.) Given the dispositive effect of the **[*1289]** motion, the trial court erred by failing to draw these inferences in plaintiffs' favor in ruling on the motion. (See *R & B Auto Center, supra, 140 Cal.App.4th at p. 359* [application of presumptions and inferences led to conclusion that trier of fact "potentially could find that [the defendant] engaged **[***42]** in unfair business practices"]; *Dillingham-Ray Wilson, supra, 182 Cal.App.4th at p. 1403*.)

4. *The Directed Verdict Was Improper*

Plaintiffs cite *Fashion 21, supra, 117 Cal.App.4th 1138*, for the proposition that the publication element of defamation may be proven with indirect evidence. In *Fashion 21*, a clothing retailer brought a claim for libel against a group of workers who allegedly distributed defamatory flyers during a demonstration. (*Id. at pp. 1143–1144*.) The defendants moved to strike the complaint as a SLAPP suit under *Code of Civil Procedure section 425.16, subdivision (b)(1)*.[11] (*Fashion 21, at p. 1143*.) The plaintiff's evidence to establish publication by one defendant "Narro" was an edited videotape of the demonstration, which showed Narro arriving at the scene of the demonstration with the demonstrators, unloading placards and a banner, and holding a stack of flyers, while passersby held and sometimes read the flyers. (*Id. at p. 1149*.) The defendants argued this evidence was insufficient to go to the jury "because it would be pure conjecture to say the flyers were distributed by Narro when they just as well could have been distributed by the other person or by persons not even shown on the videotape." (*Ibid.*)

(6) The appellate court found the circumstantial evidence sufficient for the jury to infer the fact of publication. The court explained: "Even 'slight evidence' in support **[**202]** of the fact to be inferred has been held to be sufficient. It is up to the jury to assess these credibility and judge the weight of the evidence proffered in support of and in opposition to the fact it is asked to infer. [¶] We believe the evidence showing Narro actively participated in the demonstration, had a stack of the green flyers in his possession and these flyers wound up in the hands of those passing by could, but not necessarily would, lead a reasonable trier of fact to infer Narro distributed at least some of the flyers." (*Fashion 21, supra, 117 Cal.App.4th at p. 1150*, fn.

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[11] The *Fashion 21* appeal followed the defendants' unsuccessful SLAPP motion to strike the complaint, which had required the lower court to decide **[***43]** whether Fashion 21 had established a probability that it would prevail on its causes of action. (*Fashion 21, supra, 117 Cal.App.4th at p. 1144*.)

omitted.) The appellate court rejected the notion that a jury is permitted to draw an inference only when the evidence is so strong that the inference must be found as a matter of law. (*Ibid.*)

We are persuaded by the appellate court's reasoning in *Fashion 21* and apply it here. The sum of indirect evidence contained in the record and **[*1290]** provided in plaintiffs' offer of **[***44]** proof regarding the Yelp reviews includes: (1) the date and fact of the issuance of the June 1, 2011 temporary restraining order; (2) the Yelp reviews posted on June 1, June 2, and June 3, 2011; (3) Ms. Kinda's testimony regarding her efforts to verify the jobs described and determine which customers, if any, posted the reviews; (4) the subpoenas served on Yelp, Comcast, and AT&T, and the responsive records; and (5) Mr. Herardian's expert testimony regarding IP addresses, their relation to a physical entity (i.e., router or network) through assignment by an Internet Service Provider, the technical attributes of wireless networks, and the requirements to log on to an unsecure network.

As in *Fashion 21*, we find that this evidence "could, but not necessarily would" lead a reasonable trier of fact to infer that defendant posted the Yelp reviews. (*Fashion 21, supra, 117 Cal.App.4th at p. 1150*.) This evidence includes the Yelp, Comcast, and AT&T records, as well as defendant's anticipated testimony denying responsibility for the Yelp reviews. It is "up to the jury to assess the credibility and judge the weight of the evidence proffered in support of and in opposition to the fact it is asked to infer." (*Ibid.*) And it is for the **[***45]** jury, not the trial court, to determine the significance of the gaps in direct evidence, including the temporal gap in the Comcast records, any uncertainty in the physical versus billing addresses for the AT&T records, and the fact that IP addresses connect to a network or router rather than to a specific person or device. Viewing the evidence in the context of a directed verdict—which is to apply the same standard as a nonsuit—and resolving all inferences and doubts in favor of plaintiffs, we cannot say that judgment against Ms. Kinda and Artisan on the defamation cause of action was required as a matter of law.[12]

In concluding that the trial court erred in its wholesale exclusion of the Yelp evidence and related Comcast and AT&T records, we do not intend to suggest that the trial court should abandon **[***46]** its gatekeeping function to allow or exclude evidence. The admissibility of each component of plaintiffs' evidence, including the scope of Mr. Herardian's expert testimony, was properly before the court and would have remained subject to the normal course of objections at trial.

[203]** D., E.[*] [NOT CERTIFIED FOR PUBLICATION] **[*1291]**

III. DISPOSITION

The judgment is reversed. Each side shall bear its own costs on appeal.

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[12] We note that this ruling applies only to plaintiffs Margaret Kinda and Artisan. The operative complaint alleged defamation only as to Ms. Kinda and Artisan; plaintiff Aaron Kinda was not a party to that cause of action. The exclusion of evidence in support of Ms. Kinda's and Artisan's defamation allegations cannot be said to have prejudiced Aaron Kinda in the same manner, if at all.

[*] See footnote, *ante*, page ___.

Rushing, P. J., and Márquez, J., concurred.

EXHIBIT 5

Neveau v. City of Fresno

United States District Court for the Eastern District of California

July 15, 2005, Decided

1:04-cv-06490 OWW LJO

Reporter
392 F. Supp. 2d 1159 *; 2005 U.S. Dist. LEXIS 37400 **

MICHAEL NEVEAU, Plaintiff, v. CITY OF FRESNO, a municipality; JERRY DYER, individually; MICHAEL GUTHRIE, individually; GREG GARNER, individually; DARREL FIFIELD, individually; MARTY WEST, individually; ROGER ENMARK, individually; and DOES 1 through 10, Defendants.

Subsequent History: Motion denied by, Claim dismissed by, Motion granted by, in part, Motion denied by, in part, Request granted *Neveau v. City of Fresno, 2005 U.S. Dist. LEXIS 55860, 2005 WL 8176468 (E.D. Cal., Oct. 17, 2005)*

Summary judgment granted by, Summary judgment granted by, in part, Summary judgment denied by, in part *Neveu v. City of Fresno, 2007 U.S. Dist. LEXIS 59075 (E.D. Cal., Aug. 13, 2007)*

Case Summary

Procedural Posture

Plaintiff claimant, a police officer, brought a civil rights claim under *42 U.S.C.S. § 1983* and under two California state whistleblower statutes, *Cal. Lab. Code § 1102.5* and *Cal. Gov't Code § 53298*, against defendants, a city and several individual members of the police department. The city and the individual officers moved to dismiss the claimant's second amended complaint. The claimant opposed the motions to dismiss.

Overview

The claimant brought his *§ 1983* claim based on an alleged violation of his *First Amendment* right to freedom of expression. He claimed that he was retaliated against for reporting to his superiors incidents of sexual harassment, racial discrimination, and cheating on police department exams. Also, he alleged adverse employment actions for failing to promote him in retaliation for his whistleblowing, for placing him on administrative leave after his complaints, and for refusing to reinstate him despite the fact that three psychologists declared him fit for duty. Finally, he did allege that the failure to promote him was motivated by his statements. Thus, the claimant sufficiently alleged *First Amendment* retaliation claims against the individual officers. Also, the individual officers were not entitled to dismiss the claimant's *First Amendment* retaliation claims based on qualified immunity because reporting racial discrimination, sexual

misconduct, and overtime improprieties, and testifying regarding cheating in the police department were actions facially protected by the *First Amendment* right to free speech. However, his official capacity claim against the city was deficient.

Outcome

The district court granted the motions to dismiss the claimant's *§ 1983* claims based on adverse employment actions occurring before November 1, 2002; his *§ 1983* claim against the city; his *§ 1983* claim based on the *Fourteenth Amendment*; his state law claims against the city; and his state law claims against individual officers on the grounds of failure to plead all elements. The district court denied the remainder of the motions to dismiss.

Counsel: [1]** For Michael Neveu, Plaintiff: Michael Alan Morguess, Michael Andrew McGill, Lackie and Dammeier LLP, Upland, CA.

For City of Fresno, Fresno Police Department, Jerry Dyer, Darrel Fifield, Marty West, Defendants: Joseph D. Rubin, Betts & Wright, Fresno, Ca.

For Dennis Montejano, John Fries, Roger Enmark, Greg Garner, Fremen Hunter, Defendants: Francine Marie Kanne, Fresno City Attorney's Office, Fresno, CA; Joseph D. Rubin, Betts & Wright, Fresno, Ca.

For Michael -- Guthrie, Defendant: Joseph D. Rubin, Betts & Wright, Fresno, Ca.

Judges: Oliver W. Wanger, UNITED STATES DISTRICT JUDGE.

Opinion by: Oliver W. Wanger

Opinion

[*1165] MEMORANDUM DECISION AND ORDER RE DEFENDANTS'

(1) MOTION TO DISMISS PURSUANT TO *FED. R. CIV. P. 12(b)(6)*;

(2) MOTION FOR A MORE DEFINITE STATEMENT PURSUANT TO *FED. R. CIV. P. 12(e)*; AND

(3) MOTION TO STRIKE PORTIONS OF THE SECOND AMENDED COMPLAINT PURSUANT TO *FED. R. CIV. P. 12(f)*.

I. INTRODUCTION

This is a civil rights action by a City of Fresno police officer against the City of Fresno ("CITY") and several individual **[**2]** members of the City of Fresno Police Department. Michael Neveu ("Plaintiff") brings a civil rights claim under *42 U.S.C. § 1983* and under two California state "whistleblower" statutes. Defendants CITY OF FRESNO, JERRY DYER, MICHAEL GUTHRIE, GREG GARNER, DARREL FIFIELD, MARTY WEST, and ROGER ENMARK ("Defendants")

move to dismiss Plaintiff's Second Amended Complaint. (Doc. 33, Def.'s Mem.). Plaintiff opposes the motion. (Doc. 27, Pl.'s Opp.).

II. PROCEDURAL HISTORY

Plaintiff filed his original Complaint on November 11, 2004. [1] **[**3]** (Doc. 1, Compl.). Plaintiff filed a First Amended Complaint against the same defendants on December 17, 2004. (Doc. 19, First Am. Compl.). The defendants named in the First Amended Complaint moved to dismiss on January 18, 2005. (Doc. 20, Def.'s First Mot.). Plaintiff stipulated to file a Second Amended Complaint on January 28, 2005 (Doc. 22), and filed a Second Amended Complaint on March 4, 2005. (Doc. 23, Second Am. Compl.). The Second Amended Complaint is the operative complaint and it is this complaint that the Defendants now seek to dismiss. (*See* Doc. 33, Def.'s Mem.). [2]

Plaintiff opposes Defendants' Motion. (Doc. 27, Pl.'s Opp, filed March 15, 2005). Defendants replied. (Doc. 28, Def.'s Reply). Oral argument was heard on May **[*1166]** 23, 2005. Michael A. Morguess, Esq., appeared on behalf of Plaintiff. Joseph D. Rubin, Esq., appeared on behalf of Defendants.

III. SUMMARY OF PLEADINGS

This civil rights action is brought by a Fresno City police officer against the City of Fresno, the Fresno Police Chief, and five individual Fresno City pPolice officers. Plaintiff brings his *§ 1983* claim based on an alleged violation of his *First Amendment* right to freedom of expression. Plaintiff claims he was retaliated against for reporting to his superiors a number of incidents of sexual harassment, racial discrimination, and cheating on police department exams. The allegations in the **[**4]** complaint are taken as true for the purpose of this motion to dismiss.

Plaintiff is and was at all relevant times a Fresno City police officer and has worked as a police officer for Fresno since February 1995. (Doc. 1, Compl. PP 3, 11).

Defendant JERRY DYER is and was during all relevant times the Chief of Police of the City of Fresno. Defendant ROGER ENMARK was at all relevant times Captain and Deputy Chief of the Fresno Police Department. Defendant DARREL FIFIELD was at all relevant times Deputy Chief for the Fresno Police Department. Defendant MICHAEL GUTHRIE was at all relevant times a Lieutenant for the Department. Defendants MARTY WEST and GREG GARNER were at all relevant times Captains for the Department. (*Id.* at PP 4-8).

Plaintiff alleges that Defendants retaliated against him for having reported sexual misconduct and racial discrimination to the Internal Affairs and Human Resources Departments of the

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[1] The defendants named in the original Complaint were: City of Fresno; Fresno Police Department; Jerry Dyer, Darrel Fifield; Marty West; Dennis Montejano; John Fries; Roger Enmark; Greg Garner; Fremen Hunter; Michael Guthrie; and Keith Foster.

[2] Defendants filed their original Motion to Dismiss and Memorandum in Support on March 25, 2005. (*See* Docs. 24, 25). Due to formatting problems, Defendants refiled their supporting memorandum on May 12, 2005. (Doc. 33). All citations will be to the corrected document (i.e., Doc. 33).

Fresno Police Department, and for having testified at an investigatory hearing that cheating was occurring on Fresno Police Department promotional exams. Plaintiff alleges two adverse employment actions. The first is that from June 1997 through December 2002, Defendants **[**5]** failed to promote him despite his high qualifications. The second is that, in March 2004, Defendants placed Plaintiff on administrative leave and required Plaintiff to undergo psychological examinations to determine his fitness for duty. Despite the recommendations of three psychologists that he was fit for duty, Defendants refused to reinstate him to duty in July 2004. [3]

Plaintiff began working for the Fresno Police Department in 1995. (Doc. 1, Second Am. Compl. P 11). Plaintiff alleges that he "has never scored anything below exceeds expectations' on [his] evaluations. . . ." (*Id.* at P 13). Plaintiff alleges that he "has had only one incident of discipline in his personnel record spanning his career." (*Id.* at P 14).

Plaintiff asserts he was retaliated against for four protected *First Amendment* activities. First, Plaintiff reported to Police Department Internal Affairs Investigators alleged sexual misconduct by a Richard Mata, who was a police department **[**6]** official who was "suspended due to allegations of sexual molestation" and was "investigated for sexual intimacy and improper behavior towards a teenage girl." (*Id.* at P 16). On or about July 16, 1996, Plaintiff was transferred from patrol to the post of "Explorer Post Advisor," the position from which Richard Mata had been suspended. Plaintiff alleges that unidentified Internal Affairs investigators instructed him to report directly to them any additional information relating to Richard Mata. In July 1996, Plaintiff learned of "administrative improprieties that appeared designed to foster opportunities for further sex crimes" and reported these in **[*1167]** writing to Internal Affairs. (*Id.* at PP 21, 23). In or around August 1996, after he submitted the report, Defendant WEST "ordered [Plaintiff] not to put any information he obtained regarding the Mata allegations in writing, and to only verbally report it to [Plaintiff's immediate supervisors]." (*Id.* at P 27). According to Plaintiff, Internal Affairs had instructed him not to report any information regarding Mata to his immediate supervisors, even if they instructed him to do so. Plaintiff "refused to follow WEST'S order and **[**7]** reiterated that he was going to do exactly as Internal Affairs and Chief Winchester ordered." (*Id.* at P 28).

Second, Plaintiff alleges that "[o]n or around December 23, 1996, [Plaintiff] documented and reported to [his immediate supervisors] racial harassment of Southeast Asian Explorers by Police Activity League volunteers. . . ." (*Id.* at P 29). One of Plaintiff's immediate supervisors, (not a named defendant) advised him that "Plaintiff should not have documented the racial harassment because it caused staff at the Police Activity league to become upset, including retired Deputy Chief Lee Piscola, and that pissing off a retired Chief is a bad career move.'" (*Id.*).

Third, Plaintiff alleges that "[o]n or around December, 1996, [Plaintiff] submitted an extensive end of the year report documenting potentially embarrassing or troubling incidents involving [his immediate supervisors], including the banking' of overtime hours, which were unlawfully denied to [Plaintiff]." (*Id.* at P 30). Furthermore, Plaintiff alleges that Defendant WEST prevented the report from reaching Chief Winchester's office. (*Id.*).

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[3] Plaintiff has since been reinstated to duty.

Fourth, Plaintiff alleges that in or about March **[**8]** 2002, he testified at an administrative hearing that cheating occurred on Department promotional exams. On or around March 2001, a new promotional testing system for the promotion to the rank of Sergeant was implemented by Chief DYER. (*Id.* at PP 32-34). According to Plaintiff, the system was created at the request of Defendants GARNER AND ENMARK. However, after the new system was implemented, some of the candidates complained that the system was "tainted and therefore inaccurate." (*Id.* at P 34). The complaints resulted in a hearing that took place before the Civil Service Commission in February/March 2002. (*Id.*). Plaintiff he informed attorneys handling the hearing "that some promotional candidates were unlawfully given the answers prior to taking the . . . promotional exam." The day after Plaintiff reported this information to the attorneys, Defendant GARNER "brought [Plaintiff] into his office, confronted [Plaintiff] in a hostile manner and stated words to the effect that Yesterday I spent the better part of the afternoon on the stand getting my [a **] chewed off and I only kept wondering one thing -- why your name had come up as a witness." (*Id.* at P 36). **[**9]** Moreover, Plaintiff alleges that "[i]n an attempt to discredit NEVEU's testimony, Captain GARNER advised attorneys handling the hearing that NEVEU was a crack pot,' screwball,' and that he had ethical problems.'" (*Id.* at P 37). On or about March 12, 2002, Plaintiff, as well as his wife, testified before the hearing "as to the improprieties and outright cheating on in the testing process." (*Id.* at P 38).

Plaintiff alleges these activities are protected *First Amendment* activities and that Defendants retaliated against him for engaging in these activities. Plaintiff alleges two separate adverse employment actions. First, he alleges that from approximately June 1997 and December 2002, Defendants WEST, FIFIELD, GUTHRIE, and GARNER failed to promote Plaintiff. (*Id.* at P 41). Plaintiff claims that someone informed him that "at staff meetings, WEST, FIFIELD, GUTHRIE, and GARNER **[*1168]** always disapproved of any promotion or selection of NEVEU to . . . [a] special unit, despite NEVEU's record and commendations." (*Id.*). Furthermore, Plaintiff alleges that these Defendants denied the promotions because of reporting the Mata allegations, the alleged racial harassment, the "banking" **[**10]** of overtime hours, and testifying before the Civil Service Commission. (*Id.*). Finally, Plaintiff claims that on or about July 25, 2002, the sergeants promotion list containing Plaintiff's name was "killed" before reaching Plaintiff's name in retaliation for testifying before the Civil Service Commission. This allegation is not related to any particular defendant, although Plaintiff alleges in the next paragraph that he "was further informed that Captain WEST and that group' had done similar black listing' to other officers who spoke up." (*Id.* at P 43).

Second, Plaintiff alleges that on March 1, 2004, Defendants DYER and ENMARK, with the assistance of GUTHRIE, placed him on administrative leave pending a fitness for duty examination. (*Id.* at P 45). Plaintiff alleges that DYER, ENMARK, and GUTHRIE placed him on administrative leave "for engaging in the aforementioned protected activities." (*Id.* at P 47). Plaintiff was subsequently examined by three psychologists who declared him fit for duty. (*Id.* at P 49). Plaintiff alleges that "[o]n or around July 6, 2004, Chief DYER and Deputy Chief ENMARK refused to reinstate [him]." (*Id.* at P 50).

On November 1, 2004, the **[**11]** same date that the original Complaint in this action was filed, Plaintiff filed a government tort claim pursuant to the California Tort Claims Act (*Cal. Gov. Code §§ 910 et seq.*). Plaintiff received a response dated December 13, 2004, which stated that any

causes of action accruing before November 1, 2003, were not presented within one year after the incident. (*Id.* at P 51). Plaintiff interpreted this response as a rejection of his claim. (*Id.*).

IV. LEGAL STANDARDS

A. Motion to Dismiss Pursuant to *Fed. R. Civ. P. 12(b)(6)*.

Fed. R. Civ. P. 12(b)(6) allows a defendant to attack a complaint for failure to state a claim upon which relief can be granted. A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* is disfavored and rarely granted: "[a] complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Van Buskirk v. CNN, Inc., 284 F.3d 977, 980 (9th Cir. 2002)* (citations omitted). In deciding **[**12]** whether to grant a motion to dismiss, the court "accept[s] all factual allegations of the complaint as true and draw[s] all reasonable inferences in favor of the nonmoving party." *TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999)*.

"The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)* (citations omitted). For example, matters of public record may be considered under *Fed. R. Evid. 201*, including pleadings, orders and other papers filed with the court or records of administrative bodies. *See Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)*. Conclusions of law, conclusory allegations, unreasonable inferences, or unwarranted deductions of fact need not be accepted. *See Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)*.

[*1169] "Where the facts and dates alleged in a complaint demonstrate that the complaint **[**13]** is barred by the statute of limitations, a *Federal Rule of Civil Procedure 12(b)(6)* motion should be granted." *Ritchie v. United States, 210 F. Supp. 2d 1120, 1123 (N.D. Cal. 2002)*. There is no requirement, however, that affirmative defenses, including statutes of limitation, appear on the face of the complaint. *Hyatt Chalet Motels, Inc. v. Carpenters Local 1065, 430 F.2d 1119, 1120 (9th Cir. 1970)*. "When a motion to dismiss is based on the running of the statute of limitations, it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (1980)*; *see also TwoRivers, 174 F.3d at 991*.

B. Motion for a More Definite Statement Pursuant to *Fed. R. Civ. P. 12(e)*.

A motion for a more definite statement pursuant to *Fed. R. Civ. P. 12(e)* attacks the unintelligibility of the complaint, not simply the mere lack of detail, and is only proper when a party **[**14]** is unable to determine how to frame a response to the issues raised by the complaint. A court will deny the motion where the complaint is specific enough to apprise the defendant of the substance of the claim being asserted. *Bureerong v. Uvawas, 922 F. Supp. 1450, 1461 (C.D. Cal. 1996)*; *see also Famolare, Inc. v. Edison Bros. Stores, Inc., 525 F. Supp. 940, 949 (E.D. Cal. 1981)* (finding a *Rule 12(e)* motion proper "only where the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted"). A motion

for a more definite statement is proper only where the complaint is "so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself." *Cellars v. Pacific Coast Packaging, Inc., 189 F.R.D. 575, 578 (N.D. Cal. 1999)* (internal quotations and citation omitted); *see also Sagan v. Apple Computer Inc., 874 F. Supp. 1072, 1077 (C.D. Cal. 1994)* (citing *Van Dyke Ford, Inc. v. Ford, 399 F. Supp. 277, 284 (E.D. Wis. 1975))* ("A *Rule 12(e)* motion is more likely to be granted where the complaint is so general **[**15]** that ambiguity arises in determining the nature of the claim or the parties against whom it is being made."); *Boxall v. Sequoia Union High Sch. Dist., 464 F. Supp. 1104, 1114 (N.D. Cal. 1979)* (finding a motion for a more definite statement should not be granted unless the defendant literally cannot frame a responsive pleading).

"*Rule 12(e)* is designed to strike an unintelligibility rather than want of detail. . . . A motion for a more definite statement should not be used to test an opponent's case by requiring him to allege certain facts or retreat from his allegations." *Palm Springs Med. Clinic, Inc. v. Desert Hosp., 628 F. Supp. 454, 464-65 (C.D. Cal. 1986)* (quoting *Juneau Square Corp. v. First Wis. Nat'l Bank, 60 F.R.D. 46, 48 (E. D. Wis. 1973))*. A *Rule 12(e)* motion "is likely to be denied where the substance of the claim has been alleged, even though some of the details are omitted." *Sagan, 874 F. Supp. at 1077* (citing *Boxall, 464 F. Supp. at 1113-14*).

This liberal standard of pleading is consistent with *Fed. R. Civ. P. 8(a)(2)* which allows pleadings that **[**16]** contain a "short and plain statement of the claim." Both rules assume that the parties will familiarize themselves with the claims and ultimate facts through the discovery process. *See Sagan, 874 F. Supp. at 1077* ("Motions for a more definite statement are viewed with disfavor and are rarely granted because of the minimal pleading requirements of the Federal Rules."). If the detail sought by a motion for a more definite statement is obtainable through discovery, the motion should be denied. **[*1170]** *See McHenry v. Renne, 84 F.3d 1172, 1176 (9th Cir. 1996)* (granting *12(e)* motion where complaint "does not provide defendants with a fair opportunity to frame a responsive pleading"); *see also Sagan, 874 F. Supp. at 1077* ("Parties are expected to use discovery, not the pleadings, to learn the specifics of the claims being asserted."); *Beery v. Hitachi Home Elecs. (Amer.), Inc., 157 F.R.D. 477, 480 (C.D. Cal. 1993)* (finding motion for a more definite statement should be denied if the detail sought is obtainable through discovery); *Federal Savings and Loan Ins. Corp. v. Musacchio, 695 F. Supp. 1053, 1060 (N.D. Cal. 1988)* **[**17]** (finding that if plaintiff's complaint meets the notice requirements of *Fed. R. Civ. P. 8*, and defendants are provided with a sufficient basis to respond, the proper avenue for eliciting additional detail is through discovery); *Famolare, Inc. v. Edison Brothers Stores, Inc., 525 F. Supp. 940, 949 (E.D. Cal. 1981)* ("A motion for a more definite statement should not be granted unless the defendant cannot frame a responsive pleading."); *CMAX, Inc. v. Hall, 290 F.2d 736, 738 (9th Cir. 1961)*.

C. Motion to Strike Pursuant to *Fed. R. Civ. P. 12(f)*.

Fed. R. Civ. P. 12(f) provides that "redundant, immaterial, impertinent, or scandalous matters" may be "stricken from any pleading." *Fed. R. Civ. P. 12(f)*. "[O]nly pleadings are subject to motions to strike." *See Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983)*.

Motions to strike are disfavored and infrequently granted. *See Pease & Curren Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 947 (C.D. Cal. 1990),* **[**18]** abrogated on other grounds by

Stanton Road Ass'n v. Lohrey Enters., 984 F.2d 1015 (9th Cir. 1993). "[M]otions to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Colaprico v. Sun Microsystems, Inc., 758 F. Supp. 1335, 1339 (N.D. Cal. 1991)* (citation omitted).

D. *42 U.S.C. § 1983*

"*Section 1983* provides for liability against any person acting under color of law who deprives another of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." [4] *S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 887 (9th Cir. 2003)* (quoting *42 U.S.C. § 1983*).

[19] 1. Suits Against Local Governments: The *Monell* Doctrine.**

Local governments are "persons" subject to suit for "constitutional tort[s]" under *42 U.S.C. § 1983*. [5] *Haugen v. Brosseau, 339 F.3d 857, 874 **[*1171]** (9th Cir. 2003)* (citing *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 n. 55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*). "[T]he legislative history of the *Civil Rights Act of 1871* compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom *§ 1983* applies." *Monell, 436 U.S. at 690*. Local governments can be sued for monetary, declaratory, or injunctive relief where such suits arise out of unconstitutional actions that implement or execute a "policy statement, ordinance, or decision officially adopted and promulgated by that body's officers. . . ." *Id. 690-1*. If no official policy exists, "customs and usages" may fulfill this element of a *§ 1983* claim against a local government. *Id.*

[20]** A local government's liability is limited, however. Although a local government can be held liable for its official policies or customs, it will not be held liable for an employee's actions outside of the scope of these policies or customs. "A municipality cannot be held liable solely because it employs a tortfeasor -- or, in other words, a municipality cannot be held liable under *§ 1983* on a *respondeat superior* theory." *Monell, 436 U.S. at 691*. "A local government may not be sued under *§ 1983* for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its law-makers or by those

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[4] Specifically, *42 U.S.C. § 1983* provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[5] "There is certainly no constitutional impediment to municipal liability. The *Tenth Amendment's* reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the *Fourteenth Amendment*.'" *Monell, 436 U.S. at 691* (quoting *Milliken v. Bradley, 433 U.S. 267, 291, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977)*). There is no "basis for concluding that the *Eleventh Amendment* is a bar to municipal liability." *Id.* (citing *Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976)*; *Lincoln County v. Luning, 133 U.S. 529, 530, 10 S. Ct. 363, 33 L. Ed. 766 (1890)*).

whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id. at 694.

To prevail on a § 1983 complaint against a local government under *Monell*, a plaintiff must satisfy a three-part test:

> (1) The local government official(s) must have intentionally violated the plaintiff's constitutional rights;
>
> (2) The violation must be a part of policy or custom and may not be an isolated **[**21]** incident; and
>
> (3) A nexus must link the specific policy or custom to the plaintiff's injury.

See Monell, 436 U.S. at 690-92.

2. Suits Against Governmental Officials (a) Official-Capacity Suits

"[Section] 1983 claims against government officials in their official capacities are really suits against the governmental employer because the employer must pay any damages awarded." Butler v. Elle, 281 F.3d 1014, 1023 (9th Cir. 2002) (citing Ky. v. Graham, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)); *see also* Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 839 (9th Cir. 1997) (finding that "a suit against a state official in his official capacity is no different from a suit against the [official's office or the] State itself") (citing Will v. Mich. Dep't of State Police, 491 U.S. 58, 70-71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). "As the Supreme Court has stated, official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent.'" Ruvalcaba v. City of Los Angeles, 167 F.3d 514, 524 n.3 (9th Cir. 1999) (quoting Graham, 473 U.S. at 165). **[**22]** "'As long as the government entity receives **[*1172]** notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.'" Ruvalcaba, 167 F.3d at 524 n.3 (quoting Graham, 473 U.S. at 166.).

(b) Personal-Capacity Suits

"'Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law.'" Dittman v. Cal., 191 F.3d 1020, 1027 (9th Cir. 1999) (quoting Graham, 473 U.S. at 165); *see also* Hafer v. Melo, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991) (finding that "[p]ersonal capacity suits seek to impose liability on state officials for acts taken under color of state law"); Stivers v. Pierce, 71 F.3d 732, 749 (9th Cir. 1995). In setting forth the distinctions between personal and official capacity suits, the Supreme Court said:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 237-238, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974). Official-capacity suits, in contrast, **[**23]** "generally represent only another way of pleading an action against an entity of which an officer is an agent." Monell[], 436 U.S. at 690, n. 55 []. As long as the government entity

> receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon v. Holt, 469 U.S. 464, 471-472, 105 S. Ct. 873, 83 L. Ed. 2d 878*. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).

"While the plaintiff in a personal-capacity suit need not establish a connection to governmental policy or custom,' officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law." *Pena v. Gardner, 976 F.2d 469, 473 (9th Cir. 1992)* (quoting **[**24]** *Graham, 473 U.S. at 166-167*). Individuals are not immune under the doctrine of qualified immunity if they violated "clearly established statutory or constitutional rights of which a reasonable person would have known." [6] *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*. "A victory in such a suit is a victory against the individual defendant, rather than against the entity that employs him.'" *Cerrato v. San Francisco Community College Dist., 26 F.3d 968, 973 (9th Cir. 1994)* (quoting *Graham, 473 U.S. at 166-67*).

[25] [*1173] E. State Law Claims Against Public Entities and the California Tort Claims Act.**

Plaintiff brings the following state law claims against Defendants: violation of *Cal. Labor Code § 1102.5* and violation of *Cal. Gov. Code § 53298, et seq.* The California Tort Claims Act governs tort claims against public entities and their officials. *See Cal. Gov. Code § 810 et seq.* The *California Tort Claims Act* ("CTCA") requires plaintiffs to present a written claim to the public entity allegedly responsible for their damage before initiating suit on the cause of action. *Cal. Gov. Code § 945.6*.

Under the California Tort Claims Act, no suit for "money or damages" may be brought against a public entity until a written claim has been presented to the public entity and the claim either has been acted upon or is deemed to have been rejected. *Hart v. Alameda County, 76 Cal. App. 4th 766, 778, 90 Cal. Rptr. 2d 386 (Cal. Ct. App. 1999)*. The CTCA requires a plaintiff to file a timely tort claim with the public entity; if the claim is not timely, the public entity may reject the claim.

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[6] Immunity is not absolute, as the Ninth Circuit has explained:

> This court has held that, when a public official acts in reliance on a duly enacted statute or ordinance, that official ordinarily is entitled to qualified immunity. *See Grossman v. City of Portland, 33 F.3d 1200, 1210 (9th Cir. 1994)* (holding that "an officer who reasonably relies on the legislature's determination that a statute is constitutional should be shielded from personal liability"). The existence of an authorizing statute is not dispositive, however. Qualified immunity does not extend to a public official who enforces a statute that is "patently violative of fundamental constitutional principles." *Id. at 1209*.

Dittman, 191 F.3d at 1027.

If a claimant fails to timely file **[**26]** a claim with the public entity, and its claim is consequently rejected by the public entity for that reason, courts are without jurisdiction to hear the claimant's cause of action. *Greyhound Lines, Inc. v. County of Santa Clara, 187 Cal. App. 3d 480, 487, 231 Cal. Rptr. 702 (1986)*; *Moyer v. Hook, 10 Cal. App. 3d 491, 492-3, 89 Cal. Rptr. 234 (Cal. Ct. App. 1970)*; *Carr v. State of Cal., 58 Cal. App. 3d 139, 144-6, 129 Cal. Rptr. 730 (Cal. Ct. App. 1976)*; *Williams v. Mariposa County Unified Sch. Dist., 82 Cal. App. 3d 843, 848-9, 147 Cal. Rptr. 452 (Cal. Ct. App. 1978)*. For causes of action for death, personal injury, or injury to personal property, a claimant must file a claim within six months of the accrual of the cause of action. *Cal. Gov. Code § 911.2*.

The CTCA also permits the filing of an application to file a late claim for certain claims: "[w]hen a claim that is required by *Section 911.2* to be presented not later than six months after the accrual of the cause of action is not presented within that time, a written application may be made to the public entity for leave to present that claim." *Cal. Gov. Code § 911.4*. The CTCA's six-month **[**27]** limitations period applies to causes of action for death, personal injury, or injury to personal property. *Id.* at *§ 911.2*. If a claimant fails to timely file a petition to file a late claim, courts are without jurisdiction to hear the cause of action.

The overall policy of the claim requirements and time limitations of the California Tort Claims Act are to: (1) "give the governmental entity an opportunity to settle just claims before suit is brought;" (2) "permit the entity to make an early investigation of the facts on which a claim is based, thus enabling it to defend itself against unjust claims and to correct the conditions or practices which gave rise to the claim;" and (3) "avoid multiple suits arising out of the same transaction or occurrence and thus further[] the goal of judicial economy." *Greyhound Lines, 187 Cal. App. 3d at 487* (quoting *Gehman v. Super. Ct., 96 Cal. App. 3d 257, 262, 265, 158 Cal. Rptr. 62 (Cal. Ct. App. 1979)*, disapproved on other grounds by *Dept. of Transportation v. Super Ct. ("Frost"), 26 Cal.3d 744, 759 n. 5, 163 Cal. Rptr. 585, 608 P.2d 673 (1980)*).

E. State Law Claims.

Cal. Labor Code § 1102.5 is a "whistleblower" **[**28]** statute that establishes liability for employers who retaliate against their employees for disclosing information to government or law enforcement agencies. Specifically, *§ 1102.5(b)* provides that:

> An employer may not retaliate against an employee for disclosing information **[*1174]** to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

Cal. Gov. Code § 53298(a) establishes liability for any local agency officer, manager, or supervisor who retaliates against any employee for filing a complaint with the local agency reporting "gross mismanagement, a significant waste of funds, an abuse of authority, or a specific and substantial danger to public health or safety." *Cal. Gov. Code §§ 53298(a)*, *53296(c)*; *see also LeVine v. Weis, 90 Cal. App. 4th 201, 212, 108 Cal. Rptr. 2d 562 (2001)* (discussing *§ 53298* in *dicta*).

V. ANALYSIS

A. Whether Plaintiff's § 1983 Claims Are Time-Barred.

A plaintiff is ordinarily not required to plead **[**29]** around affirmative defenses. Hyatt Chalet Motels, 430 F.2d at 1120. The statute of limitations is an affirmative defense. A complaint may nevertheless be dismissed pursuant to Rule 12(b)(6) if the facts and dates alleged demonstrate that the complaint is time-barred. Ritchie, 210 F. Supp. 2d at 1123; Jablon, 614 F.2d at 682. Defendants argue that Plaintiff's § 1983 claims are time-barred based on the allegations in the Second Amended Complaint. (Doc. 33, Def.'s Mem. 2-6).

In California, claims brought under 42 U.S.C. § 1983 are governed by California's statute of limitations for personal injury actions. Taylor v. Regents of Univ. of Cal., 993 F.2d 710, 711-2 (9th Cir. 1993). Plaintiff's 42 U.S.C. § 1983 claim is therefore governed by California's statute of limitations for personal injuries under Cal. Civ. Proc. § 335.1. Currently, the limitations period is two years; however, prior to January 1, 2003, the limitations period for personal injuries was one year. [7] The applicable statute of limitations here is two years since the Complaint was filed after January 1, 2003. **[**30]**

"Although state law prescribes the statute of limitations applicable to section 1983 claims, federal law governs the time of accrual." *Gibson v. United States, 781 F.2d 1334, 1339 (9th Cir. 1986)*. "Under federal law, a cause of action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Id.* (internal quotations omitted).

Plaintiff's § 1983 claims are based on allegations of retaliation for his exercise of expression under the First Amendment. The adverse employment actions alleged include the following: (1) from June 1997 to December 2002, Plaintiff was passed over for promotions and special assignments (including an incident in July 2002 when Defendants intentionally "killed" a promotional list with Plaintiff's name to avoid promoting Plaintiff); and (2) on March 1, 2004, Plaintiff was placed on Administrative Leave **[**31]** pending a fitness for duty examination. (*See* Doc. 27, Pl.'s Opp. 10).

Defendants do not dispute that Plaintiff's March 1, 2004, Administrative Leave is not time-barred. *(See* Doc. 33, Def.'s Mem. 6; Doc. 28, Def.'s Reply 4). Plaintiff's complaint was filed on November 1, 2004. [8] Plaintiff's § 1983 claim based on **[*1175]** his placement on Administrative

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[7] California Senate Bill 688 amended the one year statute of limitations to two years, effective January 1, 2003.

[8] Neither party addresses Plaintiff's § 1983 claim in light of the relation back doctrine of Rule 15. Defendants assume for purposes of argument that November 1, 2004, is the operative date, instead of March 3, 2005, which is the date the Second Amended Complaint was filed. Before proceeding with the statute of limitations analysis, the operative date of filing must be determined through a Rule 15 analysis.

Fed. R. Civ. P. 15(c)(2) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Here, Plaintiff's original Complaint contained § 1983 claims. (Doc. 1, Compl. P 62). Those claims related to the same protected activities alleged in the Second Amended Complaint; i.e., reporting (a) the Mata sexual misconduct allegations; (b) racial harassment of Southeast Asian Explorers; (c) the "banking" of overtime hours; and (d) testifying before the hearing regarding cheating on the promotional examination. Plaintiff's § 1983 claims in its Second Amended

Leave was therefore filed within the 2-year statutory period. Likewise, Defendants do not dispute that alleged incidents of failure to promote Plaintiff that occurred after November 1, 2002 are not time-barred. The only issue is whether incidents of failure to promote that occurred before November 1, 2002 are time-barred.

[32]** Plaintiff argues that incidents occurring before November 1, 2002 are not time-barred because they are part of a "continuing violation." Plaintiff argues that the Ninth Circuit's "related acts" test applies, and cites two Ninth Circuit cases in support (i.e., *Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1480-81*; *Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924 (9th Cir. 1982))*. Defendants respond that the "related acts" test does not apply here because that test was overruled by the United States Supreme Court in *Nat'l R. R. Passenger Corp. v. Morgan, 536 U.S. 101, 114, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)*. Defendants note that the *Morgan* Court held that where a plaintiff alleges discrete retaliatory acts, the statute of limitations runs separately from each act. Defendants argue that Plaintiff's allegations that he was passed over for promotions a number of times from 1997 to December 2002 constitute discrete acts. Defendants argue that Plaintiff cannot base his *§ 1983* claim on alleged incidents of failure to promote that occurred before November 1, 2002 because the statute of limitations for each of those alleged actions has run. **[**33]**

Discrete employment actions are not subject to the continuing violations doctrine. *Morgan, 536 U.S. 101, 114, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)*. The United States Supreme Court includes "failure to promote" among discrete employment actions. *Id.* Each of Plaintiff's allegations of failure to promote is therefore a separate actionable violation with a distinct accrual date. Although *Morgan* was an employment discrimination action brought under *Title VII*, the Ninth Circuit applies the Supreme Court's holding in *Morgan* to actions brought under *§ 1983*. *RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1061 (9th Cir. 2002)*; *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara, 344 F.3d 822 (9th Cir. 2003)*; *Thompson v. City of Shasta Lake, 314 F. Supp. 2d 1017, 1027 (E.D. Cal. 2004)*.

Plaintiff argues that "[a] continuing violation may be established by showing a series of related acts against a single individual, one or more of which falls within the limitations period." (Doc. 27, Pl.'s Opp. 11). Plaintiff cites *Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1480-81*; *Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924 (9th Cir. 1982)* **[**34]** in support of its argument that the "related acts" doctrine applies in determining whether alleged discriminatory acts **[*1176]** constitute continuing violations. However, as the Ninth Circuit noted recently:

Morgan overruled previous Ninth Circuit authority holding

> that, if a discriminatory act was "related and similar to" acts that took place outside the limitations period, all the related acts -- including the earlier acts -- were actionable as part of a continuing violation. [citation] *Morgan* held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges."

Complaint therefore arise out of the same transactions alleged in its original complaint. The relation back doctrine applies and the operative date for statute of limitations purposes is November 1, 2004.

RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1061 (9th Cir. 2002) (quoting *Morgan, 122 S.Ct. at 2072*).

Insofar as Plaintiff's *§ 1983* claims are based on incidents of failure to promote that occurred before November 1, 2002 Defendants' Motion to Dismiss is **GRANTED.** This ruling has no bearing on the evidentiary admissibility of such prior acts or omissions, which must be separately determined.

B. Whether Plaintiff States Individual Capacity Claims Against the Individual Defendants [35] Under *§ 1983*.**

Defendants argue that Plaintiff fails to state individual capacity claims under *§ 1983* against the Defendants GARNER, DYER, ENMARK, FIFIELD, and GUTHRIE because Plaintiff fails to state a claim for *First Amendment* retaliation. Defendants also argue that Plaintiff fails to state individual capacity claims against all individual Defendants because they are entitled to qualified immunity. (Doc. 33, Def.'s Mem. 8-12).

1. Whether Plaintiff States Claims for *First Amendment* Retaliation.

The underlying constitutional violation on which Plaintiff bases his *§ 1983* claim is *First Amendment* retaliation. To state a claim for retaliation based on exercise of *First Amendment* rights, a plaintiff must allege the following elements: (1) the plaintiff engaged in expressive conduct that addressed a matter of public concern; (2) the government official took an adverse action against the plaintiff; and (3) the expressive conduct was a substantial or motivating factor for the adverse action taken by the government official. *Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 923 (9th Cir. 2004)*.

Defendants GARNER, DYER, and ENMARK argue that Plaintiff's **[**36]** *§ 1983* claim against them must be dismissed because Plaintiff fails to allege the second element of a *First Amendment* retaliation claim, i.e., that GARNER, DYER, and ENMARK took an "adverse employment action" against Plaintiff. (Doc. 33, Def.'s Mem. at 8-12). However, Plaintiff responds that he alleges that all three of these defendants took an "adverse employment action" against him. (*See* Doc. 27, Pl.'s Opp. 15 n. 7; 16, n. 8). In a *First Amendment* retaliation case, an "adverse employment action" is an act that is reasonably likely to deter employees from engaging in constitutionally protected speech; it is not necessary that the plaintiff demonstrate the loss of a valuable governmental benefit or privilege. *Coszalter v. City of Salem, 320 F.3d 968, 975 (9th Cir. 2003)* (holding that to determine whether an act constitutes an adverse employment action, "the inquiry is whether the exercise of the *first amendment* rights was deterred by the government employer's action") (internal quotations omitted). First, Plaintiff alleges that GARNER failed to promote him as retaliation for his "whistleblowing." (Doc. 1, Compl. P 41). Second, Plaintiff alleges that DYER and ENMARK **[**37]** placed Plaintiff on Administrative Leave after his complaints. (*Id.* at P 45). Third, Plaintiff alleges that DYER and ENMARK refused to reinstate Plaintiff despite that three psychologists declared **[*1177]** Plaintiff fit for duty. (*Id.* at P 50). Each of these allegations identifies individual adverse employment action by each supervisor specifically directed against Plaintiff. Plaintiff has

sufficiently alleged the "adverse employmentaction" element of a *First Amendment* retaliation claim against GARNER, DYER, and ENMARK.

Defendants also argue that Plaintiff fails to state a claim against Defendants FIFIELD and GUTHRIE because he did not allege the third element for a *First Amendment* Retaliation claim; i.e., that FIFIELD and GUTHRIE's failure to promote Plaintiff was motivated by Plaintiff's expression. (Doc. 33, Def.'s Mem. 12). However, Plaintiff notes that Paragraph 41 of the Complaint does allege causation: "NEVEU was denied each and every promotion as a result of WEST, FIFIELD, GUTHRIE, and GARNER'S actions, and in retaliation for NEVEU reporting the Mata allegations, the alleged racial harassment, and the end of the year report. . . ."

Defendants' arguments that Plaintiff has **[**38]** not alleged all three elements of a *First Amendment* claim are without merit and find no support in the pleadings. Defendants' Motion to Dismiss Plaintiff's *§ 1983* claims against the individual Defendants on the grounds that Plaintiff fails to allege *First Amendment* retaliation claims against them is **DENIED.**

2. Qualified Immunity.

Defendants next argue that GARNER, DYER, ENMARK, FIFIELD, GUTHRIE, and WEST are entitled to qualified immunity. Public officials sued in their individual capacity, as here, are immune from suit if "their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*; *Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)*; *Dittman, 191 F.3d at 1027*. "To determine whether qualified immunity is appropriate, a court must identify the specific right allegedly violated and determine whether that right was so clearly established as to alert a reasonable officer to its constitutional parameters; if the law is clearly established, it determines whether a reasonable officer could have believed lawful **[**39]** the particular conduct at issue." *Knox v. Southwest Airlines, 124 F.3d 1103, 1107 (9th Cir. 1997)* (internal quotations and citations omitted); *see also Saucier, 533 U.S. at 201*. Defendants' arguments in support of qualified immunity consist solely of conclusory statements that the individual defendants in question are immune from suit. (Doc. 33, Def.'s Mem., 10.4; 11.7; 11.25; 12:8). Defendants cite a few cases that address general immunity principles, but cite no authority to support that police officials are immune from suit when they retaliate against a whistelblowing employee for reporting sexual or racial discrimination to superiors, or for testifying that other officers were cheating on promotional exams. *See Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)*; *Brewster v. Bd. of Educ. of the Lynwood Unifid Sch. Dist., 149 F.3d 971, 977 (9th Cir. 1988)*; *Knox v. Southwest Airlines, 124 F.3d 1103, 1107 (9th Cir. 1997)*.

Plaintiff alleges that his superiors denied him promotions and placed him on administrative leave because he reported sexual misconduct/harassment and racial discrimination and testified **[**40]** that cheating was occurring on police department promotional exams. Plaintiff argues that these allegations are sufficient to overcome qualified immunity at this stage in the litigation.

Plaintiffs' allegations do not establish that the officers here acted reasonably under the totality of the circumstances or in **[*1178]** reasonable reliance on a clearly established statute or constitutional provision. Plaintiff complains that he was retaliated against for having reported racial discrimination, sexual misconduct, and overtime improprieties, and for having testifying regarding cheating in the police department. Reporting such activities is expressive conduct regarding matters of public concern and is conduct facially protected by the *First Amendment* right to free speech. Defendants do not attempt to identify any statute or constitutional provision under which Defendants could have reasonably carried out such actions. Defendant's Motion to Dismiss Plaintiff's *§ 1983* claims on qualified immunity grounds is **DENIED.**

C. Whether Plaintiff States a Claim Against the CITY Under *§ 1983*.

Defendants argue that Plaintiff fails to state a claim against the CITY because he does not allege **[**41]** the existence of a *Monell* policy or custom. (Doc. 33, Def.'s Mem. 13; *see also* Doc. 28, Def.'s Reply 5-6). Plaintiff responds, in conclusory fashion, that he has alleged that Chief DYER has policy-making authority. Plaintiff does not argue that he has alleged the existence of a defined policy that operated to violate his civil rights. Defendants argue that the alleged actions of Chief DYER do not constitute a "policy." (Doc. 28, Def.'s Reply 6.18-27).

Local governments are "persons" subject to suit for "constitutional tort[s]" under *42 U.S.C. § 1983*. *Haugen, 339 F.3d at 874-875*. The CITY, as a local government, is therefore subject to suit under *§ 1983*. However, local governments can only be sued where the claims arise out of unconstitutional actions by their employees who implement or execute a "policy statement, ordinance, or decision officially adopted and promulgated by that body's officers. . . ." *Monell, 436 U.S. at 690-1*. In other words, a municipality cannot be held liable for an employee's actions outside the scope of implementation of the policies or customs on a *respondeat superior* theory. *Id.* A municipality **[**42]** can, however, be held liable for the acts of one of its employees acting in an "official" capacity. "'[O]fficial-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Ruvalcaba, 167 F.3d at 524 n. 3* (quoting *Graham, 473 U.S. at 165*).

Here, Plaintiff attempts to plead an "official capacity" suit against Defendant DYER. However, Plaintiff's conclusory allegations regarding the purported policy implemented and/or created by Defendant DYER do not define or describe what that policy is. (*See* Compl. PP 4, 54). Plaintiff's "official capacity" claim against the CITY is deficient.

Defendants argue that Plaintiff fails to state a claim against the CITY because he has not alleged that the Defendant officers had policy-making authority. Plaintiff responds that he has alleged that Chief DYER has policy-making authority. (Doc. 27, Pl.'s Opp. 17). Plaintiff cites Paragraphs 4 and 54 of his Complaint, which do contain allegations that Defendant DYER has policy-making authority. (*Id.*). However, Defendants correctly note that the alleged actions of Defendant DYER in a specific case are not **[**43]** *per se* an official policy. (Doc. 28, Def.'s Reply 6). Just as Plaintiff fails to state a claim against the CITY because he fails to identify the CITY's policy by describing a pattern or practice, Plaintiff also fails to state a claim against Defendant DYER in his official capacity for failing to define the same purported policy. Alleging that DYER had policy-making authority without defining the policy and its operation is not sufficient.

Plaintiff's argument that delegation of authority to subordinates can subject **[*1179]** a municipality to liability also fails. Plaintiff argues that municipal liability can be established by showing that "'an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate.'" (Doc. 27, Pl.'s Opp. 18 (quoting *Ulrich v. City and County of San Francisco, 308 F.3d 968, 985 (9th Cir. 2002)*). However, Plaintiff fails to identify any allegations in the Complaint that identify what decision-making authority DYER delegated to his subordinates. Defendant notes that Plaintiff incorporates Paragraphs 1-52 into his cause of action and that "[s]uch allegations include numerous actions taken **[**44]** by a variety of other officers. . . ." (Doc. 28, Def.'s Reply 6). To the extent that Plaintiff attempts to allege official capacity claims against the Defendant Officers other than DYER, Plaintiff's attempts fail. Plaintiff's allegations of decision-making and policy-making authority are conclusory and insufficient. In addition, no policy is identified or defined.

Defendants' Motion to Dismiss Plaintiff's *§ 1983* claim against the CITY is **GRANTED** with leave to amend.

D. Whether Plaintiff Can Maintain a *§ 1983* Claim Based On a Violation of the *Fourteenth Amendment*.

Defendants argue in a footnote that Plaintiff's *§ 1983* claim should be dismissed insofar as it is based on a violation of the *Fourteenth Amendment*. (Doc. 33, Def.'s Mem. 16, n. 3). Plaintiff does not address this argument in his opposition. (*See* Doc. 28, Def.'s Reply 5). Defendants argue that Plaintiff appears to allege that Defendants violated his rights under the *Equal Protection Clause of the Fourteenth Amendment* by treating him differently for having exercised his rights to free speech. (Doc. 33, Def.'s Mem. 16, n. 3).

"To state a claim under *42 U.S.C. § 1983* for a violation **[**45]** of the *Equal Protection Clause of the Fourteenth Amendment* a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001)*. The purpose of the *equal protection clause* is to "secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)* (per curiam) (quoting *Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445, 43 S. Ct. 190, 67 L. Ed. 340 (1923)*). A successful equal protection claim may be brought by a "class of one," where the plaintiff alleges that he has been intentionally treated differently from others similarly situated. *Id. at 563*.

Plaintiff identifies no allegations in his Complaint that he was treated differently from others who were similarly situated.

Defendant's Motion to Dismiss Plaintiff's *§ 1983* claims insofar as they are based on alleged violations of the *Equal Protection Clause of the Fourteenth Amendment* **[**46]** is **GRANTED**.

E. State Law Claims.

1. Whether Jurisdiction Exists over Plaintiff's Claim Under *Cal. Labor Code § 1102.5*.

Cal. Labor Code § 1102.5 establishes liability for employers who retaliate against their employees for disclosing information to government or law enforcement agencies. Defendants argue that a federal court lacks jurisdiction to hear Plaintiff's claim for violation of Cal. Labor Code § 1102.5 because, pursuant to Cal. Labor Code §§ 98.6 and 98.7, claims under Section 1102.5 are solely within the province **[*1180]** of the Labor Commissioner. (Doc. 33, Def.'s Mem. 17; Doc. 28, Def.'s Reply 7). Plaintiff responds that, pursuant to Cal. Labor Code § 96, Plaintiff "may" file a claim with the Labor Commissioner, although he is not required to do so.

Cal. Labor Code § 98.7 provides that "[a]ny person who believes that he or she has been discharged or otherwise discriminated against in violation of any law under the jurisdiction of the Labor Commissioner may file a complaint with the **[**47]** division within six months after the occurrence of the violation." Cal. Labor Code § 98.6(a) describes claims brought pursuant to various sections of the labor code, including § 1102.5, as brought "under the jurisdiction of the labor Commissioner." Neither of the provisions Defendants cite provides that **exclusive** jurisdiction over § 1102.5 claims lies with the Labor Commissioner. Defendants argue that Plaintiff cites no cases allowing a court to hear a claim under § 1102.5. Defendants also cite no cases holding that the Labor Commissioner has exclusive jurisdiction over § 1102.5 claims and that a court is *not* allowed to hear a § 1102.5 claim.

The California Supreme Court has recently held that a litigant seeking damages under § 1102.5 is required to exhaust administrative remedies before the Labor Commissioner prior to bringing suit. Campbell v. Regents of the Univ. of Cal., 35 Cal. 4th 311, 333-4, 25 Cal. Rptr. 3d 320, 106 P.3d 976 (2005) ("We conclude that absent a clear indication of legislative intent, we should refrain from inferring a statutory exemption from our settled rule requiring exhaustion of administrative remedies.") The exhaustion of administrative **[**48]** remedies rule is "well established in California jurisprudence." Id. at 321. "'[T]he rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.'" *Id.* (quoting Ablelleira v. Dist. Ct. of Appeal, 17 Cal. 2d 280, 292, 109 P.2d 942 (1941)). "Exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts." *Id.* (quoting Johnson v. City of Loma Linda, 24 Cal. 4th 61, 70, 99 Cal. Rptr. 2d 316, 5 P.3d 874 (2000) (internal quotations omitted)).

Plaintiff does not allege that he exhausted available administrative remedies, including bringing a complaint before the Labor Commissioner, before bringing suit.

Defendants' Motion to Dismiss Plaintiff's claim under Cal. Labor Code § 1102.5 is **GRANTED** on the grounds that there is no jurisdiction. [9]

[49] 2. Whether Plaintiff States a Claim Under Cal. Gov. Code § 53298, et seq.**

Cal. Gov. Code § 53298(a) establishes liability for any local agency officer, manager, or supervisor who retaliates against any employee for filing a complaint with the local agency reporting "gross mismanagement, a significant waste of funds, an abuse of authority, or a

[9] Because there is no jurisdiction to hear this claim, Defendants' substantive arguments regarding the sufficiency of Plaintiff's Section 1102.5 claim will not be addressed.

specific and substantial danger to public health or safety." *Cal. Gov. Code §§ 53298(a)*, *53296(c)*; *see also LeVine, 90 Cal. App. 4th at 212* (discussing *§ 53298 in dicta).*

Plaintiff's claim under *§ 53298* arises out of his allegations that he was placed on Administrative Leave because of (1) his written reports of sexual molestation by former-officer Mata and of "administrative improprieties that appeared designed to foster opportunities for further sex crimes;" and (2) his "written reports of **[*1181]** racial harassment of Southeast Asian Explorers by Police Activity League volunteers." (Doc. 23, Second Am. Compl. PP 21, 29, 60). Although Plaintiff's allegations are not entirely clear, it appears he filed at least some of these reports with the **[**50]** Internal Affairs and Human Resources Departments of the Fresno Police Department. (*See id.*). Plaintiff alleges that his reports of alleged sexual misconduct by Officer Mata and racial discrimination against "Southeast Asian Explorers" constituted "an abuse of authority and a substantial and specific danger to public health and safety." (*Id.* at P 60).

(a) Whether Plaintiff States a *Cal. Gov. Code § 53298* Claim against the CITY.

Defendants argue that Plaintiff is not entitled to bring a *§ 53298* claim against the CITY as is explicitly set forth in the statute. (Doc. 33, Def.'s Mem. 18). Plaintiff does not dispute Defendant's argument in his opposition. (*See* Doc. 28, Def.'s Reply 9).

Cal. Gov. Code § 53298.5(b) provides that no cause of action for violation of that section shall be brought against the local public entity:

> In no way [] shall the provisions of this article establish . . . any new cause of action against the local public entity other than liabilities contained in existing law.

Defendant's Motion to Dismiss Plaintiff's Claim Under *Cal. Gov. Code § 53298, et seq.*, against the CITY **[**51]** is **GRANTED.**

(b) Whether Plaintiff States a *Cal. Gov. Code § 53298* Claim against the Individual Defendants.

Defendants argue that Plaintiff fails to state a claim under *§ 53298* against the individual officers because he has not pleaded all required elements as set forth in *Cal. Gov. Code §§ 53296(c)-(d)*, *53297(a)-(d)*, and *53298(a)*. Plaintiff argues that he has complied with the pleading requirements.

The elements for this whistleblower cause of action are not clearly listed in any single section of the statute. Also, there does not appear to be any case law interpreting this statute. According to the statute's various provisions, it appears that the elements of a claim under *§ 53298* include the following:

> 1) The employee filed a complaint with a local agency regarding gross mismanagement, a significant waste of funds, an abuse of authority, or a specific and substantial danger to public health or safety. *Cal. Gov. Code §§ 53297(a)*, *53296(c)-(d)*.
>
> 2) The complaint was filed within 60 days of the date of the act or event that is the subject of the complaint. *Id.* at *§ 53297(a)*.

3) **[**52]** The complaint was filed under penalty of perjury. *Id.* at § 53297(d).

4) The complaint was filed in accordance with the locally adopted administrative procedure, or in the alternative there was no administrative procedure available. *Id.* at § 53297(c).

5) The employee made a good faith effort to exhaust all available administrative remedies before filing the complaint. [10] *Id.* at § 53297(b).

6) A local agency officer, manager, or supervisor took a reprisal action against the employee for filing the complaint. *Id.* at § 53298(a).

Plaintiff here has alleged three of the six elements listed above: (1) the complaints **[*1182]** he filed with Internal Affairs and/or Human Resources related to abuse of authority and a substantial and specific danger to public health or safety; (2) that these complaints **[**53]** were filed in accordance with the CITY's administrative policies and procedures; and (3) that his supervisors, who were local agency officers, took a reprisal action (i.e., placing him on Administrative Leave) as the result of his filing these complaints. Plaintiff has not alleged the three remaining elements; i.e., (1) that he filed these complaints within 60 days of the acts or events; (2) that the complaints were filed under penalty of perjury; and (3) that he attempted, in good faith, to exhaust the available administrative remedies before filing his complaint, or in the alternative that there were no available administrative remedies.

Assuming that the elements defined by the statute are pleading requirements, Plaintiff has failed to allege all elements necessary to state a claim. Defendants' Motion to Dismiss Plaintiff's claim under § 53298 is **GRANTED** with leave to amend.

(c) Whether Plaintiff fails to allege causation between Plaintiff's whistleblowing activities and the retaliatory act.

Defendants argue that because the whistleblowing activities alleged took place in 1996 and 1997, and the alleged retaliatory act (i.e., the placement of Plaintiff on Administrative **[**54]** Leave) took place over seven years later in March 2004, Plaintiff fails to establish a causal connection. Plaintiff's response is to refer to several paragraphs of the Second Amended Complaint (PP 28-29, 37, 39-41, 43). Plaintiff states in his opposition that "[w]hile the allegations are too extensive to set forth in full here, a quick perusal of the Complaint as a whole demonstrates the existence, if not presumption of a causal link." (Doc. 27, Pl.'s Opp. 20).

Plaintiff's Complaint alleges that, from 1997 to 2002, he was retaliated against by being passed over for promotions, and that eventually the retaliation culminated in his being placed on administrative leave in March 2004. While Plaintiff's argument about causation is tenuous, Defendants' contention that Plaintiff has failed to "establish" causation, ignores that this issue is for the fact-finder and cannot be resolved at the pleading stage.

Defendant's Motion to Dismiss Plaintiff's § 53298 claim on the grounds of failure to allege causation is **DENIED**.

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[10] "The 60-day time limit specified in [§ 53297(a)] shall be extended by the amount of time actually utilized by the employee in pursuing administrative remedies." *Id.* at § 53297(b).

(d) Whether Plaintiff's *§ 53298* Claim is Time-Barred for Failure to Timely File a Claim under the California Tort Claims Act.

Under the California Tort Claims **[**55]** Act, no suit for "money or damages" may be brought against a public entity until a written claim has been presented to the public entity and the claim either has been acted upon or is deemed to have been rejected. *Hart v. Alameda County, 76 Cal. App. 4th 766, 778, 90 Cal. Rptr. 2d 386 (Cal. Ct. App. 1999)*. The CTCA requires a plaintiff to file a timely tort claim with the public entity; if the claim is not timely, the public entity may reject the claim. If a claimant fails to timely file a claim with the public entity, and its claim is consequently rejected by the public entity for that reason, courts are without jurisdiction to hear the claimant's cause of action. *Greyhound Lines, 187 Cal. App. 3d at 487*; *Moyer, 10 Cal. App. 3d at 492-3*; *Carr, 58 Cal. App. 3d at 144-6*; *Williams v. Mariposa County, 82 Cal. App. 3d at 848-9*. For causes of action for death, personal injury, or injury to personal property, a claimant must file a claim within six months of the accrual of the cause of action. *Cal. Gov. Code § 911.2*.

[*1183] The parties dispute when Plaintiff's cause of action under *§ 53298* accrued. Defendants **[**56]** argue that it accrued in March 2004, when Plaintiff was placed on administrative leave. Plaintiff suggests that it accrued on July 6, 2004, when Defendants DYER and ENMARK refused to reinstate Plaintiff after allegedly having received opinions from three psychiatrists that he was fit for duty. Neither party offers any argument or authority as to when a claim under *§ 53298* accrues. Plaintiff argued that the earliest he reasonably could have been aware of his whistleblower claim was July 2004, when Defendants refused to reinstate him to duty after having been declared fit for duty by three psychologists. Construing Plaintiff's allegations in the most favorable light, as is required on a *Rule 12(b)(6)* motion, Plaintiff's whistleblower claim under *§ 53298* is not deficient for failure to timely file a complaint under the California Tort Claims Act.

Defendant's Motion to Dismiss Plaintiff's *§ 53298* claim on the grounds it is barred by the California Tort Claims Act is **DENIED.**

F. Defendants' Motion to Strike Pursuant to *Fed. R. Civ. P. 12(f)*.

"[M]otions to strike should not be granted unless it is clear that the matter to be **[**57]** stricken could have no possible bearing on the subject matter of the litigation." *Colaprico, 758 F. Supp. at 1339* (citation omitted).

1. Plaintiff's Claim for Punitive Damages under *§ 1983*.

First, Defendants argue that Plaintiff's claim for punitive damages under *§ 1983* against the individual defendants should be dismissed because Plaintiff fails to plead sufficient facts to support claims of malice against them. (Doc. 33, Def.'s Mem. 20). Under *§ 1983*, punitive damages are proper either when a defendant's conduct was driven by evil motive or intent, or when it involved a reckless or callous indifference to the constitutional rights of others. *Smith v. Wade, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983)*; *Larez v. City of Los Angeles, 946 F.2d 630, 639 (9th Cir. 1991)*. A public entity cannot be sued under *§ 1983* as a matter of law for punitive damages. *City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S. Ct.*

2748, 69 L. Ed. 2d 616 (1981). Insofar as Defendants seek to strike Plaintiff's punitive damages claim against the CITY, their motion is **GRANTED**.

As to the punitive damages claims against the individual defendants, Defendants' conclusory **[**58]** argument that "Plaintiffs [sic] allegations are insufficient to meet [the] standard as to all six individual Defendants" is not persuasive. It is not clear from Plaintiff's allegations whether the individual defendants were motivated by evil intent or whether they acted with recklessness or callous indifference to Plaintiff's constitutional rights. Plaintiff's allegations are sufficient to infer malice. *See* Fed. R. Civ. P. 9(b). Whether the officers acted with malice is a question of fact not properly decided on a motion to dismiss. Defendants' Motion to Strike Plaintiff's claim for punitive damages against the individual defendants is **DENIED.**

2. Plaintiff's Claim for Punitive Damages under *Cal. Gov. Code § 53298*.

Second, Defendants argue that Plaintiffs' claim for punitive damages under Cal. Gov. Code § 53298 should be stricken for failure to plead malice. In support, Defendants cite the definition of malice at Cal. Civ. Code § 3294(c)(1) and two California state cases regarding malice pleading requirements. Federal district courts sitting in diversity **[**59]** apply the substantive **[*1184]** law of the forum state, but apply procedural rules as stated in the Federal Rules of Civil Procedure. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *see also* Clark v. Allstate Ins. Co., 106 F. Supp. 2d 1016, 1019 n.3 (S.D. Cal. 2000). The California law Defendants cite is not controlling. While Cal. Civ. Code § 3294(a) applies insofar as it allows for the recovery of punitive damages on a successful tort claim (including statutory torts), [11] the Federal Rules of Civil Procedure govern pleading standards in federal district court.

Specifically, Rule 9(b) governs pleading requirements for malice: "Malice, intent, knowledge and other condition[s] of mind of a person may be averred generally." The court in *Clark*, following other federal district courts **[**60]** in California, held that "conclusory assertions that a defendant acted intentionally, with malice' or with conscious disregard'" are "adequate to plead the mental state required under Section 3294." Clark, 106 F. Supp. 2d at 1019-20 (holding that because plaintiff's complaint alleges that defendant intentionally denied plaintiff's insurance claim and that it acted with an intent to injure plaintiff, the Complaint complied with Fed. R. Civ. P. 8, 9). Here Plaintiff alleges that Defendants retaliated against Plaintiff for his "whistleblowing" activities. (*See* Doc. 23, Second Am. Compl. P 60). Allegations of retaliation are sufficient to infer intent to injure. Defendants' Motion to Strike Plaintiff's claim for punitive damages under Cal. Gov. Code § 53298 is **DENIED**.

3. Plaintiff's Allegations Relating to Defendants' Failure to Promote Plaintiff "Between June 1997 and December 2002."

Defendants argue that Plaintiff's allegations relating to Defendants' failure to promote Plaintiff "between approximately June 1997 and December 2002" should be stricken **[**61]** because one of Plaintiff's previously-filed complaints alleged different dates. Specifically, Plaintiff's First

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[11] Cal. Civ. Code § 3294(a) allows for an award of punitive damages against a tortfeasor whose acts are characterized by oppression, fraud, or malice.

Amended Complaint alleged that Defendants failed to promote him "between June 1997 and January 2002." Defendants argue that Plaintiff's "new" allegations contradict the allegations in the First Amended Complaint, that Plaintiff provided no explanation for the purported contradiction, and that therefore the "new" allegations need not be accepted as true and should be stricken. (Doc. 33, Def.'s Mem. 21). Defendants cited no law or rule that does not allow a plaintiff to expand the time period of alleged wrongdoing. The expanded time period in the operative complaint does not contradict the allegation in the earlier complaint. Defendants' Motion to Strike Plaintiffs' allegations relating to Defendants' failure to promote him between June 1997 and December 2002 is **DENIED.**

4. Plaintiff's Allegations Relating to Adverse Employment Actions Taken Before November 1, 2002.

Defendants argue that Plaintiff's allegations relating to adverse employment actions taken before November 1, 2002, should be stricken as time-barred. Under notice pleading requirements, a party is **[**62]** not required to plead evidentiary facts. *See* Fed. R. Civ. P. 8(a). Allegations relating to adverse employment actions may be evidence of improper motive, even if a § 1983 claim based upon those actions would be time-barred. *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara, 344 F.3d 822, 829 (9th Cir. 2003)*. It is not proper to make evidentiary rulings at the **[*1185]** pleading stage. Striking allegations of adverse actions outside the statutory period for § 1983 violations is therefore not appropriate. Defendants' Motion to Strike Plaintiff's allegations relating to adverse actions prior to November 1, 2002 is **DENIED.**

5. Plaintiff's Allegations Relating to his Written Reports of the Alleged Sexual Misconduct of Officer Mata.

Defendants' papers do not make clear the precise allegations regarding Officer Mata that they move to strike. Defendants refer to Paragraphs 16-28 of the Second Amended Complaint in their motion and their reply, and appear to move to strike all allegations contained in these paragraphs. However, Defendants' argument relates only to Plaintiff's allegations regarding the purported dispute between **[**63]** Internal Affairs and Plaintiff's chain of command as to whether Plaintiff should report issues relating to Officer Mata in writing. (Doc. 28, Def.'s Reply 12). Defendants assume that Plaintiff's § 1983 cause of action is based upon this purported internal police dispute. Defendants argue that the allegations regarding the disagreement over the form of the reports does not, as a matter of law, relate to a matter of public concern, and is therefore not protected speech under the First Amendment. Plaintiff's response does not relate specifically to his allegations regarding the form of the reports, but instead appears to relate to all of his allegations regarding Mata. Plaintiff argues that reports of sexual misconduct by a police officer address matters of public concern and are therefore protected speech.

The parties' treatment of this complex First Amendment issue is cursory and deficient. First, Defendants appear to raise an argument on the merits, which is not appropriate on a Rule 12(f) motion to strike. See Ritzer v. Gerovicap Pharmaceutical Corp., 162 F.R.D. 642, 644 (D. Nev. 1995). Defendant appears to argue that internal disputes over the form of reports are **[**64]** not, as a matter of law, matters of public concern. This argument goes to the merits of Plaintiff's First

Amendment retaliation claim and is more appropriately dealt with on a *Rule 12(b)(6)* motion to dismiss.

Second, Defendants' characterization of Plaintiff's *§ 1983* claim is inaccurate, although Plaintiff does not dispute Defendants' characterization in his opposition. Defendants state that Plaintiff's *§ 1983* violation is "based on a dispute between the Internal Affairs Division and his chain of command as to whether he should report issues relating to Officer Mata in writing." (Doc. 33, Def.'s Mem. 24). Plaintiff's *§ 1983* cause of action, as stated in the Second Amended Complaint, contains no specific allegations regarding the protected speech upon which his *§ 1983* claim is based. (*See* Doc. 23, Second Am. Compl. PP 53-4). Allegations elsewhere in the complaint, however, provide additional information. Specifically, Plaintiff alleges that he was retaliated against for having reported to Internal Affairs, in writing, information regarding purported sexual misconduct by Officer Mata. Furthermore, Plaintiff alleges that he was retaliated against for disobeying orders from his **[**65]** immediate chain of command not to report the sexual misconduct to Internal Affairs, in writing or otherwise, and that he was only to report the alleged sexual misconduct to his immediate superiors.

Plaintiff's allegations regarding a purported "dispute" within the Fresno Police Department over whether reports of Officer Mata's alleged sexual misconduct should be in writing are irrelevant to Plaintiff's *§ 1983* claim and should therefore **[*1186]** be stricken is not appropriately decided on a motion to strike.

Public employees do not relinquish their right to free speech by virtue of their employment. *Ceballos v. Garcetti, 361 F.3d 1168, 1173 (9th Cir. 2004)*. However, public employees do not enjoy absolute *First Amendment* rights. *Id.* To determine whether a public employee's speech is protected by the *First Amendment*, courts in the Ninth Circuit apply a two-step test. *Id.* The first step is to determine whether the speech addresses a matter of public concern. *Id.* If it does, the next step is to engage in a balancing analysis established by the United States Supreme Court in *Pickering v. Bd. of Educ. of Township High School Dist. 205, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)*. **[**66]** The balancing test requires a court to determine whether the public employee's interest in expressing him-or herself outweighs the government's interest "in promoting workplace efficiency and avoiding workplace disruption." *Id.*

Defendants argue that allegations regarding the dispute between Internal Affairs and Plaintiff's chain of command over whether the reports regarding Officer Mata should be in writing are not matters of public concern and are therefore irrelevant to Plaintiff's *First Amendment* claim and should be stricken. This argument goes to the merits of Plaintiff's *First Amendment* retaliation claim and should not be dealt with on a motion to strike. The issue whether the expressive conduct upon which Plaintiff bases his *First Amendment* retaliation claim is protected speech was not fully briefed by the parties and should not be decided in the context of this motion.

The dispute over the reports concerning alleged violations of law by police officers is part of the overall alleged scheme of discrimination. Defendants' Motion to Strike Plaintiff's allegations in Paragraphs 16 through 28 is **DENIED.** Defendants' motion to strike the Mata allegations as irrelevant to **[**67]** the state whistleblower claims is **MOOT.**

VI. CONCLUSION

Defendants' Motions to Dismiss pursuant to *Rule 12(b)(6)*:

(1) Plaintiff's *§ 1983* claims insofar as they are based on adverse employment actions occurring before November 1, 2002 is **GRANTED** with prejudice;

(2) Plaintiff's *§ 1983* claims against the individual Defendants is **DENIED**;

(3) Plaintiff's *§ 1983* claim against the CITY is **GRANTED** with leave to amend; Defendants' Motion for a More Definite Statement pursuant to *Rule 12(e)* as to Plaintiff's *§ 1983* claim against the CITY is **MOOT**;

(4) Plaintiff's *§ 1983* claim based on deprivation of rights under the *Fourteenth Amendment* is **GRANTED**;

(5) Plaintiff's *Cal. Labor Code § 1102.5* claim is **GRANTED**; and

(6) Plaintiff's *Cal. Gov. Code § 53298* claim against the CITY is **GRANTED**; Plaintiff's *Cal. Gov. Code § 53298* claim against the individual Defendants on the grounds of failure to plead all elements is **GRANTED** with leave to amend; Plaintiff's *§ 53298* claim against individual defendants on all other grounds **[**68]** is **DENIED.**

Defendants' Motions to Strike pursuant to *Rule 12(f)* Plaintiff's claim for punitive damages as to the CITY is **GRANTED.** Defendants' Motion to Strike all remaining claims is **DENIED.**

SO ORDERED.

DATED: July 15, 2005.

Oliver W. Wanger

UNITED STATES DISTRICT JUDGE

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EXHIBIT 6

People v. Cortez

Supreme Court of California

May 9, 2016, Filed

S211915

Reporter
63 Cal. 4th 101 *; 369 P.3d 521 **; 201 Cal. Rptr. 3d 846 ***; 2016 Cal. LEXIS 2564 ****

THE PEOPLE, Plaintiff and Respondent, v. NORMA LILIAN CORTEZ et al., Defendants and Appellants.

Subsequent History: Reported at *People v. Cortez, 2016 Cal. LEXIS 5291 (Cal., May 9, 2016)*

On remand at, Decision reached on appeal by, Remanded by *People v. Cortez, 2016 Cal. App. Unpub. LEXIS 6336 (Cal. App. 2d Dist., Aug. 29, 2016)*

Prior History: **[****1]** Superior Court of Los Angeles County, No. BA345971, Dennis J. Landin, Judge. Court of Appeal, Second Appellate District, Division Eight, No. B233833.

People v. Cortez, 2013 Cal. App. Unpub. LEXIS 3831 (Cal. App. 2d Dist., May 30, 2013)

Case Summary

Overview

HOLDINGS: [1]-*CALCRIM No. 361* (failure to explain or deny adverse testimony) applies only when a defendant completely fails to explain or deny incriminating evidence, or claims to lack knowledge and it appears from the evidence that the defendant could reasonably be expected to have that knowledge (overruling to the extent inconsistent *People v. Belmontes (1988) 45 Cal.3d 74* and *People v. Redmond (1981) 29 Cal.3d 904*); [2]-The instruction was proper under *Pen. Code, § 1127*; *Evid. Code, § 413*, in a drive-by shooting case because there was ample evidence that, despite defendant's testimony as to lack of knowledge, she could reasonably be expected to know why the shooter got out of the car, what had happened, where gunfire was coming from, how a bullet ended up on the floorboard, and whether the shooting could be related to gang activity.

Outcome
Reversed and remanded.

Counsel: Robert E. Boyce and Benjamin B. Kington, under appointments by the Supreme Court, for Defendant and Appellant Norma Lilian Cortez. **[*105]**

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller, Steven D. Matthews and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Chin, J., with Cantil-Sakauye, C. J., Corrigan, and Kruger, JJ., concurring. Concurring opinion by Werdegar, J., with Liu, and Cuéllar, JJ., concurring.

Opinion by: Chin

Opinion

[*850] [**524]** **CHIN, J.**—While riding in a car driven by defendant Norma Lilian Cortez (defendant), Rodrigo Bernal fired five or six shots at 19-year-old Emanuel Z. and 16-year-old Miguel Guzman, killing the latter. In a joint trial, a jury convicted defendant and Bernal of premeditated murder and attempted premeditated murder. The Court of Appeal unanimously affirmed Bernal's convictions. However, in a divided opinion, **[****2]** it reversed defendant's convictions based on the following: (1) the giving of *CALCRIM No. 361*, which instructed jurors that, in evaluating the evidence against a testifying defendant, they could consider the defendant's failure to explain or deny that evidence if the defendant could reasonably be expected to have done so based on what the defendant knew; (2) the admission of Bernal's out-of-court statement that he and defendant went to shoot some gang members; and (3) the prosecution's comments about the reasonable doubt standard during closing argument. We granted review, as to defendant only, to consider these issues. Finding no trial errors, we reverse the Court of Appeal's judgment.

I. Factual Background

On September 3, 2008, Miguel and Emanuel, who were childhood friends, were living in a Los Angeles neighborhood near the intersection of 5th and Bonnie Brae Streets. There was 18th Street gang graffiti in the area, and gang members frequented the neighborhood. Miguel and Emanuel, however, **[**525]** were not gang members. As they were crossing 5th Street near the corner of Bonnie Brae Street, Emanuel heard a female ask, "'Where you guys from?'" Emanuel saw a female driving a car with a male in the front passenger seat and another **[****3]** male in the back. The driver's window was down. Miguel and Emanuel kept walking and did not respond.

Emanuel heard the same female voice say, "'Let them have it,'" and saw the car stop. The male in the front passenger seat exited the car, pulled a dark-colored gun from his waist area, and began firing at Miguel and Emanuel. Emanuel ran when he saw the gun. Miguel, appearing startled, **[*106]** raised his hands. The man shot five or six times, killing Miguel. Miguel did not have a gun, and no one returned fire.

Emanuel ran into a nearby building and looked out from its balcony. He saw Miguel on the pavement below, receiving help from paramedics. He tried to leave, but **[***851]** police would not let anyone exit the building. He did not immediately speak with police because he was

"shocked" and afraid to talk to them. About a week later, as he was visiting Miguel's family at Miguel's house, he unexpectedly encountered detectives and spoke with them. Viewing a six-pack photo array, he identified three women as resembling defendant. He identified Bernal as the shooter from a six-pack photo array, and later identified him again at the preliminary hearing. He did not identify Bernal at trial.

On the day of the **[****4]** shooting, David R., who also lived in the neighborhood, heard the sound of brakes slamming and saw a light beige car stop suddenly. Defendant was driving the car, Bernal was in the front passenger seat, and another passenger—perhaps a child—was in the back. Defendant and Bernal were yelling at Miguel. Because they were yelling over each other, David R. could not understand what they were saying. Miguel may have responded, "'18th Street,'" but he continued walking. Bernal exited the car, pulled a gun from his waist area, and started shooting. Miguel raised his hands and looked scared. After the last shot, the beige car moved a few feet forward and then stopped when Bernal said, "'Hold on, … hold on.'" Bernal entered the car and said, "'Let's go, let's go.'" The car proceeded south on Bonnie Brae Street. After calling 911 and giving the operator a partial license plate number, David R. noticed Miguel lying on 5th Street, not moving or breathing. Police spoke to David R. on the day of the shooting during their canvass of the neighborhood.

Marvin B., who also lived in the neighborhood, was in his apartment when he heard a gunshot. From his window, he saw Bernal standing beside a parked **[****5]** car and shooting. He heard more shots and saw Bernal chase someone across the street. He heard more shots after Bernal left his line of sight. Marvin B. walked outside and saw defendant's car turning right from 6th Street onto Alvarado Street. He saw the female driver's face. He spoke with police at the scene shortly after the shooting and described defendant. He identified her that same day during a field showup.

At 4:15 p.m., responding officers found Miguel bleeding from his mouth and not breathing. Because the shooting had occurred in 18th Street gang territory, they went to the nearby territory of the rival Rockwood gang. There, they saw a car matching the description—including license plate number—of the car reportedly involved in the shooting, double-parked in the middle of **[*107]** the street with its hazard lights flashing. They found defendant in the driver's seat and arrested her. On the car's passenger side, they found a live round of ammunition that matched the caliber and brand of several found at the scene of the shooting.

On September 3, 2008, during a recorded police interview the jury later heard at trial, defendant initially gave the following account: On the day of the **[****6]** shooting, Bernal asked for a ride to pick up some money. They stopped and picked up Bernal's friend, who was "very young" and dressed in "gangster attire." Bernal was in the front passenger seat and his friend was in the back. Bernal told defendant to "'just drive around.'" He then instructed her, first to stop at 3rd and Bonnie Brae Streets so he and his friend could exit, and then to continue driving. He said he and his friend would catch up with her. As defendant drove, she heard gunshots from two blocks away at 5th **[**526]** and Bonnie Brae Streets. Bernal and his friend then reentered defendant's car. Defendant did not know what had happened and she did not ask about the shots. She drove to where **[***852]** police later found and arrested her, which was where Bernal and his friend had exited the car and instructed her to wait. She had known Bernal about a year, and

they were friends. She knew he associated with the Rockwood gang, but did not believe he was a gang member. She believed he "always carrie[d]" a gun.

Later in the interview, defendant admitted that her initial statement was untrue, and she gave the following, different account: Before the shooting, she heard Bernal yelling, "'Where you from?'" to **[****7]** two young men she believed to be gang members. The young men responded, "'18th Street.'" Bernal yelled, "'Rockwood.'" Defendant told Bernal to "'[l]et it go.'" Instead, he jumped out of the car, and defendant then heard shots. The backseat passenger did not exit the car. Defendant continued driving, but did not get far because of traffic. Bernal ran and jumped back into the car. Defendant started to "cuss[] him out." He said nothing to her except, "'drive.'" Defendant kept driving, and was scared. Bernal told her to stop, and he then exited. He told her to drive down the block and wait for him. She did so, stopping and activating her emergency lights.

Detective John Motto investigated the shooting. He testified that six bullet casings and one expended bullet were found at the scene, all nine millimeter but different brands. He also testified that officers commonly find at a single crime scene bullet casings from multiple manufacturers that have been discharged from a single gun.

On September 4, 2008, in a taped interview with police that was played for the jury, Bernal's nephew, Oscar Tejeda, told police that Bernal had come to his apartment and said that he "and this woman … went to—'we **[****8]** went **[*108]** shooting some 18s,'" that they "went … in her car," and that she "was the one driving" and "he was the one shooting." Tejeda also told police he thought the woman Bernal had identified lived in his (Tejeda's) apartment building. At first, Tejeda said he could not remember the woman's name. Asked whether her name was "Stephanie," "Sylvia," "Nancy," "Mickey," "Martha," or "Norma," he said, "Norma. I think it's Norma." He then confirmed that Bernal had "said her name." The police then asked, "So he told you the girl he went and did the shooting with is Norma?" Tejeda replied, "Yeah. She was driving in her car." He also identified defendant from a six-pack photo array and told police that Bernal was a member of the Rockwood gang, that Bernal's gang moniker was "Scooby," and that defendant socialized with Bernal and other Rockwood gang members.

At trial, Tejeda gave an entirely different account, testifying as follows: Police came to his house with their guns drawn and handcuffed him and his sister. Some hours later, they asked him for a gun and said they would arrest him for aiding a murder suspect if he did not give them one. He replied that he did not know what they were talking **[****9]** about. He was scared. They took him to the station. There, he lied about what Bernal had said and felt pressured by police to do so. In fact, Bernal had said nothing about a shooting. Tejeda nevertheless also testified that the detective who had interviewed him had been friendly and polite. Finally, he testified that he had seen defendant and Bernal socializing with Rockwood gang members and that Bernal was a Rockwood gang member.

Gang expert Antonio Hernandez testified that the Rockwood and 18th Street gangs were enemies and occupied adjacent territories. Bernal was a Rockwood member, with the monikers "Scooby" and "Woody." Hernandez did not believe defendant, **[***853]** Miguel, or Emanuel were gang members. Defendant and Miguel each had a triangular, three-dot tattoo that signified the "crazy life" and suggested that its bearer was living a life of doing drugs, drinking, and

committing crimes. Both gang members and associates of gangs—those who hang out with gang members but who have not been formally admitted into the gang—commonly have this tattoo.

Presented a hypothetical based on the facts of this case, Hernandez opined that the shooting was for the benefit of the Rockwood **[**527]** gang, the primary **[****10]** activities of which were committing robberies, assaults, extortion, criminal threats, felony vandalism, and narcotics sales. He also opined that it was not safe for gang members casually to enter a rival gang's territory, and that before doing so, gang members would "already have a plan" to "shoot or assault" anyone they "possibly see as an enemy." According to Hernandez, when a gang member asks, "Where are you from," it is a challenge that is intended to initiate a confrontation; those uttering the statement have "made **[*109]** up their mind they are going to assault th[e] person" to whom they are speaking "because they see [the person] as a possible threat."

From jail, Bernal tried sending a letter to Rockwood gang member Jose Birrueta. In it, Bernal stated defendant's full name and booking number, and asked Birrueta to "go and see her at Lynwood jail and talk to her to see what she's saying with me or against me." The letter continued: "If she's against me write to me and let me know what's up so I can make a game plan. If she's with me let me know what she's saying and tell her to change her story because they don't have anything on both of us to say that I wasn't with her that day to let me **[****11]** go. She's the only one holding me back so when I get out I could help her with a lawyer." Bernal asked Birrueta to "brainwash" defendant, "talk to her, convince her to say I was not with her, that they scare her, the police did, and she was just nervous and she just confused." In the letter, Bernal described Emanuel Z. as "the other fool who's snitching me out," and stated: "Could you go … talk to him and say different." "My nephew talked to him to say the police scare him and threatened him. So when the detectives came he said what he say, so to say different. He was scared, but it was a lie, what he said when he gets to court."

At trial, defendant testified as follows: She was not a gang member and was not involved in any kind of gang mission on the day of the shooting. On that day, Bernal asked for a ride so he could pick up money he had lent to someone. She replied that she would need gas money if she gave him a ride, and he agreed. They started driving on 6th Street near Bonnie Brae and Alvarado Streets, and picked up Bernal's teenage friend, who got in the backseat. Bernal did not ask for permission to give his friend a ride. Defendant did not ask why the friend entered the **[****12]** car, but assumed it was because he owed Bernal the money. She did not care, and did not see anything wrong in the situation. Bernal told her to continue driving and he would direct her where to go.

As they neared the intersection of 5th and Bonnie Brae Streets, she saw two young men yelling "'18th Street'" and making signs with their hands. No one in her car responded. However, without saying a word, Bernal jumped out of the still-moving car. One of the young men "reach[ed] like a motion like to getting a gun." Defendant, who was still driving, then heard shots. Bernal then reentered the car and said, "'let's go.'" He directed her to another location. She stopped as instructed, at which point Bernal and his **[***854]** friend exited. She knew something bad had happened, but did not ask what because she was scared. She activated her hazard lights and waited for Bernal's return. She was a "bundle of nerves" and did not go home

because she was not thinking. She was "frozen" and did not know what to do. Police arrived 10 minutes later and arrested her. She was not initially truthful with them because she was scared. **[*110]**

She met Bernal when she moved into her apartment, and he and some of his friends had offered **[****13]** to help her carry groceries. Their relationship was platonic. She had believed he was a nice, helpful person, and did not think he was a gang member. However, he talked a lot about the Rockwood gang and was proud of it, and got into fights and carried a gun at all times. She knew she lived in Rockwood gang territory, but denied there was gang activity in her neighborhood or the neighborhood where the shooting occurred.

II. Discussion

As earlier noted, in reversing defendant's convictions, the Court of Appeal majority concluded that three errors cumulatively prejudiced defendant: (1) the giving of *CALCRIM No. 361*; (2) admission of Bernal's **[**528]** out-of-court statements to Tejeda that he and defendant went to shoot members of another gang; and (3) comments of the prosecution during closing argument that lowered the standard of proof to convict. Below, we address each of these issues in turn.

A. *The Trial Court Properly Gave CALCRIM No. 361*.

During discussion of the jury instructions, the prosecution asked the court to give *CALCRIM No. 361*, which addresses a testifying defendant's failure to explain or deny incriminating trial evidence. The prosecution argued that the instruction applied because defendant had inadequately explained during **[****14]** her testimony why she had driven into the neighborhood where the shooting occurred, and had failed to explain why she had stopped the car, why witnesses had heard her screaming from the car, or why she had waited for Bernal at various times. Defendant's counsel disagreed, arguing that defendant had adequately explained her actions. The trial court responded: "You don't have to argue it now. I think, in fairness to the People, I should include it. Then you can argue that there's no such evidence of that." Following *CALCRIM No. 361*, the court later gave the following instruction: "If the defendant Norma Cortez failed in her testimony to explain or deny evidence against her and if she could reasonably be expected to have done so based on what she knew, you may consider her failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

The Court of Appeal concluded that the giving of this instruction was error because defendant had not failed during her testimony **[****15]** to explain or deny any fact or evidence within her personal knowledge. It reasoned: "She generally explained her actions the day of the shooting. She explained why she gave **[*111]** Bernal a ride (to pick up some money), why she drove to the area of the shooting (she was following Bernal's directions), and why she waited for Bernal after the shooting (she was scared, nervous, and not thinking straight). [The People are] simply incorrect when [they] assert[] that [defendant] failed to explain a number of things within her **[***855]** knowledge. For instance, [the People] argue[] [defendant] did not explain a three-hour discrepancy between the time she said the shooting occurred (approximately 1:00 p.m.) and the

time prosecution witnesses said it occurred (approximately 4:00 p.m.). A conflict in the evidence does not equate to a failure to explain. [Citation.] Still, when confronted with the discrepancy on cross-examination, she explained it. She admitted that she was not 'quite sure' the shooting occurred around 1:00 p.m., and it was probable she had been mistaken when she said that it occurred early in the day. [The People] also argue[] she did not explain whether she thought Bernal's friend was dressed **[****16]** like a gang member. But [she] explained the friend's dress, and if there was any failure to explain, it was only because the prosecutor cut her off. … In yet another instance, [the People] argue[] [defendant] failed to explain why she did not stop the car to let Bernal in after the shooting. To the contrary, she explained she was not going to 'stop and check' because gunfire had just occurred and she was scared. As a final example, [the People] maintain[] she failed to explain how a live bullet ended up on the floorboard of her car. In fact, she testified she did not put the bullet there, she had no idea how it got there, and she did not know if it was there before Bernal got into the car because she did not check the car before then. [She] explained that the bullet's presence was not within her personal knowledge. She need not have speculated how the bullet came to be there. [Citations.] [¶] [The People] further assert[] that several of [defendant's] statements were implausible and therefore justified the instruction. Whether [the People] found her statements plausible is not the test, however. [Citation.]"

The People continue to assert that the giving of the instruction was proper. **[****17]** Citing *People v. Belmontes (1988) 45 Cal.3d 744 [248 Cal. Rptr. 126, 755 P.2d 310]* (*Belmontes*), *People v. Redmond (1981) 29 Cal.3d 904 [176 Cal. Rptr. 780, 633 P.2d 976]* (*Redmond*), and **[**529]** several decisions from our Courts of Appeal, they argue the instruction applies not only when a testifying defendant completely fails to explain or deny incriminating trial evidence, but also when the defendant's testimony "contains logical gaps," "creat[es] 'crucial points of conflict'" with other trial evidence, or is otherwise "bizarre," "implausible," or "nonresponsive." Such testimony, the People argue, is "inherently a failure to explain or deny facts," is "the functional equivalent of no explanation at all," and "amounts to a failure to explain or deny evidence." Under these principles, because defendant's testimony "was riddled with implausible statements and logical gaps, and she either did not **[*112]** directly answer or gave vague responses to several of the prosecutor's questions," the trial court properly gave the instruction.

Defendant, on the other hand, continues to assert that the trial court erred. Citing other decisions from our Courts of Appeal and our decision in *People v. Saddler (1979) 24 Cal.3d 671 [156 Cal. Rptr. 871, 597 P.2d 130]* (*Saddler*), she argues the instruction applies "only where the defendant completely fails to explain a specific, significant piece of evidence," and "is not justified merely because a defendant's **[****18]** explanation conflicts with other evidence, or because the jury may ultimately disbelieve the defendant's testimony." In her view, decisions indicating that the instruction applies when the defendant's testimony is "bizarre" or "implausible" use those terms not "in the sense" that the testimony is not "believable" or "represents an arguably less likely interpretation of the evidence," but "in the sense" that it "fail[s] to account for indisputable physical evidence or fail[s] to describe what happened during long **[***856]** periods of time—in other words, [it] fail[s] to explain the evidence." Because, under these principles, she "did not fail to explain or deny evidence against her," the trial court should not have given the instruction.

These divergent views are understandable under existing case law. In *Saddler, supra, 24 Cal.3d at page 677*, we held that the trial court had erred in giving the following instruction: "'If you find that [the defendant] failed to explain or deny any evidence or facts against him which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may **[****19]** be reasonably drawn therefrom those unfavorable to the defendant are the more probable.'" (Fn. omitted.) "Under the instruction," we first explained, "inferences are permissible only if the jury finds that [the] defendant failed to explain or deny facts or evidence that he could be reasonably expected to explain or deny." (*Id. at p. 680*, italics omitted.) The instruction was unwarranted, we continued, because "[t]here [were] no facts or evidence in the prosecution's case within [the defendant's] knowledge which he did not explain or deny. There is no indication that he failed to disclose any facts within his knowledge that would have shed further light on the robbery. *There were contradictions between* [*his*] *testimony and that of the prosecution witnesses, but a contradiction is not a failure to explain or deny*. Thus, [the defendant's] testimony that he sometimes smoked Kool cigarettes if offered to him but never 'requested' them and [a police officer's] testimony that on occasion [the defendant] requested a Kool cigarette from him *establishes a clear conflict in the evidence, but it does not constitute, as the People suggest, a failure to explain or deny*." (*Id. at pp. 682–683*, italics added, fn. omitted; see *People v. Marks (1988) 45 Cal.3d 1335, 1346 [248 Cal. Rptr. 874, 756 P.2d 260]* [finding **[****20]** "persuasive" the defendant's contention that "he did not fail to explain or to **[*113]** deny any important evidence against him" where "he testified extensively to a version of the events that contradicted the prosecution's case in all important respects"].)

Citing *Saddler*, a number of Courts of Appeal have stated that "a contradiction arising between [a defendant's] testimony and that of a prosecution witness does not constitute a failure to explain or deny" that justifies giving the instruction. (*People v. Ellers (1980) 108 Cal. App. 3d 943, 955 [166 Cal. Rptr. 888]*; see *People v. Lamer (2003) 110 Cal.App.4th 1463, 1469 [2 Cal. Rptr. 3d 875]*; *People v. Kondor (1988) 200 Cal. App. 3d 52, 57 **[**530]** [245 Cal. Rptr. 750]*; *People v. Mask (1986) 188 Cal. App. 3d 450, 455 [233 Cal. Rptr. 181]* (*Mask*); *People v. Roehler (1985) 167 Cal. App. 3d 353, 393, 404 [213 Cal. Rptr. 353]*.) Based on this principle, some of these courts have also rejected the view that the instruction is warranted where the defendant's testimony is "so improbable it amount[s] to no explanation at all." (*Kondor, at p. 57*.) In the view of these courts, the instruction "is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear." (*Ibid.*; see *Lamer, at p. 1469* [quoting *Kondor*].)

On the other hand, in *Belmontes, supra, 45 Cal.3d at page 784*, we held that the instruction had properly been given at trial, explaining: "There were … crucial points of conflict between [the] defendant's extrajudicial statements and trial testimony on **[***857]** the one hand, and the physical evidence and **[****21]** testimony of witnesses on the other. … [T]hese … conflicts were hardly 'tangential, collateral and of little importance.' '[I]f the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible, the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury [citations].' (*People v. Mask[, supra,] 188 Cal. App. 3d [at p. 455]* … .)" In *Redmond, supra, 29 Cal.3d at page 911*, the other decision on which the People rely, we held that the giving of the instruction was justified by

"[the] defendant's delay for two months in disclosing the location of the knife" used in the crime, "his failure to summon an ambulance or assist or transport [the victim] for medical assistance, and the variance between the description of [the victim's] wound as 'downward and inward' and defendant's version of an 'upward' thrust caused by [the victim's] fall on the knife." "It is entirely proper," we explained, "for a jury, during its deliberations, to consider logical gaps in the defense case, and the jury is reminded of this fact by the instruction at issue." (*Ibid*.)

To resolve this apparent **[****22]** inconsistency in the case law, we begin with the history of a defendant's right to testify in California. At common law, a criminal defendant was "incompetent to testify under oath in his own behalf **[*114]** at his trial." (*Ferguson v. Georgia (1961) 365 U.S. 570 [5 L. Ed. 2d 783, 81 S. Ct. 756]*.) In 1866, the Legislature abolished the common law rule in California by enacting a statute providing that a person charged with a crime "shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the Court." (Stats. 1865–1866, ch. 644 (DCXLIV), p. 865.) Three years later, we held that the prosecution may not comment on a defendant's exercise of the option under this statute *not* to testify; otherwise, by "declining to exercise [the] privilege," the defendant "would practically, if not theoretically, … furnish evidence of his guilt that might turn the scale and convict him." (*People v. Tyler (1869) 36 Cal. 522, 530*.) The Legislature effectively codified this holding by enacting Penal Code former section 1323 [1] to provide that a defendant's "neglect or refusal to [be a witness] shall not in any manner prejudice him nor be used against him on the trial or proceeding." (1872 Pen. Code, pt. 11, tit. X, § 1323, p. 293; **[****23]** see *People v. O'Brien (1885) 66 Cal. 602, 603 [6 P. 695]*.) "[U]nder this section in general it [was] not proper for the district attorney to comment on the effect of the failure of the defendant to testify upon any subject connected with the trial, although he may have been a witness and may have testified on other subjects." (*People v. Mead (1904) 145 Cal. 500, 506 [78 P. 1047]* (*Mead*).)

During the same period, we explained that different rules apply when a defendant *does* testify on a subject. Several of our decisions held that, under these circumstances, the prosecution may comment on the defendant's failure to make an express or explicit denial of facts shown by the prosecution's evidence. (*People v. Mayen (1922) 188 Cal. 237, 258 [205 P. 435]* ["'If the defendant in a criminal **[**531]** action voluntarily testifies for himself, the same rights exist in favor of the state's attorney to comment upon his testimony, or his refusal to answer any proper question, or **[***858]** to draw all proper inferences from his failure to testify upon any material matter within his knowledge, as with other witnesses.'"]; *Mead, supra, 145 Cal. at p. 507* [prosecution properly commented on testifying defendant's failure to make "express" or "explicit denial" of circumstance, shown by prosecution's evidence, that the defendant was married to the woman he **[****24]** allegedly allowed to be placed in a house of prostitution]; *People v. Wong Bin (1903) 139 Cal. 60, 65–66 [72 P. 505]* [because the testifying defendant "went fully into the details of the difficulty, claiming that the killing was in self-defense," the prosecution "was authorized in commenting upon his failure to deny certain alleged statements testified by other witnesses to have been made by him, inconsistent with his testimony given on the trial"].)

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[1] All unlabeled statutory references are to the Penal Code.

In other decisions, our courts explained that, where warranted by a defendant's trial testimony, a court may instruct the jury that "'[a] witness **[*115]** who willfully testifies falsely as to any material fact in giving his testimony is to be distrusted in other parts of his testimony.'" (*People v. Gibson (Cal. 1917) 33 Cal.App. 459, 462 [166 P. 585]*.) This instruction "submits the testimony of the defendant, who testifie[s] in his own behalf, to the usual and general tests of credibility in common with that of the other witnesses." (*Ibid*.) For many years, this principle has appeared in *CALJIC No. 2.21.2*, which provides: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability **[****25]** of truth favors his or her testimony in other particulars." The principle now also appears in somewhat different form in *CALCRIM No. 226*, which was given in this case and which provides in relevant part: "If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says." These instructions apply where there is a "material conflict in witnesses' testimony" (*People v. Allison (1989) 48 Cal.3d 879, 895–896 [258 Cal. Rptr. 208, 771 P.2d 1294]*), where there are "inconsistencies within the testimony of a single witness" (*People v. Turner (1990) 50 Cal.3d 668, 699 [268 Cal. Rptr. 706, 789 P.2d 887]*), where a witness's "efforts to explain away undisputed circumstances are inherently implausible" (*ibid.*), and where a witness's testimony is "vague and improbable" (*People v. Murillo (1996) 47 Cal.App.4th 1104, 1107 [55 Cal. Rptr. 2d 21]*).

The legal landscape changed in 1934, when the California electorate, through the initiative process, amended *article I, former section 13 of the California Constitution* to provide: "[I]n any criminal case, *whether the defendant testifies or not*, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." (*Cal. Const., art. I, former § 13*, as amended Nov. 6, 1934, and repealed Nov. 5, 1974, italics added; see *People v. Perry (1939) 14 Cal.2d 387, 395 [94 P.2d 559]*.) The next year, the Legislature made three **[****26]** statutory changes consistent with the revised constitutional provision: (1) it amended *section 1127* to provide that, "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court" (Stats. 1935, ch. 718, § 2, p. 1942); (2) it amended *section 1093, former subdivision 6*, to provide that the judge "may comment on the failure of the defendant to explain or deny by his testimony **[***859]** any evidence or facts in the case against him, whether the defendant testifies or not" (Stats. 1935, ch. 718, § 1, p. 1941); and (3) it amended former section 1323 to provide that "[t]he failure of the defendant **[*116]** to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel" (Stats. 1935, ch. 718, § 3, p. 1942).

About 10 years later, in *People v. Adamson (1946) 27 Cal.2d 478, 486–490 [165 P.2d 3]* (*Adamson*), we held that the new state constitutional provision did not violate the federal **[**532]** Constitution. "[T]he consideration and comment" the provision authorized, we explained, "relate[d], not to the defendant's failure to take the stand, but to 'his failure to explain or deny by his testimony any evidence or facts in the case against him' whether he testifies **[****27]** or not." (*Id. at p. 488*.) In this respect, it "ma[d]e applicable to criminal cases in which the defendant does not testify, the established rule that the failure to produce evidence

that is within the power of a party to produce does not affect in some indefinite manner the ultimate issues raised by the pleadings, but relates specifically to the unproduced evidence in question by indicating that this evidence would be adverse." (*Ibid.*) The logical "basis" for this rule was "'[t]he instinct of self-preservation,'" which "'impels one in peril of the penitentiary to produce whatever testimony he may have to deliver him from such peril. … Whenever therefore a fact is shown [that] tends to prove crime upon a defendant, and any explanation of such fact is in the nature of the case peculiarly within his knowledge and reach, a failure to offer an explanation must tend to create a belief that none exists.' Therefore the failure of the defendant to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable **[****28]** to the defendant are the more probable." (*Id. at pp. 488–489*.) In other words, "[t]he failure of the accused to testify becomes significant because of the presence of evidence that he might 'explain or … deny by his testimony' (*art. I, [former] § 13, Cal. Const.*), for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it. [Citations.] No such inference may be drawn, however, if it appears from the evidence that defendant has no knowledge of the facts with respect to which evidence has been admitted against him, for it is not within his 'power' [citation] to explain or deny such evidence. [Citations.]" (*Id. at p. 489*.)

In 1965, the Legislature repealed former section 1323 as unnecessary in light of the substantially identical constitutional provision. (Stats. 1965, ch. 299, § 146, p. 1369; Recommendation Proposing an Evidence Code (Jan. 1965) 7 Cal. Law Rev. Com. Rep. (1965) p. 366.) The same year, the United States Supreme Court held that *article I, former section 13 of the California Constitution* violated the *Fifth Amendment to the United States Constitution* insofar as it permitted comment on a criminal defendant's failure to take the stand and testify at his trial. (*Griffin v. California (1965) 380 U.S. 609, 613 [14 L. Ed. 2d 106, 85 S. Ct. 1229]*.) Consistent with this holding, in 1974, the **[*117]** part of *article I, former section 13 of the California Constitution* that permitted **[****29]** comment on a defendant's failure to explain or deny incriminating trial evidence was deleted (*Strauss v. Horton (2009) 46 Cal.4th 364, 467, fn. 46 [93 Cal. Rptr. 3d 591, 207 P.3d 48]*), and in 1976, the Legislature deleted the sentence in *section 1093, former subdivision 6*, that authorized a judge to comment **[***860]** on a defendant's failure to explain or deny incriminating evidence (compare Stats. 1975, ch. 195, § 1, p. 568 with Stats. 1976, ch. 488, § 1, p. 1231).

In *Saddler*, the defendant argued that the 1974 repeal of former *article I, section 13 of the California Constitution* and the 1976 amendment to *section 1093* "indicate[d] legislative disapproval of comment on a defendant's testimony when he takes the stand" and "invalidate[d]" the instruction the court had given on that subject. (*Saddler, supra, 24 Cal.3d at p. 678*.) We disagreed, based largely on the Legislature's failure to modify *section 1127* or *Evidence Code section 413*. As noted earlier, the former provides that, "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court." (*§ 1127*.) The latter, which was enacted in 1965 by the same legislation that repealed former section 1323 (Stats. 1965, ch. 299, § 146, p. 1369), provides that, "[i]n determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may **[**533]** consider, among other things,

the **[****30]** party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case." (*Evid. Code, § 413*, as enacted by Stats. 1965, ch. 299, § 2.)

(1) In light of this background, we hold that the instruction applies only when a defendant completely fails to explain or deny incriminating evidence, or claims to lack knowledge and it appears from the evidence that the defendant could reasonably be expected to have that knowledge. The instruction acknowledges to the jury the "reasonable inferences that may flow from *silence*" when the defendant "fail[s] to explain or deny evidence against him" and "the facts are peculiarly within his knowledge." (*People v. Modesto (1965) 62 Cal.2d 436, 452 [42 Cal. Rptr. 417, 398 P.2d 753]*, italics added.) As to incriminating evidence that a testifying defendant denies or explains, there is no silence from which an inference "may flow." (*Ibid*.) Even if the defendant's testimony conflicts with other evidence or may be characterized as improbable, incredible, unbelievable, or bizarre, it is not, as the People assert, "the functional equivalent of no explanation at all." On the other hand, those circumstances *do* suggest that the defendant may have "deliberately lied **[****31]** about something significant," in which case a court may, as the court did here, instruct jurors to "consider not believing anything that witness says." (*CALCRIM No. 226*.) Indeed, as explained above, our cases hold that this instruction, or the CALJIC instruction on the subject (*CALJIC No. 2.21.2*), is **[*118]** warranted under the very circumstances the People claim warrant instruction on a failure to explain or deny, i.e., when there is a "material conflict in witnesses' testimony" (*People v. Allison, supra, 48 Cal.3d at p. 895*), when there are "inconsistencies within the testimony of a single witness" (*People v. Turner, supra, 50 Cal.3d at p. 699*), and when a witness's "efforts to explain away undisputed circumstances are inherently implausible" (*ibid.*). (See *People v. Lang (1989) 49 Cal.3d 991, 1024 [264 Cal. Rptr. 386, 782 P.2d 627]* [instruction warranted by "sharply conflicting testimony" of the defendant and another trial witness]; *People v. Murillo, supra, 47 Cal.App.4th at p. 1107* ["instruction on a willfully false witness" was warranted by the defendant's "vague and improbable" testimony]). These circumstances implicate a testifying defendant's *credibility* as a witness, and thus are properly addressed **[***861]** by an instruction designed to apply "neutral standards of credibility" to testifying defendants. [2] (*Turner, supra at p. 699*.) By contrast, the focus of *CALCRIM No. 361*, as its language indicates, is not on the defendant's credibility as a witness, but on the **[****32]** role of a testifying defendant's failure to explain or deny incriminating evidence in how jurors "evaluat[e] that evidence," i.e., the evidence the defendant has failed to explain or deny. In other words, as we have stated, a testifying defendant's failure to explain or deny incriminating evidence—i.e., "[a] defendant's silence"—cannot "be regarded as a confession" and "does not create a presumption or warrant an inference of guilt, but should be considered only in relation to evidence that he fails to explain or deny." (*Adamson, supra, 27 Cal.2d at p. 490*.)

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[2] Both defendant and the People state that a different instruction on false or misleading statements—*CALCRIM No. 362*—applies when the defendant's testimony is implausible. However, a 2009 amendment to that instruction clarifies that the instruction applies to false or misleading statements a defendant made "before" trial, not to false or misleading trial testimony. (*CALCRIM No. 362*; see *People v. Beyah (2009) 170 Cal.App.4th 1241, 1248 [88 Cal. Rptr. 3d 829]* ["We doubt that *CALCRIM No. 362* was intended to be used when the basis for an inference of consciousness of guilt is disbelief of a defendant's trial testimony … ."].)

To the extent People v. Belmontes, supra, 45 Cal.3d 744 and People v. Redmond, supra, 29 Cal.3d 904 may be read as indicating otherwise, we overrule them. As explained earlier, in the former, after noting the existence of "crucial **[****33]** points of conflict between" the defendant's testimony and that of other witnesses, we stated, quoting *Mask*, that "'[I]f the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible, the inquiry whether he reasonably should have known about circumstances claimed to be **[**534]** outside his knowledge is a credibility question for resolution by the jury [citations].'" (Belmontes, supra, 45 Cal.3d at p. 784.) However, in *Mask*, in the sentence preceding the quoted statement, the court, citing *Saddler*, stated: "[T]he mere fact that [a testifying] defendant's story is contradicted by other prosecution evidence does not pave the way for giving the instruction, because contradiction is not by itself a failure to explain or deny. [Citations.]" (Mask, supra, 188 Cal. App. 3d at ***[*119]*** p. 455.) Moreover, in finding that the instruction had properly been given because the testifying defendant's "story was inherently implausible," the court in *Mask* explained that the defendant had failed "to account" for a three-hour period. (*Ibid*.) Thus, properly understood, Mask was simply a case in which the testifying defendant had failed to explain incriminating evidence, i.e., his "presence near the scene of the crime" *at the time* **[****34]** of the crime. (*Ibid.*)

Mask cited two decisions as support for the statement *Belmontes* quoted: People v. Roehler, supra, 167 Cal. App. 3d 353 (*Roehler*), and People v. Haynes (1983) 148 Cal. App. 3d 1117 [196 Cal. Rptr. 450] (*Haynes*). (Mask, supra, 188 Cal. App. 3d at p. 455.) In *Roehler*, the defendant, who was convicted of murdering his wife and stepson while they were all boating together, testified that the boat had capsized accidentally and that he "simply did not know what had happened to them." (Roehler, supra, at p. 393.) The defendant claimed that the trial court had erred in giving CALJIC No. 2.62, which, like CALCRIM No. 361, addressed a testifying defendant's failure to explain or deny incriminating evidence. (Roehler, at pp. 391–392.) **[***862]** The court first explained that "[c]ontradictory testimony by a defendant does not invoke the giving of [the instruction] [citation], nor does failure to recall specific details [citation]." (Id. at p. 393.) It then held, however, that the defendant's claim "that *he didn't know* what happened was [not] an explanation of these events which precluded the giving of" the instruction. (Id. at p. 394.) It reasoned that the defendant's claim not to know was "a credibility question" and that "the state of his knowledge, what it was reasonable to expect that he *would* know, given the circumstances in which he was, was within the province of the jury to determine." (*Ibid.*) *Roehler* is correct that a defendant's **[****35]** claimed lack of knowledge of relevant facts or circumstances is not an explanation that renders the instruction inapplicable where it appears from the evidence that the defendant "could reasonably be expected to know" those facts or circumstances. (Adamson, supra, 27 Cal.2d at p. 491.) In other words, as the People argue, "the instruction is not precluded simply because a defendant denies knowledge." However, Roehler is not persuasive authority for the broader proposition that the instruction is warranted where the defendant does not merely claim a lack of knowledge, but actually offers a denial or provides an explanation that may be characterized as incredible, unbelievable, or bizarre.

Haynes is even less persuasive authority for this proposition. There, the defendant, who had been convicted of committing various sexual offenses against a minor at a motel, claimed on appeal that the giving of the instruction was prejudicial error because there was no prosecution evidence he had failed to explain or deny. (Haynes, supra, 148 Cal. App. 3d at pp. 1118–1119.)

In response, the court first noted that the defendant had "stated he 'didn't really notice' that there was a 'big sign out in front of the motel … that says, "Adult Movies,"' nor had he noticed that [the minor's] **[****36]** **[*120]** condition was such [that] she had put her jumpsuit on inside out when she dressed prior to leaving the motel." (*Id. at pp. 1120–1121*, fn. omitted.) These statements, the court stated, constituted "relatively minor instances of [the defendant's] failure either to deny or explain some potentially incriminating facts—unless it can be said his alleged lack of 'notice,' or inability to 'remember,' the fact in question constituted a 'denial' or an 'explanation' thereof as a matter of law." (*Id. at p. 1120*.) The court next expressed "doubt" that the defendant's reply when asked why he had registered at the motel using a false name **[**535]** and address—"'[I]t's not uncommon for a person that goes to a motel to not use his true name'"—"'explain[ed]' why the [defendant] so chose to conduct himself on" the occasion in question. (*Id. at p. 1121*.) The court next noted that the defendant's version of the encounter—the girl had eagerly accepted his sexual advances and he did not know her true age—left unexplained her "bizarre" behavior "as soon as she separated from him," i.e., she recorded the license number of his car and "exposed" her family "to the embarrassment of reporting all the sordid details of their encounter to the police and, later, to the world **[****37]** at large in a public trial." (*Id. at p. 1121*.) The court then continued: "It could perhaps be argued that as stressed in the challenged instruction itself, this might be an instance in which 'a defendant [did] not have the knowledge that he would need to deny or to explain' why anyone would behave in so bizarre a fashion. Nonetheless, it would seem such a possibility should be a question of fact for a jury, not one of law for a **[***863]** trial judge." (*Ibid.*) Ultimately, however, the court did not decide whether *any* of these "instances" merely showed "contradictions in the testimony"—which would not have justified giving the instruction—or "failures" of the defendant "to explain or deny"—which would have justified giving the instruction—because it found that any error was not prejudicial. (*Id. at p. 1122*.) The court's unresolved discussion about whether the defendant had failed to explain or deny incriminating evidence does not constitute persuasive authority for the proposition that a bizarre or implausible explanation justifies the giving of the instruction. [3]

In *Redmond*, the defendant argued it was error to give the instruction, not because there was no evidentiary basis for it, but "because at trial he was not asked to explain or deny the adverse evidence against him." (*Redmond, supra, 29 Cal.3d at p. 911*.) We rejected that argument, explaining that "[t]he scope of [the defendant's] direct examination was a tactical trial choice of his counsel." (*Ibid.*) We then added, as earlier noted, that there was "evidentiary support" in the record for the instruction, including the defendant's failure to explain why he waited "two months" before "disclosing the location of the **[*121]** knife" used in the crime or why he "fail[ed] to summon an ambulance or assist or transport [the victim] for medical assistance." (*Ibid*.) These two failures were sufficient to justify giving the instruction. The third basis we identified—"the variance between the description of [the victim's] wound as 'downward and inward' and [the] defendant's version of an 'upward' thrust caused by [the victim's] fall on the knife" (*ibid.*)—was therefore unnecessary. Moreover, under *Saddler*, which *Redmond* failed to cite or discuss, this "variance" (*Redmond, at p. 911*)—i.e., this evidentiary conflict—did not justify **[****39]** giving the instruction. In this respect, we disapprove *People v. Redmond, supra, 29 Cal.3d 904*.

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[3] Notably, as this discussion demonstrates, *Haynes, supra, 148 Cal. App. 3d at page 1121*, used the term "bizarre" to characterize *the victim's behavior*, not, as *Belmontes, Mask*, and *Roehler* indicate, **[****38]** the defendant's testimony. (*Belmontes, supra, 45 Cal.3d at p. 784*; *Mask, supra, 188 Cal. App. 3d at p. 455*; *Roehler, supra, 167 Cal. App. 3d at p. 393*.)

(2) Although we reject the People's position regarding the circumstances that warrant the giving of the instruction, under the preceding principles, we nevertheless agree with the People that giving the instruction in this case was not error. During her testimony, defendant acknowledged that, after Bernal exited her car, she heard gunshots that sounded very close. She also testified, however, that she did not know any of the following information: (1) "why [Bernal] got out" of the car; (2) what had happened; (3) "where [the gunfire] was coming from"; (4) how a bullet ended up on the floorboard of her car; and (5) whether the shooting "could be in regards to gang activity."

However, there was ample evidence that defendant "could reasonably be expected to know" these facts or circumstances. (*Adamson, supra, 27 Cal.2d at p. 491*.) First and foremost, in her own statement to **[**536]** police, which was played to the jury as evidence, she stated the following: Bernal was an "associate" of the Rockwood gang and "talk[ed] a lot about" it. As she approached the area of the shooting, she saw "two young gang members" across the street. Bernal "yelled out, 'Where you from?'" The young men responded, "'18th **[****40]** Street.'" Defendant **[***864]** then said to Bernal, "'Come on, man.' … 'Don't be stupid.'" "'Fool, stop. Stop. Just let it go. Let's go.'" Bernal "didn't listen," and defendant saw him "open[] the passenger door" and "jump[] out of the car." She heard Bernal yell, "'Rockwood,'" and "[t]hen [she] heard the gunshots." Though she did not actually see Bernal firing, she "assumed" he was firing "[a]t those kids" who had responded "'18th Street.'" "[I]n [her] mind," Bernal had "hit them up," i.e., "shot at those kids." At that point, she realized it was a gang incident. Bernal then "chased" the car and "got in." Defendant "couldn't believe what [had] happened" and "cussed [Bernal] out," saying, "'Fucking asshole, what the fuck are you doing?'" Bernal said, "'Let's drop my homeboy off,'" and told defendant to drive to the location where they had earlier picked up his friend. A few buildings before they reached that location, Bernal told defendant to stop and let him out, and said, "'meet me there where we picked up homeboy at.'" Defendant replied, "'Okay,'" drove to the designated spot, stopped her car, put on her emergency lights, and waited. Second, during her trial testimony, defendant added that, before Bernal **[****41]** exited the car, the victims were "yelling out, 'where you **[*122]** from,'" and "'18th Street,'" and were "throwing their arms up in the air, making signs" and "doing hand gestures." Finally, other witnesses testified at trial that the driver of the car slammed on the car's brakes and, along with the passenger, was yelling at the victims; that a female in the car said, "'where are you from'" and "'Let them have it'" ; that the passenger exited the car and started shooting from the passenger side, either from the trunk area or from over the roof while resting his arm and hand on it; and that after the shooting, the shooter yelled, "'Hold on,'" the driver slammed on her brakes again, the shooter jumped back in, and the car drove away. Given this evidence, the trial court properly gave the instruction notwithstanding defendant's professed lack of knowledge about certain matters. [4]

B. *The **[****42]** Trial Court Properly Admitted Bernal's Statement to Tejeda*.

As noted above, the prosecution played at trial a tape of Tejeda's interview with police. During that interview, Tejeda stated that Bernal had come to his apartment and said that, the previous

[4] Given this conclusion, we need not examine the many failures to explain or deny that the People assert. We note, however, that the People's argument, insofar as it rests on defendant's failure to explain contradictory testimony or on the implausibility of her testimony, is inconsistent with the preceding analysis.

day, he "'and this woman … went to—we went shooting some 18s, like at some 18s.'" Regarding defendant's participation, Tejeda variously told police that Bernal had said the following: (1) we "'went there in—in her car, and … we went to shoot at two 18s'"; (2) the woman "'was the one driving'" and "he was the one shooting"; (3) "he went with some lady to go shoot somebody"; (4) "'we went shooting some—some gang member'"; (5) "'yesterday we went and we shot at two 18s'"; (6) "he went with some—the girl, the driver was a girl. She was the one driving, this woman. And he went with her and he was the one shooting"; (7) "they went shooting in a car"; (8) he "went shooting some 18-year-old with this girl, a friend"; (9) he "went there in—in her car, and he's like, and 'we went to shoot at two 18s'"; (10) "'we went, me and this woman, … we went to—we went shooting some 18s, like at some 18s'"; (11) "she **[****43]** came and, that woman, went in her car, and they went to shoot at some 18s"; (12) he "'went yesterday **[***865]** with a woman and shot at some 18s'"; and (13) "the girl he went and did the shooting with is Norma."

(3) Before trial, defendant requested exclusion of the tape insofar as it related Bernal's statements to Tejeda, arguing in part that those statements were inadmissible hearsay and, alternatively, should be excluded as a matter of discretion under *Evidence Code section 352* **[**537]** because their probative value was "substantially outweighed by" their potential for "undue prejudice." The prosecution asserted that the statements were admissible under *section 1230 of [*123] the Evidence Code*, which establishes an exception to the hearsay rule for statements against penal interest, i.e., where "the declarant is unavailable as a witness and the statement, when made, … so far subjected [the declarant] to the risk of … criminal liability, … that a reasonable man in his position would not have made the statement unless he believed it to be true." In response, defendant argued that (1) the references to her in the statements were outside of the exception because they were not disserving of Bernal's penal interest, (2) Tejeda's reliability was questionable **[****44]** because he did not and could not know the identity of the woman Bernal had mentioned, and (3) the statements were unduly prejudicial in that they could "easily [be] misconstrued to implicate [her] as being somehow involved in the planning or the underlying conduct or the planning or participation or knowledge of the shooting." The trial court ruled that the statements qualified for the hearsay exception, that they were reliable, and that exclusion under *Evidence Code section 352* was not appropriate.

Applying the abuse of discretion standard, the Court of Appeal reversed. It agreed that the statements were against Bernal's penal interest, that the "setting" in which he made them—"a discussion in the family home between close family members"—" promoted truthfulness," and that the statements "were trustworthy to the extent [Bernal] reported on []his own actions and thoughts." However, invoking an argument defendant had not made in either the trial court or her appellate briefs, the court concluded that, "[a]s against" defendant, the statements "lacked a guarantee of trustworthiness." It reasoned: "The references to a woman or lady and the phrase 'we went' necessarily implied that he [Bernal] *and Cortez* went to go **[****45]** shoot someone that day. The statements suggest Cortez knew of a plan to commit the shooting and went along with it. Indeed, the prosecutor argued to the jury that Bernal's statements were evidence Cortez knew of Bernal's purpose and had the intent to assist him. The prosecutor stated: 'And when the nephew talked to the police about what his uncle told him, he repeatedly said that his uncle told him we went, we went and shot at some 18[s]. That is how you know she had the knowledge of his purpose going there and she had the intent to assist him.' However, Bernal could not speak

from personal knowledge in describing Cortez's state of mind. His statements in that respect were speculation and hence not trustworthy." Therefore, the statements should not have been admitted without redacting "[r]eferences to 'we,' a lady, or a woman," i.e., "the portions that specifically implicated" defendant.

(4) We conclude that the Court of Appeal erred in finding that the testimony was inadmissible because Bernal lacked personal knowledge of whether defendant knew of and went along with a plan to commit the shooting. The Evidence Code declares that "the testimony of a witness [at trial] concerning a particular matter **[****46]** is inadmissible unless [the witness] has personal knowledge of the matter." (*Evid. Code, § 702, subd. (a)*.) **[***866]** California **[*124]** courts have extended this personal knowledge requirement to statements of hearsay declarants. (*People v. Valencia (2006) 146 Cal.App.4th 92, 103–104 [52 Cal. Rptr. 3d 649]*.) When a witness's personal knowledge is in question, the trial court must make a preliminary determination of whether "there is evidence sufficient to sustain a finding" that the witness has the requisite knowledge. (*Evid. Code, § 403, subd. (a)(2)*.) "Direct proof of perception, or proof that forecloses all speculation is not required." (*Miller v. Keating (3d Cir. 1985) 754 F.2d 507, 511*.) The trial court may exclude testimony for lack of personal knowledge "'*only if no jury could reasonably find* that [the witness] has such knowledge.'" (*People v. Anderson (2001) 25 Cal.4th 543, 573 [106 Cal. Rptr. 2d 575, 22 P.3d 347]*.) Thus, "[a] witness challenged for lack of personal knowledge *must* … be allowed to testify *if there is evidence from which a rational trier of fact could find* that the witness accurately perceived and recollected the testimonial events. Once that threshold is passed, it is for the jury to decide whether the witness's perceptions and recollections are credible. **[**538]** [Citation.]" (*Id. at p. 574*.) An appellate court reviews a trial court's determination of this issue "under an abuse of discretion standard." (*People v. Tatum (2003) 108 Cal.App.4th 288, 298 [133 Cal. Rptr. 2d 267]*, citing *People v. Lucas (1995) 12 Cal.4th 415, 466 [48 Cal. Rptr. 2d 525, 907 P.2d 373]*.)

The record here reveals no abuse of **[****47]** discretion. Insofar as Bernal's statements suggest that defendant knew of and went along with a plan to commit the shooting, there was ample evidence from which a rational trier of fact could conclude that Bernal had personal knowledge of these matters. As defendant concedes, evidence other than Tejeda's statement "overwhelmingly established" that Bernal "rode with" defendant "to the location of the shooting" and "shot at [the victims] while [defendant] drove." There was also evidence of the following: (1) Bernal and defendant were neighbors and did favors for each other; (2) after agreeing to give Bernal a ride, defendant, who believed Bernal always carried a gun and was an associate of the Rockwood gang, drove where Bernal instructed, first to pick up a friend of Bernal's who defendant thought looked like a "gangster," and then to the location of the shooting; (2) as she approached the victims, defendant "slam[med]" on the brakes and stopped the car; (3) after the car stopped, one of the victims—Emanuel Z.—heard a female voice ask, "'Where you guys from,'" which is something a gang member commonly asks his or her intended victims just before initiating a planned assault; (4) defendant grew **[****48]** up around gangs and had friends and relatives in gangs; (5) Emanuel Z. then heard the car's occupants yell at him and Miguel, and heard a female voice say, "'Let them have it'"; (6) Bernal then got out of the stopped car and, from the trunk area or over the roof, started shooting at the victims; (7) as the victims fled, Bernal chased them and continued shooting; (8) after Bernal fired the final shots, defendant, knowing Bernal had shot at the victims, moved the car a few feet **[*125]** forward and

stopped near Bernal as he was trying to put the gun in his waistband and yelling, "'Hold on. Hold on'"; (9) after Bernal got in the car and yelled "'Let's go. Let's go,'" defendant drove the car away, stopped in the middle of the street where Bernal directed her to stop and, after Bernal exited, remained in the driver's seat with the hazard lights on, waiting for him to return. On this record, a jury could reasonably conclude that the shooting was a joint, planned undertaking of Bernal and defendant. It could also reasonably conclude **[***867]** that Bernal and defendant had had conversations in order to coordinate their joint undertaking such that Bernal had personal knowledge of whether defendant knew of and **[****49]** went along with a plan to commit the shooting. Given the evidence, the question of Bernal's personal knowledge about these issues was for the jury. Therefore, the Court of Appeal erred in concluding that, as a matter of law, Bernal's lack of personal knowledge rendered the statements inadmissible.

Defendant argues that Bernal's statements to Tejeda were unreliable for the additional reason that, during his interview with police, Tejeda gave varying accounts of Bernal's statements and could not remember "exactly" what Bernal had said. According to defendant, some of Tejeda's accounts suggest that she knowingly participated in the shooting while others "merely stated that Bernal rode with [her] on his way to the shooting." Because, in light of Tejeda's recantation at trial, the jury had no way to determine the words Bernal used or what he meant by them, the statements were unreliable and inadmissible.

(5) We reject defendant's argument. As to hearsay statements that qualify under the party admissions exception to the hearsay rule (*Evid. Code, § 1220*), "[w]e have long recognized that … persons are often unable '"to state the exact language of an admission."'" [Citation.] This recognition, however, does not **[****50]** automatically render any statements of a party inadmissible … ." (*People v. Riccardi (2012) 54 Cal.4th 758, 832 [144 Cal. Rptr. 3d 84, 281 P.3d 1]*.) Nor does ambiguity regarding the meaning of a party's out-of-court statement automatically render the party admissions exception inapplicable. (*People v. Guerra (2006) 37 Cal.4th 1067, 1122 [40 Cal. Rptr. 3d 118, 129 P.3d 321]*; **[**539]** *People v. Kraft (2000) 23 Cal.4th 978, 1035 [99 Cal. Rptr. 2d 1, 5 P.3d 68]*.) The same principles logically apply to the admissibility of a hearsay statement under the exception for statements against penal interest. On the record here, neither Tejeda's inability to remember "exactly" what Bernal had said, nor the ambiguity defendant alleges regarding Bernal's meaning, establishes that the trial court abused its discretion in admitting the statement. [5]
[*126]

Defendant next contends that "the **[****51]** portions" of Bernal's statement to Tejeda "referring to [her] were not against Bernal's penal interest" and therefore did not qualify for the hearsay

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[5] Our precedents establish that the abuse of discretion test applies in reviewing a trial court's determination that the hearsay statement, as *Evidence Code section 1230* requires, "'so far subjected [the declarant] to the risk of … criminal liability, … that a reasonable man in his position would not have made the statement unless he believed it to be true.'" (*People v. Brown (2003) 31 Cal.4th 518, 535 [3 Cal. Rptr. 3d 145, 73 P.3d 1137]*; see *People v. Lawley (2002) 27 Cal.4th 102, 153–154 [115 Cal. Rptr. 2d 614, 38 P.3d 461]*.) Citing *People v. Cervantes (2004) 118 Cal.App.4th 162, 174–175 [12 Cal. Rptr. 3d 774]*, defendant argues for de novo review. However, the authority *Cervantes* cited (*ibid.*) involved the separate question of whether admission of a hearsay statement violates the *confrontation clause*. (See *Lilly v. Virginia (1999) 527 U.S. 116, 136–137 [144 L. Ed. 2d 117, 119 S. Ct. 1887]* (plur. opn. of Stevens, J.); *People v. Schmaus (2003) 109 Cal.App.4th 846, 856 [135 Cal. Rptr. 2d 521]*; *People v. Eccleston (2001) 89 Cal.App.4th 436, 445–446 [107 Cal. Rptr. 2d 440]*.)

exception in *Evidence Code section 1230*. She argues (1) the exception authorizes admission of "[o]nly those portions of [a hearsay] statement [that] are 'specifically disserving' to the [declarant's] interests"; and (2) Bernal's references to her fail this test because they do nothing more than indicate that he "was accompanied by" her, and "nothing about who accompanied [him] made him more or less culpable in the shooting."

[*868]** For several reasons, we conclude that the trial court did not abuse its discretion in concluding that the statements were disserving of Bernal's penal interest. Initially, we disagree that Bernal's references to defendant indicate only that she "accompanied" Bernal. As earlier explained, Bernal's references to defendant, along with the other evidence, suggested that he and defendant had engaged in a joint, planned drive-by shooting, thus showing premeditation and implicating him in a conspiracy to commit murder by means of a drive-by shooting. (See *People v. Cortez (1998) 18 Cal.4th 1223, 1228 [77 Cal. Rptr. 2d 733, 960 P.2d 537]*.) Moreover, Bernal's statement that the person he went with to shoot "some 18s" did the driving provides **[****52]** evidence of one of the elements of a conspiracy conviction: "the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." (*People v. Morante (1999) 20 Cal.4th 403, 416 [84 Cal. Rptr. 2d 665, 975 P.2d 1071]*.) In these respects, the portion of the statements referring to a criminal companion were against Bernal's penal interest. (Cf. *People v. Samuels (2005) 36 Cal.4th 96, 121 [30 Cal. Rptr. 3d 105, 113 P.3d 1125]* [declarant's statement that he was paid by the defendant to commit the killing "was specifically disserving to [the declarant's] interests in that it intimated he had participated in a contract killing—a particularly heinous type of murder—and in a conspiracy to commit murder"].)

On the specific facts of this case, we also disagree that Bernal's identification by name of who accompanied him was not specifically disserving of his interest. Our analysis begins with *Williamson v. United States (1994) 512 U.S. 594, 600–601 [129 L. Ed. 2d 476, 114 S. Ct. 2431]* (*Williamson*), where the high court held that the federal hearsay exception for statements against penal **[*127]** interest does not authorize admission of collateral, non-self-inculpatory statements, even if they are made within a broader narrative that contains self-inculpatory statements. In disagreeing that this holding would eviscerate the federal exception, the court explained: "[W]hether a statement is self-inculpatory or not can only **[****53]** be determined by viewing it in context. Even statements that are on their face neutral may actually be against the declarant's interest. 'I hid the gun in Joe's apartment' may not be a confession of a crime; but *if it is likely to help the police find the murder weapon*, then it is certainly self-inculpatory. 'Sam and I went to Joe's **[**540]** house' might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that *being linked* to Joe and Sam would implicate the declarant in Joe and Sam's conspiracy. And other statements that give the police significant details about the crime may also, depending on the situation, be against the declarant's interest. The question … is always whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person in the declarant's position would not have made the statement unless believing it to be true,' and this question can only be answered in light of all the surrounding circumstances." (*Id. at pp. 603–604*, italics added, fn. omitted.)

Here, Bernal's identification of defendant by name, viewed in context, specifically disserved his penal interest in several respects. When Bernal spoke to Tejeda, **[****54]** he said that, after the

shooting, he "left the car" and "went in [a] building," that the woman who was driving the car "waited for him while he went in that building," and that she was "caught" while she was "in the car" "[w]aiting" for him "to come back out." Thus, according to Tejeda's statement, when Bernal said that defendant **[***869]** was the one driving, he knew she and her car were already in police custody. [6] He thus also knew that, by identifying her, he was increasing the likelihood that evidence connecting him to the shooting would be found. Indeed, as noted above, police found on the floor of the passenger side of defendant's car a live round matching the caliber and brand of several found at the scene of the shooting. Finally, Bernal knew that "being linked to" defendant "would implicate" him in a drive-by shooting for which defendant had been arrested. (*Williamson, supra, 512 U.S. at p. 603*.) For these reasons, Bernal's identification of defendant by name specifically disserved his penal interest. (See *U.S. v. Moses (3d Cir. 1998) 148 F.3d 277, 280–281* ["by naming [the defendant], as well as the place where he was meeting [the defendant] to make payments, [the declarant] provided self-inculpatory information that might have enabled the authorities to better investigate his **[****55]** wrongdoing"].)
[*128]

Finally, nothing in the attendant circumstances undermines the trial court's conclusion that Bernal's statements were truly disserving of his interests. As the People assert, "the portions of Bernal's statement that implicated [defendant] were in no way exculpatory" or "self-serving," Bernal "consistently assigned the most blame to himself by admitting he was the shooter, and he never attempted to shift blame to [defendant]." Moreover, the context in which Bernal made the statements—a conversation with a close family member in an apartment he frequented—does not suggest that Bernal was trying to improve his situation with police. Indeed, as the Court of Appeal explained, the "setting" for the conversation—"a discussion in the family **[****56]** home between close family members"—"promoted truthfulness." Given the totality of the circumstances, the trial court did not abuse its discretion in finding that Bernal's identification of defendant "so far subjected [Bernal] to the risk of … criminal liability, … that a reasonable man in his position would not have made the statement unless he believed it to be true." (*Evid. Code, § 1230*.)

Defendant next asserts that the trial court erred in not excluding Tejeda's statements under *Evidence Code section 352*, which provides in relevant part that a 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." According to defendant, the statements had only "minimal probative value" because they established only that "Bernal rode with [her] to the location of the shooting," a fact that was "overwhelmingly established by other evidence." They were unduly prejudicial, she continues, because they "could be misconstrued as stating [that she] shared Bernal's purpose." Indeed, defendant **[**541]** asserts, "[t]he prosecutor used the statements for precisely [this] prejudicial effect," arguing to the jury that "Bernal, **[****57]** by saying 'we went,' told Tejeda [that defendant] shared his purpose." Because the statements' "minimal probative value was outweighed by the potential for undue prejudice," the trial court should have excluded them.

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[6] Tejeda stated that he "guessed" Bernal was referring to police when Bernal said "'they'" caught defendant. Tejeda's understanding is fully supported by the evidence, which indisputably shows that the police arrested defendant as she was waiting in her car for Bernal to return from a building. As defendant described Tejeda's statement in her briefs below, Bernal said he "'watched from inside'" a building "'as [defendant] was arrested.'"

(6) Defendant's argument fails because it rests on a mistaken understanding of the term "prejudice" in *Evidence Code section 352*. **[***870]** For purposes of that section, "prejudice" does not mean damage to a party's case that flows from relevant, probative evidence. Rather, it means the tendency of evidence to evoke an emotional bias against a party because of extraneous factors unrelated to the issues. (*People v. Doolin (2009) 45 Cal.4th 390, 439 [87 Cal. Rptr. 3d 209, 198 P.3d 11]*.) Thus, evidence is subject to exclusion under *Evidence Code section 352* on the basis of prejudice only "'when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the **[*129]** substantial likelihood the jury will use it for an illegitimate purpose.' [Citation.]" (*People v. Doolin, at p. 439*.) As explained above, defendant's claim of prejudice rests only on the potential of Tejeda's statements to show **[****58]** that she shared Bernal's purpose, i.e., the damage to her defense that flowed from those statements as relevant, probative evidence. She identifies no sense in which the statements would tend to inflame the jurors' emotions or cause them to punish her because of an emotional reaction. Her claim under *Evidence Code section 352* therefore fails.

(7) We also reject defendant's final attack on the trial court's ruling: that admission of Bernal's statements to Tejeda violated her *Sixth Amendment* right to confront and cross-examine witnesses. [7] Defendant rests her argument principally on *Bruton v. United States (1968) 391 U.S. 123 [20 L. Ed. 2d 476, 88 S. Ct. 1620]*, but that decision is inapposite because it involved a nontestifying codefendant's hearsay statement that did *not* qualify for admission against the defendant under any hearsay exception and that was "clearly inadmissible against [the defendant] under traditional rules of evidence." (*Id. at p. 128, fn. 3*.) Indeed, the high court in *Bruton* expressly declined to comment on the admissibility of a nontestifying codefendant's hearsay statement where, as here, a "recognized exception to the hearsay rule" applies. (*Ibid*.) Moreover, in *Davis v. Washington (2006) 547 U.S. 813, 824 [165 L. Ed. 2d 224, 126 S. Ct. 2266]*, the high court unequivocally held "that the *confrontation clause* applies *only to testimonial hearsay statements* and not to [hearsay] statements that are nontestimonial." (*People v. Geier (2007) 41 Cal.4th 555, 603 [61 Cal. Rptr. 3d 580, 161 P.3d 104]*, italics **[****59]** added.) Bernal's statements to his nephew in his nephew's apartment were unquestionably nontestimonial; defendant's counsel expressly "concede[d]" this fact in the trial court and defendant does not now assert otherwise. Thus, binding high court precedent requires us to hold that the *Sixth Amendment* is inapplicable **[***871]** and that defendant's *confrontation clause* claim therefore fails.
[*130]

C. *The Prosecution's Comments on Reasonable Doubt Did Not Constitute Misconduct*.

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[7] The People argue we should not consider this claim because it "is not one of the issues, or fairly included within the issues," they set forth in their petition for review. However, the People's petition stated the relevant issue as follows: "Is a statement that implicates a nontestifying codefendant *admissible* where it is against the declarant's interest, inextricably tied to and part of the statement against interest, and made under circumstances that this Court and the Court of Appeal have repeatedly deemed to demonstrate trustworthiness?" (Italics added.) Whether the statement is admissible under the *Sixth Amendment* is fairly included within this statement of the issue. However, we note that, under our rules, defendant could have foreclosed the People's procedural argument by raising the issue in an answer to the petition for review. (***Cal. Rules of Court, rule 8.500(a)(2)*** [party may file an answer to **[****60]** the petition "ask[ing] the court to address additional issues if it grants review"].)

During his rebuttal argument, the prosecutor stated: "The court told you that **[**542]** beyond a reasonable doubt is not proof beyond all doubt or imaginary doubt. Basically, I submit to you what it means is you look at the evidence and you say, 'I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me.'" Defendant's counsel objected that these comments "misstate[d] the law." Before the court ruled on the objection, the prosecution added, "That's proof beyond a reasonable doubt." The trial court then overruled the objection.

Defendant asserts that these comments constituted prejudicial misconduct in that they lowered the People's burden of proof. She argues they improperly indicated that "proof beyond a reasonable doubt required no more than a simple belief, so long as that belief was not based on speculation or imagination," i.e., "a nonimaginary *belief*" that could "be supported by a preponderance of the evidence, or even a strong suspicion." The error was prejudicial, she asserts, because (1) the case **[****61]** against her turned on "a single issue," i.e., her "mental state," (2) the evidence on this issue was "'close and not particularly strong,'" and (3) the prosecution's comments "permitted the jury to convict [her] when a contrary and innocent interpretation of the evidence was reasonable."

(8) As we have often explained, "it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation]." (*People v. Marshall (1996) 13 Cal.4th 799, 831 [55 Cal. Rptr. 2d 347, 919 P.2d 1280]*.) Improper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hill (1998) 17 Cal.4th 800, 819 [72 Cal. Rptr. 2d 656, 952 P.2d 673]*.) Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Ibid.*) To establish misconduct, defendant need not show that the prosecutor acted in bad faith. (*Id. at p. 822*.) However, she does need to "show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood **[****62]** the jury understood or applied the complained-of comments in an improper or erroneous manner." (*People v. Centeno (2014) 60 Cal.4th 659, 667 [180 Cal. Rptr. 3d 649, 338 P.3d 938]*.) If the challenged comments, viewed in context, "would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable." (*People v. Benson (1990) 52 Cal.3d 754, 793 [276 Cal. Rptr. 827, 802 P.2d 330]*.)
[*131]

Applying these principles, we find no misconduct. Initially, we observe that the challenged remarks, viewed in isolation, were incomplete at best. They informed jurors that their "belief" about what had happened had to be "based in the evidence" rather than "imaginary." Although this is a correct statement of the law, it does not alone suffice as a definition of the beyond-a-reasonable-doubt standard.

However, viewing the challenged statements in context, we find no reasonable likelihood that jurors understood them as **[***872]** defendant asserts, i.e., that a "simple," "nonimaginary" belief "supported by a preponderance of the evidence, or even a strong suspicion" was sufficient to convict. Initially, in determining how jurors likely understood the prosecution's arguments, we

do "'not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, **[****63]** will draw that meaning from the plethora of less damaging interpretations.'" (*People v. Gonzalez (1990) 51 Cal.3d 1179, 1224, fn. 21 [275 Cal. Rptr. 729, 800 P.2d 1159]* (*Gonzalez*); see *People v. Frye (1998) 18 Cal.4th 894, 970 [77 Cal. Rptr. 2d 25, 959 P.2d 183]*.)

(9) In light of this principle, it is significant that the trial court properly defined the reasonable doubt instruction in both its oral jury instructions and the written instructions it gave the jury to consult during deliberations. Before the parties gave closing arguments, the court instructed the jury that "[a] defendant in a criminal case is **[**543]** presumed to be innocent," that the People must "prove a defendant guilty beyond a reasonable doubt," and that jurors "must find" defendant and Bernal not guilty "[u]nless the evidence proves [them] guilty beyond a reasonable doubt." Later in its preargument instructions, the court reemphasized numerous times—in connection with the jurors' consideration of defendant's pretrial statements, proof of first degree murder, proof of attempted murder, and proof of enhancement allegations—that it was the People's burden to prove guilt "beyond a reasonable doubt." The first time it set forth the People's burden, the court added: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate **[****64]** all possible doubt because everything in life is open to some possible or imaginary doubt." The court later submitted these instructions to the jury in writing to refer to during deliberations. As we have explained, "[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Clair (1992) 2 Cal.4th 629, 663, fn. 8 [7 Cal. Rptr. 2d 564, 828 P.2d 705]*.) "[P]rosecutorial commentary should not be given undue weight in analyzing how a reasonable jury understood … instructions. Juries are warned in advance that counsel's remarks are mere argument, missteps can be challenged when they occur, and juries generally understand that counsel's assertions are the 'statements of advocates.' Thus, argument should 'not be **[*132]** judged as having the same force as an instruction from the court.'" (*Gonzalez, supra, 51 Cal.3d at p. 1224, fn. 2*.)

Indeed, the trial court here emphasized in several ways that jurors should follow its instructions rather than anything potentially contrary in counsel's arguments. In its oral and written jury instructions, the court stated: "If you believe the attorneys' comments on the law conflict with my instructions, you must follow my instructions." The court later emphasized this principle **[****65]** in ruling on objections. After one of defense counsel's arguments, the prosecution interjected: "Objection, that is a misstatement of law." The court responded: "Well, the jurors have been instructed on the law, they will get copies of the jury instructions. If counsel's statement is different than what you understand the law to be based on what I said, you will have to ignore counsel's statement on that." Later, during rebuttal, after the prosecution asserted that defense counsel had made a legal misstatement during closing argument, defense counsel stated: "I'd object[.] I did not misstate the law." **[***873]** The court responded: "The jurors heard what you said, and they can compare it to the laws I gave them."

It is also significant that defense counsel emphasized the court's instructions on reasonable doubt numerous times during closing argument. Early in his argument, he reminded the jury of both the presumption of innocence and the People's burden to prove defendant's guilt "beyond a

reasonable doubt." He later briefly referenced the legal "definition" of "reasonable doubt," stating that "it's kind of … [legalese] of an abiding conviction." Toward the end of his argument, defendant's **[****66]** counsel became more specific, stating: "Here's that jury instruction that I mentioned. I'll reference you to the third paragraph. You'll get the document. Proof beyond a reasonable doubt is an abiding conviction that the charge is true." Counsel also added his own gloss on this instruction, stating that an "[a]biding conviction the charge is true … is one that's enduring. You're not going to go home and second-guess yourself that you made the right choice. You're certain in your decision making." At another point, counsel emphasized that "[p]roof beyond a reasonable doubt is the greatest burden in our legal system. … We want to be virtually certain, as certain as possible in someone's guilt before we take away their liberty."

Also significant is the fact that the prosecution's comments on reasonable doubt specifically referred the jury to the court's instruction on the subject. The prosecution introduced this topic by stating: "Counsel [for defendant] talked to you about reasonable doubt. You have the instruction on that." Only after directing the jury's attention to the court's reasonable doubt instruction **[**544]** did the prosecution discuss defense counsel's "characteriz[ation]" of the standard and submit its alternative **[****67]** view of "what [the standard] means." The **[*133]** court gave correct instructions and the prosecution explicitly deferred to them. Thus, it is unlikely that jurors would have understood the prosecution's statement, "That's proof beyond a reasonable doubt," made after defense counsel's interruption, to imply either a repudiation of those correct instructions or an invitation that the jury disregard or deviate from them.

Finally, it is significant that the challenged statement was a brief, isolated remark offered in response to defense counsel's misleading comments on the subject. To explain the standard, defendant's counsel stated at one point that "proof beyond a reasonable doubt" is the "amount of evidence" that would enable "[e]ven a mother … to believe [her] child is guilty." Defendant's counsel later added: "This is my way to say what is reasonable doubt to you. Ask yourself, 'are you a reasonable person? Would you entertain ridiculous arguments?' … You guys are reasonable people. You only entertain reasonable arguments. You will only entertain reasonable doubt. If you have a doubt, if you're a reasonable person, any doubt you have about the case is reasonable. If you entertain doubt, it's **[****68]** reasonable." It is in response to these comments that the prosecutor told jurors that their belief about what had happened had to be "based in the evidence" and "not imaginary." As the high court has observed, "[i]solated passages of a prosecutor's argument," "like all closing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." (*Donnelly v. DeChristoforo (1974) 416 U.S. 637, 646–647 [40 L. Ed. 2d 431, 94 S. Ct. 1868]*.) This general observation is the basis for the rule, as noted above, that "court[s] should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging **[***874]** meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (*Id. at p. 647*.) It aptly describes the isolated remark defendant challenges here, which was surely improvised to answer defense counsel's assertions that (1) proof beyond a reasonable doubt is the "amount of evidence" that would enable "[e]ven a mother … to believe [her] child is guilty," and (2) because the jurors were "reasonable people," "any doubt" they had "about the case [was] reasonable."

In summary, given that the challenged comments were brief **[****69]** and constituted a tiny, isolated part of the prosecution's argument, that the prosecution was responding to defense counsel comments, that the prosecution expressly referred the jurors to the instruction they had on reasonable doubt, that both the court and defense counsel properly defined "reasonable doubt" numerous times, and that the jury had written instructions during deliberations that properly defined the standard, we find no reasonable likelihood the jury **[*134]** construed or applied the prosecution's challenged remarks in an objectionable fashion. We therefore reject defendant's misconduct claim. [8]

III. Disposition

The judgment of the Court of Appeal's is reversed and the matter is remanded **[****70]** for further proceedings consistent with this opinion.

Cantil-Sakauye, C. J., Corrigan, J., and Kruger, J., concurred.

Concur by: Werdegar

Concur

WERDEGAR, J., Concurring.—I concur in the result and most of the reasoning of the majority opinion. I write separately to address the prosecutor's comments on proof beyond a reasonable doubt, which in my view were not merely incomplete but a misstatement of that standard. I **[**545]** also explain my view of why the trial court did not err in admitting evidence of the statement codefendant Rodrigo Bernal made to his nephew Oscar Tejeda.

As the majority acknowledges (maj. opn., *ante*, at p. 130), for a prosecutor to misstate the law in argument to the jury is improper and constitutes misconduct; this is particularly true of the standard of proof beyond a reasonable doubt, which fundamentally defines the People's burden at trial. (*People v. Centeno (2014) 60 Cal.4th 659, 666 [180 Cal. Rptr. 3d 649, 338 P.3d 938]*; *People v. Hill (1998) 17 Cal.4th 800, 829 [72 Cal. Rptr. 2d 656, 952 P.2d 673]*.) To establish such misconduct, bad faith or intentional misrepresentation is not required. For that reason, this type of "misconduct" could more aptly be termed prosecutorial "error." (*People v. Centeno, supra, at pp. 666–667*; *People v. Hill, supra, at p. 823, fn. 1*.)

In this case, the prosecutor erred—most likely unintentionally—by misdescribing the standard of proof beyond **[****71]** a reasonable doubt to the jury. Responding to a defense argument that overstated the burden **[***875]** of proving guilt beyond a reasonable doubt (see maj. opn., *ante*, at pp. 132–133), the prosecutor stated: "The court told you that beyond a reasonable doubt is not proof beyond all doubt or imaginary doubt. Basically, I submit to you *what it means is you*

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[8] Notably, the concurring opinion does not state disagreement with our conclusion that, in the context of the whole argument and the instructions, there is no reasonable likelihood the jury applied the challenged remarks in an improper or erroneous manner. Instead, it abandons our well-established contextual approach to misconduct claims and, citing no supporting authority, evaluates the challenged remarks only in isolation (except in determining prejudice). (Conc. opn. of Werdegar, J., *post*, at p. 135.)

look at the evidence and you say, 'I believe I know what happened, and my belief is not imaginary. It's based in the evidence in front of me.' … That's proof beyond a reasonable doubt." (Italics added.)

The vice in the prosecutor's explanation was that it reversed the standard of proof beyond a reasonable doubt, telling the jury that their belief in guilt **[*135]** need only be nonimaginary, rather than that the evidence must exclude all reasonable *doubts*. As we explained in *People v. Centeno, supra, 60 Cal.4th at page 672*, where we disapproved a similar prosecutorial argument, a statement that the jury must set aside unreasonable inferences is permissible, but does not itself describe the standard of proof: "It is not sufficient that the jury simply believe that a conclusion is reasonable. It must be convinced that all necessary facts have been proven beyond a reasonable doubt." Contrary to the prosecutor's **[****72]** argument here, a belief that is "not imaginary" and is "based in the evidence" does not necessarily meet the beyond a reasonable doubt standard. By suggesting that the People's burden was satisfied if the evidence supported a reasonable, nonimaginary belief in guilt, the prosecutor erred.

The majority characterizes the prosecutor's remarks as "correct" but "incomplete." (Maj. opn., *ante*, at p. 131.) This is a bit like describing the maiden voyage of the Titanic as "incomplete." The essence of the proof beyond a reasonable doubt standard is its specification of a particular level of certainty on the fact finder's part; omitting mention of that level from an explanation of the standard, as the prosecutor did here, makes the explanation not merely incomplete but wrong. "Proof to a nonimaginary degree" is not equivalent to proof beyond a reasonable doubt, and the prosecutor erred in saying it is.

To establish a claim for prosecutorial misstatement of the law, defendant must, as the majority states (maj. opn., *ante*, at p. 130), show a reasonable likelihood that the jury understood the comments in an erroneous manner. (*People v. Centeno, supra, 60 Cal.4th at p. 667*.) The majority finds no such reasonable likelihood here when the prosecutor's **[****73]** remarks are viewed in the context of the court's correct instructions on proof beyond a reasonable doubt, the admonitions given the jury that it must follow the law as provided in the court's instructions over anything contrary in counsel's arguments, and portions of both attorneys' arguments that referred to and quoted the court's instructions on the standard of proof. (Maj. opn., *ante*, at pp. 131–133.)

In a case where the prosecutor's challenged remarks were ambiguous, so that they could reasonably have been taken in either a proper or objectionable manner, examining **[**546]** the context to determine how the jury would likely have understood them makes sense. But this is not such a case. The prosecutor's statement that proof beyond a reasonable doubt "means" that "you look at the evidence and you say, 'I believe I know what happened, and my belief is not imaginary' "is unambiguous, and unambiguously wrong. Notably, the majority does not attempt to say how this remark reasonably could be understood in an unobjectionable manner.

The contextual factors the majority brings forward are, however, persuasive as **[***876]** to the lack of prejudice from this prosecutor's misstatement of the law. The **[*136]** prosecutor's **[****74]** isolated misstatement clearly was not so extensive and egregious as to render the trial fundamentally unfair, infringing on defendant's federal due process rights. The misstatement violated only California law against the use of deceptive methods in jury argument,

making it subject only to the prejudice standard generally applicable to state law trial errors, whether a reasonable probability exists the error affected the jury's verdict. (*People v. Hill, supra, 17 Cal.4th at p. 819*; *People v. Espinoza (1992) 3 Cal.4th 806, 820–821 [12 Cal. Rptr. 2d 682, 838 P.2d 204]*.) Consequently, for the same reasons the majority finds no reasonable likelihood "the jury construed or applied the prosecution's challenged remarks in an objectionable fashion" (maj. opn., *ante*, at pp. 133–134), I would find no reasonable probability the prosecutor's misstatement of the law affected the jury's verdict.

With respect to the admission of evidence that codefendant Bernal told Tejeda that one of his cohorts drove the car used in the shooting and identified defendant by name as the driver, I agree with the majority that the trial court did not abuse its discretion under *Evidence Code section 1230*. (Maj. opn., *ante*, at p. 128.) But unlike the majority, I would rely only on the inculpatory value for Bernal of linking himself to defendant and her car, knowing she had been **[****75]** arrested in that car. (Maj. opn., *ante*, at pp. 126–127) The fact that Bernal's identification of a criminal companion as the driver provided evidence of an overt act in furtherance of a conspiracy (maj. opn., *ante*, at p. 126) provides, in this factual context, too weak a connection to criminality to be considered disserving of Bernal's penal interest under *Evidence Code section 1230*. Knowing that the conspiracy to shoot rival gang members had actually borne fruit in a shooting, which Bernal himself committed, a reasonable person in Bernal's position would not have considered it incriminating to admit that another person had committed a preparatory act in furtherance of the conspiracy.

I concur in the judgment.

Liu, J., and Cuéllar, J., concurred.

EXHIBIT 7

Stevens v. Superior Court of San Francisco

Court of Appeal of California, First Appellate District, Division One

May 9, 1958

Civ. No. 18097

Reporter
160 Cal. App. 2d 264 *; 325 P.2d 204 **; 1958 Cal. App. LEXIS 2117 ***

GLADYS TORREGANO STEVENS, Petitioner, v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; ALFRED TORREGANO, Real Party in Interest

Prior History: [*1]** PROCEEDINGS in mandamus, certiorari and prohibition to review the propriety of rulings of the Superior Court of the City and County of San Francisco in striking a proposed narrative statement and in purporting to amend a judgment after an appeal had been taken therefrom.

Disposition: Writ of mandate granted; order purporting to amend judgment, annulled; alternative writ of prohibition discharged.

Case Summary

Procedural Posture
Petitioner alleged heir sought a writ of mandamus to review the propriety of rulings of respondent Superior Court of the City and County of San Francisco (California) (trial court), which struck a proposed narrative statement and purported to amend a judgment in favor of real party in interest legatee on the alleged heir's petition seeking a determination that she was a pretermitted heir of the decedent.

Overview
The alleged heir filed a petition seeking a determination that she was a pretermitted heir of the decedent. The trial court granted the legatee's motion to dismiss the petition. The alleged heir filed a notice of appeal and her election to appeal on a settled statement. Subsequently, the trial court amended their judgment to included pertinent facts of a prior heirship determination. The alleged heir filed her proposed settled statement containing a narrative statement of the evidence. The trial court granted the legatee's motion to strike the narrative portion of the settled statement. The alleged heir sought a writ to review the trial court's decisions. The trial court abused its powers in striking from the proposed settled statement the narrative statement of the oral proceedings, because the effect of the order was to compel the alleged heir to appeal on the judgment roll alone, and it deprived her of her right to appeal on a settled statement. The court concluded that the trial court erred in amending its judgment to included reference to a prior heirship determination because the amendment was an attempt to correct a judicial error and not to correct a mere clerical error.

Outcome
The court granted the alleged heir's request for a writ annulling the order of the trial court purporting to amend the heirship decree.

Counsel: Bergen Van Brunt and Allan L. Sapiro for Petitioner.

No appearance for Respondent.

Wallace, Garrison, Norton & Ray for Real Party in Interest.

Judges: Peters, P. J. Bray, J., and Wood (Fred B.), J., concurred.

Opinion by: PETERS

Opinion

[*265] [205]** This is a petition for an appropriate writ in a controversy involving the propriety of the trial court's rulings in striking a proposed narrative statement, and in purporting to amend the decree involved after an appeal had been taken from it.

Ernest Torregano died testate in January of 1954. His will contains three provisions that are here relevant. The first of these is the second paragraph which provides:

"I declare that I am a widower and that I have no children, issue of my marriage; that my deceased wife's name was Pearl C. Torregano; **[***2]** that my entire estate is separate property."

The thirteenth paragraph of the will provides:

"I give, devise and bequeath to any person or persons who may contest this my Last Will and Testament, or assert any claim to share my estate by virtue of relationship or otherwise the sum of One Dollar ($ 1.00) each in settlement of their said claim or claims."

By the fourteenth paragraph of the will the residue of the estate was devised to the brother of the deceased, Alfred Torregano, if he should survive the testator, and if not, then to his brother's wife and to the testator's nieces.

The Bank of America has been appointed executor of this will.

In January of 1957, the petitioner, Gladys Torregano Stevens, filed a petition seeking a determination that she is the daughter and pretermitted heir of Ernest Torregano. This petition alleges, in substance, that petitioner is the daughter of the testator, that she was unintentionally omitted from the will, and that she is a pretermitted heir under section 1080 of the Probate Code. Alfred Torregano, as the real party in interest, in due course, answered this petition, setting up as his sole defense that under paragraph 13 of the will petitioner **[***3]** was disinherited and under paragraph 14 he was entitled to the residue of the estate.

[*266] The case proceeded to trial on this issue in May of 1957. At the commencement of the trial Alfred Torregano moved to dismiss on the ground that, under the will, petitioner, even if a

daughter, as a matter of law, was not a pretermitted heir. The motion was taken under submission. Then a jury was selected, and, over a period of five and a half days, the parties presented their respective cases to the jury. Both sides then rested. Before argument, the trial court granted the motion to dismiss, ruling that, as a matter of law, and regardless of the evidence, the petitioner is not a pretermitted heir of Ernest Torregano and was entitled to the sum of $ 1.00 only. It entered its decree accordingly. After denial by the trial court of petitioner's motion for a new trial, on September 13, 1957, petitioner filed a notice **[**206]** of appeal and her election to appeal on a settled statement.

On September 26, 1957, Alfred Torregano moved the trial court for an order to amend *nunc pro tunc* the decree appealed from that had been entered May 27, 1957, to add to it the determination that **[***4]** in January of 1955 one Janet Bryant had filed a petition in the Torregano estate for a decree determining to whom distribution should be made and establishing the rights of all persons interested therein; that notice of this proceeding was given as required by law; that on February 11, 1955, the court issued its decree determining heirship, finding that the various persons mentioned in the will, not including petitioner, were entitled to certain fixed sums, and that the residue of the estate was vested in Alfred Torregano. Petitioner objected to the motion on the grounds that since an appeal had been taken from the May 27, 1957, decree, the trial court was without jurisdiction to amend that decree; that the issues as to the existence or effect of the Bryant decree were first raised by Alfred Torregano in September of 1957; that petitioner did not know of the death of her father until December, 1956, and was never served with process in the Bryant proceeding. The trial court rejected petitioner's objections and entered its order amending its May 27, 1957, decree, *nunc pro tunc*, on September 30, 1957, by adding to it the pertinent facts in reference to the Bryant heirship proceeding, **[***5]** and by concluding that the Bryant decree "is final and binding on all persons."

Petitioner attacks this *nunc pro tunc* order, pointing out that she cannot appeal from it as a special order after final judgment because *section 1240 of the Probate Code*, which lists the appealable orders in probate proceedings, does not **[*267]** include such orders. Her major contention is that the trial court attempted in this fashion to amend its prior decree by correcting it for a judicial error after it had lost jurisdiction by reason of the appeal. This constitutes one of the two matters involved in this petition.

The second matter relates to petitioner's unsuccessful attempt to secure a settled statement on her appeal from the May 27, 1957, decree. On November 26, 1957, petitioner filed her proposed settled statement with the trial court. Alfred Torregano moved to strike those portions of the proposed settled statement containing the narrative statement of the evidence on the ground that all such evidence was irrelevant to the points involved on the appeal. The real party in interest also moved to augment the clerk's transcript portion of the settled statement by adding thereto the **[***6]** *nunc pro tunc* order above mentioned.

On January 10, 1958, a hearing was had on the settlement of the proposed settled statement. At the conclusion of that hearing the trial court granted the motion of Alfred Torregano to strike all of the narrative statement of the oral proceedings, and ordered that the settled statement be augmented by including therein the *nunc pro tunc* order of September 30, 1957, and the several

documents relating thereto. The correctness of these rulings constitutes the second matter involved in this petition, and will first be considered by this court.

Petitioner avers, and it is not denied, that Alfred Torregano made no showing that any portion of the proposed narrative statement was false, fraudulent or unsupported by the record, made no proposed amendments to her narrative statement, and has not proposed any corrections thereto. Petitioner further avers that by granting the motion to strike, the trial court has prevented the appellate courts from reviewing the evidence in order that the circumstances existing at the time of the making and executing of the decedent's will may be fully understood; that in petitioner's case, among other things, the **[***7]** narrative statement and oral proceedings show, by unrebutted testimony, that the decedent, who was an attorney, believed that his daughter, the petitioner herein, was dead at the time he executed the will. It is contended that such evidence may and **[**207]** should be considered in construing the will.

(1) The trial court clearly abused its powers in striking from the proposed settled statement the narrative statement of the oral proceedings. This conclusion necessarily follows **[*268]** from a consideration of the duties of the trial court in ruling upon settled statements. Under the Rules on Appeal the appellant may select the method by which the record shall be prepared -- the judgment roll, full reporter's transcript, agreed statement or settled statement. Rule 7 confers the legal right to proceed on a settled statement. That rule provides for the filing by appellant, in lieu of a reporter's transcript, of a proposed narrative statement. The respondent is then given the opportunity to file proposed amendments. Rule 7(d) then provides for a hearing on the settlement of the statement. The judge is then required to "settle the statement and fix the time within which the appellant **[***8]** shall engross it as settled." When the appellant files the engrossed statement, with time given to respondent to object, it is "presented by the clerk to the judge for certification." The rules do not provide for a motion to strike the narrative statement except in rule 7(c) where it is provided that the appellant, if he has had an entire or partial transcript of the oral proceedings prepared and refuses to comply with a court order to allow its use by respondent, a motion to strike the proposed statement may be granted. **(2)** As was said in *Sweet v. Markwart, 115 Cal.App.2d 735, 742 [252 P.2d 751]*, "a motion to strike is not a means of testing the propriety or sufficiency of the proposed statement except in extreme cases where it can be said that the statement is fraudulent or sham." That case also held that the rules applicable to motions to strike in connection with the old proceeding for the settlement of a bill of exceptions were applicable to motions to strike when a record is prepared under rule 7. The court referred to *Walkerly v. Greene, 104 Cal. 208 [37 P. 890]*, and stated that under the rule of that case (p. 742) ". . . it was only in a gross case of palpable **[***9]** and deliberate fraud that the severe penalty of striking out the bill and thus denying the party a hearing upon the merits of his case could be properly imposed; that the right of a judge to strike out or refuse to settle a bill of exceptions was limited to a case of gross and manifest fraud on the part of the one proposing it."

(3) The court in the Sweet case went on to state that if the appellant has prepared a statement, even if deficient, that contained "those portions of the oral proceedings which he deemed material to the determination of his points on appeal, the court could not strike it out, but must proceed to settle it." It is only where the proposed narrative statement is **[*269]** wholly insufficient, a sham and a fraud, that the court may strike it. (*Keller v. Superior Court, 100*

Cal.App.2d 231 [223 P.2d 309]; *Western States Const. Co. v. Municipal Court, 38 Cal.2d 146 [238 P.2d 562]*.)

(4) It is quite obvious that under the rules it is the duty of the trial court to settle a proposed statement, not to make one. The appellant has the legal right to choose his method of appeal and to present any legal argument he may desire. The theory of the trial court **[***10]** in striking the proposed narrative statement, as disclosed by its memorandum opinion, was that under the case of *Van Strien v. Jones, 46 Cal.2d 705 [299 P.2d 1]*, and other cases, the fact, if it be a fact, that the evidence shows that decedent thought that petitioner was dead when he executed the will and so excluded her unintentionally, is immaterial because the interpretation of the disinheriting clause is purely a question of law to be determined from the will alone. Petitioner contends, and argues at length, that the provisions of the will involved in the Van Strien case were radically different from those here involved, that this will shows on its face that it is ambiguous, and that, in such a case, the oral testimony is admissible to show that the deceased thought his daughter was dead when he executed the will. This, so it is contended, makes petitioner a pretermitted **[**208]** heir. That is the very point that will be decided on the appeal on its merits. We express no opinion on it now. Petitioner, right or wrong, has the legal right to present the point. The trial court, by striking the proposed narrative statement, assumed to decide the point. The effect **[***11]** of its order was to compel the petitioner to appeal on the judgment roll alone, and to deprive her of the right to appeal on a settled statement. It was not for the trial court to decide in passing on the record that its order of dismissal was correct because the oral evidence could not be used to interpret the will. By purporting to so decide the trial court assumed the functions of the appellate court. That is not the purpose of a proceeding to settle a proposed statement. The trial court abused its powers when it attempted to prevent the petitioner from submitting the record she needed to intelligently argue the point.

In view of the fact that the Van Strien case was decided by a divided court, and in view of the differences between the will in that case and in the instant one, it cannot be said that by arguing for a rule contrary to that announced by the majority in the Van Strien case, the petitioner was fraudulent, or that her position was sham or frivolous. Even if the **[*270]** decided cases without question held that oral testimony cannot be considered, and we do not so construe them, the petitioner has the legal right to seek a reversal of those cases. This she would **[***12]** be prevented from doing if the order granting the motion to strike is allowed to stand.

It is apparent that a writ of mandate should issue. Although Alfred Torregano has not seen fit to submit amendments to the proposed narrative statement, in the interests of justice, the trial court may permit him to do so, and the court is then ordered to settle the proposed settled statement in accordance with the views herein expressed.

The other point raised is the propriety of the *nunc pro tunc* order of September 30, 1957, purporting to amend the heirship decree after the trial court had lost jurisdiction of that decree. This is not an appealable order, so that this portion of the petition may be treated as a petition for a writ of *certiorari*.

(5) This order of September 30, 1957, was obviously a nullity. The contention that the Bryant decree was res judicata was not raised in the pleadings or at the trial. The first mention of it in the record is in the motion to amend *nunc pro tunc* the heirship decree. Thus, the order *nunc pro*

tunc was an attempt to add to the judgment already rendered and then on appeal the defense of res judicata. It is too elementary to require extended **[***13]** discussion that the benefit of a prior adjudication constituting an estoppel may be waived, that it must be pleaded, and unless pleaded it is waived. (See cases collected 29 Cal.Jur.2d p. 258, § 282.) The basis of the rule is that there are several valid defenses that may exist to such a plea so that the issue must be passed on by the trial court.

It is clear that the amendment *nunc pro tunc* by adding this defense to the action was an attempt by the trial court to correct a judicial error and not to correct a mere clerical one. The filing of the notice of appeal deprived the trial court of the power to later amend or modify its judgment. (*Wagner v. Shapona, 123 Cal.App.2d 451 [267 P.2d 378]*.) The attempt to do so was an attempt to correct a judicial error. (See *Lankton v. Superior Court, 5 Cal.2d 694 [55 P.2d 1170]*; *Stevens v. Superior Court, 7 Cal.2d 110 [59 P.2d 988]*; *Bastajian v. Brown, 19 Cal.2d 209 [120 P.2d 9]*; *Estate of Burnett, 11 Cal.2d 259 [79 P.2d 89]*; 29 Cal.Jur.2d 17; 3 Witkin, California Procedure, p. 1894.) This the court had no power to do. The amending order *nunc pro tunc* should be annulled.

[*271] [*14]** Let a writ of mandate issue in accordance with the views herein expressed. The order of September 30, 1957, purporting to amend the heirship decree is annulled. The alternative writ of prohibition is discharged.

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EXHIBIT 8

The Utility Reform Network v. Public Utilities Com.

Court of Appeal of California, First Appellate District, Division Five

February 5, 2014, Opinion Filed

A138701, A139020

Reporter
223 Cal. App. 4th 945 *; 167 Cal. Rptr. 3d 747 **; 2014 Cal. App. LEXIS 119 ***; 2014 WL 526411

THE UTILITY REFORM NETWORK, Petitioner, v. PUBLIC UTILITIES COMMISSION, Respondent; PACIFIC GAS AND ELECTRIC COMPANY et al., Real Parties in Interest.INDEPENDENT ENERGY PRODUCERS ASSOCIATION et al., Petitioners, v. PUBLIC UTILITIES COMMISSION, Respondent; PACIFIC GAS AND ELECTRIC COMPANY et al., Real Parties in Interest.

Notice: CERTIFIED FOR PARTIAL PUBLICATION†

Subsequent History: Request denied by *The Utility Reform Network v. Public Utilities Com., 2014 Cal. LEXIS 8050 (Cal., Oct. 1, 2014)*

Prior History: **[***1]** Cal. P.U.C. Dec., No. 12-12-035, Cal. P.U.C. Dec., No. 13-04-32.

Util. Reform Network v. PUC, 2012 Cal. App. Unpub. LEXIS 2049 (Cal. App. 1st Dist., Mar. 16, 2012)

Case Summary

Procedural Posture

Real party in interest utility filed an application with respondent California Public Utilities Commission (PUC) seeking approval of an agreement by which the utility would acquire a new gas-fired power plant. The PUC's decision approving the application expressly relied on hearsay materials in finding the project was needed. Petitioner organizations filed petitions for writs of review after the PUC denied their applications for rehearing.

Overview

The court concluded that the PUC's finding of need was unsupported by substantial evidence, because it relied on uncorroborated hearsay materials the truth of which was disputed and which did not come within any exception to the hearsay rule. The remaining evidence in the record failed to support the PUC's finding of need. Even if it was proper for the PUC to consider and rely upon the hearsay materials over petitioners' procedural objections, its finding that the

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† Pursuant to *California Rules of Court, rules 8.1105(b)* and *8.1110*, this opinion is certified for publication with the exception of part V.

project was needed could not rest on those materials alone. Because the PUC's finding of need was based upon uncorroborated hearsay evidence, and the truth of the extra-record statements was disputed, the PUC's finding could not be sustained.

Outcome
The PUC's decisions were annulled.

Counsel: Robert E. Finkelstein for Petitioner The Utility Reform Network.

Goodin, MacBride, Squeri, Day & Lamprey, Robert A. Goodin, Brian T. Cragg, Suzy Hong and Megan Somogyi for Petitioner Independent Energy Producers Association.

Douglass & Liddell and Daniel W. Douglass for Petitioner Western Power Trading Forum.

Paul Clanon, Frank Lindh, Helen W. Yee and Jack M. Mulligan for Respondent Public Utilities Commission.

Charles Middlekauf for Real Parties in Interest Pacific Gas and Electric Company.

Latham & Watkins, James L. Arnone and Laura A. Godfrey for Real Parties in Interest Pacific Gas and Electric Company and Contra Costa Generating Station, LLC.

Judges: Opinion by Jones, P. J., with Needham and Bruiniers, JJ., concurring.

Opinion by: Jones, P. J.

Opinion

[751] [*949]**

JONES, P. J.—In 2012, Pacific Gas and Electric Company (PG&E) filed an application with the California Public Utilities Commission (the Commission) seeking approval of an agreement by which PG&E would acquire a new gas-fired powerplant in Oakley, California (the Oakley Project). A principal issue in the application proceedings was whether there was a need for the Oakley Project. The need was said to **[***2]** arise in part from California's efforts to obtain a greater percentage of its energy from renewable sources, thus requiring additional conventional electrical generating capacity to cope with fluctuations in supply due to the intermittent nature of wind and solar power.

As evidence of this claimed need, PG&E presented a declaration from an executive of the California Independent System Operator (the CAISO) and a petition the CAISO had filed with a federal agency. Neither the CAISO executive nor the authors **[**752]** of the petition testified in the Commission's proceedings. Because of their hearsay nature, the administrative law judge (ALJ) presiding over the application case ruled these materials could not be used as evidence of the need for the Oakley Project. She later issued a proposed decision recommending denial of PG&E's application.

The Commission did not adopt the ALJ's decision, and its decision approving PG&E's application expressly relied on these hearsay materials in finding the Oakley Project is needed. The Utility Reform Network (TURN), Western Power Trading Forum (WPTF), and Independent

Energy Producers Association (IEP), which had participated in the application proceedings, sought **[***3]** rehearing before the Commission. Among other arguments, they claimed the Commission had violated their substantial rights by relying on hearsay evidence the ALJ had ruled could not be used as proof of need for the Oakley Project and that the Commission's decision was unsupported by substantial evidence. After the Commission denied their applications for rehearing, they filed petitions for writs of review under *Public Utilities Code section 1756, subdivision (a)*.[1]

(1) In the published portion of our opinion, we conclude the Commission's finding of need is unsupported by substantial evidence, because it relies on uncorroborated hearsay materials the truth of which is disputed and which do not come within any exception to the hearsay rule. Under established California law, such uncorroborated hearsay evidence does not constitute substantial evidence to support an administrative agency's finding of fact. Because the remaining evidence in the record fails to support the Commission's finding of need, the decisions must be annulled.
[*950]

FACTUAL AND PROCEDURAL BACKGROUND

The Oakley Project approval process has been the subject **[***4]** of at least three Commission proceedings extending over several years. We will explain those proceedings in summary fashion and limit our factual statement to matters relevant to the issues presented in the petitions before us.

The Initial Application for the Oakley Project

Under the Commission's biennial procurement review process, investor-owned electric utilities such as PG&E must submit long-term procurement plans (LTPPs) that serve as the basis for utility procurement activities. (See *§ 454.5, subd. (a)*; *Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development (Jan. 22, 2004) Cal.P.U.C. Dec. No. 04-01-050 [2004 Cal.P.U.C. Lexis 28, pp. *11–*12]*.) In a 2007 decision, the Commission approved PG&E's 2006 LTPP, and among other things, directed PG&E to issue a request for offers (RFO) “to obtain contracts for 800 to 1,200 MW [(megawatts)] of new operationally flexible and dispatchable capacity by 2015.”

PG&E issued the RFO in 2008. It later submitted an application to the Commission for approval of a proposed purchase and sale agreement (PSA) for the Oakley plant. In 2010, the Commission issued a **[***5]** decision denying approval for the Oakley Project. (*Decision on Pacific Gas and Electric Company's 2008 Long-term Request for Offer Results and Adopting Cost Recovery and Ratemaking Mechanisms (July 29, 2010) Cal.P.U.C. Dec. No. 10-07-045 [2010 **[**753]** Cal.P.U.C. Lexis 289, p. *1]* (hereafter Decision 10-07-045).) In that decision, the Commission chose to “deny the Oakley Project at this time” and made a factual finding that the project was not needed. (*Id., 2010 Cal.P.U.C. Lexis 289 at pp. *60, *79*.) Nevertheless, the

[1] All further undesignated statutory references are to the Public Utilities Code.

Commission believed the Oakley Project had "numerous beneficial attributes," so it allowed PG&E to resubmit the application subject to various conditions. (*Id. at p. *60*.) Among other conditions, the Commission stated PG&E could resubmit the application "[i]f the final results from the CAISO Renewable Integration Study demonstrate[] that, even with the projects approved by the Commission, there are significant negative reliability risks from integrating a 33% Renewable Portfolio Standard."[2] (*Id. at p. *61*.)

The Commission's Approval of the Oakley Project Is Annulled

PG&E modified the Oakley PSA to address *D. 10-07-045*, and then submitted a petition for modification of that decision. Acting sua sponte, the **[*951]** Commission treated the petition for modification as an application for approval of the project. (*Decision Authorizing Pacific Gas and Electric Company to Enter Into a Purchase and Sale Agreement with Contra Costa Generating Station LLC (Dec. 16, 2010) Cal.P.U.C. Dec. No. 10-12-050 [2010 Cal.P.U.C. Lexis 457, p. *2]* (hereafter Decision 10-12-050).) A number of parties, including TURN and WPTF, filed comments opposing PG&E's petition for modification, arguing that a new application, not a petition for modification, was the correct procedural vehicle for bringing the Oakley Project back for Commission consideration. (*Id., 2010 Cal.P.U.C. Lexis 457 at p. *7*.) Although the Commission agreed with this procedural objection, it went on to consider PG&E's filing as an application. (*Id. at pp. *11–*12*.) It concluded that the benefits of the amended Oakley Project justified approval of the amended PSA. (*Id. at pp. *19–*20, *23*.) After the Commission denied various parties' applications for rehearing, TURN sought **[***7]** writ review of *Decision 10-12-050* and the Commission's decision denying rehearing, *Order Modifying Decision 10-12-050, and Denying Rehearing of Decision as Modified (May 26, 2011) Cal.P.U.C. Dec. No. 11-05-049 [2011 Cal.P.U.C. Lexis 303]* (hereafter Decision 11-05-049).

In *The Utility Reform Network v. Public Utilities Commission* (Mar. 16, 2012, A132439) (nonpub. opn.) (*TURN I*), we annulled *Decision 10-12-050* and Decision 11-05-049.[3] We held the Commission could not treat PG&E's petition for modification as a new application because the Commission had failed to follow its own rules of practice and procedure. (*TURN I, supra, A132439*.) We concluded the Commission's failure to proceed in the manner required by law had prejudiced the parties to the proceeding, and we therefore set aside the Commission's decisions. (*Ibid.*)

Proceedings on PG&E's Renewed Application

Shortly after issuance of our decision in *TURN I*, PG&E filed with the Commission **[**754]** a new application for approval of the amended Oakley PSA. On May 21, 2012, PG&E submitted

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[2] The Renewable Portfolio Standard (RPS) is part of California's effort to attain a target of generating 33 percent of its total retail sales of electricity from renewable energy resources by the end of 2020. (*§§ 399.11, subd. (a)*, **[***6]** *399.12, subd. (i)*.)

[3] Citation of our prior unpublished opinion does not violate ***California Rules of Court, rule 8.1115(a)*** because "[w]e … cite the decision to explain the factual background of the case and not as legal authority." (*Pacific Gas & Electric Co. v. City and County of San Francisco (2012) 206 Cal.App.4th 897, 907, fn. 10 [142 Cal. Rptr. 3d 190]*.)

prepared **[***8]** testimony in support of its application. The testimony addressed the need for and benefits of the Oakley Project, and it referred to a petition the CAISO had filed with the Federal Energy Regulatory Commission (FERC) seeking a waiver to prevent the retirement of the Sutter Energy Center (the Sutter Waiver Petition). PG&E asserted that the CAISO had supported the Sutter Waiver Petition with testimony describing CAISO studies that had "identified a need for new flexible generation capacity resources in 2017–2018 in order to integrate intermittent renewable **[*952]** resources."[4] PG&E relied in particular upon the declaration of CAISO executive director of market analysis and development, Mark Rothleder (the Rothleder Declaration). In his declaration, Rothleder stated that using certain assumptions, the CAISO's analysis had concluded "there will be a shortage or gap of 3,570 MW for meeting system-wide capacity needs in California by the end of 2017. This shortage would pose significant challenges to the reliable operation of the [CAISO] grid." According to Rothleder, CAISO was concerned about the problem caused by integration of renewable energy resources, "especially given the retirement of thousands **[***9]** of MWs of once-through cooling (OTC) units."

On May 25, 2012, the commissioner assigned to PG&E's application, Michael R. Peevey, issued his "Scoping Memo and Ruling" for the proceedings (the Scoping Memo). (See *§ 1701.1, subd. (b)*.) Among the issues identified in the Scoping Memo was the need for the Oakley Project. The Scoping Memo asked: "Is the Oakley PSA barred or authorized pursuant to D. 07-12-052, which requires all UOG [utility-owned generation] to be selected through a competitive process unless it is needed to meet a specific, unique reliability issue? *This issue includes consideration of whether the Oakley project will meet a specific, unique reliability issue*." (Italics added & fn. omitted.) A separate issue laid out in the Scoping Memo was whether the CAISO had "issued its final report on its renewable resource integration study demonstrating significant negative reliability risks from integrating a 33% [RPS.]" (Fn. omitted.) The Scoping **[***10]** Memo stated that the first issue—the need for the Oakley Project—was one of fact and was contested by the parties. Commissioner Peevey therefore determined evidence was required and scheduled evidentiary hearings.

In addition to its prepared testimony, PG&E asked the Commission to take official notice of decisions of the California Energy Commission (CEC) and the Bay Area Air Quality Management District (the District) regarding each agency's review of elements of the Oakley Project. After submission of PG&E's prepared testimony, the parties conducted discovery and responded with their own prepared testimony. PG&E, in turn, submitted rebuttal testimony that included a copy of the entire Sutter Waiver Petition.

On August 14, 2012, the Commission's Division of Ratepayer Advocates (DRA) filed a motion to strike portions of PG&E's prepared and rebuttal testimony on the grounds that the identified portions consisted of "hearsay or **[*953]** double hearsay statements by representatives of the … CAISO, which have been submitted to prove the truth of the matter asserted therein: namely, that new system resources are needed to support system-wide **[**755]** operational flexibility needs beginning in 2017–2018." **[***11]** The documents subject to DRA's motion to strike included both the Rothleder Declaration and the Sutter Waiver Petition.

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[4] Renewable energy resources, such as wind and solar power, are "intermittent" because they fluctuate naturally. To cite an obvious example, the availability of solar power is affected by the rising and setting of the sun and by cloud cover.

Evidentiary Rulings

On the first day of the evidentiary hearings, the presiding ALJ granted PG&E's motion for official notice of the documents from the CEC and the District, but only "for the limited purpose of supporting the testimony that's already been given." With respect to the Rothleder Declaration and the Sutter Waiver Petition, the ALJ granted DRA's motion to strike in part, stating, "Regarding all the other attachments which refer to the … CAISO … , at issue in this case is whether the [CAISO] has issued a final determination, a final report, a final result, … and PG&E may offer evidence toward this issue. [¶] And these documents … on the issue of whether these very documents alone or in total satisfy the requirement, that requirement of [Decision]10-07-045, this evidence goes to that and is not—for that purpose it's appropriate. [¶] I will not allow … this evidence … to be used for the purpose of proving on this record the truth of the matter asserted; that is, for proving that there is a system reliability need or … for the purpose **[***12]** of proving that what [the CAISO] says is true, or that the Commission should find on the basis of what the [CAISO] says that … what the [CAISO] says is true. [¶] The [CAISO's] statements are not binding on the Commission, and in that way they are not judicially noticeable authority. And they are subject to dispute. They are being challenged before the [Commission]. [¶] And so again, I will not strike the attachments, but I will strike the testimony that does cite to those attachments for purposes of the truth."

During the course of the evidentiary hearings, the ALJ explained she would allow consideration of the CAISO materials for the purpose of showing whether the CAISO had reached a final determination on the issue of significant negative reliability risks, but not for the purpose of showing that the Oakley Project would meet a specific, unique reliability issue, i.e., whether there was a need for the Oakley Project. At one point, when DRA's counsel told the ALJ that her proposed cross-examination was seeking information about PG&E's claim that there was a residual need for flexible energy resources that could only be met by the Oakley Project, the ALJ stated, "I don't want this. **[***13]** I don't want hearsay evidence used for that **[*954]** issue, … because we can't litigate that because we don't have the [CAISO] here. [¶] [T]hat's why I struck a lot of testimony from PG&E because it was using the third party statements for the truth of the matter asserted. [¶] We cannot use the third party documentation for that. The third party documentation is for whether there's a final [CAISO] report."[5]

The Proposed Decisions

After briefing from the parties, the ALJ filed a proposed decision recommending denial of PG&E's application. She found there was insufficient evidence of a specific, unique reliability need for the Oakley Project. The ALJ rejected PG&E's reliance on various CAISO statements, including the Sutter Waiver Petition. She concluded PG&E's use of the evidence violated her rulings and noted that because the CAISO was not a party to the proceedings, "there ha[d] been no opportunity **[**756]** to probe its out-of-record statements in the context of the **[***14]** specific issues presented here."

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[5] Despite the obvious importance of the CAISO's findings to the issues litigated in this proceeding, the CAISO elected not to become a party. It appears PG&E may have asked the CAISO to submit testimony, but the CAISO declined to do so.

The ALJ's proposed decision also relied on the fact that both the CAISO and PG&E were parties to a settlement in a separate Commission proceeding in which they had stipulated that " '[t]he resource planning analyses presented … do not conclusively demonstrate whether or not there is need to add capacity for renewable integration purposes through the year 2020, the period to be addressed during the current LTPP cycle … .' " In its decision approving the settlement in that proceeding, the Commission explained the parties had agreed to defer determination of the utilities' future need for additional generation. (*Decision on System Track I and Rules Track III of the Long-term Procurement Plan Proceeding and Approving Settlement (Apr. 19, 2012) Cal.P.U.C. Dec. No. 12-04-046 [2012 Cal.P.U.C. Lexis 192, p. *8]* (*Decision Approving Settlement*).)[6] The Commission quoted the parties' settlement agreement, which expressed the settling parties' " 'general agreement that further analysis is needed before any renewable integration resource need determination is made.' " (*2012 Cal.P.U.C. Lexis 192 at p. *8*.) In determining the reasonableness of the settlement, the Commission looked at the whole **[***15]** record and found "clear evidence … that additional generation is not needed by 2020, so there is record support for deferral of procurement." (*Id. at p. *11*.)
[*955]

Assigned Commissioner Peevey issued a proposed alternate decision recommending approval of the Oakley PSA. The proposed alternate decision relied on the Sutter Waiver Petition and statements from CAISO's chief executive officer as evidence that "retirement of OTC plants and integration of the 33% RPS by 2020 creates the potential for a significant reliability risk."

The Commission's Decision

In *Alternate Decision of President Peevey Approving Application for Amended Purchase and Sale Agreement (Dec. 20, 2012) Cal.P.U.C. Dec. No. 12-12-035 [2012 Cal.P.U.C. Lexis 594]* (*Oakley Decision*), the full Commission adopted the proposed alternate decision and approved the amended Oakley PSA. The Commission referred to the ALJ's ruling allowing the CAISO materials into the record only for limited purposes but noted that hearsay evidence **[***16]** is admissible in Commission proceedings. (*Oakley Decision, 2012 Cal.P.U.C. Lexis at pp. *32–*33*.) It therefore chose to accord the CAISO studies and statements PG&E had introduced "less weight than we would for a CAISO study that was subject to cross examination in a Commission proceeding." (*Id. at p. *33*.) The Commission did not accept as true the CAISO's conclusion that there would be a shortfall of 3,750 megawatts by 2018, but following the alternate decision, it concluded the CAISO's findings were persuasive evidence demonstrating significant negative reliability risks from integrating a 33% RPS. (*Id. at pp. *33, *61*.)

The Rehearing Decision

IEP sought rehearing of the *Oakley Decision*, as did TURN and WPTF. In their applications, the parties contended the Commission had improperly relied on hearsay evidence for its finding of

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[6] On July 8, 2013, PG&E filed a request that we take judicial notice of several Commission decisions, as well as a document from the Commission's records and an ALJ decision. We grant the request with respect to exhibits A through S, which are copies of Commission decisions. (*Evid. Code, § 452, subd. (c)*.) We deny as moot the request as to exhibits T and U.

significant reliability risk. The applicants also argued the Commission had failed to preserve **[**757]** the substantial rights of the parties and had not proceeded in the manner required by law when it relied on hearsay evidence despite the ALJ's ruling precluding use of the CAISO materials as evidence of need. (See Cal. Code Regs., tit. 20, § 13.6(a) (Rule 13.6(a)) ["Although technical rules of evidence **[***17]** ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved."].) Furthermore, the applicants claimed the Commission's decision was not supported by substantial evidence.

In Order Modifying Decision 12-12-035, and Denying Rehearing of Decision as Modified (Apr. 18, 2013) Cal.P.U.C. Dec. No. 13-04-032 [2013 **[*956]** Cal.P.U.C. Lexis 134] (*Rehearing Decision*), the Commission addressed the parties' applications. It explained that in the *Oakley Decision*, it had intended to overrule the ALJ's evidentiary ruling and could thus rely on the Rothleder Declaration and the Sutter Waiver Petition to demonstrate the need for the Oakley Project. (Rehearing Decision, 2013 Cal.P.U.C. Lexis 134 at p. *9.) Because it had not expressly overruled the ALJ, however, the Commission acknowledged it had "generated some confusion." (*Ibid*.) The Commission explained it had "reviewed the ALJ's ruling, and decided not to follow it." (Id. at p. *10.) It therefore modified its earlier decision to make it expressly clear it was overruling the ALJ's ruling regarding the use of the Rothleder Declaration and the Sutter Waiver Petition. (Id. at p. *40.) It further ruled that the substantial rights of the parties had been preserved, because the parties had been given the opportunity to challenge the substance of the Rothleder **[***18]** Declaration and the Sutter Waiver Petition through their own testimony and through data requests to PG&E. (Id. at p. *13.)

The Commission also reasoned that its rules of practice and procedure permitted it to rely on hearsay evidence for the truth of the matter asserted. (Rehearing Decision, supra, 2013 Cal.P.U.C. Lexis 134 at p. *10.) Under Rule 13.6(a), " 'the Commission allows admissions of hearsay although it is given less weight than other evidence. In general, hearsay in administrative proceedings is admissible if a responsible person would rely upon it in the conduct of serious affairs, regardless of its possible inadmissibility in civil actions.' " (Rehearing Decision, at p. *11.) Moreover, the Commission asserted, hearsay evidence is accepted in Commission proceedings when supported by other evidence, and administrative agencies are permitted to rely upon it. (Id. at pp. *11–*12.) Since the Rothleder Declaration and Sutter Waiver Petition had been submitted to FERC under penalty of perjury, the Commission found the Sutter Waiver Petition was "an analysis upon which [it] could reasonably rely in conducting [its] affairs." (*Ibid*.) In addition to the Sutter Waiver Petition, the Commission cited statements from reports issued **[***19]** by the CEC and the District on the Oakley Project as the basis for its finding of a "significant negative reliability risk from integrating a 33% [RPS] by 2020." (Id. at p. *25.)

After considering and rejecting all of the parties' other arguments, the Commission denied the applications for rehearing. (Rehearing Decision, supra, 2013 Cal.P.U.C. Lexis 1342 at pp. *40–*41.)
[*957]

The Petitions for Review

On May 20, 2013, TURN filed a petition for writ of review of the Commission's decisions in this court. (*§ 1756, subd. (a)*.) That same day, IEP and WPTF filed a combined petition for writ of review in the Court of Appeal for the Third Appellate District. On June 18, 2013, the Supreme Court ordered the latter proceeding transferred to this court. We consolidated the petitions on our own motion.

DISCUSSION

Petitioners raise a number of challenges to the Commission's decisions. They devote **[**758]** the greater part of their briefing to their claim that the Commission failed to preserve the substantial rights of the parties because it relied on the Rothleder Declaration and the Sutter Waiver Petition to support the finding of need for the Oakley Project despite the ALJ's ruling that this evidence could not be used for that purpose. (See *Rule 13.6(a)*.) **[***20]** They argue this prejudiced them because they were unable to challenge the claims made in these materials through cross-examination. In addition, they assert that if they had known the Commission would rely on these materials for the purpose of demonstrating the need for the Oakley Project, they would have presented their own evidence on that issue during the hearings.

As we explain, we conclude we need not resolve petitioners' procedural challenges. Even if we assume the Commission's procedures sufficiently preserved the substantial rights of the parties, we do not find substantial evidence to support its finding that the Oakley Project is needed to meet a specific, unique reliability risk. Before addressing the issue of substantial evidence, we explain why writ review is appropriate and outline the scope of our review of the Commission's decisions.

I. *Propriety of Writ Review*

(2) Any party aggrieved by an order or decision of the Commission may petition for a writ of review from the Court of Appeal or the Supreme Court. (*§ 1756, subd. (a)*.) “Where, as here, ‘writ review is the exclusive means of appellate review of a final order or judgment, an appellate court may not deny an apparently **[***21]** meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case **[*958]** less worthy of its attention than other matters.’ [Citation.] We are not, however, ‘compelled to issue the writ if the [Commission] did not err … .’ (*Pacific Bell v. Public Utilities Com. (2000) 79 Cal.App.4th 269, 282 [93 Cal. Rptr. 2d 910]*, fn. omitted.)” (*PG&E Corp. v. Public Utilities Com. (2004) 118 Cal.App.4th 1174, 1193 [13 Cal. Rptr. 3d 630]*.) We need not issue the writ “if the petitioning party fails to present a convincing argument for annulment of the [Commission's] decision.” (*Pacific Bell v. Public Utilities Com., supra, 79 Cal.App.4th at p. 272*.)

In accordance with this standard, after considering the briefing and exhibits submitted by the parties, we concluded the petitions appeared meritorious. We therefore granted the writ petitions and gave notice of our intent to decide the matter on the record provided, unless a party promptly filed an objection or a request for oral argument. Having received no such objection or request, we deem the matter submitted.

II. *Standard of Review*

Section 1757 delimits the **[***22]** scope of our review of Commission decisions. (*§ 1757, subd. (a)*.) In this case, the petitioners' challenges require us to determine whether (1) the Commission has proceeded in the manner required by law and (2) the findings in its decision are supported by substantial evidence in light of the whole record. (*§ 1757, subd. (a)(2)*, *(4)*.)

(3) In assessing whether the Commission proceeded in the manner required by law (*§ 1757, subd. (a)(2)*), "we are mindful that '[t]here is a strong presumption of validity of the [C]ommission's decisions … .' [Citation.]" (*Utility Consumers' Action Network v. Public Utilities Com. (2010) 187 Cal.App.4th 688, 697 [114 Cal. Rptr. 3d 475]*.) The Commission's interpretation of its own rules and regulations "is entitled to consideration and respect by **[**759]** the courts." (*Southern Cal. Edison Co. v. Public Utilities Com. (2000) 85 Cal.App.4th 1086, 1096 [102 Cal. Rptr. 2d 684]*.) We will not interfere with the Commission's choice of procedures "absent a manifest abuse of discretion or an unreasonable interpretation of the statutes governing its procedures." (*Pacific Bell v. Public Utilities Com., supra, 79 Cal.App.4th at p. 283*.) In addition, if we conclude the Commission has failed to proceed in the manner required **[***23]** by law, we will annul its decision only if that failure was prejudicial. (See *Southern California Edison Co. v. Public Utilities Com. (2006) 140 Cal.App.4th 1085, 1106 [45 Cal. Rptr. 3d 485]*.)
[*959]

(4) Under *section 1757, subdivision (a)(4)*, we apply "familiar principles to review for substantial evidence." (*SFPP, L.P. v. Public Utilities Commission (2013) 217 Cal.App.4th 784, 794 [159 Cal. Rptr. 3d 10]*.) We must consider all relevant evidence in the record, but it is for the Commission to weigh the preponderance of conflicting evidence. (*Ibid.*) "The 'in light of the whole record' language means that the court reviewing the agency's decision cannot just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record. [Citation.] Rather, the court must consider all relevant evidence, including evidence detracting from the decision, a task which involves some weighing to fairly estimate the worth of the evidence." (*Lucas Valley Homeowners Assn. v. County of Marin (1991) 233 Cal.App.3d 130, 141–142 [284 Cal. Rptr. 427]* (*Lucas Valley*).) We may reverse the Commission's decision only if, based on the evidence before the Commission, no reasonable person could reach the conclusion it did. (*SFPP, L.P. v. Public Utilities Commission, supra, 217 Cal.App.4th at p. 794*.)

III. **[***24]** *Hearsay Evidence Is Admissible in Commission Proceedings but Cannot Be the Sole Support for a Finding of Disputed Fact*.

(5) The parties agree that the Rothleder Declaration and the Sutter Waiver Petition are hearsay evidence.[7] (*Evid. Code, § 1200, subd. (a)* [defining hearsay evidence]; *Re Pacific Gas and Electric Co. (1986) 23 Cal.P.U.C.2d 352, 354* ["Documentary evidence that is introduced for the purpose of proving the matter stated in the writing is hearsay *per se* because the document is not a statement by a person testifying at the hearing."].) The parties also agree that, as a general matter, hearsay evidence is admissible in Commission proceedings. In addition, although they disagree about the significance of petitioners' lack of opportunity to cross-examine Rothleder or other CAISO officials, there is no dispute that the statements contained in the CAISO materials were not tested by cross-examination in this proceeding.

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[7] Neither the Commission nor PG&E claims these documents fall within an exception to the hearsay rule.

Consequently, the issue before us is a narrow one. May the Commission base a finding of fact solely upon hearsay evidence where the truth of the extrarecord statements **[***25]** is disputed? The answer is no.

A. *Standards Governing the Admission and Weight of Hearsay Evidence in Commission Proceedings*

(6) The Commission's proceedings are governed by its rules of practice and procedure, "and in the conduct thereof the **[**760]** technical rules of evidence need not be applied." (*§ 1701, subd. (a)*; see *Rule 13.6(a)*.) The Commission's own **[*960]** precedent establishes that hearsay evidence is admissible in its proceedings. (See, e.g., *Investigation on the Commission's Own Motion Into the Fitness of the Officers, Directors, Owners and Affiliates of Clear World Communications Corporation (June 16, 2005) Cal.P.U.C. Dec. No. 05-06-033 [2005 Cal.P.U.C. Lexis 221, p. *81]* (*Clear World Communications*); *Re Landmark Communications, Inc. (1999) 84 Cal.P.U.C.2d 698, 701* (*Landmark Communications*).) Administrative agencies like the Commission are given more latitude to consider hearsay testimony than are courts (*Landmark Communications, at p. 701*.), in part because "factfinders in administrative proceedings are more sophisticated than a lay jury" (*Re Pacific Gas and Electric Co., supra, 23 Cal.P.U.C.2d at p. 354*).

(7) "The Commission generally allows hearsay evidence if a responsible person would rely upon it in the conduct of **[***26]** serious affairs." (*Landmark Communications, supra, 84 Cal.P.U.C.2d at p. 701*.) The Commission may rely to some extent even on unverified prepared testimony, at least when it is submitted in anticipation of sworn oral testimony, and when due consideration is given to the fact that the sponsor of the testimony has not been subjected to cross-examination. (*Re American Telephone & Telegraph Co. (1994) 54 Cal.P.U.C.2d 43, 49*.) Hearsay evidence is given less weight, however, and if evidence is objectionable on hearsay grounds, "the Commission weighs it accordingly when all of the evidence in the case is reviewed." (*Landmark Communications, supra, 84 Cal.P.U.C.2d at p. 701*.)

B. *Uncorroborated Hearsay Evidence Is Insufficient to Support a Finding of Fact*.

(8) "The admissibility and substantiality of hearsay evidence are different issues." (*Gregory v. State Bd. of Control (1999) 73 Cal.App.4th 584, 597 [86 Cal. Rptr. 2d 575]*.) As the California Supreme Court has explained, "mere admissibility of evidence does not necessarily confer the status of 'sufficiency' to support a finding *absent other competent evidence*." (*Daniels v. Department of Motor Vehicles (1983) 33 Cal.3d 532, 538, fn. 3 [189 Cal. Rptr. 512, 658 P.2d 1313]*, italics added (*Daniels*).) "There **[***27]** must be substantial evidence to support … a board's ruling, and hearsay, unless specially permitted by statute, is not competent evidence to that end." (*Walker v. City of San Gabriel (1942) 20 Cal.2d 879, 881 [129 P.2d 349]* (*Walker*), overruled on another ground in *Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 37, 44 [112 Cal.Rptr. 805, 520 P.2d 29]*.)

(9) California decisions adhere to the so-called "residuum rule," under which the substantial evidence supporting an agency's decision must consist **[*961]** of at least "a residuum of legally

admissible evidence."[8] (1 Witkin, Cal. Evidence, *supra*, § 60, p. 72.) A version of the rule has been codified in this state's *Administrative Procedure Act* (*Gov. Code, § 11340 et seq*.), which provides: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection *shall not be sufficient in itself to support a finding* unless it would be admissible over objection in civil actions." (*Gov. Code, § 11513, subd. (d)*, italics added.)

[761] (10)** This provision of the Administrative Procedure Act (*Gov. Code, § 11340 et seq*.) does not apply to hearings before the Commission, and the agency has never expressly adopted the rules embodied in that statute. (*§ 1701, subd. (b)*; *Re Pacific Gas and Electric Co., supra, 23 Cal.P.U.C.2d at p. 354*.) The Commission's decisions nevertheless follow the general rule stated in *Government Code section 11513, subdivision (d)* and articulated by the California Supreme Court in cases such as *Walker, supra, 20 Cal.2d 879*. For example, in *Clear World Communications, supra, 2005 Cal.P.U.C. Lexis 221 at page *81*, the Commission noted that "[w]hile hearsay is admissible in our administrative hearings, it cannot be the basis for an evidentiary finding without corroboration where the truth of the out-of-court statements is at issue. (*Gov. Code § 11513(d)*.)" Consequently, hearsay is admissible in Commission proceedings, but it "may not be solely relied upon to support a finding."[9] (*Re Communication TeleSystems Internat. (1996) 66 Cal.P.U.C.2d 286, 292, fn. 8*.) Thus, like the California courts, the Commission has followed the residuum rule.

The residuum rule, and the California cases applying it, have been the subject of forceful criticism. (Collins, *Hearsay and the Administrative Process: A Review and Reconsideration of the State of the Law of Certain Evidentiary Procedures Applicable in California Administrative Proceedings* (1976) 8 Sw.U. L.Rev. 579, 591–598, 607–615.) The rule was abandoned in the federal courts after the United States Supreme Court's decision in *Richardson v. Perales (1971) 402 U.S. 389 [28 L. Ed. 2d 842, 91 S. Ct. 1420]*. (See, e.g., *Johnson v. U.S. (D.C. Cir. 1980) 202 U.S. App. D.C. 187 [628 F.2d 187, 190]* ["We have rejected **[***30]** a per se approach that brands evidence as **[*962]** insubstantial solely because it bears the hearsay label."].) Thus, in a case upon which the Commission relies, the United States Court of Appeals for the District of Columbia Circuit rejected as unsupported the claim "that uncorroborated and untested testimony and hearsay testimony cannot constitute substantial evidence." (*Echostar Communications Corp. v. F.C.C. (D.C. Cir. 2002) 292 F.3d 749, 753* (*Echostar*).)

(11) As the foregoing discussion of California law makes clear, however, the Commission's reliance on *Echostar* is necessarily misplaced. Unlike federal law, under California statutory and decisional law, as well as the Commission's own decisions, uncorroborated hearsay cannot

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[8] Witkin calls hearsay falling within an exception to the hearsay rule "competent hearsay." (1 Witkin, Cal. Evidence (5th ed. 2012) Introduction, § 67, p. 80.) "Incompetent hearsay" is hearsay evidence that would not be admissible **[***28]** over objection in a civil action. (See *id*., § 68 at p. 81.)

[9] The Commission does not **[***29]** appear to have concluded it may base a finding of fact solely upon uncorroborated hearsay evidence that does not fall within an exception to the hearsay rule. (See *Re Investigation into Possible Overassessment by the State Board of Equalization of Property Owned by Commission-regulated Utilities (1998) 80 Cal.P.U.C.2d 685, 697, fn. 1* [declining to decide the question]; cf. *Re Pacific Gas and Electric Co., supra, 23 Cal.P.U.C.2d at p. 354* ["We ... have not reached the question of whether documentary evidence, standing alone, would provide legally sufficient evidence of a disputed fact necessary to support our decision."].)

constitute substantial evidence to support an agency's decision absent specific statutory authorization.[10] (*Daniels, supra, 33 Cal.3d at pp. **[**762]** 536–537*; accord, *In re Lucero L. (2000) 22 Cal.4th 1227, 1244 [96 Cal. Rptr. 2d 56, 998 P.2d 1019]* [citing *Walker* with approval].) This means that even if it was proper for the Commission to consider and rely upon the Rothleder Declaration and the Sutter Waiver Petition over the petitioners' procedural objections, its finding that the Oakley Project is needed cannot rest **[***31]** on those materials alone. Having clarified that this hearsay evidence may not serve as the sole factual basis for the Commission's finding, we now consider whether there is other competent, substantial evidence to support the Commission's decision.

IV. *The Commission's Finding of Need Is Unsupported by Substantial Evidence*.

Petitioners contend the Commission's finding of need for the Oakley Project is unsupported by substantial evidence. They concede hearsay evidence is admissible before the Commission, but they argue that the Rothleder **[*963]** Declaration and the Sutter Waiver Petition lack the " 'satisfactory indicia of reliability' " that make reliance on hearsay evidence appropriate. (*Rehearing Decision, supra, 2013 Cal.P.U.C. Lexis 134 at p. *12*, quoting *Echostar, supra, 292 F.3d at p. 753*.) In addition, they assert there is no corroborating evidence **[***33]** to support the Commission's finding that "the integration of the 33% RPS and phase-out of [OTC] plants creates the potential for a significant reliability risk before 2020."

In response, both the Commission and PG&E set forth lists of evidence they contend supports the Commission's finding of need. In accordance with our standard of review, we will examine the cited evidence in light of all relevant evidence in the record. (*Lucas Valley, supra, 233 Cal.App.3d at p. 142*.)

A. *The Evidence Cited by the Commission*

We begin with the evidence upon which the Commission expressly relied.[11] To support the finding of need, the *Oakley Decision* cited only the Sutter Waiver Petition and a statement by the

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[10] Since the Commission's own precedent holds that uncorroborated hearsay is insufficient to support a finding of disputed fact, it does not appear to claim it possesses such specific statutory authorization. We note that in response to petitioners' procedural arguments, the Commission and PG&E have relied on the following language of *section 1701, subdivision (a)*: "No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission."

The California Supreme Court has required very explicit statutory authorization before permitting an agency's reliance on uncorroborated hearsay. For example, hearings in workers' compensation cases are governed by *Labor Code section 5709*, which provides: "No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed **[***32]** as specified in this division. *No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure*." (Italics added.) In *Daniels*, the court suggested that even this very broad statutory language "does not necessarily sanction sole reliance on uncorroborated hearsay." (*Daniels, supra, 33 Cal.3d at pp. 538–539, fn. 4*.) We need not definitively resolve the issue, as the Commission's own rulings preclude reliance on uncorroborated hearsay to support a finding of fact.

[11] The Commission's identification of the evidence upon which it relied in making **[***34]** findings of fact is helpful for purposes of judicial review, but there is no requirement that its decisions "contain a complete summary of all proceedings and evidence leading to the decision." (*Toward Utility Rate Normalization v. Public Utilities Com. (1978) 22 Cal.3d 529, 540 [149 Cal. Rptr.*

CAISO's chief executive officer, Steve Berberich. (*Oakley Decision, supra, 2012 Cal.P.U.C. Lexis 594 at pp. *31–*34*.) Acknowledging their hearsay nature, the Commission gave these materials "reduced weight," but it adjudged them to be "persuasive evidence" of the existence of a **[**763]** significant reliability risk. (*Ibid*.; see *SFPP, L.P. v. Public Utilities Commission, supra, 217 Cal.App.4th at p. 794* [Commission may weigh value of conflicting evidence].)

Petitioners argue these hearsay materials are particularly unreliable based on a number of factors. Since the Commission has already recognized the materials are hearsay and has accorded them reduced weight, we need not determine whether they should be given *even less* weight because of the factors petitioners raise.[12] As explained in part III.B., *ante*, unless the CAISO materials are corroborated by other competent evidence, they do not constitute substantial evidence to support the Commission's decision. Thus, whatever evidentiary weight is due the CAISO materials, they cannot alone support the Commission's finding of need for the Oakley Project. (*Daniels, supra, 33 Cal.3d at p. 538, fn. 3*; **[***35]** *Clear World Communications, supra, 2005 Cal.P.U.C. Lexis 221 at p. *81*.)
[*964]

As further support for the Commission's finding of need, the *Rehearing Decision* cited a passage from the District's final determination of compliance for the Oakley Project. (*Rehearing Decision, supra, 2013 Cal.P.U.C. Lexis 134 at p. *25*.) The District stated: "The proposed facility will … provide energy-efficient electric generation capacity using new conventional generation technology, with operational flexibility to efficiently address grid fluctuations due to the intermittent nature of renewable generation such as wind and solar." This statement, however, says only that the Oakley facility would provide generation capacity to address *general* grid fluctuations due to the intermittent nature of renewable energy sources. It does not address the actual question posed in the Scoping Memo, which was "whether the Oakley project will meet a *specific, unique* reliability issue." (Italics added.) Moreover, the District's passing statement was made in the context of its analysis of "how the facility will comply with applicable air quality regulatory requirements." **[***36]** The District was *not* analyzing the issue of need for the Oakley Project,[13] and its statement therefore does not support the Commission's finding on that issue. (See *City of Los Angeles v. Public Utilities Commission (1972) 7 Cal.3d 331, 349 & fn. 11 [102 Cal. Rptr. 313, 497 P.2d 785]* (*City of Los Angeles*) [evidence did not support increase in cost of service where it addressed only cost of establishing new service in one city but not costs in cities where service was already established].)

The *Rehearing Decision* also quoted from the CEC's final permit decision on the Oakley Project. (*Rehearing Decision, supra, 2013 Cal.P.U.C. Lexis 134 at pp. *24–*25*.) After acknowledging the intermittent nature of wind and solar power, the CEC noted, "in order to rely on such intermittent sources … , utilities must have available other, nonrenewable generating resources … that can fill the gap when renewable generation decreases. … [¶] [The Oakley Project] is likely to serve as an important firming source for **[***37]** intermittent renewable resources in support of

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692, 585 P.2d 491].) Our statutory standard of review requires us to evaluate the findings in the decision "in light of the whole record." (*§ 1757, subd. (a)(4)*.) We therefore consider all record evidence, even if it was not specifically cited by the Commission.

[12] Since we do not reach this issue, we deny as moot IEP's June 21, 2013 request for judicial notice.

[13] Indeed, while PG&E's prepared testimony cited this passage from the District's determination, it did so only in the chapter of its testimony addressing the Oakley Project's development and construction status, not in the chapter addressing the issue of need.

California's RPS and [greenhouse gas] goals." The CEC explained, however, that its "siting process is not intended to determine market need for power plants. **[**764]** That determination is made by the [Commission], which, in December 2010 approved the [PSA] between the Applicant and PG&E for the [Oakley] Project." The CEC thus disclaimed any intention to determine whether the Oakley Project was needed, referring instead to the Commission's approval of the Oakley PSA in *Decision 10-12-050*, the decision we annulled in *TURN I*. In light of these limitations, the CEC's statement does not constitute substantial **[*965]** evidence to support the Commission's determination of need. (Cf. *City of Los Angeles, supra, 7 Cal.3d at p. 340* [where sole support for Commission decision was earlier decision annulled by Supreme Court, decision under review could not be sustained].)

B. *Other Evidence*

In its answer, the Commission points to the testimony of a PG&E witness as support for the claim that "the Oakley Project can provide a significant contribution to the integration of the 33% RPS." First, although the Commission has provided us with some excerpts of the reporter's transcript, **[***38]** the cited testimony does not appear to be among them. Second, testimony about whether the Oakley Project can contribute to meeting a possible need does not support the claim that the need itself exists. The remaining evidence cited in the Commission's answer addresses issues other than the Scoping Memo's question about whether the Oakley Project is needed to address a specific, unique reliability issue. We find no support for the finding of need in this evidence.

PG&E's answer lists other items of evidence to support the Commission's finding of need, evidence not cited in the Commission's own answer. Much of the evidence simply refers to or relies on the CAISO's assessment of need. For example, the rebuttal testimony submitted by the Coalition of California Utility Employees and California Unions for Reliable Energy states, "The period during which there are *fears* that reliability needs *may occur* that a 2020 power plant cannot meet, *according to the* [CAISO], is every year from 2013 through 2019 … ." (Italics added.) The testimony makes no definitive statement that there will be reliability needs, but makes projections about "post-2016 Sutter costs" "*if* there are reliability needs in **[***39]** 2020 or before." (Italics added.)

PG&E also cites its own testimony concerning the possible effect of the retirement of the San Onofre Nuclear Generating Station[14] and nonrenewal of the licenses for its Diablo Canyon nuclear powerplant. But this testimony is based in significant part on the *possibility* that licenses for the latter plant will not be renewed in 2024 and 2025. PG&E claimed only that *if* its Diablo Canyon plant is not relicensed, there will be a greater need for new generation sources in Northern California.
[*966]

PG&E also directs us to various attachments to DRA's testimony. Some of these are simply slides from a CAISO presentation showing how electrical generating capacity varies over the course of a day. They are thus both hearsay and unresponsive to the question of need. Another

[14] Citing an online news release, rather than material in the Commission's record, PG&E tells us that Southern California Edison has announced plans to retire this plant. Even if we assume this is a fact subject to judicial notice, PG&E has not requested judicial notice of it.

is a data response from PG&E concerning the Oakley Project's effect on the retirement of OTC facilities. It **[**765]** also fails to **[***40]** address the issue of need for the Oakley Project. Yet another is testimony PG&E and other utilities provided in the Commission's 2010 LTPP proceeding, but as explained earlier, in that proceeding PG&E joined a settlement in which it agreed that further analysis would be needed " 'before any renewable integration resource need determination is made.' " (*Decision Approving Settlement, supra, 2012 Cal.P.U.C. Lexis 192 at p. *8*.) Finally, PG&E also cites a DRA cross-examination exhibit that consists of Rothleder's testimony in a separate Commission proceeding. This testimony does not appear to be sworn and is hearsay in any event. Furthermore, Rothleder states that the CAISO "recommends that the Commission's assessment of the need for new system resources to meet renewable integration needs should take place *in this docket during calendar year 2013* with a decision on system needs by December 2013." (Italics added.) Given that recommendation, this testimony would hardly seem to support a finding of need in *this* proceeding.

In sum, the materials identified by PG&E are either themselves based on CAISO's hearsay analysis or do not address the issue of need for the Oakley Project. They therefore **[***41]** cannot serve to corroborate the hearsay materials upon which the Commission relied to support its finding of need. Because the Commission's finding is based upon uncorroborated hearsay evidence, and the truth of the CAISO's extrarecord statements is disputed, the finding cannot be sustained. (*Clear World Communications, supra, 2005 Cal.P.U.C. Lexis 221 at p. *81*; *Cleancraft, Inc. v. San Diego Gas and Electric Co. (1983) 11 Cal.P.U.C.2d 975, 984* [party's claim could not rest on "the hearsay opinions of unavailable experts"].)

V. *TURN Has Not Demonstrated the Commission Failed to Proceed in the Manner Required by Law in Refusing to Apply the Requirements of Decision 12-04-046 Retroactively*.* [NOT CERTIFIED FOR PUBLICATION] **[*967]**

DISPOSITION

Commission decision No. 12-12-035, as modified by decision No. 13-04-032, is annulled.

Needham, J., and Bruiniers, J., concurred.

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* See footnote, *ante*, page 945.

EXHIBIT 9

United States v. Heller

United States Court of Appeals for the Ninth Circuit

August 28, 2008, Argued and Submitted, Seattle, Washington; January 8, 2009, Filed

No. 07-30452

Reporter
551 F.3d 1108 *; 2009 U.S. App. LEXIS 344 **

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GLENN HELLER, Defendant-Appellant.

Subsequent History: US Supreme Court certiorari denied by *Heller v. United States, 2009 U.S. LEXIS 3767 (U.S., May 18, 2009)*

Prior History: [1]** Appeal from the United States District Court for the District of Montana. D.C. No. CR-07-00002-CCL. Charles C. Lovell, District Judge, Presiding.

United States v. Heller, 2007 U.S. Dist. LEXIS 60608 (D. Mont., Aug. 17, 2007)

Disposition: AFFIRMED.

Case Summary

Procedural Posture

Following a bench trial, the United States District Court for the District of Montana convicted defendant of receiving and possessing child pornography, in violation of *18 U.S.C.S. § 2252A(a)(2)*, *(a)(5)(B)*. Defendant appealed, arguing that the district court erred in denying his suppression motion and motion in limine, that his confession was involuntary, and that his *Fed. R. Crim. P. 29* motion for acquittal should have been granted.

Overview

Defendant was convicted of state criminal charges after a developmentally disabled man disclosed that he had a sexual relationship with him while in his care. Defendant was not charged in connection with child pornography found on the man's computer. Two years later, after being informed that he was not under arrest and was free to leave, defendant confessed to a police officer and a federal agent that he and the man viewed the pornography while engaging in sexual acts. The court held that the district court did not abuse its discretion under D. Mont., R. 12.1(c) in allowing the government to file a late response to the suppression motion because plea negotiations were still going on when the time for filing the response expired. The district court did not have to rule on defendant's motion in limine because that motion was mooted once defendant waived his right to a jury trial. The district court did not commit clear error in finding that neither the circumstances of the interview, nor the fact that defendant had taken

prescription medication, rendered his confession involuntary. The government sufficiently connected defendant to the pornography found on the man's computer.

Outcome
The court affirmed the district court's judgment.

Counsel: Anthony R. Gallagher, Federal Defender, and Michael Donahoe, Senior Litigator, Federal Defenders of Montana, Helena, Montana, for the defendant-appellant.

William W. Mercer, United States Attorney, and Kurt G. Alme and Marcia Hurd, Assistant United States Attorneys, Billings, Montana, for the plaintiff-appellee.

Judges: Before: Michael Daly Hawkins, M. Margaret McKeown, and Jay S. Bybee, Circuit Judges. Opinion by Judge McKeown.

Opinion by: M. Margaret McKeown

Opinion

[*1110] McKEOWN, Circuit Judge:

Glenn Heller appeals his conviction following a bench trial for receipt of child pornography, in violation of *18 U.S.C. § 2252A(a)(2)*, and possession of child pornography, in violation of *18 U.S.C. § 2252A(a)(5)(B)*. Heller's conviction stems from Heller's activities while serving as a caretaker for a developmentally disabled man, J.W. The government alleged J.W. downloaded child pornography at Heller's direction for their mutual viewing. Heller first challenges the district court's pretrial rulings related to his suppression motion and his motion in limine. Heller next faults **[**2]** the district court's determination that his confession was voluntary. Finally, Heller asserts the government presented insufficient evidence at trial to support his conviction. We affirm his conviction.

BACKGROUND

Between 2001 and 2004, Heller served as a caretaker for J.W., a 42-year-old developmentally disabled ward of the State of Montana. In 2004, Heller was terminated as caretaker because he was spending time with J.W. after hours. J.W. later disclosed to his guardian that he had a sexual relationship with Heller while Heller was his caretaker. Heller was convicted in Montana state court on charges of criminal endangerment and sexual assault. During the course of the prosecution, child pornography files were found on J.W.'s computer. Heller denied that he had any involvement with the pornography. Heller's home and home computer were searched but authorities found no child pornography.

In 2006, a Montana police officer stopped Heller on the street and told him that he needed to go to the station to update his sex offender registration. The officer told Heller that he was not under arrest and would not be arrested when he arrived at the station. Heller agreed to go to the station later **[**3]** that day.

Once at the station, Heller met with the officer for a compliance check of his sex offender registration requirements. The meeting took place in a small interrogation room, and the door was never shut. At the beginning of the encounter, the officer reminded Heller that he was not under arrest. After Heller finished filling out compliance paperwork, the officer told Heller he was free to leave the station. An FBI agent then entered the room and asked Heller if they could talk about child pornography Heller may have received while caring for J.W. Heller agreed to talk to the agent, but initially denied any involvement with J.W.'s child pornography collection. The agent told Heller that new information had come to light since the state proceeding, including new statements made by J.W. and a box of compact discs ("CDs") containing child pornography. Heller stated that child pornography was saved on J.W.'s computer, and that one of the folders was entitled "glenn's files." Heller further acknowledged that he had a sexual relationship with J.W. and that they viewed child pornography together while engaging in sexual acts.

Throughout the questioning, the officer and the FBI agent **[**4]** reminded Heller he was free to leave and was not under arrest. After about an hour of conversation, Heller provided a written statement and initialed every line of a typewritten statement prepared by the officers. Once he finished his statements, Heller left the station. Heller was later indicted and convicted for one count of receipt of child **[*1111]** pornography and one count of possession of child pornography.

ANALYSIS

I. THE PRE-TRIAL MOTIONS

Before trial, Heller moved to suppress the statements he provided to the officer and the FBI agent. The government filed a response to the suppression motion five days late, justifying its untimely reply by explaining that the parties had been negotiating a plea agreement and the government thought a response was unnecessary while negotiations were still pending.

The district court determined that the government's explanation was corroborated by the case file. Indeed, the record supports the government's position that plea negotiations were ongoing and, during this period, Heller's counsel even asked for an extension of the plea agreement deadline.

The district court's determination that it would overlook the government's untimely filing was governed by **[**5]** Rule 12.1(c) of the Local Rules of Procedure for the United States District Court for the District of Montana, which states: "Failure to file briefs within the prescribed time may subject any motion to summary ruling." We review the district court's application of this local rule for an abuse of discretion. *See* *Bias v. Moynihan, 508 F.3d 1212, 1223 (9th Cir. 2007)* ("A district court's compliance with local rules is reviewed for 'an abuse of discretion.' " (quoting *Hinton v. NMI Pac. Enters., 5 F.3d 391, 395 (9th Cir. 1993)*)). "Only in rare cases will we question the exercise of discretion in connection with the application of local rules." *United States v. Warren, 601 F.2d 471, 474 (9th Cir. 1979)* (per curiam).

Rule 12.1(c) does not mandate a summary ruling for late filings. Rather, Rule 12.1(c) is permissive and a late filing "may subject [a] motion to summary ruling." In this instance, there is no indication the district court abused its discretion. The district court fairly considered the chronology of events documented by the parties. The discretionary determination to accept the late filing was not an abuse of discretion.

Heller also challenges the government's failure to respond **[**6]** to his motion in limine to preclude reference to his sexual relationship with J.W. and his related state court conviction. Before the government responded and before the court had the chance to rule on his motion, Heller waived his right to a jury trial. Heller feared potential jury bias could result if the jury were presented with "evidence of the homosexual relationship" between Heller and J.W. At the suppression hearing, in reference to Heller's request for a bench trial, the government informed the district court that Heller's motion in limine "may be a moot point" because there would be no jury if Heller had a bench trial.

The district court made no express ruling concerning the government's failure to reply to Heller's motion in limine. The absence of a ruling is not surprising. The need for in limine motions was moot once it was clear that Heller had waived his right to a jury trial. *See* *Johnson v. Doughty, 433 F.3d 1001, 1007 (7th Cir. 2006)* ("Johnson also had filed a motion in limine to restrict the defendants from mentioning his criminal history and prison disciplinary record at trial. (The motion later became moot when the matter was converted from a jury trial to a bench **[**7]** trial.)").

The term "in limine" means "at the outset." Black's Law Dictionary 803 (8th ed. 2004). A motion in limine is a procedural mechanism to limit in advance testimony or evidence in a particular area. *See id*. at 1038-39. In the case of a jury trial, a court's ruling "at the outset" gives counsel **[*1112]** advance notice of the scope of certain evidence so that admissibility is settled before attempted use of the evidence before the jury. Because the judge rules on this evidentiary motion, in the case of a bench trial, a threshold ruling is generally superfluous. It would be, in effect, "coals to Newcastle," asking the judge to rule in advance on prejudicial evidence so that the judge would not hear the evidence. For logistical and other reasons, pretrial evidentiary motions may be appropriate in some cases. But here, once the case became a bench trial, any need for an advance ruling evaporated.

II. THE VOLUNTARINESS OF HELLER'S CONFESSION

We now turn to the substance of Heller's suppression motion. Heller asserts that his confessions were involuntary because he was impaired by medication at the time he provided the handwritten and initialed statements to law enforcement. We review de novo **[**8]** the voluntariness of a confession and the factual findings supporting the determination for clear error. *United States v. Gamez, 301 F.3d 1138, 1144 (9th Cir. 2002)*. The test is well known: we determine whether, "considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *United States v. Leon Guerrero, 847 F.2d 1363, 1366 (9th Cir. 1988)*.

Heller testified at the suppression hearing that he ingested a 7.5 milligram dose of Tylenol III with codeine ("Tylenol III") in the morning of the day he made his confessions. He took the medication because he suffered from an undiagnosed illness that caused him to experience uncontrollable movement of his legs. At the time of the confessions, he felt "tired" and his hands shook uncontrollably. Heller asserted the Tylenol III "led [him] to make bad decisions" and "slowed [him] down and made [him] sleepy." He explained that the medication, when coupled with being in a small meeting room with no windows for an extended time, made his confession involuntary, as he "didn't know what else to do except admit to what the police **[**9]** wanted [him] to admit."

After considering Heller's claim, the district court denied the motion to suppress, finding the confessions voluntary. *See* *United States v. Heller, No. CR 07-02-H-CCL, 2007 U.S. Dist. LEXIS 60608, 2007 WL 2358631, at *6, *10 (D. Mt. Aug. 17, 2007)*. The district court made detailed findings in response to Heller's motion. Significantly, it found Heller knew he was free to leave the interview. *2007 U.S. Dist. LEXIS 60608, [WL] at *3*. The district court further determined the atmosphere of the interview was "friendly and cordial on all sides." *Id*. Regarding Heller's medication, the district court found that Heller did not inform the officer or the FBI agent about the medication, even though he had taken the pill that morning. *2007 U.S. Dist. LEXIS 60608, [WL] at *4*. Heller appeared to the officer and agent "to be cognitively alert and able" and Heller admitted that the amount of medication "was a low dose." *Id*. Overall, the district court found Heller's "testimony regarding his inability to reason when he was interviewed by law enforcement on April 6, 2006, not to be credible." *Id*.

Based on the record, the district court's determination that Heller believed he was free to leave and that the environment was "friendly and cordial," *2007 U.S. Dist. LEXIS 60608, [WL] at *3*, was not **[**10]** clearly erroneous. The questioning was not "extended and oppressive." *See* *United States v. Martin, 781 F.2d 671, 674 (9th Cir. 1985)*. Heller was at the station for approximately two hours, but questioning took place for about one hour, and the officers told Heller repeatedly that he was free to leave.

[*1113] Heller's argument concerning his medication goes to a slightly different inquiry--whether he was unable to exercise free will due to an impaired mental state. We are guided in this question by our decision in *Martin*. [1] Martin had received Demerol, a painkiller, and was groggy when a detective and a federal agent questioned him in the hospital. *Id. at 672-73*. Though he had ingested Demerol, Martin was awake and fairly coherent, and there was no evidence that he received excessive quantities or unusual combinations of drugs. *Id. at 674*. Like Heller, Martin "was not reluctant to tell his story." *Id*. We agreed with the district court's conclusion that the "type, dosage, and schedule of painkilling narcotic administered to [Martin] was not sufficient to overbear his will to resist the questioning or impair his rational faculties." *Id*. (alteration in original).

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[1] Heller urges us to look to *United States v. Howard, 381 F.3d 873 (9th Cir. 2004)*, **[**11]** in which we determined an evidentiary hearing was appropriate to discern whether the defendant's use of a painkiller affected the voluntariness of his guilty plea. *Id. at 881*. *Howard's* holding regarding the necessity of an evidentiary hearing is inapposite. Here, the district court's detailed findings followed an evidentiary hearing at which Heller and the officers testified.

As in *Martin*, Heller appeared "cognitively alert and able." *Heller, 2007 U.S. Dist. LEXIS 60608, 2007 WL 2358631, at *4*, but, unlike the defendant in *Martin*, there was no suggestion that he was groggy. The district court found that Heller had ingested the Tylenol III at least two hours before he came to the station. Heller admitted that he took a "low dose," he was not rendered "unconscious" or "comatose," and there is no other evidence to suggest that the type, dosage, or timing of the Tylenol III influenced Heller's will to resist questioning. *See Martin, 781 F.2d at 674*. The district court did not clearly err in its determination that Heller's "reason and judgment were not impaired" by his prior ingestion of Tylenol III. *Heller, 2007 U.S. Dist. LEXIS 60608, 2007 WL 2358631, at *5*. Heller's confessions were not the result of "physical or psychological coercion" such **[**12]** that his "will was overborne." *Leon Guerrero, 847 F.2d at 1366*. The district court properly determined that Heller's confessions were voluntary.

III. THE SUFFICIENCY OF THE EVIDENCE

Finally, we consider Heller's assertion that the district court erroneously denied his *Federal Rule of Criminal Procedure Rule 29* motion because the evidence was insufficient to support his conviction for receipt and possession of child pornography. In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the defendant guilty of each element of the crime beyond a reasonable doubt. *United States v. Rosales, 516 F.3d 749, 751-52 (9th Cir. 2008)* (citing *United States v. Hinton, 222 F.3d 664, 669 (9th Cir. 2000))*.

The parties stipulated that the movies on J.W.'s computer were child pornography and had been transported over the internet. Thus, we confront only the question whether the evidence is sufficient to demonstrate that Heller knowingly received and knowingly possessed child pornography. To establish receipt and possession of child pornography, there must be a " 'sufficient connection **[**13]** between the defendant and the contraband to support the inference that the defendant exercised dominion and control over [it].' " *United States v. Romm, 455 F.3d 990, 999 (9th Cir. 2006)* (quoting *United States v. Carrasco, 257 F.3d 1045, 1049 (9th Cir. 2001))* (alteration in original).

[*1114] Heller's primary focus is that J.W.'s actions--downloading and storing child pornography--may not serve as a proxy for Heller's own guilt. Heller reasons the government's theory that J.W. acted as a conduit to Heller's receipt and possession of child pornography is fatally undermined by two facts: 1) the evidence did not sufficiently demonstrate that the period in which J.W. downloaded the child pornography coincided with Heller's service as J.W.'s caretaker; and 2) the evidence shows J.W. downloaded and possessed child pornography both before and after his association with Heller. Thus, Heller argues, the evidence is insufficient to support his conviction beyond a reasonable doubt.

We are not persuaded by Heller's characterization of the evidence. It is true that J.W. downloaded and possessed pornography for periods beyond the tenure of Heller's care taking. But this fact does nothing to change the evidence **[**14]** of what occurred while Heller served as the caretaker. The actual timeline just doesn't jibe with Heller's argument.

Though J.W. physically performed the acts of downloading and storing the child pornography, Heller sought out the prohibited material, actively directed J.W. to obtain pornography, and "exercised dominion and control over it." *Romm, 455 F.3d at 999*. *See also United States v. Tucker, 305 F.3d 1193, 1205 (10th Cir. 2002)* (affirming a conviction for possession where defendant "intentionally sought out and viewed child pornography"). J.W. testified that Heller "wanted me to download" and asked J.W. to download movies involving boys; that it was Heller's idea to find and download movies depicting kids and young teenagers involved in sexual situations with adult men; and that they watched the downloaded movies together.

Heller admitted that he "directed [J.W.] to download movies which contained child pornography," "directed him to save these movies onto his computer and then to a CD," and "directed him to download the child movies and keep them at his house because [Heller] did not want [his] wife to find out that [he] liked child pornography." J.W. saved the files and labeled **[**15]** CDs to remember which ones Heller liked. One CD was labeled "XXX Glenn." Heller had access to the porno graphic materials whenever he visited J.W., both on and off duty.

Considering the evidence, Heller's challenge to his conviction falls short. The evidence demonstrates Heller directed J.W. to obtain the materials for Heller's viewing and that, once the files were downloaded and stored, Heller "exercised dominion and control over [them]." *Romm, 455 F.3d at 999*. This evidence, viewed in the light most favorable to the government, is sufficient to establish Heller received and possessed the materials. The district court did not err in denying Heller's *Rule 29* motion.

AFFIRMED.

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EXHIBIT 10

Valero Refining Co.—California v. Bay Area Air Quality Management Dist. Hearing Bd.

Court of Appeal of California, First Appellate District, Division Two

May 27, 2020, Opinion Filed

A151004

Reporter
49 Cal. App. 5th 618 *; 262 Cal. Rptr. 3d 885 **; 2020 Cal. App. LEXIS 462 ***

VALERO REFINING COMPANY—CALIFORNIA, Plaintiff and Respondent, v. BAY AREA AIR QUALITY MANAGEMENT DISTRICT HEARING BOARD et al., Defendants and Appellants.

Prior History: [*1]** Superior Court of San Francisco County, No. CPF-15514407, Harold E. Kahn, Judge.

Valero Ref. Co. - Cal. v. Hearing Bd. of Bay Area Air Quality Mgmt. Dist., 2016 Cal. Super. LEXIS 20331 (Cal. Super. Ct., Nov. 28, 2016)

Case Summary

Overview

HOLDINGS: [1]-An air quality management district hearing board's standard of review neither required nor empowered the district to consider whether applying the regulation to the particular case before it was in some broad sense fair, but instead was limited to a quasi-judicial inquiry entailing the exercise of its independent judgment to decide if the agency official's interpretation of that regulation was correct. The superior court erred in construing the hearing board's standard of review to permit, and indeed require, the hearing board to consider some other, more amorphous concept of "fairness;" [2]-Because the hearing board applied the correct standard of review, the superior court erred in granting a writ of mandate on plaintiff's first cause of action, which alleged the hearing board did not proceed in the manner required by law with respect to the proper standard of review.

Outcome

Judgment reversed.

Counsel: Brian C. Bunger and Alexander G. Crockett for Defendants and Appellants.

Xavier Becerra, Attorney General, Robert W. Byrne, Assistant Attorney General, Annadel A. Almendras, Connie P. Sung and Ryan R. Hoffman, Deputy Attorneys General, for State Air Resources Board as Amicus Curiae on behalf of Defendants and Appellants.

Bayron Gilchrist, Barbara Baird and Mary J. Reichert for South Coast Air Quality Management District as Amicus Curiae on behalf of Defendants and Appellants. **[*624]**

Pillsbury Winthrop Shaw Pittman, Ronald E. Van Buskirk, John T. Hansen, Michael S. McDonough and Stacey C. Wright for Plaintiff and Respondent.

Judges: Opinion by **[**888]** Stewart, J., with Kline, P. J., and Richman, J., concurring.

Opinion by: Stewart, J.

Opinion

STEWART, J.—An oil refinery, respondent Valero Refining Company—California (Valero), undertook a costly, three-year construction project both to comply with a consent decree it entered into with the federal government and to upgrade portions of its facility. The project resulted in a significant reduction in air pollution, and after constructing it Valero sought approval from the regional air quality management district **[***2]** to bank the resulting emissions reductions as valuable environmental credits. It was denied a significant portion of the requested credits—first by the agency official charged with deciding the issue, and then by the hearing board to which it appealed. In this administrative mandamus action, it asked the superior court to set aside the hearing board's decision. The superior court did so, remanded the case back to the hearing board for reconsideration, and the air district has appealed.

The sole issue raised in this appeal concerns the standard of review that the air district's hearing board must apply when reviewing the agency official's decision denying approval of such emission reduction credits. Here, the agency official charged with considering the refinery's banking application in the first instance denied the credits in question because, applying a local air district regulation that prescribes the methodology for measuring emissions reductions, the official calculated a significantly lower reduction in air pollution than the refinery calculated. The refinery then appealed the official's decision to the hearing board, which upheld the official's interpretation of the regulation **[***3]** and on that basis declined to disturb the official's decision. The superior court ruled the hearing board did not apply the correct standard of review in deciding the refinery's appeal, because the hearing board erroneously declined to consider evidence that denial of the refinery's banking application was “unfair” under the circumstances.

(1) We hold the air district hearing board's standard of review neither requires nor empowers it to consider whether applying the regulation to the particular case before it is in some broad sense fair, but instead is limited to a quasi-judicial inquiry entailing the exercise of its independent judgment to decide if the agency official's interpretation of that regulation was correct. **[**889]** The hearing board could, and did, appropriately consider Valero's evidence regarding the fairness of applying the regulation to Valero, but in another context: in addressing Valero's claim that the air district was equitably estopped from applying it here. The superior court erred in construing the **[*625]** hearing board's standard of review to permit, and indeed require, the hearing board to consider some other, more amorphous concept of “fairness.” Accordingly, we reverse and remand **[***4]** the case to the trial court to address the issues it did not reach, which we will not decide in the first instance on appeal.

BACKGROUND

A. *The Regulatory Framework*

In California, regulatory oversight over sources of air pollution is divided between the State Air Resources Board which has exclusive control over emissions from motor vehicles, and 35 local and regional air quality management districts (air districts) which have primary responsibility for the control of air pollution from all other sources. (See *Health & Saf. Code,*[1] *§§ 39002*, *39003*, *39500*, *40000*; *Friends of Outlet Creek v. Mendocino County Air Quality Management Dist. (2017) 11 Cal.App.5th 1235, 1239, fn. 4 [218 Cal. Rptr. 3d 212]*.) This case, involving emissions from an oil refinery, concerns the scope of regulatory powers and duties at the air district level.

"Subject to the powers and duties of the state board," air districts are empowered to "adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction, and shall enforce all applicable provisions of state and federal law." (*§ 40001, subd. (a)*.)

(2) The regulatory powers and duties of air districts are carried out at three levels. Each air district has a governing board, composed of locally elected officials, which adopts substantive rules and regulations **[***5]** through a public hearing process. (See *§§ 40704.5*, *40725, subd. (a)*, *40726*.) The governing board also appoints an air pollution control officer for the district, commonly referred to in regulatory parlance as the "APCO." (*§ 40750*.) The APCO possesses broad enforcement authority, with responsibility for enforcing "[a]ll orders, regulations, and rules prescribed by the district board." (*§ 40752*.) The governing board also appoints a five-member hearing board, comprised of two members of the public and three professionals (one lawyer, one engineer and one medical expert with specialty in environmental medicine or related fields).[2] (*§§ 40800*, *40801*.) **(3)** The hearing board serves a hybrid function; it sits in a reviewing capacity in some types of cases (permit disputes (see *§§ 42302.1* [issuance], *42302* [denial], *42306* [suspension], *42307* [revocation]) and appeals of emissions reduction credit banking decisions (*§ 40713*)) and it presides over other types of matters directly in the first **[*626]** instance, in a nonreviewing capacity (see *§§ 42350, subd. (a)* [variance applications], *42451, subd. (a)* [abatement proceedings]). It is empowered to hold public hearings (*§ 40808*), subpoena witnesses (*§ 40840*) and "adopt rules for the conduct of its hearings" (*§ 40807*). Its decisions may be judicially reviewed by petition **[***6]** for a writ of mandate under *Code of Civil Procedure section 1094.5*. (*§ 40864*.)

(4) *Section 40709* requires each air district to adopt regulations establishing an air **[**890]** pollution emission offset system. (See *§ 40709*.) Broadly described, an offset system enables owners of pollution sources who voluntarily reduce their air pollution emissions below the levels required by law to receive emission reduction credits (ERC), certified by the air district, that can be banked for future use or sold to other emission sources for profit. (*Elk Hills Power, LLC v. Board of Equalization (2013) 57 Cal.4th 593, 603 [160 Cal. Rptr. 3d 387, 304 P.3d 1052]*.)[3]

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[1] Unless otherwise noted, all further statutory references are to the Health and Safety Code.

[2] No officer or employee of the district may sit on the hearing board. (*§ 40803*.)

[3] Specifically, *section 40709* provides that every air district board "shall establish by regulation a system by which all reductions in the emission of air contaminants that are to be used to offset certain future increases in the emission of air contaminants shall

Approval of emissions reductions through an offset system results in the issuance of a certificate evidencing the ownership of all approved reductions. (*§ 40710*.) Each air district offset system is subject to disapproval by the state board within 60 days of adoption. (*§ 40709, subd. (a)*.)

(5) The Legislature has prescribed two levels of agency action for regulatory approval of ERCs. Under *section 40709*, the initial decision rests with the APCO. (See *§ 40709, subd. (a)* [emission reductions "shall be registered, certified, or otherwise approved by the district air pollution control officer before they may be banked"].) Pursuant to *section 40713*, if the APCO refuses to register, certify or otherwise approve an application for emission reductions under *section 40709*, the applicant may seek review of that decision **[***7]** by the district hearing board, which must hold a hearing to decide "whether the application was properly refused." (*§ 40713*.)

The underlying dispute here arose under regulations promulgated by the Bay Area Air Quality Management District (the air district) concerning the banking of ERCs, which we summarize briefly for context. The air district's regulations state that emissions reductions calculated in accordance with its **[*627]** specified methodology qualify as "emission reduction credit" if they exceed the reductions required by law, rule, regulation or the district's clean air plan. The regulations also specify that the reductions must be "real, permanent, quantifiable, and enforceable." Subject to exceptions not pertinent here, ERCs are then "bankable," meaning they can be deposited into the air district's "emissions bank."

The air district's regulations require an application to deposit an emission reduction in the district's emissions bank, on forms specified by the APCO. However, the regulations prohibit the submission of a banking application for pollutant sources that are subject to an abatement order or other similar formal order "until compliance with the emissions limitations which are **[***8]** the subject of the … order is achieved."

The dispute in this case turned on the meaning of regulation 2-2-605.1, which specifies one aspect of the methodology for calculating ERCs. That regulation mandates the use of a "baseline period" to calculate emissions reductions that "consists of the 3 year period immediately preceding *the date that the application is complete.*"[4] (Italics added.) **[**891]** The baseline period reflects the "before" input in what is essentially a "before and after" calculation mandated by the air district's regulations. In dispute here was the meaning of the phrase "the application." We will elaborate further below.

B. *These Proceedings*

1. *The Construction Project*

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be banked prior to use to offset future increases in emissions." (*§ 40709, subd. (a)*.) The intent of the system is to "provide a mechanism for districts to recognize the existence of reductions of air contaminants that can be used as offsets, and to provide greater certainty that the offsets shall be available for emitting industries." (*Id., subd. (b)*.) Substantively, it specifies that "[t]he system shall provide that only those reductions in the emission of air contaminants that are not otherwise required by any federal, state, or district law, rule, order, permit, or regulation" are eligible for being banked and used to offset future increases in air pollution emissions. (*Id., subd. (a)*.)

[4] In full, regulation 2-2-605.1 states: "The baseline period consists of the 3 year period immediately preceding the date that the application is complete (or shorter period if the source is less than 3 years old). The applicant must have sufficient verifiable records of the source's operation to substantiate the emission rate and throughput during the entire baseline period."

In 2005, Valero entered into a consent decree with the United States Environmental Protection Agency to settle litigation charging it with violations of the Clean Air Act. The consent decree required Valero to take certain steps to reduce air pollution emissions at its refinery in Benicia, California, including installing some new equipment (a "scrubber," to scrub one type of pollutant from its fluid coker).

At issue here are reductions in air pollution that resulted from a project that included **[***9]** both the equipment necessary to enable compliance with the consent decree and additional upgrades Valero decided to undertake voluntarily at the same time. As described by Valero, the project "was an integrated project" that included decommissioning two furnaces and their associated equipment and replacing them with two more efficient furnaces, a set of modern catalytic **[*628]** reduction beds and two flue gas scrubbers. According to Valero, about $500 million of its $750 million total outlay for the project was spent to achieve emissions reductions beyond those required by the consent decree. Valero opted to undertake greater than required improvements in order to modernize its refinery, expand its processing capability and make significant emissions reductions that it could use in the future.

In April 2008, Valero filed a permit application with the air district requesting authority to construct these improvements.[5] Under the air district's "New Source Review" regulations (Regulation 2, Rule 2), the purpose of that permit review process was to ensure that certain new or modified sources of air pollution would achieve no net increase in emissions. (See *§ 40919, subd. (a)(2)*.)

Valero's permit application expressly anticipated **[***10]** seeking approval of credit for the resulting emissions reductions. Its permit application (in section 7.0, entitled "Banking Credits") stated that the project would result in a reduction in emissions and that "Valero will submit an application to bank ERCs from these reductions under separate cover." The air district deemed the permit application to be complete on May 16, 2008. Subsequently, on December 15, 2008, the authority-to-construct permit issued.

On December 31, 2010, after two years of construction, Valero permanently shut down the two older furnaces, and about two months later, on February 23, 2011, the two new furnaces began operating. Over the next several months, Valero underwent mandatory emissions testing of the new equipment so the district could verify it complied with all permit limitations. **[**892]** The testing was completed and certified in September 2011.

2. *The APCO's Decision on Valero's Banking Application*

In order to satisfy the air district's requirement that emissions reductions be "real, permanent, verifiable and enforceable" to qualify as an ERC, Valero believed it could not submit a banking application until the old furnaces had been permanently shut down, the new ones had been **[***11]** built and tested and Valero had modified its federal operating permit.[6]

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[5] Technically, the furnace upgrades were addressed in a separate written amendment to the April 2008 permit application filed several months later, in December 2008. No party ascribes any significance to that fact, however, and in their briefing both parties treat the permit application as having been filed in April 2008. We will do the same.

[6] Valero obtained an amended federal operating permit in December 2010.

After the improvement project was operational, Valero submitted an application (in Mar. 2012) to bank the resulting emissions reductions. In its **[*629]** banking application, Valero calculated its emissions reductions using the same baseline period it had used in its permit application: a three-year period ending in March 2008 (*before* it had performed the refinery upgrades), the date corresponding with its permit application.[7]

The air district had instructed Valero to use this baseline period in its permit application,[8] and it also was the same baseline period the air district used in engineering evaluations of the project it prepared in connection with Valero's permit application. The engineering evaluations had stated, “The baseline emissions shall be calculated in accordance with Regulation 2-2-605 [Basis: Banking],” which Valero had taken to mean that the same baseline period would be used to bank its emission reductions. The engineering evaluations also contained statements that led Valero to believe it could not submit a banking application until the project had been completed,[9] which was consistent with the district's **[***12]** regulation (2-4-401) that prohibits the submission of a banking application for pollutants that are the subject of a formal order such as the consent decree until after the emission limitations required by the order are achieved.

In November 2014, after lengthy wrangling with Valero, the APCO issued a final decision authorizing the banking of a significantly lower number of ERCs than Valero sought. Interpreting regulation 2-2-605.1 to require the use of a three-year baseline period ending on the date Valero's *banking application* was deemed complete (May 15, 2012), the APCO measured the reductions against a more recent baseline period (May 2009 to May 2012) than the period in Valero's banking application (Apr. 2005 to Mar. 2008). The more recent baseline period included the period after Valero had shut down its existing furnaces but not yet brought the new ones online (i.e., when no emissions were generated), and extended into the postproject period when its emissions were lower than **[**893]** they had been prior to construction of the project. In all, Valero argued that the more recent baseline period captured about 18 months of postchange emissions rather than reflecting **[***13]** three full years of prechange emissions. As a result, Valero argued, this baseline period was not representative of Valero's prechange emissions, it understated the true level **[*630]** of emissions reductions Valero had achieved and using it to calculate Valero's emissions reductions for purposes of the banking application reduced the amount of ERCs Valero could receive.

3. *Valero's Appeal to the Hearing Board*

Valero appealed to the hearing board, and the matter proceeded to a five-day hearing at which both parties submitted prehearing briefs, presented evidence and argued.

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[7] Although Valero submitted its permit application in April 2008, and the application was deemed complete in May, March was the last month for which it had a complete set of emissions data to calculate its projected emissions reductions for the application.

[8] Valero's permit application had originally proposed an even earlier baseline period.

[9] For example, the evaluation stated that “Valero may bank any allowable excess of emissions reductions, in accordance with Regulation 2, Rule 4, after the project is built and the actual equipment has shut down.” A district employee testified this statement meant only that a banking *certificate* could not issue until after the equipment had been shut down but did not mean Valero could not have submitted a banking *application* with its [New Source Review] permit application. The engineering evaluation also said that reductions “shall be eligible for banking after being demonstrated by source-testing or other means acceptable to the APCO.”

Rule 3.6 of the hearing board rules (Rule 3.6) sets forth the board's standard of review, and the scope of this rule is the central issue in this appeal. It states: "The traditional legal presumption is one of the correctness of a regulatory agency's action. *California Evidence Code Section 664* ('It is presumed that official duty has been regularly performed'). The Board may not readily substitute its judgment for that of the District's expertise. The Board's role is to determine whether the APCO's interpretation of the applicable legal requirements in its action is fair and reasonable and consistent with other actions of the APCO and whether the APCO followed proper and **[***14]** appropriate procedures and guidelines. The burden of proof in an appeal is on the party challenging the APCO's action or finding. *California Evidence Code Section 660*. [¶] The scope of the Hearing Board's review is deference to the District's determination with the burden on the Appellant(s) to show the District's action was erroneous. Specifically, it is the Board's task to determine whether the agency's interpretation of its duty was reasonable and if its performance of that duty was regularly performed." (Rule 3.6.)

Valero argued the APCO's use of a baseline period ending on the completeness date of the banking application, rather than a preproject baseline ending in March 2008, was legally erroneous. It argued that the "application" date as used in regulation 2-2-605.1 meant the completion date for the application that made the emissions reductions *enforceable*: either the application seeking an authority-to-construct permit in cases (like this one) that required such a permit, and in all other cases (such as emissions reductions resulting only from a shutdown of equipment), the banking application itself.

Valero also asserted in its reply brief before the hearing board that, under the circumstances, the air district should be **[***15]** equitably estopped from using the banking application completeness date to set the baseline period. Specifically, it argued that the district "should not be permitted to assert a different position on the baseline [period] than the one it [applied to Valero's permit application] in part because Valero detrimentally relied on the District's statements and actions … ."

The APCO argued that the "application" date used in regulation 2-2-605.1 meant only the banking application and not some other one. It argued that the **[*631]** "declining baseline" that results when an applicant delays submitting its banking application was adopted by design "'to encourage applicants to complete their applications in a timely manner,'" and that the history of the current version of the rule reflected that intention. It also argued the plain language of the regulation supported its interpretation and the district's treatment of prior applications interpreted the regulation **[**894]** consistently to have the same meaning it was applying to Valero.

The APCO also addressed Valero's estoppel argument, both contending that it was not timely made and therefore was waived and opposing it on the merits. Valero responded to that **[***16]** procedural objection by invoking Rule 3.6 and contending the estoppel arguments in its reply brief were the same arguments it had previously advanced in its prehearing briefing about the hearing board's standard of review, just reframed.

After the five-day evidentiary hearing concluded, the hearing board by a divided 3-2 vote upheld the APCO's interpretation of the banking regulation and dismissed Valero's appeal. Applying Rule 3.6 in a 10-page written ruling, the hearing board concluded that "the APCO's interpretation of Regulation 2-2-605.1, and its application of that provision in this particular case, was fair and

reasonable and consistent with other actions of the ACPO" and that the APCO "applied this interpretation fairly and consistently to Valero in the same manner as it has applied to other similarly-situated applicants seeking to bank emission reduction credits under similar circumstances." It reached this conclusion principally by examining the regulation's language, its regulatory context, evidence from various sources of the air district's intent and two prior instances in which the district had applied the regulation similarly.

The hearing board also rejected Valero's equitable estoppel **[***17]** theory. It did so principally on factual grounds, finding there was nothing in Valero's permit application, the engineering evaluations, the permit, its banking application or the banking decision itself that was "inconsistent with the APCO's position that the baseline period for the banking application is based on the date of the banking application itself." It rejected Valero's theory that Valero had relied on assurances by air district staff that the same baseline period would be used for both the permit application and the later banking application, observing that there was no evidence that Valero ever confirmed such an understanding in writing. "Furthermore," it stated, "the position of an individual Air District staff member does not bind the agency as a whole, especially in cases where such a position was not reflected in the actual permitting documents that District staff prepared, and where it was not the position that the APCO took in approving the … permit application or banking application." It concluded that Valero had "not demonstrated that the APCO ever took an inconsistent position that would justify a conclusion that the APCO's position in this matter was unreasonable **[***18]** or otherwise improper."
[*632]

The hearing board was not entirely unsympathetic to Valero, however. It concluded its ruling with advisory suggestions "encourag[ing]" the air district both to "reconsider the fairness of denying banking credits under these circumstances" and to "make its interpretation of the baseline rules clear to the public and to regulated entities that may be affected by it." Quite presciently anticipating these proceedings, it also encouraged the parties to engage in settlement discussions.

4. *The Superior Court's Ruling*

Valero then filed a petition for writ of mandate pursuant to *Code of Civil Procedure section 1094.5* against the hearing board, the air district and the air district's APCO, Jack Broadbent (collectively, the "air district parties"). The first cause of action alleged the hearing board did not proceed in the manner required by law with respect to the proper standard of review. The second cause of action alleged **[**895]** the hearing board's ruling was not supported by the findings. And the third cause of action alleged the hearing board's findings were not supported by substantial evidence.

The superior court (the Hon. Harold E. Kahn) issued a writ of mandate, vacating the board's decision and remanding **[***19]** the matter for a new hearing. It ruled that the hearing board had prejudicially abused its discretion by not applying the correct standard of review under Rule 3.6. Specifically, it concluded that the hearing board had "improperly limited its consideration of Valero's appeal to the sole question of whether the APCO's interpretation of [regulation] 2-2-605.1 was reasonable." The court ruled that, "[r]ead as a whole and within the context of administrative law, Rule 3.6 quite clearly has its origins in and therefore should take its meaning

from the case law on the independent judgment standard of review," observing that the rule "incorporates all aspects of the independent judgment standard," including "the presumption of correctness of the APCO's decision, the exercise of the Board's own judgment not in a way that is in derogation of the presumption of correctness, and the Board's obligation to set aside the APCO's decision when the Board's own judgment shows that the APCO's decision was erroneous." It concluded that the hearing board "erred in determining that Rule 3.6 required it to dismiss Valero's appeal once it determined that the APCO's interpretation of [regulation] 2-2-605.1 was reasonable … . **[***20]** The Board's decision not to consider any of the facts adduced from the evidence received by the Board that persuaded all five members of the Board that the denial of Valero's application was *unfair* to Valero shows that, had the majority properly construed Rule 3.6, there is a significant possibility that one or more of the three persons who voted to dismiss Valero's appeal may have decided the appeal differently." (Italics added.) The superior court appears to have been addressing Valero's first cause of action and not to have reached Valero's second and third causes of action.
[*633]

This appeal by the air district parties then followed.

DISCUSSION

I.

Appellate Jurisdiction

Before turning to the merits of this appeal, we first address whether this appeal was timely filed and conclude that it was.

(6) Under *California Rules of Court, rule 8.104 (rule 8.104)*, a 60-day deadline to appeal commences when "the superior court clerk serves on the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, showing the date either was served," assuming (as is true here) that nothing has triggered an even earlier deadline. (*Cal. Rules of Court, rule 8.104(a)(1)(A)*.) In this case, the air district parties filed their notice of appeal more **[***21]** than 60 days after the superior court clerk mailed the parties a file-stamped copy of the appealable judgment accompanied by a proof of service, and so we requested supplemental briefing concerning the appeal's timeliness.[10] (See *Hollister Convalescent Hosp., Inc. v. Rico (1975) 15 Cal.3d 660, 667 [125 Cal. Rptr. 757, 542 P.2d 1349]* [if appeal is untimely "'the court has no discretion but must dismiss the appeal of its own motion even if no objection is made'"]; *Cal. Rules of Court, rule 8.104(b)*.)

[896]** The supplemental briefing disclosed that the superior court clerk's mailing was sent to an incorrect address. At the air district parties' request, we have taken judicial notice of the

[10] Contrary to the suggestion by the air district parties, the appealable judgment was the court's order granting a writ of mandate, not a "judgment" that it subsequently entered. (See *Molloy v. Vu (2019) 42 Cal.App.5th 746, 753, fn. 6 [255 Cal. Rptr. 3d 679]*.)

notice of change of address their counsel had filed in the superior court several months earlier. As now enlarged by that document, the record thus reveals that the superior clerk mailed the judgment to appellants' counsel's former address of record, not to counsel's current address of record.

Our research has revealed no authority addressing whether a clerk's mailing of notice of entry of judgment to counsel's former rather than current address of record commences the deadline to appeal under *rule 8.104*, but we have no hesitation concluding it does not.

(7) Under *rule 8.104*, service "may be by any method permitted by the Code of Civil Procedure." (*Cal. Rules of Court, rule 8.104(a)(2)*.) Code of ***[*634]*** Civil Procedure section 1013, which prescribes **[***22]** the requirements for valid mail service, requires papers to be addressed to "the office address *as last given by that person on any document filed in the cause*." (Italics added.) That was not done here. After a notice of change of address has been filed with the court, as it was here, mail sent to a former address of record does not constitute proper service under section 1013. (See Lee v. Placer Title Co. (1994) 28 Cal.App.4th 503, 510 [33 Cal. Rptr. 2d 572] [notice of dismissal sent to prior address of record held ineffective]; see also Gamet v. Blanchard (2001) 91 Cal.App.4th 1276, 1286 [111 Cal. Rptr. 2d 439] [trial court notices sent to address not specified in party's notice of change of address were "faulty" and "inadequate," rendering resulting judgment void].)

(8) Because the clerk's notice of entry of judgment was not properly served, it did not satisfy *rule 8.104*. "[S]trict compliance" with Code of Civil Procedure section 1013 is required (Valley Vista Land Co. v. Nipomo Water & Sewer Co. (1967) 255 Cal.App.2d 172, 174 [63 Cal. Rptr. 78]), and therefore "[n]otice of an appealable judgment or order mailed to an incorrect address is not sufficient to constitute legal notice" for purposes of calculating the deadline to appeal. (Moghaddam v. Bone (2006) 142 Cal.App.4th 283, 288 [47 Cal. Rptr. 3d 602] [notice of entry of judgment addressed with wrong zip code held ineffective]; see also Triumph Precision Products, Inc. v. Insurance Co. of North America (1979) 91 Cal.App.3d 362, 365 [154 Cal. Rptr. 120] [notice of entry of judgment listing correct street address for appellant's counsel but omitting law firm name]; Valley Vista Land Co., at pp. 173–174 [notice of entry of **[***23]** judgment with incorrect street address].)

Citing dicta that notice of entry of judgment mailed to an incorrect address would trigger the 60-day deadline to appeal upon "proof notice was actually received" (Moghaddam v. Bone, supra, 142 Cal.App.4th at p. 288 [construing Cal. Rules of Court, former rule 2]), Valero urges us to deem this appeal untimely because appellants *did* receive the clerk's mailing, a fact ultimately established by a declaration the air district parties filed with their reply supplemental briefing in order to clarify matters.[11] That **[**897]** is irrelevant, however. The fact remains that *California Rules of Court, rule 8.104* was not strictly complied with.

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[11] Before they did so, Valero filed a request asking us to take judicial notice of e-mail correspondence between counsel corroborating the fact that appellants' counsel possessed a file-stamped copy of the judgment. We now deny that request, both because such materials are not a proper subject of judicial notice and they are irrelevant in light of the air district parties' acknowledgement they did receive the clerk's notice. We also deny the air district parties' request to take judicial notice of the materials that their counsel did, in fact, receive because the fact of receipt is established by their counsel's declaration.

(9) Although in other contexts, technical defects in giving notice are of no consequence where it can be inferred that notice was in fact received (see, **[*635]** e.g., *In re T.W. (2011) 197 Cal.App.4th 723, 729–731 [128 Cal. Rptr. 3d 373]* [ZIP Code omitted from notice of writ advisement under *Welf. & Inst. Code, § 366.26(l)(3)*]), actual notice that an appealable judgment has been entered, including by receiving a notice of entry of judgment or a file-stamped copy of the judgment, does not trigger the deadline to appeal when notice of entry of judgment has not been given in accordance with *rule 8.104*. Even trivial errors in giving notice of entry of judgment, which this was not, cannot be excused.[12] (See *Alan v. American Honda Motor Co., Inc. (2007) 40 Cal.4th 894, 903 [55 Cal. Rptr. 3d 534, 152 P.3d 1109]* ["the older rule that technical defects in a notice of **[***24]** entry of judgment are excusable unless they are so egregious as to preclude actual notice of entry [citation] has not been applied to *rule 8.104(a)(1)*"].) Our Supreme Court has made clear that *rule 8.104* does not require litigants to "guess, at their peril" whether documents mailed by the court clerk trigger the deadline to appeal. (*Alan, at p. 905*.) "'Neither parties nor appellate courts should be required to speculate about jurisdictional time limits.'" (*Ibid.*)

(10) The issue here is one of first impression, but courts have held that other attempts to give notice of the entry of judgment that failed strictly to comply with *rule 8.104* were ineffective to trigger the appeal deadline even in situations when the service clearly did result in actual notice to the appealing party of the entry of judgment. We are aware of no case reaching a contrary result. (See *InSyst, Ltd. v. Applied Materials, Inc. (2009) 170 Cal.App.4th 1129 [88 Cal. Rptr. 3d 808]* [electronic service of notice that judgment was entered, with instructions and hyperlink to electronic file-stamped copy of judgment held insufficient]; *Citizens for Civic Accountability v. Town of Danville (2008) 167 Cal.App.4th 1158, 1164 [84 Cal. Rptr. 3d 684]* [similar]; see also *Thiara v. Pacific Coast Khalsa Diwan Society (2010) 182 Cal.App.4th 51 [105 Cal. Rptr. 3d 333]* [judgment mailed with cover letter but no proof of service]; *Keisha W. v. Marvin M. (2014) 229 Cal.App.4th 581, 585 [177 Cal. Rptr. 3d 161]* [personal service of restraining order but no evidence it was file-stamped]; *In re Marriage of Lin (2014) 225 Cal.App.4th 471 [170 Cal. Rptr. 3d 34]* [appellant personally present in court when restraining order **[***25]** issued, making order legally enforceable, followed by court clerk handing written copy to appellant's counsel].) "Because appellate time limits are jurisdictional and cut off litigants' access to the courts, we strictly construe statutes and rules concerning the time in which to file a notice of appeal. [Citation.] 'On numerous occasions, California courts have resolved ambiguities concerning appellate jurisdictional time limits to extend, rather than limit, the right to appeal, even where such interpretations may be considered **[**898]** hypertechnical in other contexts.'" (*Lin, at p. 474*.) Simply put, "mere **[*636]** knowledge" an appealable judgment has been entered is not sufficient to start the 60-day appeal period. (*Johnson v. Ralphs Grocery Co. (2012) 204 Cal.App.4th 1097, 1102, fn. 5 [139 Cal. Rptr. 3d 396]*; see also *Lee v. Placer Title Co., supra, 28 Cal.App.4th at p. 511* [actual notice "does not substitute for compliance with [*Code Civ. Proc., §] 1013*"].)

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[12] Notice mailed to an address that is not an attorney's address of record is not a trivial, technical misstep. We are dealing here not with a misspelling, a wrong name or a missing ZIP Code but, rather, a totally incorrect address as reflected in the trial court's records.

Valero also cites authority that "mail sent to a former address is deemed properly served for up to one year after the change of address because postal regulations require the postal service to forward first class mail at no charge during that period" (*Whitehead v. Habig (2008) 163 Cal.App.4th 896, 903 [77 Cal. Rptr. 3d 679]*), and contends that because the clerk's notice in this case was sent within the one-year mail-forwarding window it should be deemed properly served absent proof it was not received. **[***26]** We do not agree. *Whitehead* is not on point, involved a different issue and opposite facts. It held that defendants who changed addresses but did *not* file a notice of change of address with the court were not denied due process when a notice of the trial date was mailed to their address of record, even though it was no longer their current address. (See *ibid.*) Unlike here, there was no issue in *Whitehead* about the validity of mail service under *Code of Civil Procedure section 1013* much less the timeliness of a notice of appeal; quite sensibly, *Whitehead* simply held the defendants had no due process right to receive notice of the trial date at their new address when they never bothered to change their address of record on file with the court.

Nothing in either *Whitehead* or in postal mail forwarding regulations persuades us to interpret *rule 8.104* in a manner that "would create a trap for the unwary." (*Citizens for Civic Accountability v. Town of Danville, supra, 167 Cal.App.4th at p. 1164*.) The rule "must be strictly construed to preserve the right to appeal when possible without doing violence to the language of the rule." (*Id. at pp. 1163–1164*.) Strict construction allows no room to depart from the requirement, incorporated by *rule 8.104(a)(2)* (service by any method "permitted by the Code of Civil Procedure"), that mail service be accomplished by addressing **[***27]** a notice of entry of judgment to "the office address as last given by that person on any document filed in the cause" (*Code Civ. Proc., § 1013, subd. (a)*). That was not done here.

The air district parties filed their notice of appeal within 60 days of the date that Valero's counsel served them with a (properly addressed) notice of entry of judgment. Accordingly, their appeal is timely. (See *Cal. Rules of Court, rule 8.104(a)(1)(B)*.)
[*637]

II.

The Hearing Board Applied the Correct Standard of Review.

The legal issue we are asked to decide in connection with the air district's banking decision is very narrow, and so we begin by clarifying what is not at issue. We are not asked to decide whether the air district should be *estopped* from using an emissions baseline period ending on the date of Valero's banking application, a theory Valero advanced before the hearing board but did not raise in the first cause of action of its petition for writ of mandate in the superior court and does not raise here. We also are not asked to decide whether the APCO and the hearing board *correctly interpreted* the air district's banking regulation to require the use of that emissions baseline period rather than the (more favorable) **[**899]** baseline period Valero used in its permit application. The **[***28]** merits of that issue were not before the superior court in Valero's

first cause of action and are not before us now.[13] The sole legal question we are asked to decide is whether the hearing board applied the proper standard of review in deciding Valero's appeal. That is all.

We review this legal question de novo. In reviewing an agency's decision on a question of law ""“the trial and appellate courts perform essentially the same function, and the conclusions of the trial court are not conclusive on appeal.”"" (*Duncan v. Department of Personnel Administration (2000) 77 Cal.App.4th 1166, 1174 [92 Cal. Rptr. 2d 257]*.)

The air district parties argue that the hearing board correctly interpreted and applied its standard of review, and therefore the superior court erred in vacating the hearing board's decision and directing it to reconsider Valero's appeal. They, along with several amici who have submitted briefs in support of their position,[14] assert that Rule 3.6 requires the board to determine *only* whether the APCO's decision was correct as a matter of law and does not empower the board to depart from the law based on board members' individual views as to whether applying the regulation in the circumstances before it is substantively fair. The air district parties also assert, secondly, that the board **[***29]** engaged in exactly the inquiry required by Rule 3.6 and the superior court erred in concluding otherwise.
[*638]

Valero, on the other hand, contends Rule 3.6 “goes beyond requiring simply a check on the ‘legal correctness’ of APCO regulatory interpretations” and, instead, broadly empowers the hearing board to “go[] beyond the bare interpretation of the regulations at issue” and consider “‘basic principles of fundamental fairness’” in deciding an appeal. It says that “Rule 3.6 specifies a multi-faceted standard of review under which both facts and law—and not just mere interpretation of regulations—may be important in determining whether a banking application was ‘properly refused’ by the APCO.” Indeed, although Valero's appellate briefing is somewhat opaque about the contours of what Rule 3.6 supposedly entails, and it backpedals in its response to amicus curiae briefing (inconsistently),[15] it was quite clear in its briefing before the hearing board. There, Valero expressly conflated the standard of review required by Rule 3.6 with the principles of equitable estoppel, telling the hearing board there was in fact no difference (“they are the same arguments—indeed, the same issues”). Here, since the board members expressed concerns about the **[***30]** substantive fairness of the outcome—and indeed, in advisory comments, **[**900]** even encouraged the APCO to “reconsider the fairness of denying banking credits under these circumstances”—Valero says that the board prejudicially misconstrued its standard of review and it urges us to affirm the superior court's ruling. Second,

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[13] We express no opinion whether these merits issues are encompassed by either of the two remaining causes of action that were mooted by the superior court's ruling. The parties are free to address the scope of those two other claims on remand.

[14] There are two amicus curiae briefs, one submitted by the State Air Resources Board and the other by four regional air quality and air pollution control districts (South Coast, Sacramento, San Joaquin and Monterey Bay).

[15] In that filing, Valero asserts repeatedly that “fairness” pertains only to the proper *interpretation* of the applicable regulations, arguing for example that “the Hearing Board was entitled under Rule 3.6 to address the competing interpretations and to adopt the one that avoided (rather than caused) manifest injustice.” On the other hand, it also asserts repeatedly in that filing that “Rule 3.6 plainly goes beyond requiring simply a check on the ‘legal correctness’ of APCO regulatory interpretations,” and gives the hearing board “wide latitude to fashion an appropriate remedy.”

and relatedly, Valero also faults the hearing board for considering only whether the APCO's interpretation was "reasonable" and nothing more.

We agree with the air district parties.

A. *The Hearing Board Is Not Empowered To Review the APCO's Decision for "Fundamental Fairness."*

(11) We start with the general principle that the hearing board was required to exercise its independent judgment in deciding Valero's appeal. It could not blindly ratify the APCO's decision but, rather, was required to decide the merits of the issues for itself. On appeal, this basic proposition does not appear to be in contention. The superior court concluded that the hearing board's standard of review encompassed the obligation to exercise independent judgment; Valero argues the trial court "properly recognized that Rule 3.6 effectively restates the independent standard of review"; and the air district **[***31]** parties embrace this understanding of the hearing board's standard of review as well. They argue the hearing board properly "applied its own **[*639]** independent judgment," and equate the board's standard of review with the principles of judicial review prescribed in *Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1 [78 Cal. Rptr. 2d 1, 960 P.2d 1031]* (*Yamaha*). Under *Yamaha*, our Supreme Court's seminal decision establishing the framework for assessing the amount of judicial deference an administrative interpretation is entitled to by the courts, "'The standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action.'" (*Id. at p. 8*.) Moreover, our independent research has revealed cases in which an independent review standard has been held applicable to administrative entities acting in a reviewing capacity that, like the hearing board, have the power to take evidence, hear from witnesses, entertain argument and render a decision. (See *Quintanar v. County of Riverside (2014) 230 Cal.App.4th 1226, 1233–1235 [179 Cal. Rptr. 3d 82]* (*Quintanar*) [hearing officer presiding over appeal of employee disciplinary proceeding pursuant to county collective bargaining agreement required to exercise independent judgment regarding appropriate discipline]; **[***32]** *Kolender v. San Diego County Civil Service Com. (2005) 132 Cal.App.4th 1150, 1157 [34 Cal. Rptr. 3d 209]* [county civil service commission must "independently review the facts and law" in appeal from disciplinary order]; accord, *Lopez v. Imperial County Sheriff's Office (2008) 165 Cal.App.4th 1, 5 [80 Cal. Rptr. 3d 557]* [county appeals board presiding over appeal of employee termination].) **(12)** "In any review process, a provision that the reviewer must hold a full evidentiary hearing tends to show that the reviewer is supposed to exercise independent judgment; this is true regardless of whether the review process is contractual or statutory. Likewise, a provision, whether contractual or statutory, that a reviewer can 'modify' a decision tends to show that the reviewer is supposed to exercise independent judgment."[16] (*Quintanar, at p. 1235*.) There is no reason to conclude the district's enactment of Rule 3.6 **[**901]** was intended to circumscribe the board's review powers more narrowly. And, as said, no party contends otherwise.[17]

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[16] The hearing board's rules specify it may do this.

[17] Although the cases we located in our independent research held that little or no deference was owed in the circumstances presented there (see *Quintanar, supra, 230 Cal.App.4th at p. 1235* ["Based on the wording chosen by the parties to the [memorandum of understanding], we conclude that the Department gave up any requirement that the hearing officer defer to its

[*640]

Contrary to the trial court's ruling, however, the hearing board's exercise of independent judgment under Rule 3.6 does not encompass a broader inquiry than simply determining whether the APCO's interpretation and application of the applicable regulations was correct as a matter of law. It does not allow (much less require) the hearing board to decline to apply the regulations if, in the hearing board's **[***33]** view, applying them in the case before it would be "unfair."[18] The trial court erred in holding otherwise.

(13) First, no statute authorizes the district to promulgate a regulation empowering its hearing board to engage in such an expansive and amorphous "fairness" inquiry. (See *PaintCare v. Mortensen (2015) 233 Cal.App.4th 1292, 1305 [183 Cal. Rptr. 3d 451]* ["An administrative agency 'has only as much rulemaking power as is invested in it by statute'"]; *Friends of Kings River v. County of Fresno (2014) 232 Cal.App.4th 105, 117 [181 Cal. Rptr. 3d 250]* [similar].) The Legislature has specified that *the APCO* is legally required to follow the law, i.e., to enforce "[a]ll orders, regulations, and rules prescribed by the district boards" (*§ 40752*), and in the banking context in particular, *section 40713* requires the hearing board to determine only whether the APCO "properly refused" a banking application.[19] It follows that the hearing board is charged with deciding only whether the APCO "properly" enforced the district's orders, regulations and rules on the subject. Nothing more. (See *Industrial Indemnity Co. v. City and County of San Francisco (1990) 218 Cal.App.3d 999, 1009 [267 Cal. Rptr. 445]* ["A court must construe an administrative regulation in light of the enabling statute's intent"].) Valero asserts that "[i]t makes no sense to equate 'properly refused' with 'legally correct.'" But that rather astonishing position makes no sense. Indeed, elsewhere in its briefing Valero says **[***34]** the opposite, acknowledging that the statutory "properly refused" standard entails reviewing for legal *error*.[20]

(14) **[**902]** We also recognize, of course, the hearing board is authorized to "adopt rules for the conduct of its hearings" (*§ 40807*), but the fact "'[t]hat an agency has been granted *some* authority to act within a given area does not mean that it enjoys *plenary* authority to act in that area.'" (*Friends of Kings **[*641]** River v. County of Fresno, supra, 232 Cal.App.4th at p. 117*.)

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discretion"]; *Kolender v. San Diego County Civil Service Com., supra, 132 Cal.App.4th at p. 1157* [sheriff's decision was "not due substantial deference"]), none involved an agency's interpretation of its own regulation, nor a rule specifying a particular standard of review such as Rule 3.6 expressly requiring "deference to the agency's determination." Here, although Valero appears to blow hot and cold on the subject, ultimately we understand all parties to agree that Rule 3.6 incorporates the principles of judicial review expressed in *Yamaha* and its progeny. The parties have not specified how those factors would apply here, however, and we are not asked to decide that issue.

[18] The parties disagree as to how much deference *we* must give the *hearing board's* interpretation of its own standard of review embodied in Rule 3.6, but it is unnecessary to decide that issue because we readily agree with the board's interpretation even if we give it no deference.

[19] The Legislature has utilized similar language to describe the scope of other types of appeals before the hearing board. (See *§§ 42302* [whether permit "was properly denied"], *42302.1* [whether permit "was properly issued"], *42306* [whether permit "was properly suspended"].)

[20] Valero points out in its respondent's brief that Rule 3.6 expressly requires the hearing board to "determine whether 'the District's action was erroneous'" which Valero says "echoe[s] the statutory requirement" under *section 40713* "that the Board determine 'whether the application was properly refused.'"

That limited grant of *procedural* power (governing the "conduct" of hearings), cannot reasonably be construed as a grant of *substantive* authority to disregard duly enacted administrative regulations. Not even Valero seriously points to *section 40807* as a source of legislative authority for the expansive interpretation of Rule 3.6 it advocates.[21]

(15) Second, nothing in the plain language of Rule 3.6 itself suggests the hearing board is to engage in anything other than a traditional quasi-judicial administrative review exercise. The rule states that the hearing board's "role" is "to determine whether the APCO's interpretation of the applicable legal requirements in its action is fair and reasonable and consistent with other actions of the APCO" and "to determine whether the agency's interpretation of its duty was reasonable," while also incorporating **[***35]** the presumption of correctness, commanding "deference" to the District's decision, and providing that the hearing board "may not readily substitute its judgment for that of the District's expertise."

(16) Valero places great reliance on the rule's mention of "fair and reasonable," but that language does not support its expansive interpretation of Rule 3.6. The rule expressly says the relevant question is whether the APCO's *interpretation* of the applicable *legal requirements* of the law is "fair and reasonable," not whether *applying* that law is fair in the particular case. This language does nothing more than reflect fundamental principles of constitutional, statutory and regulatory construction, using terminology regularly employed by both the United States Supreme Court and our Supreme Court. (See, e.g., *Thompson v. Oklahoma (1988) 487 U.S. 815, 821–822, fn. 4 [101 L. Ed. 2d 702, 108 S. Ct. 2687]* [constitutional provision should not be given "'a crabbed interpretation that robs [it] of its full, fair and reasonable meaning'"]; *People v. Freeman (1988) 46 Cal.3d 419, 425 [250 Cal. Rptr. 598, 758 P.2d 1128]* [statute will be construed in a manner that is constitutional where it is capable of such meaning """'by fair and reasonable interpretation'"""]; *Walters v. Bank of America etc. Assn. (1937) 9 Cal.2d 46, 52 [69 P.2d 839]* [statutes must be "reasonably and fairly interpreted … so as to give effect, if possible, to the expressed intent of **[***36]** the legislature"]; *State Farm Mutual Automobile Ins. Co. v. Quackenbush (1999) 77 Cal.App.4th 65, 79 [91 Cal. Rptr. 2d 381]* [interpreting insurance regulations based on "a fair reading of the regulations as a whole"].) Likewise, Rule 3.6's directive to consider whether the APCO's interpretation of the law is "consistent with other actions **[*642]** of the APCO" simply reflects one factor under the *Yamaha* framework for assessing the amount of deference to give an agency's interpretation of law. The reviewing tribunal considers **[**903]** whether "the agency 'has consistently maintained the interpretation in question, especially if [it] is long-standing,'" because "'[a] vacillating position … is entitled to no deference.'" (*Yamaha, supra, 19 Cal.4th at p. 13*.)

We also find support for the air district parties' construction of Rule 3.6 in the academic commentary. Both parties cite a law review article authored by Santa Clara University Law Professor Kenneth Manaster, who served as chairman of this very hearing board for more than 10 years (1978–1989) and represented Valero in this case. (Manaster, *Fairness In The Air:*

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[21] Apart from a generalized string citation, Valero cites *section 40807* in one sentence of its response to amicus curiae briefing where it asserts, without discussion or analysis: "The Code allows all air district hearing boards discretion to carry out their statutory review authorities by adopting their own rules for hearing administrative appeals of banking decisions and other determinations by air district staff. *See* [*Health & Saf. Code,] § 40807*."

California's Air Pollution Hearing Boards (2006) 24 UCLA J. Envtl. L. & Pol'y 1, fn. *.) Professor Manaster describes the standard of review governing air district hearing boards in language that virtually mirrors the text of Rule 3.6, with no mention of a duty to consider whether **[***37]** applying the law in any given case would be "fair" but, on the contrary, making clear that a hearing board's duty is solely to ascertain whether district staff properly followed the law. According to Professor Manaster: "[T]he inquiry … should be *whether the district staff has made a fair, reasonable interpretation of the applicable legal requirements* in its action … . The hearing board's usual function should be to determine *whether the staff view in the permit dispute*[22] *falls within a sensible application of the language and purpose of the pertinent regulations or other requirements.* [¶] This perspective is consistent with the traditional legal presumption of the regularity and correctness of administrative action. This presumption means that the burden of proof in a permit dispute should be on the party challenging the district staff's action or finding. It also means that the hearing board should not lightly disagree with the staff's determinations. *A hearing board in permit cases is operating analogously to the role of an appellate court reviewing administrative agency action*. This is in contrast to the board's function in variance or abatement cases, where the better analogy **[***38]** is the work of trial courts determining matters in the first instance. In short, the hearing board should not substitute its judgment in permit cases for that of the expert, full-time staff of the [Air Pollution Control District]. [¶] This does not mean, of course, that this oversight and review function of the hearing board should be forfeited through automatic, uninformed deference to the staff." (Manaster, *supra*, 24 UCLA J. Envtl. L. & Pol'y at pp. 80–81, italics added, fns. omitted.) Professor Manaster's views are at odds with Valero's assertion that the hearing board is *not* "like any reviewing tribunal" subject to "'familiar judicial principles'" that "apply to reviewing *courts* evaluating agency interpretations," and Valero's view that Rule 3.6 does *not* "limit[] the Board **[*643]** to a regulatory interpretation exercise to determine whether the APCO properly effectuated the intent of the Board of Directors in adopting the regulations."

Finally, both the air district parties and the amici curiae caution that upholding the expansive construction of Rule 3.6 that Valero urges would cause great regulatory uncertainty. As the State Air Resources Board puts it, "If hearing boards, exercising independent judgment, could reverse an APCO's action, even after determining that the APCO applied **[***39]** a reasonable legal construction in conformance with procedural requirements, they could functionally repeal or amend air districts' technical permit regulations on a case-by-case basis. That is not the role of hearing boards, **[**904]** which do not enact substantive regulations and are not charged to enforce them.[23] A broad expansion of the hearing board's scope of review, sought by Valero and sanctioned by the Superior Court, would destabilize public health controls by frustrating the public rulemaking process and engendering regulatory uncertainty." Such an approach would threaten to decrease transparency in decisionmaking, it tells us, decrease the ability of third parties to rely on APCO decisions, and ultimately impede the State Air Resources Board itself from fulfilling its statutory mandate to coordinate statewide pollution control activities.

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[22] The author characterizes ERC banking applications as a type of "permit dispute." (See Manaster, *supra*, 24 UCLA J. Envtl. L. & Pol'y at p. 79.)

[23] As we have discussed, it is the air district's *governing* board, acting in a quasi-legislative capacity, that adopts substantive rules and regulations. (See p. 625, *ante*.)

(17) Administrative review depends no less on proper adherence to the law than does judicial review. *Courts* cannot refuse to follow the law "'simply because we disagree with the wisdom of the law or because we believe that there is a fairer method for dealing with the problem.'" (*San Diego County Water Authority v. Metropolitan Water Dist. (2004) 117 Cal.App.4th 13, 28 [11 Cal. Rptr. 3d 446]*.) As this court has recognized, proper interpretation **[***40]** of the law might produce results that are "uneven, perhaps even unfair," but that does not empower courts to declare the result unlawful. (*Service Employees Internat. Union, Local 1000 v. Brown (2011) 197 Cal.App.4th 252, 275 [128 Cal. Rptr. 3d 711]*.) "The wisdom and expediency of the choices made by the political branches are not subject to judicial recalibration." (*Ibid.*) The same is true of the hearing board carrying out its statutory mandate to review whether the APCO's decision was "properly refused" under regulations duly promulgated by the air district.

(18) That said, the hearing board did consider Valero's "fairness" evidence, and addressed it in a context that was appropriate, namely, in evaluating Valero's equitable estoppel claim. (*Lentz v. McMahon (1989) 49 Cal.3d 393, 402–404 [261 Cal. Rptr. 310, 777 P.2d 83]* [largely factual claims of estoppel should be heard first in administrative hearing despite absence of **[*644]** specific statutory authorization for such defense].) As the parties recognized in their prehearing briefs, equitable estoppel is an established doctrine with well-defined elements, including intentional or negligent inducement of reliance and actual reliance. The APCO disputed both of these elements, and as we have already discussed, the hearing board rejected Valero's estoppel argument on several grounds, in effect finding no acts or statements by the APCO **[***41]** that were intended to or negligently caused Valero's reliance. In the first cause of action in its writ petition, Valero did not challenge the hearing board's factual determinations, and the issue of whether those findings have the requisite support therefore is not before us. In any event, we reject the trial court's suggestion that the hearing board chose not to consider Valero's evidence at all and its conclusion that the hearing board should have determined whether that evidence violated some nebulous concept of fairness untethered from equitable estoppel.

B. *The Hearing Board Properly Applied Rule 3.6*.

Although the principal focus of the parties' briefing, as well as the amicus curiae briefing, is on the foregoing fairness issue, the superior court also misconstrued the hearing board's decision as more deferential than it in fact was, and on appeal Valero does too. As the air district parties argue, the hearing board did not solely **[**905]** consider whether the APCO's interpretation of the banking regulation was reasonable. Rather, it acknowledged and applied the very standard that Rule 3.6 required: namely, "whether the APCO's interpretation of the applicable legal requirements in its action is fair and reasonable **[***42]** and consistent with other actions of the APCO." There is simply no other way to read the board's decision.[24]

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[24] **(19)** Although both parties quote liberally from comments by individual board members at the hearing, we review only the hearing board's written ruling. Oral comments or statements made during deliberations cannot be used to impeach the board's final decision. (See, e.g., *Key v. Tyler (2019) 34 Cal.App.5th 505, 539, fn. 16 [246 Cal. Rptr. 3d 224]* [court's comments from the bench "were not final findings and cannot impeach the court's subsequent written ruling"]; *Silverado Modjeska Recreation & Park Dist. v. County of Orange (2011) 197 Cal.App.4th 282, 300–301 [128 Cal. Rptr. 3d 772]* ["we disregard the trial court's tentative ruling and the comments the court made [at the hearing], and consider only the trial court's final order on the motion"].)

First, the hearing board quoted Rule 3.6 and said that it had "applied this standard in reaching its decision in this matter." Next, it found that "[t]he APCO's interpretation of Regulation 2-2-605.1, and its application of that provision in this particular case, was fair and reasonable and consistent with other actions of the APCO. The APCO's interpretation of Regulation 2-2-605.1 was reasonable, and the APCO applied this interpretation fairly and consistently to Valero in the same manner as it has applied it to other similarly-situated applicants seeking to bank emission reduction credits under **[*645]** similar circumstances." It then spent three pages explaining its reasons, which were based upon: (1) the language of the regulation, (2) its regulatory context, (3) evidence of the district's regulatory intent contained in a staff report issued when the regulation was adopted, (4) a prior version of the regulation, and (5) the board's factual finding that the district had applied the regulation the same way to two similarly situated applicants in the past. The board then concluded: "The Hearing **[***43]** Board therefore finds that the APCO's interpretation of Regulation 2-2-605.1, and its application of Regulation 2-2-605.1 to Valero's banking application in this case, *was fair, reasonable, and consistent with other actions of the APCO*, for all of the reasons outlined above." (Italics added.)

C. *Conclusion*

Because the hearing board applied the correct standard of review, the superior court erred in granting a writ of mandate on Valero's first cause of action. The air district parties also ask us to exercise our discretion to dismiss the other two claims Valero asserted in its writ petition that the superior court did not reach. But the air district parties have briefed these issues in a conclusory manner that does not facilitate meaningful appellate review, the superior court did not address these other claims which were clearly mooted by its ruling on the first cause of action, and we believe it should decide those causes of action in the first instance.

DISPOSITION

The judgment is reversed. Appellants shall recover their costs.

Kline, P. J., and Richman, J., concurred.

EXHIBIT 11

Voices of the Wetlands v. State Water Resources Control Bd.

Supreme Court of California

August 15, 2011, Filed

S160211

Reporter
52 Cal. 4th 499 *; 257 P.3d 81 **; 128 Cal. Rptr. 3d 658 ***; 2011 Cal. LEXIS 8117 ****; 41 ELR 20268

VOICES OF THE WETLANDS, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents; DUKE ENERGY MOSS LANDING, LLC, et al., Real Parties in Interest and Appellants.

Subsequent History: Reported at *Voices of the Wetlands v. State Water Resources Control Board (Duke Energy Moss Landing, LLC), 2011 Cal. LEXIS 8766 (Cal., Aug. 15, 2011)*

Time for Granting or Denying Rehearing Extended *Voices of the Wetlands v. California State Water Resources Control Board (Dule Energy Moss Landing, LLC), 2011 Cal. LEXIS 9394 (Cal., Sept. 12, 2011)*

Request denied by *Voices of the Wetlands v. Cal. State Water Res. Control Bd., 2011 Cal. LEXIS 10654 (Cal., Oct. 12, 2011)*

Prior History: [**1]** Superior Court of Monterey County, No. M54889, Robert A. O'Farrell, Judge. Court of Appeal, Sixth Appellate District, No. H028021.

Voices of the Wetlands v. California State Water Resources Control Bd., 157 Cal. App. 4th 1268, 69 Cal. Rptr. 3d 487, 2007 Cal. App. LEXIS 2024 (Cal. App. 6th Dist., 2007)

Case Summary

Procedural Posture

Plaintiff, an environmental organization, filed an administrative mandamus action challenging the issuance of a National Pollutant Discharge Elimination System (NPDES) permit by defendant regional water board. The trial court denied the mandamus petition. The California Court of Appeal, Sixth Appellate District, affirmed the trial court's judgment. Plaintiff sought review.

Overview

The NPDES permit authorized a powerplant to draw cooling water from a harbor and slough. The court concluded that the trial court did not err in using an interlocutory remand to resolve perceived deficiencies in the regional water board's best technology available (BTA) finding. In compliance with the trial court's directive, the board engaged in a full reconsideration of the BTA issue, and gave all interested parties, including plaintiff, a noticed opportunity to appear and to

present evidence, briefing, and argument pertinent to the BTA determination. The court rejected plaintiff's argument that *Code Civ. Proc., § 1094.5, subd. (e)*, precluded the board from accepting and considering new evidence on remand absent a showing that such evidence could not have been produced at the original administrative proceeding, or was improperly excluded therefrom. The court further concluded that the board did not err by basing its BTA determination on a finding that the costs of alternative cooling technologies for the powerplant were wholly disproportionate to the anticipated environmental benefits. The board's use of this standard was proper.

Outcome
The judgment of the appellate court was affirmed.

Counsel: Earthjustice, Mills Legal Clinic of Stanford Law School, Deborah A. Sivas, Leah J. Russin and Holly D. Gordon for Plaintiff and Appellant.

Kurt R. Wiese, Barbara Baird; Daniel P. Selmi; John J. Sansone, County Counsel (San Diego), Paula Forbis, Deputy County Counsel; Law Offices of Nancy Diamond, Nancy Diamond; Steven M. Woodside, County Counsel (Sonoma) and Cory W. O'Donnell, Deputy County Counsel, for South Coast Air Quality Management District, San Diego County Air Pollution Control District, North Coast Unified Air Quality Management District and Northern Sonoma County Air Pollution Control District as Amici Curiae on behalf of Plaintiff and Appellant.

Bill Lockyer, Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Gordon Burns and Manuel M. Medeiros, State Solicitors General, J. Matthew Rodriquez, Chief Assistant Attorney General, Mary E. Hackenbracht and Kathleen Kenealy, Assistant Attorneys General, John Davidson, Anita E. Ruud and Michael M. Edson, Deputy Attorneys General, for Defendants and Appellants.

Pillsbury Winthrop Shaw Pittman, **[****2]** Sarah G. Flanagan, John M. Grenfell and Blaine I. Green for Real Parties in Interest and Appellants.

Michael J. Levy and William M. Chamberlain for California Energy Commission as Amicus Curiae on behalf of Real Parties in Interest and Appellants.

Judges: Opinion by Baxter, J., with Cantil-Sakauye, C. J., Kennard, Werdegar, Chin, Corrigan, and Kitching, JJ., concurring. Concurring opinion by Werdegar, J., with Cantil-Sakauye, C. J., concurring.

Opinion by: Baxter **[*506]**

Opinion

[84] [***662]** **BAXTER, J.**—Voices of the Wetlands, an environmental organization, filed this administrative mandamus action in the Monterey County Superior Court to challenge the issuance, by the California Regional Water Quality Control Board, Central Coast Region (Regional Water Board), of a federally required permit authorizing the Moss Landing Power Plant (MLPP) to draw cooling water from the adjacent Moss Landing Harbor and Elkhorn **[**85]**

Slough. [1] The case, now more than a decade old, presents issues concerning the technological and environmental standards, and the procedures for administrative and judicial **[****3]** review, that apply when a thermal powerplant, while pursuing the issuance or renewal of a cooling water intake permit from a regional water board, also seeks necessary approval from another state agency, the State Energy Resources Conservation and Development Commission (Energy Commission), of a plan to add additional generating units to the plant, with related modifications to the cooling intake system.

Against a complex procedural backdrop, we will reach the following conclusions:

First, the superior court had jurisdiction to entertain the administrative mandamus petition here under review. We thus reject the contention of defendants and the real party in interest that, because the substantive issues plaintiff seeks to raise on review of the Regional Water Board's decision **[****5]** to renew the plant's cooling water intake permit were also involved in the Energy Commission's approval of the plant expansion, statutes applicable to the latter process placed exclusive review jurisdiction in this court.
[*507]

Second, the trial court did not err when, after concluding that the original record before the Regional Water Board did not support the board's finding on a single issue crucial to issuance of the cooling water intake permit, the court deferred a final judgment, ordered an interlocutory remand to the board for further "comprehensive" examination of that issue, then denied mandamus after determining that the additional evidence and analysis considered by the board on remand supported the board's reaffirmed finding.

Third, recent United States Supreme Court authority confirms that, when applying federal Clean Water Act of 1977 (CWA; *Pub.L. No. 95-217 (Dec. 27, 1977) 91 Stat. 1566*) standards **[***663]** for the issuance of this permit, the Regional Water Board properly utilized cost-benefit analysis, and in particular a "wholly disproportionate" cost-benefit standard, to conclude that the MLPP's existing cooling water intake design, as upgraded to accommodate the plant expansion, "reflect[ed] the *best technology available* for minimizing **[****6]** adverse environmental impact." (CWA, § 316(b), codified at *33 U.S.C. § 1326(b)*, italics added (hereafter CWA section 316(b)).)

We decline to address several other issues discussed by the parties. For instance, plaintiff insists the Regional Water Board violated CWA section 316(b) by approving compensatory

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[1] In the case title in this court, and hereafter in our discussion, we refer to Voices of the Wetlands, the mandamus petitioner, as "plaintiff." (See Cal. Style Manual (4th ed. 2000) § 6:28, pp. 230–231.) The mandamus petition named as respondents the State Water Resources Control Board (State Water Board) and the Regional Water Board. In the case title in this court, and hereafter as convenient in our discussion, we refer to these parties as "defendants." (*Ibid.*) The mandamus petition also named Duke Energy North America LLC and its subsidiary, Duke Energy Moss Landing, LLC (collectively Duke), then the MLPP's owners, as real parties in interest. At some point, apparently during the appellate process, the MLPP changed ownership. The current owner is Dynegy Moss Landing LLC (Dynegy), **[****4]** an entity unrelated to Duke. Dynegy has filed all pleadings and briefs in this court as the MLPP's owner and as real party in interest. As Duke's successor in interest, Dynegy is entitled to continue the action in Duke's name (*Code Civ. Proc., § 368.5*), and Dynegy has not moved to substitute itself as a formally named party (see *Cal. Rules of Court, rule 8.36(a)*). Accordingly, to maintain title symmetry with the Court of Appeal decision, and to facilitate tracking and legal research by the bench, bar, and public, we have retained Duke in the case title in this court as the real parties in interest and appellants. (See Cal. Style Manual, *supra*, § 6:28, p. 230.) As the context dictates, our discussion hereafter refers variously to Duke, Dynegy, or "real party in interest" (singular or plural), or "the MLPP's owner."

mitigation measures—a habitat restoration program funded by the MLPP's owner—as a means of satisfying the requirement to use the best technology available (BTA). The legal issue whether section 316(b) allows such an approach is certainly significant (see *Riverkeeper, Inc. v. U.S. E.P.A. (2d Cir. 2007) 475 F.3d 83, 110* (*Riverkeeper II*); *Riverkeeper, Inc. v. U.S. E.P.A. (2d Cir. 2004) 358 F.3d 174, 189–191* (*Riverkeeper I*)), and it has not been finally resolved.

However, the trial court found, as a matter of fact, that the Regional Water Board had not directly linked the habitat restoration **[**86]** program to its BTA determination. The Court of Appeal concluded that the trial court's no-linkage finding had substantial evidentiary support. Here, as in the Court of Appeal, defendants and real party in interest decline to pursue the legal issue, urging only that the trial court's factual finding should not be disturbed. **[****7]** As so framed, the issue presented is case and fact specific, and involves no significant question of national or statewide importance. Accordingly, we exercise our discretion not to consider it. (See *Cal. Rules of Court, rule 8.516(b)(3)*.) By so proceeding, we expressly do not decide whether compensatory mitigation and habitat restoration measures can be components of BTA, and we leave that issue for another day.

Finally, in its briefs on the merits, plaintiff advances issues it did not raise in its petition for review. Plaintiff now insists the evidence in the administrative record does not support the Regional Water Board's finding that the costs **[*508]** of alternative cooling technologies would be "wholly disproportionate" to their environmental benefits. Plaintiff also urges that even if the board properly considered compensatory restoration measures as a means of satisfying BTA, the record does not support its determination that the habitat restoration project it approved was sufficient to offset the environmental damage caused by the MLPP's cooling system.

These issues are case and fact specific, did not factor into our decision to grant review, and do not currently appear to be matters **[****8]** of significant national or statewide interest. Again, therefore, we decline to address them.

Accordingly, we will affirm the judgment of the Court of Appeal.

FACTS AND PROCEDURAL BACKGROUND

The MLPP, in operation under various owners for nearly 60 years, sits at the mouth of Elkhorn Slough, an ecologically rich tidal estuary that drains into Monterey Bay between the cities of Santa Cruz and Monterey. As a thermal powerplant, the MLPP uses superheated steam to generate electricity. The plant's cooling system appropriates water from Moss Landing Harbor, and water from the adjacent slough is also drawn into the system. The MLPP has traditionally employed a once-through cooling system, in which water continuously passes from the source through the plant, then back into the source at a warmer temperature. The thermal effects of the cooling system aside, **[***664]** the intake current kills some aquatic and marine life by trapping larger organisms against the intake screens (impingement) and by sucking smaller organisms through the screens into the plant (entrainment). [2]

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[2] Alternative cooling technologies exist, particularly including closed-cycle and dry-cooling systems. A closed-cycle system uses a holding **[****9]** basin, reservoir, or tower to retain, cool, and continuously recycle a single supply of cooling water within the

Under the CWA, the MLPP must have a National Pollutant Discharge Elimination System (NPDES) permit in order to draw cooling water from the harbor and slough. The discharge of a "pollutant" from a "point source" into navigable waters may only occur under the terms and conditions of such a permit, which must be renewed at least every five years. (*33 U.S.C. §§ 1311*, *1342(a)*, *(b)*.) In California, NPDES permits, which must comply with all minimum federal clean water requirements, are issued under an EPA-approved state water quality control program **[****10]** administered, pursuant to the **[*509]** Porter-Cologne Water Quality Control Act (Porter-Cologne Act; *Wat. Code, § 13000 et seq.*), by the State Water Board and the nine regional water boards. (*Id.*, *§§ 13372*, *13377*; see *33 U.S.C. § 1342(b)*; *40 C.F.R. §§ 123.21–123.25 (2011)*; *39 Fed.Reg. 26061 (July 16, 1974)*; *54 Fed.Reg. 40664–40665 (Oct. 3, 1989)*.)

In 1999, Duke applied to the Energy Commission for approval of Duke's plan to modernize the MLPP by adding two new 530- **[**87]** megawatt gas-fired generators. These new units would supplement the two 750-megawatt generators, units 6 and 7, already in operation, and would replace units 1 through 5, older generators that were no longer being used. Pursuant to the Warren-Alquist State Energy Resources Conservation and Development Act (Warren-Alquist Act; *Pub. Resources Code, § 25000 et seq.*), the siting, construction, or modification of a thermal powerplant with a generating capacity in excess of 50 megawatts must be certified by the Energy Commission. (*Id.*, *§§ 25110*, *25120*, *25500*.) As set forth in greater detail below, the commission's certification must be consistent with all applicable federal laws (*id.*, *§§ 25514, subd. (a)(2)*, *25525*), and is "in lieu of **[****11]** any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law" (*id.*, *§ 25500*).

Concurrently with its Energy Commission application, Duke applied to the Regional Water Board for renewal of its NPDES permit—which was due to expire in any event—and to include therein terms and conditions consistent with operation of the new generators. In both applications, Duke proposed various modifications to the design and operation of the existing once-through cooling system, both to accommodate the new generators, and to minimize aquatic and marine mortality resulting from cooling water intake operations. [3] However, the proposal did not contemplate **[***665]** conversion of the plant to either a closed-cycle or a dry-cooling system (see fn. 2, *ante*).

In order to renew the plant's NPDES permit, the Regional Water Board was required, among other things, to determine, under section 316(b) of the CWA, that "the location, design,

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plant. Such a system requires renewal from an outside water source only to replace evaporation loss. Dry cooling eliminates the need for cooling water, instead employing air as the cooling medium. These designs substantially reduce or eliminate impingement and entrainment damage, as compared to a once-through water cooling system, but they may produce their own adverse environmental effects, and converting an existing powerplant from a once-through system to closed-cycle or dry-cooling technology involves significant additional expense.

[3] As the Regional Water Board's order issuing the NPDES permit explained, the MLPP had two cooling water intake stations, one which served the currently operational units 6 and 7, and the other, then inactive, which had served the retired units 1 through 5. Under the MLPP proposal, this latter station would be reactivated to serve the proposed new generators. Changes in **[****12]** the design and operation of the existing once-through cooling system would be employed to reduce impingement mortality, including alterations in the angles of the intake screens, the use of finer mesh on the screens, reductions in cooling water intake velocity made possible by the design of the new generators, and the elimination of a 350-foot tunnel in front of the intake screens.

construction, and capacity of [the MLPP's] cooling water intake structures reflect[ed] the best technology available for minimizing adverse environmental impact [(i.e., BTA)]." (33 U.S.C. ***[*510]*** § 1326(b); see *id.*, §§ 1316(b)(1)(A), 1342(b)(1)(A).) In the year 2000, when the MLPP's Energy Commission and Regional Water Board applications were pending, there were no federal regulations in place directing permitting agencies how to apply the BTA standard. When lacking regulatory guidance for applying the CWA's NPDES permit standards, including section 316(b)'s BTA standard for cooling water intake structures, agencies were expected to exercise **[****13]** their "best professional judgment" on a case-by-case basis. (See, e.g., *Entergy Corp. v. Riverkeeper, Inc. (2009) 556 U.S. 208, 213 [173 L.Ed.2d 369, 129 S. Ct. 1498, 1503]* (*Entergy Corp.*); *National Resources Defense Council v. U.S. E.P.A. (9th Cir. 1988) 863 F.2d 1420, 1425*.)

The Energy Commission and Regional Water Board proceedings went forward concurrently, and were coordinated to a significant degree. As noted by the Court of Appeal, " 'the [Energy] Commission and the [Regional Water Board] formed a Technical Working Group (TWG) made up of representatives from various regulatory agencies, the scientific community, and Duke … . The TWG worked to design biological resource studies and then validate the results of those studies.' "

On October 25, 2000, after full agency review and opportunity for public comment, the Energy Commission approved the application for certification and authorized construction of the MLPP modernization project. Under the federal-compliance provisions of the Warren-Alquist Act, the commission addressed the BTA issue. In this regard, the commission determined that design alternatives to Duke's proposed modifications of the MLPP's cooling intake system either would not significantly **[****14]** reduce environmental damage to the source of cooling water, or were economically infeasible, and that the proposed **[**88]** modifications represented the most effective economically feasible alternative considered. The commission thus concluded that this proposal represented BTA for purposes of section 316(b) of the CWA, though it "recommend[ed]" that, prior to each five-year renewal of the NPDES permit, the Regional Water Board require the plant's owner to provide an analysis of "alternatives and modifications to the cooling water intake system 1.) which are feasible under [the California Environmental Quality Act] and 2.) [which] could significantly reduce entrainment impacts to marine organisms."

As a separate condition of certification, the Energy Commission specified that the MLPP's owner would provide $ 7 million to fund an Elkhorn Slough watershed acquisition and enhancement project. The commission concluded that compliance with "existing and new permits, including the … NPDES … permit[,] will result in no significant water quality degradation." Finally, the commission entered a formal finding that the conditions of certification, if implemented, would "ensure that the project **[****15]** will be designed, sited, and operated **[***666]** in conformity with applicable local, regional, state, and federal laws, **[*511]** ordinances, regulations, and standards, including applicable public health and safety standards, and air and water quality standards."

On October 27, 2000, after similar full procedures, the Regional Water Board issued its revised Waste Discharge Requirements Order No. 00-041 (Order No. 00-041), which included NPDES permit No. CA0006254, applicable to the MLPP. The stated purpose of the order was to permit,

pursuant to conditions and limitations specified in the order, the "discharge of industrial process wastewater, uncontaminated cooling water and storm water from the [MLPP]."

In finding No. 48 of its order, the Regional Water Board addressed CWA section 316(b)'s BTA mandate, as required for issuance of the permit. The order recited that the powerplant "must use BTA to minimize adverse environmental impacts caused by the cooling water intake system. *If the cost of implementing any alternative for achieving BTA is wholly disproportionate to the environmental benefits to be achieved, the Board may consider alternative methods to mitigate these adverse environmental impacts. In* ***[****16]*** *this case the costs of alternatives to minimize entrainment impacts are wholly disproportionate to the environmental benefits.* However, Duke Energy will upgrade the existing intake structure for the new units to minimize the impacts due to impingement of larger fish on the traveling screens, and will fund a mitigation package to directly enhance and protect habitat resources in the Elkhorn Slough watershed … ." (Italics added.)

In finding No. 49, the Regional Water Board set forth the required cooling system modifications and the environmental results to be expected therefrom. Subsequent findings detailed the features of the habitat enhancement program to be funded by a $ 7 million deposit from the powerplant's owner.

No person or entity sought administrative or judicial relief to stop or stay construction or operation of the plant additions and modifications under the terms and conditions of the Energy Commission's certification order, nor was any other form of judicial review of the commission's order pursued. The project to install the two new generating units at the MLPP, with attendant modifications to the cooling intake system, has since been constructed, and has been in operation **[****17]** since 2002.

Meanwhile, plaintiff did file with the State Water Board an administrative appeal of the Regional Water Board's Order No. 00-041. On June 21, 2001, the State Water Board rejected the appeal.

On July 26, 2001, plaintiff filed the instant petition for administrative mandamus (*Code Civ. Proc., § 1094.5* (*section 1094.5*)) in the Monterey **[*512]** County Superior Court (No. M54889). The petition claimed that the Regional Water Board had failed to comply with the CWA, in that the October 2000 NPDES permit issued to Duke did not satisfy the BTA requirement of section 316(b) of that statute. The prayer for relief asked that Order No. 00-041, issuing the permit, be set aside. However, plaintiff did not seek injunctive or other relief to halt, delay, or suspend the operative effect of the 2000 **[**89]** NPDES permit while the mandamus challenge was pending. [4]

Defendants and real parties in interest demurred to the petition, asserting, among other **[***667]** things, lack of subject matter jurisdiction, in that the claims for **[****18]** relief concerned matters determined by the Energy Commission, whose decisions the Warren-Alquist Act insulates from review by the superior court. The commission, as amicus curiae, filed a supporting memorandum. The trial court overruled the demurrers. Duke sought a writ of mandate in the Court of Appeal, Sixth Appellate District, to challenge this decision. (*Duke*

[4] The 2000 NPDES permit here at issue expired in 2005. We are advised that the MLPP's cooling system is currently operating under an administrative extension of this permit. (See *40 C.F.R. § 122.6 (2011)*.)

Energy Moss Landing v. Superior Court, June 12, 2002, H024416.) The Court of Appeal summarily denied mandate.

The superior court then considered plaintiff's claims on the merits. On October 1, 2002, after a hearing, the court issued its intended decision. In this tentative ruling, the court rejected finding No. 48 of the Regional Water Board's Order No. 00-041—the board's determination that the MLPP's cooling water system satisfied BTA—concluding that this finding was not supported by the weight of the evidence. The intended decision proposed to order issuance of a peremptory writ of mandate, directing the board "to conduct a thorough and comprehensive analysis of [BTA] applicable to the [MLPP]." However, the intended decision specified that "[n]othing in this decision compels an interruption in the ongoing plant operation **[****19]** during the … board's review of this matter."

On October 29, 2002, after receiving initial objections from real parties in interest, the court designated the intended decision as the statement of decision and ordered plaintiff to prepare a proposed judgment for review and signature. Plaintiff submitted a proposed judgment granting a peremptory writ of mandate and setting aside the challenged NPDES permit.

Defendants and real parties in interest objected that a judgment setting aside the permit would conflict with the intended decision's proviso that no interruption in current plant operations was being ordered, and would require the Regional Water Board to start the NPDES permit process over from "square one." These parties submitted an alternative proposed judgment that **[*513]** granted the peremptory writ and remanded to the board "for further proceedings in [the board's] discretion that are consistent with this Judgment and the Statement of Decision," again specifying that nothing in the judgment compelled an interruption in ongoing plant operations pending the board's review.

Ultimately, on March 7, 2003, the court issued an order which (1) stated that finding No. 48 was not supported by the weight of the evidence, **[****20]** (2) remanded Order No. 00-041 to the Regional Water Board "to conduct a thorough and comprehensive analysis with respect to Finding No. 48," and (3) directed the board to advise the court when it had completed its proceedings on remand "so that the [c]ourt may schedule a status conference." Plaintiff's petition for mandate in the Court of Appeal, seeking to set aside the March 7, 2003, order (*Voices of the Wetlands v. Superior Court* (Apr. 18, 2003, H025844)) was summarily denied.

On remand, the Regional Water Board issued a notice soliciting written testimony, evidence, and argument from the parties—including, for this purpose, both plaintiff and the Energy Commission—as to (1) what alternatives to once-through cooling were effective to reduce entrainment, (2) the costs, feasibility, and environmental benefits of such alternatives, and (3) whether the costs of any such alternatives were wholly disproportionate to their environmental benefits. The parties, and the board's staff, thereafter submitted voluminous materials in conformity with the notice.

On May 15, 2003, the Regional Water Board held a public hearing on the issues specified in the remand order. Plaintiff **[***668]** participated in **[****21]** the hearing. The parties had the opportunity to summarize their evidence, cross-examine witnesses, and present closing arguments. Members of the public in attendance were also allowed to comment. The board

members' discussion indicated a **[**90]** majority view that closed-cycle cooling, despite its ability to reduce entrainment, would actually have adverse effects on air and water quality and would reduce plant efficiency, and that more expensive cooling alternatives were not justified by their environmental benefits, given the overall good health of the adjacent marine habitat after 50 years of plant operations. These considerations, the board majority concluded, supported the original determination that the costs of alternatives to the MLPP's once-through cooling system were wholly disproportionate to the corresponding environmental benefits. By a four-to-one vote, the board approved a motion declaring that, for the reasons specified in the foregoing discussion, "Finding [No.] 48 in NPDES order 00041 is supported by the weight of the evidence." **[*514]**

Plaintiff filed an administrative appeal of the Regional Water Board's decision on remand. The State Water Board summarily denied the appeal on grounds **[****22]** that it failed to "raise substantial issues that are appropriate for review."

On October 15, 2003, plaintiff filed a second superior court mandate petition (*Voices of the Wetlands v. California Regional Water Quality Control Bd.* (Super. Ct. Monterey County, No. M67321)), attacking the Regional Water Board's resolution on remand on multiple grounds. On July 21, 2004, acting on the petition at issue here, No. M54889, the court issued a statement of decision resolving the postremand issues the parties had agreed remained open. In pertinent part, the court ruled that (1) the board's limitation on the scope of the remand issues complied with the court's remand order, (2) in deciding whether finding No. 48 had sufficient support, the court could consider the new evidence developed on remand, (3) plaintiff was correct that mitigation measures could not be considered in determining BTA (citing *Riverkeeper I, supra, 358 F.3d 174*), but the board had not used the $ 7 million Elkhorn Slough habitat restoration plan as a "substitute" for selecting BTA, and the board's BTA determination "[did] not rest on that plan as the basis for its [BTA] finding," and (4) the board on remand conducted "a sufficiently **[****23]** comprehensive analysis of the potential technological alternatives" to once-through cooling, "and the record contains a realistic basis for concluding that the existing modified [cooling] system provides [BTA] for the [MLPP]."

On August 17, 2004, the court entered judgment denying a peremptory writ of mandate in No. M54889. On the parties' stipulation, the court thereafter entered an order of dismissal with prejudice in No. M67321.

Plaintiff appealed in No. M54889, urging that the trial court erred in ordering an interlocutory remand, and in denying mandate to overturn the NPDES permit on grounds that the Regional Water Board had improperly determined BTA. Defendants and real parties in interest cross-appealed on the issue whether the superior court had jurisdiction to entertain the mandamus petition.

Meanwhile, in July 2004, the EPA finally promulgated regulations setting BTA standards for the cooling systems of existing powerplants. (*69 Fed.Reg. 41576 (July 9, 2004)*; see *40 C.F.R. § 125.90 et seq. (2011)* (Phase II regulations).) [5] As explained **[***669]** in greater detail below, the Phase II regulations established national performance standards based on the impingement

[5] The EPA had previously issued regulations governing BTA for the cooling systems of new powerplants (Phase I regulations).

and **[*515]** entrainment mortality **[****24]** rates to be expected from closed-cycle cooling (see fn. 2, *ante*). However, the regulations allowed existing facilities to meet those standards by alternative cooling system technologies, or, where reliance on such a technology alone was less feasible, less cost effective, or less environmentally desirable, by using restoration measures as a supplementary aid to compliance. A facility could also obtain a site-specific determination of BTA based on performance "as close as practicable" to the national standards, where, in the particular case, the costs of strict compliance would be "significantly greater" than those considered by the EPA director when formulating the regulations (the "cost-cost" alternative), or than the environmental benefits **[**91]** to be expected (the "cost-benefit" alternative). (*40 C.F.R. suspended § 125.94 (2011)*.)

In 2007, while the instant appeal was pending, the United States Court of Appeals for the Second Circuit issued its decision in *Riverkeeper II*, addressing the Phase II regulations. [6] The *Riverkeeper II* court concluded that these regulations were invalid **[****25]** under section 316(b) of the CWA insofar as they permitted the use of (1) cost-benefit analysis (as opposed to stricter cost-effectiveness analysis) [7] and (2) compensatory restoration measures for purposes of determining BTA. (*Riverkeeper II, supra, 475 F.3d 83, 98–105, 108–110, 114–115*.)

Thereafter, the Court of Appeal for the Sixth Appellate District unanimously affirmed the trial court judgment in this case. The Court of Appeal concluded that (1) the superior court properly entertained the mandamus petition; (2) the court did not err by ordering, in advance of a final judgment, an interlocutory remand to the Regional Water Board; (3) the board properly considered new evidence on remand; (4) section 316(b) of the CWA does not permit the use of compensatory **[****26]** restoration measures as a factor in establishing BTA (citing *Riverkeeper II*), but substantial evidence in the administrative record supports the trial court's determination that the board did not employ mitigation measures as " 'a *substitute* for selecting the best technology available' "; (5) the board could properly conclude that BTA did not require the implementation of cooling technologies whose costs were "wholly disproportionate" to their environmental benefits; and (6) the administrative record substantially supports the trial court's ultimate determination that, in the MLPP's case, the costs of alternative technologies to once-through cooling were wholly disproportionate to the expected environmental results.
[*516]

Plaintiff sought review, raising three contentions: (1) section 316(b) of the CWA does not permit a cost-benefit analysis, such as the Regional Water Board's "wholly disproportionate" standard, in determining BTA; (2) the board improperly accepted compensatory restoration measures—specifically, the $ 7 million Elkhorn Slough habitat enhancement program—as a factor in achieving BTA; and (3) the trial court improperly ordered an interlocutory remand after finding insufficient **[****27]** evidence to support the board's BTA finding. In its answer to the petition for review, Dynegy **[***670]** urged that if review was granted, we should conclude the superior

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[6] In *Riverkeeper I, supra, 358 F.3d 174*, the same court of appeals had previously considered challenges to the Phase I regulations.

[7] Thus, *Riverkeeper II* concluded that CWA section 316(b)'s BTA standard does allow selection of the least costly technology "whose performance does not essentially differ from the performance of the best-performing technology whose cost the industry reasonably can bear." (*Riverkeeper II, supra, 475 F.3d 83, 101*.)

court lacked subject matter jurisdiction, because the BTA determination was subsumed in the Energy Commission's powerplant certification, as to which review was solely in this court.

We granted review and deferred briefing pending the United States Supreme Court's resolution of the then pending petitions for certiorari in *Riverkeeper II*. The high court subsequently granted certiorari. In April 2009, the court issued its decision in *Entergy Corp.*, resolving certain of the issues addressed by the court of appeals in *Riverkeeper II*. Our discussion below proceeds accordingly.

DISCUSSION [8]

A. *Superior court jurisdiction*.

(1) Pursuant to the Porter-Cologne Act, decisions and orders of the Regional Water Board, including the issuance and renewal of NPDES permits, are reviewable by administrative appeal to the State Water Board, and then by petition for administrative mandamus **[**92]** in the superior court. (*§ 1094.5*; *Wat. Code, §§ 13320*, *13330*.) In the mandamus proceeding, the superior court is obliged to exercise its independent judgment on the evidence before the administrative agency, i.e., to determine whether the agency's findings are supported by the weight of the evidence. (*§ 1094.5, subd. (c)*; *Wat. Code, § 13330, subd. (d)*.)

Plaintiff pursued these avenues of relief. Nonetheless, defendants and Dynegy, joined by the Energy Commission as amicus curiae, urge at the outset that the superior court lacked jurisdiction to entertain plaintiff's petition for mandate in this case. The trial court and the Court of Appeal rejected this contention. We do so as well.
[*517]

(2) The jurisdictional argument is based on the Warren-Alquist Act, which mandates simplified and expedited processing and review of applications to certify the siting, construction, and modification **[****29]** of thermal powerplants. **[***671]** The Warren-Alquist Act accords the Energy Commission "the exclusive power to certify all sites and related facilities" for thermal powerplants with generating capacities of 50 or more megawatts, "whether a new site and related facility or a change or addition to an existing facility." (*Pub. Resources Code, § 25500*; see also *id.*, *§§ 25110*, *25119*, *25120*.) When a certification application is filed, the commission undertakes a lengthy review process that involves multiple staff assessments, communication with other state and federal regulatory agencies, environmental impact analysis, and a series of public hearings. (*Id.*, *§§ 25519–25521*.) With an exception not relevant here, the commission may not certify a proposed facility that does not meet all applicable federal, state, regional, and local laws. (*Id.*, *§ 25525*.) Accordingly, "[t]he issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation **[****30]** of

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[8] The Energy Commission has filed an amicus curiae brief urging, in support of defendants and Dynegy, that the Regional Water Board's permit decision was properly reviewable only in this court. An amicus curiae brief in support of plaintiff has been jointly filed by the North Coast Unified Air Quality Management District, the Northern Sonoma County Air Pollution Control District, the South Coast Air Quality Management District, and the San Diego County **[****28]** Air Pollution Control District.

any state, local, or regional agency, or federal agency to the extent permitted by federal law." (*Id.*, *§ 25500*.)

(3) The Warren-Alquist Act also constrains judicial review of an Energy Commission powerplant certification decision. Between 1996 and 2001, the statute provided that review of such a decision was exclusively by a petition for writ of review in the Court of Appeal or the Supreme Court. (Pub. Resources Code, former § 25531, subd. (a); *Pub. Utilities Code, § 1759, subd. (a)*.) [9] An emergency amendment to *Public Resources Code section 25531, subdivision (a)*, effective in May 2001, establishes that this court alone now has jurisdiction to review powerplant certification decisions by the commission. (*Pub. Resources Code, § 25531, subd. (a)*, as amended by Stats. 2001, 1st Ex. Sess. 2001–2002, ch. 12, § 8, pp. 8101–8102.)

Subdivision (c) of Public Resources Code section 25531 further provides that "[s]ubject to the right of judicial review of decisions of the [Energy] **[*518]** [C]ommission," as set forth in *subdivision (a)*, "no court in this state has jurisdiction to hear or determine any case or controversy concerning any matter which was, or could have been, determined in a proceeding before the commission, or to stop or delay the construction or operation of any thermal powerplant except to enforce compliance with the provisions of a decision of the commission."

Defendants **[****32]** and Dynegy urge as follows. Under the particular circumstances of this **[**93]** case, the fundamental issue presented—whether the MLPP's once-through cooling water intake system satisfied BTA for purposes of section 316(b) of the CWA—is one which "was, or could have been" (*Pub. Resources Code, § 25531, subd. (c)*), and indeed, had to be, determined in the certification proceeding before the Energy Commission. In order to certify the proposed expansion of the MLPP, the commission was required to find, and did find, that the project, including the intended modifications to the MLPP's cooling intake system, conformed to all applicable local, state, and federal laws, including section 316(b). Hence, the "case or controversy" advanced by plaintiff "concern[s] a matter" within the commission's purview, and was thus subject to the Warren-Alquist Act's exclusive-review provisions, with which plaintiff did not comply.

Plaintiff makes the following response: Entirely aside from the plant expansion project, the MLPP cannot operate its cooling water intake system without a federally required, time-limited NPDES permit. Under both federal and state law, only the State Water Board and the regional water **[****33]** boards have authority in California to issue or renew such permits. Although the MLPP's NPDES permit renewal process coincided with its Energy Commission certification proceedings, and the two matters were significantly coordinated, it is the Regional Water Board's decision to renew the NPDES permit, not the Energy Commission's certification of the

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[9] Adopted as part of the Public Utilities Act in 1951, *Public Utilities Code section 1759, subdivision (a)*, originally provided for exclusive Supreme Court review of the Public Utility Commission's decisions and orders. (Stats. 1951, ch. 764, § 1759, p. 2091.) *Public Resources Code section 25531, subdivision (a)*, adopted as part of the Warren-Alquist Act in 1974, originally **[****31]** provided that review of powerplant siting decisions by the Energy Commission would be the same as for Public Utility Commission decisions granting or denying certificates of public convenience and necessity for powerplants. (Stats. 1974, ch. 276, § 2, pp. 501, 532.) In 1996, *Public Utilities Code section 1759, subdivision (a)*, was amended to allow review of Public Utilities Commission decisions either by this court or by the Court of Appeal. (Stats. 1996, ch. 855, § 10, p. 4555.) The effect, under then unamended *Public Resources Code section 25531, subdivision (a)*, was to establish similar review for Energy Commission powerplant siting certifications.

plant expansion, that is the subject of this "case or **[***672]** controversy." The Porter-Cologne Act thus provides for mandamus review by the superior court of the Regional Water Board's permit decision.

Indeed, plaintiff emphasizes, such a conclusion in this case does not thwart the Warren-Alquist Act's purpose to expedite the certification of new powerplant capacity. Plaintiff notes that it never sought to stop, delay, or suspend the construction and operation of the MLPP expansion project in conformity with the Energy Commission's certification, including the approved modifications to the cooling water intake system, and the project has long since been implemented.

(4) Applying well-established principles of statutory construction, we conclude, as did the Court of Appeal, that plaintiff has the better argument. **[*519]** When interpreting statutes, we begin with **[****34]** the plain, commonsense meaning of the language used by the Legislature. (E.g., *Ste. Marie v. Riverside County Regional Park & Open-Space Dist. (2009) 46 Cal.4th 282, 288 [93 Cal. Rptr. 3d 369, 206 P.3d 739]*.) If the language is unambiguous, the plain meaning controls. (*Ibid.*) Potentially conflicting statutes must be read in the context of the entire statutory scheme, so that all provisions can be harmonized and given effect. (*San Leandro Teachers Assn. v. Governing Bd. of San Leandro Unified School Dist. (2009) 46 Cal.4th 822, 831 [95 Cal. Rptr. 3d 164, 209 P.3d 73]*.)

Here, however, there is no actual conflict. Under the plain language of the two statutory schemes, as applicable to this case, each agency—the Regional Water Board and the Energy Commission—had exclusive jurisdiction in a discrete area of thermal powerplant operations, and a distinct provision for judicial review applied in each case. Under the Warren-Alquist Act, the commission had sole authority to certify, i.e., to grant general permission for, the MLPP's proposal to install and operate additional generating capacity, and to modify other plant systems as necessary to accommodate this expansion. There is no question, under the unambiguous language of the Warren-Alquist Act, that the **[****35]** commission's certification order was subject to judicial review in this court alone. Plaintiff did not seek judicial review of the commission's certification decision, and that determination has long since become final and binding.

However, as defendants and Dynegy concede, regardless of any plans for new generating capacity that might involve the Energy Commission, a federal law, the CWA, obliged the MLPP to have in effect at all times a valid NPDES permit in order to cycle cooling water from Elkhorn Slough and Moss Landing Harbor in and out of the plant. The Porter-Cologne Act assigns the exclusive authority to issue, renew, and modify such permits to the State Water Board and the regional water boards. This statute further **[**94]** plainly specifies that these agencies' decisions are reviewable by mandamus in the superior court. Plaintiff mounted such a judicial challenge to the NPDES permit renewal granted to the MLPP by the Regional Water Board.

Defendants and Dynegy note that the Warren-Alquist Act requires the Energy Commission, before issuing a powerplant certification, to find conformity with all "applicable local, regional, state, and federal standards, ordinances, or laws." (*Pub. Resources Code, § 25523, subd. (d)(1)*; **[****36]** see also *id.*, *§ 25514, subd. (a)(2)*.) Hence, these parties insist, the issue underlying this litigation—whether the MLPP's cooling water intake system, with its proposed modifications, satisfied BTA for purposes of the CWA—is a "matter" which, in this particular

instance, "was, or could have been, determined" by the Energy Commission (Pub. Resources Code, § 25531, subd. (c)) **[***673]** as a **[*520]** necessary component of its decision to certify the plant expansion. Accordingly, the argument runs, only this court had "jurisdiction to hear or determine any case or controversy concerning [that] matter." (*Ibid.*)

We are not persuaded. When the judicial review provisions of the Warren-Alquist Act, as set forth in Public Resources Code section 25531, are read in context, the meaning of subdivision (c)'s critical phrase "any case or controversy concerning any matter which **[***674]** was, or could have been, determined in a proceeding before the [Energy] [C]ommission" is unmistakably clear.

(5) We must analyze the words of subdivision (c) of Public Resources Code section 25531 in conjunction with subdivision (a) of the same section. Subdivision (a) specifies the extent of this court's exclusive direct review jurisdiction **[****37]** as mandated by the Warren-Alquist Act. Under subdivision (a), "[t]he decisions of the [Energy] [C]ommission *on any application for certification of a site and related facility* are subject to judicial review by the Supreme Court of California." (Italics added.) Read together with subdivision (a), subdivision (c) simply confirms that no other court may review directly a *certification decision* of the commission, or may otherwise entertain a "case or controversy" that attacks *such a decision* indirectly by raising a "matter" the commission determined, "or could have … determined," *for purposes of* the certification proceeding. Section 25531 neither states nor implies a legislative intent to interfere with normal mandamus review of the actions of *another* agency, simply because that agency, exercising functions within *its* exclusive authority, has independently decided an issue the commission also must or might have addressed for its own purposes.

The Energy Commission did find, in connection with the MLPP's certification application, that the cooling system modifications proposed in connection with the expansion project satisfied the CWA's BTA requirement. But the commission made this finding only **[****38]** to support its decision, under the Warren-Alquist Act, to certify the proposed expansion. If plaintiff had challenged this certification on grounds the commission's BTA finding was improper, the "case or controversy concerning [that] matter" (Pub. Resources Code, § 25531, subd. (c)) could only have proceeded in accordance with the Warren-Alquist Act.

However, despite the interagency cooperation on the MLPP's expansion application, and the agencies' agreement that the plant's cooling system satisfied BTA, the fact remains that only the Regional Water Board had authority, under the Porter-Cologne Act, and by EPA approval for purposes of the CWA, to determine the BTA issue *as necessary for renewal of the plant's federally required NPDES permit*.
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[*675]** Defendants and Dynegy concede this exclusive administrative authority of the Regional Water Board. Nonetheless, they imply that the board's BTA finding was ratified, adopted, and subsumed in the Energy Commission's certification decision. Such is not the case. By law, each agency made an independent BTA determination, based on its distinct and separate regulatory function. Had the two agencies disagreed about BTA, the Energy Commission might still **[****39]** have been able to certify the plant expansion, but it could not

have overruled or countermanded a decision by the Regional Water Board to deny or condition an NPDES permit renewal **[**95]** on grounds the plant's cooling system did not satisfy BTA.

It follows that, by attacking only the Regional Water Board's decision to renew the plant's federally required NPDES permit, plaintiff has not raised a "case or controversy concerning any matter which was, or could have been, determined in a proceeding before the [Energy] [C]ommission." (*Pub. Resources Code, § 25531, subd. (c)*.) Hence, plaintiff's lawsuit, limited to an examination of the propriety of the permit renewal, is not affected by the judicial review provisions of the Warren-Alquist Act.

Defendants and Dynegy point out that under the Warren-Alquist Act, "[t]he issuance of a certificate by the [Energy] [C]ommission" for the siting, construction, or expansion of a thermal powerplant "shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, **[****40]** ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law." (*Pub. Resources Code, § 25500*.) Under this provision, a commission certification clearly supplants and supersedes all state, county, district, and city permits and approvals that would otherwise be required for the siting, construction, and expansion of a thermal powerplant.

(6) But *Public Resources Code section 25500* acknowledges, as it must, the supremacy of *federal* law. Under the CWA, a federal statute, any facility that discharges wastewater into a navigable water source, as the MLPP has always done, must have an unexpired permit, conforming to federal water quality standards, in order to do so. Pursuant to the regulatory approval of a "federal agency," the EPA, only the State Water Board or a regional water board may issue a federally compliant discharge permit; such a decision is entirely outside, and independent of, the Energy Commission's authority. Under the Porter-Cologne Act, judicial review of the decisions of these agencies, including those to grant or renew NPDES permits, is by mandamus in the superior court.
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Defendants and Dynegy nonetheless insist that **[****41]** the NPDES permit at issue here is a *state*, not a federal, permit, as to which federal law requires no particular avenue of review beyond minimum standards of due process. Hence, these parties urge, the state agency's decision is entirely subject, within the limits of due process, to the state's own preferences for judicial review. Accordingly, they assert, California may conclude, and has concluded, that when the issuance of a wastewater discharge permit is linked to a powerplant certification proceeding, the Warren-Alquist Act's "one-stop shopping" requirement of exclusive review by this court prevails over the review provisions that would otherwise apply, under the Porter-Cologne Act, to decisions of the State Water Board and the regional water boards.

The contention lacks merit. It is true, as these parties observe, that the CWA does not directly delegate to a state agency the authority to administer the federal clean water program; instead, it allows the EPA director to "suspend" operation of the federal permit program in individual states in favor of EPA-approved permit systems that operate under those states' own laws in lieu of the federal framework. (*33 U.S.C. § 1342(b)*; see **[****42]** *Shell Oil Co. v. Train (9th Cir. 1978) 585 F.2d 408, 410*.) But the distinction is of little moment for our purposes. The state-

administered program must conform to federal standards, and it must be approved by a federal agency, the EPA. In California, the EPA has approved a program under which the federally required permits are issued and renewed, not by the Energy Commission, but solely by the State Water Board and the regional water boards. (*54 Fed.Reg. 40664–40665 (Oct. 3, 1989)*; *39 Fed.Reg. 26061 (July 16, 1974)*; *Wat. Code, § 13377*.)

(7) Defendants and Dynegy suggest that, even if this is so, federal law does not prohibit resort to the Warren-Alquist Act's restrictive provisions for judicial review in cases where, as here, a proceeding for issuance or renewal of an NPDES permit coincides with a powerplant certification proceeding before the Energy Commission. Perhaps not. But under the Warren-Alquist Act itself, only "[t]he decisions of the [Energy] [C]ommission **[**96]** *on any application for certification of a site and related facility*" are subject to exclusive review in this court (*Pub. Resources Code, § 25531, subd. (a)*, italics added), and other courts are deprived of jurisdiction **[****43]** only of a "case or controversy concerning [a] matter which *was, or could have been*, determined in a proceeding before the commission" (*id.*, *subd. (c)*, italics added).

As we have seen, an NPDES permit decision by a regional water board is not an Energy Commission certification decision. Conversely, under California's EPA-approved NPDES permit program, neither commission certification proceedings, nor findings the commission may make in connection with such proceedings, can result in the issuance or renewal of an NPDES permit; only **[*523]** the State Water Board and the regional water boards may issue or renew such permits. Hence, a challenge to the issuance or renewal of an NPDES permit is not a "case or controversy concerning [a] matter which was, or could have been, determined" by the commission. (*Pub. Resources Code, § 25531, subd. (c)*.)

(8) Nothing in the Warren-Alquist Act states or implies that where a powerplant has concurrently sought both a renewal from the Regional Water Board of its NPDES wastewater discharge permit, and an Energy Commission certification to install additional generating capacity, the regional water board's decision, normally reviewable in the superior court pursuant to **[****44]** the Porter-Cologne Act, is suddenly subject to the exclusive-review provisions of the Warren-Alquist Act. We see no basis for reading such a requirement into the latter statute. [10]

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[10] Dynegy alludes to the portion of *Public Resources Code section 25531, subdivision (c)* which states that "[s]ubject to the right of judicial review [in this court] of decisions of the [Energy] [C]ommission, no court … has jurisdiction … to *stop or delay* the construction *or operation* of any thermal powerplant except to enforce compliance with … a decision of the commission." (Italics added.) Dynegy implies that because the superior court was thus deprived of authority to enforce any NPDES permit ruling it might make by "stop[ping] or delay[ing]" the wastewater discharge "operation[s]" of the MLPP, it must therefore have been deprived of all jurisdiction to entertain a challenge to the ruling. Like the Court of Appeal, we conclude we need not, and we do not, directly address whether the superior court had "stop or delay" authority, because no such stoppage or delay was sought or ordered in this case. But we do have serious doubts about Dynegy's premise. We have explained that under federal and California **[****45]** water quality laws, all industrial facilities, including thermal powerplants, that discharge wastewater into navigable water sources may only do so under the terms of valid NPDES permits. The State Water Board and the regional water boards have exclusive authority and responsibility to issue, renew, and administer such permits, and a powerplant certification by the Energy Commission cannot operate "in lieu" (*Pub. Resources Code, § 25500*) of a properly issued, federally required NPDES permit. Review of a decision of the State Water Board or a regional water board is by mandamus in the superior court, which court, upon proper evidence and findings, may command the agency to "set aside [its] order or decision," and direct the agency "to take such further action as is specially enjoined upon it by law." (*Code Civ. Proc., § 1094.5, subd. (f)*.) Of course, the agency's compliance with such an order withdraws the federal and state legal authority for the plant's wastewater discharge "operation[s]." Moreover, if the State Water Board or a regional water board perceives a "threatened or continuing" violation of

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[*676]** Defendants and Dynegy stress that the purposes of the Warren-Alquist Act, including its "one stop" permit process and its provision for exclusive judicial review, are to **[**97]** consolidate the state's regulation of electrical generation and transmission facilities, and to expedite the operative effect of powerplant certifications by the Energy Commission. (See, e.g., *Pub. Resources Code, § 25006*; *County of Sonoma v. State Energy Resources Conservation etc. Com. (1985) 40 Cal.3d 361, 368 [220 Cal. Rptr. 114, 708 P.2d 693]*; *Public Utilities Com. v. Energy Resources Conservation & Dev. Com. (1984) 150 Cal. App. 3d 437, 453 [197 Cal. Rptr. 866]*.) Superior court jurisdiction in this case, they urge, defeats these statutory aims.

However, as we have explained, a federal law, the CWA, requires all industrial facilities, including thermal powerplants, that discharge wastewater into navigable water sources to have in effect unexpired NPDES permits authorizing such discharge. This requirement is independent of the Energy Commission's certification, under California law, of an application to locate, construct, or expand such a powerplant. As defendants and Dynegy concede, a state statute, the Porter-Cologne **[****48]** Act—specifically approved by the federal agency responsible for authorizing state administration of the CWA's requirements—assigns the issuance and renewal of NPDES permits exclusively to the State Water Board and the regional water boards. Although the Energy Commission must make a general finding, before issuing a powerplant certification, that the project conforms to all applicable local, regional, state, and federal laws, such a certification cannot contravene, subsume, encompass, supersede, substitute for, or operate in lieu of, the federally required NPDES permit.

The Porter-Cologne Act provides that review of NPDES permit decisions by the State Water Board or the regional water boards is in the superior court. No provision of either the Porter-Cologne Act or the Warren-Alquist Act states or suggests that these review provisions are altered simply because an NPDES permit issuance or renewal proceeding took place concurrently, or in connection, with a certification proceeding for the same powerplant. Hence, we have no basis to conclude that the purposes of the Warren-Alquist Act are impaired by recognizing superior court jurisdiction under the circumstances of this case.

For **[****49]** these reasons, we conclude that the superior court had subject matter jurisdiction of the instant mandamus proceeding.

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the permit provisions, it may require the Attorney General to seek direct injunctive **[****46]** relief against the violator. (*Wat. Code, § 13386*.)

Construed literally, the no "stop or delay" provision of *Public Resources Code section 25531, subdivision (c)*, would entirely swallow these provisions as applied to thermal powerplants; it would *never* allow a superior court to prevent the illegal wastewater activities of such a plant "except to enforce compliance with … a decision of *the* [*Energy*] [*C*]*ommission*"—an agency which, *even in connection with a powerplant certification*, has no direct authority over wastewater discharge violations, or the issuance, renewal, or administration of NPDES permits.

Fairly read in context, and properly harmonized with the requirements of federal and state water quality laws, the cited portion of *Public Resources Code section 25531, subdivision (c)*, like the rest of the section, operates only with respect to "decisions" *properly within the purview of the Energy Commission*, i.e., powerplant certifications. The subdivision precludes any court except this court from "stop[ping] or delay[ing]" the "operation" of a thermal powerplant insofar as such "operation" is authorized by the Energy Commission's decision, under the Warren-Alquist Act, to certify **[****47]** the plant's siting, construction, or expansion.

[*677]** B. *Interlocutory remand*.

Plaintiff urges that under section 1094.5, once the trial court found insufficient evidence to support the Regional Water Board's finding No. 48 (the BTA finding), the court had no choice but to render a final mandamus judgment directing the board to set aside its Order No. 00-041, renewing the MLPP's wastewater discharge permit. The court thus erred, plaintiff insists, when it instead (1) retained jurisdiction pending an interlocutory remand to the board for reconsideration of finding No. 48; (2) allowed the board to take new evidence and reaffirm its finding; then (3) denied mandamus relief after concluding that the administrative record, as augmented on remand, supported the board's determination. We conclude that no error occurred.

Plaintiff bases its argument on two portions of section 1094.5—subdivisions (e) and (f). Subdivision (e) provides that "[w]here the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before [the **[****50]** agency], it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case." Subdivision (f) states that "[t]he court shall enter judgment either commanding respondent [(the agency)] to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment … ."

Read together, plaintiff asserts, these provisions establish that the court (1) may order the administrative agency to reconsider its decision only as part of a final judgment **[**98]** granting a writ of mandate; (2) in such event, must specify that the entire "case" be reconsidered; and (3) may allow the agency, upon reconsideration, to accept and consider new evidence *only* when such evidence (a) could not earlier have been produced before the agency with due diligence or (b) was improperly excluded at the initial administrative hearing.

As plaintiff **[****51]** observes, defendants and Dynegy do not claim that the evidence the court found wanting was unavailable at the time of the Regional Water Board's proceedings, or that the agency improperly rejected an attempt to present such evidence. Hence, plaintiff urges, upon concluding that the board's BTA finding was not supported by the weight of the evidence then contained in the administrative record, the trial court was required to enter a final judgment granting the requested writ of mandamus and overturning the agency's permit renewal order in its entirety.
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(9) We conclude, however, that, properly understood and interpreted, subdivisions (e) and (f) of section 1094.5 impose no absolute bar on the use of prejudgment limited remand procedures such as the one employed here. Moreover, when a court has properly remanded for agency reconsideration on grounds that all, or part, of the original administrative decision has insufficient support in the record developed before the agency, the statute does not preclude the agency from accepting and considering additional evidence to fill the gap the court has identified.

(10) To determine the meaning of these provisions, we must first examine their words, which **[****52]** have remained unchanged since *section 1094.5* was adopted over six decades ago. (Stats. 1945, ch. 868, § 1, pp. 1636–1637.) The statutory language simply does not support the arbitrary and restrictive **[***678]** **[***679]** construction plaintiff advocates. On its face, *subdivision (f) of section 1094.5* indicates the form of *final judgment* the court may issue in an administrative mandamus action. Unremarkably, *subdivision (f)* states that the last step the trial court shall take in the proceeding is either to command the agency to set aside its decision, or to deny the writ. The trial court here followed that mandate; it issued a final judgment denying a writ of mandamus.

As defendants and Dynegy observe, nothing in *subdivision (f) of section 1094.5* purports to limit procedures the court may appropriately employ *before* it renders a final judgment. A more general statute covers that subject. *Code of Civil Procedure section 187*, adopted in 1872, broadly provides that whenever the Constitution or a statute confers jurisdiction on a court, "all the means necessary to carry it [(that jurisdiction)] into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding *be not specifically* ***[****53]*** *pointed out* by this Code or the statute, *any suitable process or mode of proceeding may be adopted* which may appear most conformable to the spirit of this Code." (Italics added.)

Subdivision (f) of section 1094.5 does not "specifically point[] out" the prejudgment procedures to be followed in an administrative mandamus action, nor do its terms prohibit the court from "adopt[ing]" a "suitable process or mode of proceeding" when addressing the issues presented. (*Code Civ. Proc., § 187*.) Hence, we find nothing in *subdivision (f)*'s language that suggests an intent to limit or repeal *Code of Civil Procedure section 187* for purposes of administrative mandamus actions. (See, e.g., *Ste. Marie v. Riverside County Regional Park & Open-Space Dist., supra, 46 Cal.4th 282, 296* [implied repeals disfavored].)

Extrinsic aids to interpretation do not persuade us otherwise. The limited available legislative history of *section 1094.5* does not suggest the Legislature's intent to limit the application of *Code of Civil Procedure section 187*, **[*527]** as it might appropriately apply in administrative mandamus actions, or to categorically confine the mandamus court only to postjudgment remands. (See, e.g., Cal. Dept. **[****54]** of Justice, Inter-Departmental Communication to Governor re Sen. Bill No. 736 (1945 Reg. Sess.) June 7, 1945, pp. 1–3; Legis. Counsel, Rep. on Sen. Bill No. 736 (1945 Reg. Sess.) June 9, 1945, pp. 1–2.)

Decisions have long expressed the assumption that the court in a mandamus action has **[**99]** inherent power, in proper circumstances, to remand to the agency for further proceedings prior to the entry of a final judgment. (See, e.g., *No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 81 [118 Cal. Rptr. 34, 529 P.2d 66]* (*No Oil*) [professing no "question" of trial court's power in traditional mandamus to order interlocutory remand to agency for clarification of findings]; *Keeler v. Superior Court (1956) 46 Cal.2d 596, 600 [297 P.2d 967]* [noting there is "no question" of a court's power under *Code Civ. Proc., § 187* to remand, prior to a final mandamus judgment, for further necessary and appropriate agency proceedings; "aside from" court's power under *§ 1094.5* to enter judgment remanding for consideration of evidence not available, or improperly excluded, in original agency proceeding, "such a power to remand" prior to judgment "also exists under the inherent powers of the court"]; *Garcia v. California Emp. Stab. Com. (1945) 71 Cal. App. 2d 107, 114 [161 P.2d 972]* **[****55]** [in original mandamus action, Court of Appeal, without

issuing final judgment, remanded for further agency proceedings after finding that evidence in administrative record was insufficient to support denial of unemployment **[***680]** benefits].) In *Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist. (1986) 185 Cal. App. 3d 996 [230 Cal. Rptr. 225]* (*Rapid Transit Advocates*), an administrative mandamus action governed by *section 1094.5*, the Court of Appeal, citing *No Oil* and *Keeler*, expressly upheld the trial court's order continuing the trial and remanding for clarification of the agency's findings. (*Rapid Transit Advocates, supra, at pp. 1002–1003*.)

We perceive no compelling reason why the Legislature would have wished to categorically bar interlocutory remands in administrative mandamus actions. Though its arguments have varied somewhat, we understand plaintiff to raise two basic objections to such a procedure.

First, plaintiff insists, the purpose of an administrative mandamus suit is to determine, once and for all, whether an agency has acted "without, or in excess of jurisdiction," in that the agency "has not proceeded in the manner required by law, the order or decision is not supported by the findings, **[****56]** or the findings are not supported by the evidence." (*§ 1094.5, subd. (b)*.) If the agency's action, as originally presented for review, is found defective by these standards, plaintiff urges, that action must simply be set aside, and the administrative process—assuming further proceedings are appropriate at all—must begin anew. Plaintiff contends the instant trial court violated these **[*528]** principles by withholding final judgment on the validity of the Regional Water Board's NPDES permit determination while allowing the agency to reconsider, and justify, a single finding the court had deemed insufficiently supported.

Second, plaintiff seems to suggest, a limited prejudgment remand raises the danger of a sham proceeding, in which interested parties are denied the opportunity to argue or present evidence, and the agency simply concocts a post hoc rationalization for the decision it has already made. Such concerns appear paramount in two Court of Appeal decisions that expressly disagreed with *Rapid Transit Advocates, supra, 185 Cal. App. 3d 996*, and broadly asserted that *section 1094.5* bars interlocutory, as opposed to postjudgment, remands in administrative mandamus proceedings. (*Sierra Club v. Contra Costa County (1992) 10 Cal.App.4th 1212, 1220–1222 [13 Cal. Rptr. 2d 182]*; **[****57]** *Resource Defense Fund v. Local Agency Formation Com. (1987) 191 Cal. App. 3d 886, 898–900 [236 Cal. Rptr. 794]* (*Resource Defense Fund*).)

(11) But considerations of fairness and proper agency decisionmaking do not justify the absolute prohibition for which plaintiff argues. Significantly, *subdivision (f) of section 1094.5* provides that, when granting mandamus relief, the court may "order the reconsideration of the case *in the light of the court's opinion and judgment*." (Italics added.) This clearly implies that, in the final judgment itself, the court may direct the agency's attention to specific portions of its decision that need attention, and need not necessarily require the agency to reconsider, de novo, the entirety of its prior action. That being so, no reason appears why, in appropriate circumstances, the same objective **[**100]** cannot be accomplished by a remand prior to judgment. Indeed, such a device, properly employed, promotes efficiency and expedition by allowing the court to retain jurisdiction in the already pending mandamus proceeding, thereby eliminating the potential need for a new mandamus action to review the agency's decision on reconsideration.

(12) We agree with plaintiff, and with the courts in *Sierra **[****58]** Club v. Contra Costa County* and *Resource Defense Fund*, that any agency reconsideration must fully comport with due

process, and may not simply allow the agency to rubberstamp **[***681]** its prior unsupported decision. Indeed, the judgments in *Sierra Club v. Contra Costa County* and *Resource Defense Fund* could have been based solely on the conclusions of the Courts of Appeal in those cases that the particular agency decisions on remand suffered from such flaws. [11]
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However, a limited interlocutory remand raises no greater inherent danger in these regards than does a final judgment ordering limited reconsideration, as expressly authorized by *subdivision (f) of section 1094.5*. No fundamental concerns about fair, sound, and complete agency decisionmaking impose the need for a categorical bar on such prejudgment remands.

(13) Accordingly, we are persuaded that *subdivision (f) of section 1094.5* imposes no blanket prohibition on the appropriate use, in an administrative mandamus action, of a prejudgment remand for agency reconsideration of one or more issues pertinent to the agency's decision. We reject plaintiff's contrary argument. To the extent the Courts of Appeal in *Resource Defense Fund* and *Sierra Club v. Contra Costa County* concluded otherwise, we will disapprove those decisions.

We are further convinced that the interlocutory remand in this case was not employed, or conducted, improperly. Under the circumstances presented, the trial court's choice to utilize this device was eminently practical. Plaintiff's mandamus petition challenged only a single, discrete facet of the lengthy and complex NPDES permit order—the order's treatment of the BTA issue. **[****61]** The trial court ultimately concluded that a single finding on this issue—finding No. 48—lacked evidentiary and analytic support. Confronted with this situation, the trial court reasonably concluded it need not, and should not, enter a final judgment vacating the entire permit pending further consideration of that issue.

Such a judgment, even if it included an order narrowing the issues, would have required a new permit proceeding and, most likely, a new mandamus action to review the resulting decision. In the interim, the MLPP's authority to use the cooling system essential to its electrical generation operations **[*530]** would be cast in **[***682]** doubt. Instead, the court reasonably decided it could achieve the necessary further examination of the BTA issue by postponing a final

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[11] Thus, in *Resource Defense Fund*, a case involving the California Environmental Quality Act (CEQA), the trial court ordered an interlocutory remand to allow a city council to supply *missing* findings in support of an annexation approval. The order simply provided that the court would enter judgment after the council's action, or the expiration of 60 days. The Court of Appeal noted that this sparse and abbreviated procedure raised "serious questions of due process: it effectively precluded any possible challenge to the sufficiency of the evidence to support the new findings" and "fostered a *post hoc* rationalization … ." (*Resource Defense Fund, supra, 191 Cal. App. 3d 886, 900*.) In *Sierra Club v. Contra Costa County*, the trial court **[****59]** determined that an environmental impact report (EIR), required by CEQA, was inadequate because it failed to fully analyze, and the county board of supervisors had thus failed to fully consider, less environmentally damaging alternatives to a massive residential development approved by the board. The court nonetheless denied the mandamus relief requested by opponents of the development, " 'with the exception that the County should administratively make further findings on alternatives.' " (*Sierra Club v. Contra Costa County, supra, 10 Cal.App.4th 1212, 1216*.) The board then adopted supplemental findings. Promptly thereafter, the court found the EIR, as so augmented, to be " 'legally adequate in all respects,' " whereupon the court discharged the alternative writ and entered judgment for the county. (*Id., at pp. 1216–1217*.) Besides finding that this procedure did not satisfy the specific requirements of CEQA, the Court of Appeal stressed that, as was the case in *Resource Defense Fund*, the trial court's procedure raised serious questions of due process by insulating the board's supplemental findings "from any meaningful challenge." (*Sierra Club v. Contra Costa County, supra, at p. 1221*.) **[****60]**

judgment pending **[**101]** the Regional Water Board's focused reconsideration of that matter. The court thus properly exercised its inherent authority to adopt a "suitable process or mode of proceeding" in aid of its jurisdiction. (*Code Civ. Proc., § 187*.)

Moreover, unlike the procedures at issue in *Resource Defense Fund* and *Sierra Club v. Contra Costa County*, the instant remand was not unfair, and it produced no mere post hoc rationalization **[****62]** by the agency. On the contrary, in compliance with the trial court's directive, the Regional Water Board engaged in a full reconsideration of the BTA issue, and gave all interested parties, including plaintiff, a noticed opportunity to appear and to present evidence, briefing, and argument pertinent to the BTA determination.

Nor was the Regional Water Board's finding on remand insulated from meaningful review. Plaintiff was able to pursue, and did pursue, its statutory right to seek an administrative appeal of the board's BTA finding on remand, and then was allowed, in the resumed judicial proceedings, a full opportunity to dispute the foundation for that finding.

For all these reasons, we find no error in the trial court's use of an interlocutory remand to resolve perceived deficiencies in the Regional Water Board's BTA finding.

We similarly reject plaintiff's argument that *subdivision (e) of section 1094.5* precluded the Regional Water Board from accepting and considering new evidence on remand absent a showing that such evidence could not have been produced at the original administrative proceeding, or was improperly excluded therefrom. We do not read *subdivision (e)* to impose such **[****63]** a limitation under the circumstances presented here.

As explained above, *subdivision (e) of section 1094.5* provides that "[w]here the court finds that there *is relevant evidence*" (italics added) which could not with reasonable diligence have been produced, or was improperly excluded, in the administrative proceeding, the court may remand the case "to be reconsidered in the light of *that evidence*." (Italics added.) To the extent this language is ambiguous, plaintiff extracts the most radical interpretation—that when a court, for whatever reason, directs or authorizes the agency to reconsider its prior decision, in whole or in part, the agency is always confined to the evidence it previously received, with the exception of evidence the court determines was unavailable, or wrongly excluded, in the original administrative proceeding.

But the precise circumstances of this case illustrate why plaintiff's construction makes little sense. The instant trial court found that the Regional **[*531]** Water Board's finding No. 48 was *not sufficiently supported* by the original administrative record. The only possible cure for such a deficiency is the agency's reconsideration of its decision *on the basis of additional* ***[****64]*** *evidence*. Plaintiff's construction of *subdivision (e) of section 1094.5* would categorically preclude the court, except in narrow circumstances, from authorizing the agency to reach a better considered and better supported result *on a sufficient record*. Unless those narrow exceptions applied, any reconsideration at all would thus simply be futile; the very flaw the court had found could not be remedied.

Yet *section 1094.5* contains no other indication that the Legislature intended such a constraint on the scope of an agency reconsideration directed or authorized by the court. Indeed, *subdivision (f)* broadly provides that when the court directs the agency decision to be set aside,

it "may order the reconsideration of the case in the **[***683]** light of the court's opinion and judgment … but the judgment shall not limit or control in any way the discretion legally vested in the [agency]." The implication is plain that if, as here, the court finds the administrative record *insufficient* to support the original agency determination, it may order reconsideration *in the light of that judicial finding*—i.e., a reconsideration in which the agency may entertain all the additional evidence necessary **[****65]** to support its new decision.

Moreover, had the instant trial court simply vacated the Regional Water Board's issuance of the NPDES permit in this case, the MLPP's owner could, should, and would simply have commenced a new permit proceeding before the board. Plaintiff does not suggest that, in such a new proceeding, the **[**102]** board would be limited to the evidence it had considered before, plus only previously unavailable or improperly excluded evidence. On the contrary, the board would have been empowered to receive and consider, de novo, all evidence pertinent to its decision whether to issue the requested permit. Accordingly, there is no reason to conclude the board lacks such authority when directed or ordered by the court to reconsider an insufficiently supported decision.

Albeit with little analysis, a number of decisions have expressed the unremarkable principle that, when an agency determination is set aside for *insufficiency of the evidence* in the administrative record, the proper course is to remand to the agency for further appropriate proceedings—presumably the agency's consideration of additional evidence as the basis for its decision on reconsideration. (See, e.g., *Fascination, Inc. v. Hoover (1952) 39 Cal.2d 260, 268 [246 P.2d 656]*; **[****66]** *La Prade v. Department of Water & Power (1945) 27 Cal.2d 47, 53 [162 P.2d 13]*; *Carlton v. Department of Motor Vehicles (1988) 203 Cal. App. 3d 1428, 1434 [250 Cal. Rptr. 809]*.)
[*532]

(14) Accordingly, we are persuaded that *section 1094.5, subdivision (e)* is not intended to prevent the court, upon finding that the administrative record itself *lacks* evidence sufficient to support the agency's decision, from remanding for consideration of additional evidence. A more reasonable interpretation, which fully honors the statutory language, is that *subdivision (e)* simply prevents a mandamus petitioner from challenging an agency decision that *is* supported by the administrative record on the basis of evidence, presented to the court, which could have been, but was not, presented to the administrative body.

This interpretation adheres most closely to the literal words of *section 1094.5, subdivision (e)*. As noted, the subdivision provides that when the court determines there "is relevant evidence" meeting the statutory criteria, it may remand to the agency for consideration of "that evidence," or, in cases where the court is authorized to weigh the evidence independently, the court may "admit *the evidence*" (italics added) in the judicial proceeding **[****67]** itself. Read most naturally, this language contemplates a situation in which a party to the mandamus action has actually proffered to the court specific evidence not included in the administrative record. *Subdivision (e)* provides that the court may remand for agency consideration of *such evidence*, or may consider the evidence itself, only if *that evidence* could not reasonably have been presented, or was improperly excluded, at the administrative proceeding.

(15) Thus, *subdivision (e) of section 1094.5* merely confirms that while, in most cases, the court is limited to the face of the administrative record in deciding whether the agency's decision is valid as it stands, in fairness, the court may consider, or may permit the agency to consider, extra-record evidence for a contrary outcome, if persuaded that such evidence was not **[***684]** available, or was improperly excluded, at the original agency proceeding. (See *No Oil, supra, 13 Cal.3d 68, 79, fn. 6* [in administrative mandamus action, "the court reviews the administrative record, receiving additional evidence only if that evidence was unavailable at the time of the administrative hearing, or improperly excluded from the record"].)

The limited available **[****68]** legislative history of Senate Bill No. 736 (1945 Reg. Sess.), in which *section 1094.5* was adopted, is consistent with this view. The Department of Justice advised the Governor that the bill was designed to settle areas of confusion which had arisen about judicial review of administrative decisions, and would, as "a most important consideration, … permit the court to remand administrative proceedings for further consideration by the administrative agency in cases where relevant evidence was not available or was wrongfully excluded from the administrative hearings *so that the administrative agency, rather than the court, may finally determine the whole proceeding and the court may in turn actually review the administrative* ***[*533]*** *action. The latter consideration accords both to the administrative agency and the reviewing court their primary functions and the opportunity of carrying out the legislative intent in authorizing the administrative agency to conduct and determine its own proceedings.*" (Cal. **[**103]** Dept. of Justice, Inter-Departmental Communication to Governor re Sen. Bill No. 736 (1945 Reg. Sess.) June 7, 1945, p. 1, italics added.)

This explanation indicates an intent to provide that **[****69]** where the reviewing court learns of evidence the agency should have considered, but did not or could not do so for reasons beyond the control of the participants in the administrative proceeding, the court may give the agency, the appropriate primary decision maker, the opportunity to include this evidence in its determination, subject to the court's limited review of the resulting administrative record for abuse of discretion. Nothing suggests, on the other hand, that the court is powerless to allow reconsideration by the agency, with such additional evidence as the agency may find appropriate, when the court finds, in the first instance, that there is not enough evidence in the original administrative record to support the agency's decision.

The decisional law also generally supports our conclusion. Courts have most frequently applied *subdivision (e) of section 1094.5* simply to determine whether and when an agency decision may be challenged on mandamus with evidence outside the administrative record. [12] On the

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[12] E.g., *Sierra Club v. California Coastal Com. (2005) 35 Cal.4th 839, 863 [28 Cal. Rptr. 3d 316, 111 P.3d 294]* (in administrative mandamus action challenging coastal zone permit, evidence proffered by mandamus petitioner, which was not part of administrative record, that coastal commission members did not personally review final EIR before granting permit, could not be considered); *State of California v. Superior Court (1974) 12 Cal.3d 237, 257 [115 Cal.Rptr. 497, 524 P.2d 1281]* (in administrative mandamus action challenging coastal zone permit, mandamus petitioner was not entitled to propound interrogatories to determine whether coastal commission denied fair hearing by receiving, and relying upon, secret prehearing testimony by commission staff); *Eureka Citizens for Responsible Government v. City of Eureka (2007) 147 Cal.App.4th 357, 366–367 [54 Cal. Rptr. 3d 485]* (in administrative mandamus action by neighborhood organization challenging city's allowance of nonconforming school playground, court could not consider mandamus petitioner's proffer of correspondence to and from city officials, not included in administrative record, as evidence of school's " 'ongoing land use **[****71]** violations' "); *Pomona Valley Hospital Medical Center v. Superior Court (1997) 55 Cal.App.4th 93, 101–109 [63 Cal. Rptr. 2d 743]* (under *§ 1094.5, subd. (e)*,

other **[***685]** hand, our research has disclosed only two decisions holding or suggesting that section 1094.5 **[*534]** precludes a remand for new evidence when, as happened here, the trial court **[****70]** finds that the existing administrative record simply fails to support the agency's original determination.

Thus, in Ashford v. Culver City Unified School Dist. (2005) 130 Cal.App.4th 344 [29 **[**104]** Cal. Rptr. 3d 728] (*Ashford*), the Court of Appeal held that except under the circumstances specifically set forth in subdivision (e) of section 1094.5, there was no ground for a remand to give a public employer a second chance to provide additional evidence in support of the original, inadequately founded, administrative decision to terminate an employee. (Ashford, supra, at pp. 350–354.) Similarly, in Newman v. State Personnel Bd. (1992) 10 Cal.App.4th 41 [12 Cal. Rptr. 2d 601] (*Newman*), the Court of Appeal concluded that the trial court erred when, after finding insufficient evidence in the administrative record to support the medical termination of a California Highway Patrol (CHP) employee, the court remanded for further proceedings. In the Court of Appeal's view, subdivision (f) of section 1094.5 prevented a remand for agency reconsideration when the agency had failed to reach a result substantially supported by the evidence. The Court of Appeal stated that the CHP had failed in its burden to prove grounds for the employee's dismissal, and was **[****74]** "not now entitled to a second opportunity to establish its case." (Newman, supra, at p. 49.)

Ashford and Newman illustrate circumstances in which due process principles entirely separate from section 1094.5 may preclude successive administrative proceedings. It may well be, as *Ashford* and *Newman* suggested, that there should be no second chance to muster sufficient evidence **[***686]** to impose administrative sanctions on a fundamental or vested right, such as the right against dismissal from tenured public employment except upon good cause.
[*535]

But we find no such categorical bar in section 1094.5 itself. The quasi-judicial administrative proceedings governed by this statute include a wide variety of matters, including applications for

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discovery to obtain evidence that administrative hearing was not fair is permissible only if evidence sought is relevant and could not, with reasonable diligence, have been presented in administrative proceeding); Fort Mojave Indian Tribe v. Department of Health Services (1995) 38 Cal.App.4th 1574, 1591–1598 [45 Cal. Rptr. 2d 822] (expression of expert opinion that postdates administrative proceeding is not truly "new" evidence of "emergent facts" which would justify remand, at mandamus petitioner's behest, under § 1094.5, subd. (e)); Elizabeth D. v. Zolin (1993) 21 Cal.App.4th 347, 355–357 [25 Cal. Rptr. 2d 852] (in administrative mandamus action challenging suspension of driver's license on ground of licensee's seizure disorder, mandamus petitioner could obtain remand to Department of Motor Vehicles (DMV) under § 1094.5, subd. (e) for consideration of physician's declaration, which postdated DMV hearing, that disorder was being well controlled by medication); Armondo v. Department of Motor Vehicles (1993) 15 Cal.App.4th 1174, 1180 [19 Cal. Rptr. 2d 399] (in mandamus action challenging administrative suspension of driver's **[****72]** license based on breathalyzer results, court properly excluded, absent showing that § 1094.5, subd. (e) exception applied, petitioner's proffered evidence that local crime laboratory was not licensed to use particular breathalyzer model); Toyota of Visalia, Inc. v. New Motor Vehicle Bd. (1987) 188 Cal. App. 3d 872, 881–882 [233 Cal. Rptr. 708] (car dealer seeking mandamus review of administrative discipline could introduce evidence outside administrative record on issue of appropriate penalty only if such evidence could not, with reasonable diligence, have been presented in administrative proceeding); Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 596–597 [155 Cal. Rptr. 63] (administrative mandamus petitioner may introduce evidence beyond administrative record if such evidence relates to events that postdate agency proceeding); see also Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559, 564 [38 Cal. Rptr. 2d 139, 888 P.2d 1268] (evidence outside administrative record was not admissible in traditional mandamus action to determine, under Pub. Resources Code, § 21168.5, a provision of CEQA, whether the agency's decision constituted a " 'prejudicial abuse of discretion,' " either because the agency " '[did] not proceed[] in **[****73]** a manner required by law,' " or because its decision was not supported by " 'substantial evidence' ").

permits and licenses, that have nothing to do with disciplinary or punitive sanctions. Here, as plaintiff concedes, even if the instant trial court had vacated the MLPP's NPDES permit renewal for lack of evidence, the plant could, should, and would have begun anew the process for obtaining this permit, essential to the continuation of its electrical generation operations. In this new proceeding, the Regional Water Board could, should, and would have considered all evidence **[****75]** relevant to its permit decision, regardless of whether that evidence had been presented in the prior proceeding. No reason appears to construe *section 1094.5* to preclude such new evidence when the court, having found insufficient record support for the agency's decision, remands for reconsideration of that matter.

(16) In sum, *section 1094.5, subdivision (e)*, promotes orderly procedure, and the proper distinction between agency and judicial roles, by ensuring that, with rare exceptions, the court will review a quasi-judicial administrative decision on the record actually before the agency, not on the basis of evidence withheld from the agency and first presented to the reviewing court. But once the court has reviewed the administrative record, and has found it wanting, *section 1094.5* does not preclude the court from remanding for the agency's reconsideration in appropriate proceedings that allow the agency to fill the evidentiary gap. To the extent the analyses in *Ashford* and *Newman* are inconsistent with these conclusions, we will disapprove those decisions.

Here, the trial court found that the administrative record did not support one finding by the agency in support of its issuance of a **[****76]** permit essential to the permittee's operations. Hence, the court acted properly by remanding to the agency for additional evidence and analysis on this issue. No error occurred.

C. *"Best technology available" under CWA section 316(b).*

As indicated, finding No. 48 of the Regional Water Board's order issuing the MLPP's 2000 NPDES permit renewal addressed the requirement, under CWA section 316(b), that "the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." (*33 U.S.C. § 1326(b)*.) In this regard, the board determined that "[i]f the cost of implementing any alternative for achieving BTA is wholly disproportionate to the environmental benefits to be achieved, the Board may consider alternative **[**105]** methods to mitigate these adverse environmental impacts." The board further found that, though the MLPP's existing once-through cooling system would be modified and upgraded in certain respects to minimize adverse impacts on aquatic life, **[*536]** proposed alternatives to this basic system were "wholly disproportionate to the environmental benefits." After complying, on remand, with the superior court's **[****77]** directive to analyze the available technologies more closely, the board confirmed finding No. 48, and the superior court denied mandamus.

As we have noted, shortly before the superior court issued its final judgment, the EPA promulgated the Phase II regulations applying CWA section 316(b)'s BTA standard to *existing* electric powerplants. **[***687]** (*69 Fed.Reg., supra, p. 41576*; *40 C.F.R. § 125.90 et seq. (2011)*.) The Phase II regulations did not follow the approach of the Phase I regulations, which had required *new* powerplants either to adopt closed-cycle cooling systems or to achieve comparable environmental performance—i.e., up to 98 percent reductions in impingement and

entrainment mortality relative to typical once-through systems. (*69 Fed.Reg., supra, pp. 41576, 41601, 41605*.) The EPA declined to impose such a stringent requirement on existing powerplants because it concluded that conversion to closed-cycle systems was impossible or economically impracticable for many existing facilities, that such conversions could have adverse impacts on the environment and on the plants' production and consumption of energy, and that other, less costly technologies could approach the environmental benefits **[****78]** of closed-cycle systems. (*Id., at p. 41605*.)

Instead, therefore, the Phase II regulations set national performance standards requiring an existing facility to reduce impingement and entrainment mortality rates by 60 to 95 percent compared to the rates estimated to arise from a typical once-through system at the site. (*40 C.F.R. suspended §§ 125.93*, *125.94(b)(1)*, *(2) (2011)*.) The regulations provided alternative means of achieving compliance, based on a range of available technologies the EPA had determined were "commercially available and economically practicable." (*69 Fed.Reg., supra, pp. 41576, 41602*.)

The Phase II regulations also allowed a powerplant to seek and receive a site-specific variance from the standards. Such a variance could be obtained by establishing that the plant's costs of literal compliance would be "significantly greater" than (1) the costs the EPA had considered in setting the performance standards or (2) "the benefits of complying" with the standards. (*40 C.F.R. suspended § 125.94(a)(5)(i)*, *(ii) (2011)*.) If a variance was granted, the plant would be required to employ remedial measures that yielded results "as close as practicable to the applicable **[****79]** performance standards." (*Ibid.*)

While the instant appeal was pending, the Second Circuit addressed the Phase II regulations in *Riverkeeper II*. The federal court held that while section 316(b) of the CWA allows consideration of extreme forms of economic burden or unfeasibility, the Phase II regulations were invalid under **[*537]** section 316(b) insofar as, among other things, they determined BTA, or allowed such a site-specific determination, based on mere cost-benefit analysis—i.e., a simple comparison between the expense of a particular cooling system technology and its expected environmental benefits. (*Riverkeeper II, supra, 475 F.3d 83, 98–105, 114–115*.) Nonetheless, the Court of Appeal in this case subsequently upheld the Regional Water Board's "wholly disproportionate" determination, concluding that it was not foreclosed by *Riverkeeper II*.

On review in this court, plaintiff, relying heavily on *Riverkeeper II*, renewed its argument that the Regional Water Board had employed a cost-benefit analysis forbidden by CWA section 316(b). At the time we granted review, petitions for certiorari were pending in *Riverkeeper II*. The United States Supreme Court thereafter granted certiorari and rendered **[****80]** its decision in *Entergy Corp. Entergy Corp.* reversed *Riverkeeper II*, unequivocally holding that "the EPA *permissibly* relied on cost-benefit analysis in setting the national performance standards and in providing for cost-benefit variances from those standards as part of the Phase II regulations. The Court of Appeals' reliance in part on the agency's use of cost-benefit **[**106]** analysis in invalidating the site-specific cost-benefit variance provision [citation] **[***688]** was therefore in error, as was its remand of the national performance standards for clarification of whether cost-benefit analysis was impermissibly used [citation]." (*Entergy Corp, supra, 556 U.S. 208, 226 [129 S. Ct. 1498, 1510]*, italics added.)

In our view, this holding clearly disposes of plaintiff's general claim that CWA section 316(b) prohibited the Regional Water Board from premising its BTA finding on a comparison of costs and benefits. Though the Regional Water Board's 2000 decision to renew the MLPP's NPDES permit preceded the Phase II regulations, and was not based upon them, there is no reason to assume the Regional Water Board, using its "best professional judgment" in the preregulatory era, was forbidden to apply a form **[****81]** of analysis the United States Supreme Court has determined was properly employed in subsequent regulations interpreting the statute at issue.

Moreover, a portion of the majority's opinion in *Entergy Corp.*, though dictum, undermines plaintiff's further contention that the particular cost-benefit standard employed by the Regional Water Board—i.e., whether the costs of alternatives to the MLPP's once-through cooling system were "wholly disproportionate" to the expected environmental benefits—was improper.

In his concurring and dissenting opinion in *Entergy Corp.*, Justice Breyer had asserted that, while he agreed some form of cost-benefit analysis was **[*538]** permissible under CWA section 316(b), the EPA had failed to explain why, in the Phase II regulations, it had abandoned its traditional "wholly disproportionate" standard in favor of one allowing site-specific variances where the costs of compliance were merely " 'significantly greater' " than the anticipated benefits to the environment. (*Entergy Corp., supra, 556 U.S. 208, 236 [129 S. Ct. 1498, 1515]* (conc. & dis. opn. of Breyer, J.).)

In response, the majority noted that the issue raised by Justice Breyer had no bearing on the basic permissibility **[****82]** of cost-benefit analysis, "the only question presented here." Nonetheless, the majority remarked, "It seems to us … that the EPA's explanation was ample. [The EPA] explained that the 'wholly out of proportion' standard was inappropriate for the existing facilities subject to the Phase II rules because those facilities lack 'the greater flexibility available to new facilities for selecting the location of their intakes and installing technologies at lower costs relative to the costs associated with retrofitting existing facilities,' and because 'economically impracticable impacts on energy prices, production costs, and energy production … could occur if large numbers of Phase II existing facilities incurred costs that were more than "significantly greater" than but not "wholly out of proportion" to the costs in the EPA's record.' [Citation.]" (*Entergy Corp., supra, 556 U.S. 208, 222, fn. 8 [129 S. Ct. 1498, 1510, fn. 8]*.)

(17) The clear implication is that the "wholly disproportionate" standard of cost-benefit analysis—the very standard employed by the Regional Water Board in this case—is *more stringent* than section 316(b) of the CWA requires for existing powerplants such as **[****83]** the MLPP. Rather, the *Entergy Corp.* majority suggested, the EPA was free, having "ampl[y]" explained and justified its choice, to select for such facilities a more lenient "significantly greater" standard of economic and environmental practicality. Under these circumstances, we discern no basis to hold that the board erred by basing its BTA determination on a finding that the costs of alternative cooling technologies for the MLPP were "wholly disproportionate" to the anticipated environmental benefits. We conclude **[***689]** that the board's use of this standard was proper. [13]

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[13] Following the *Riverkeeper II* decision, the EPA withdrew the Phase II regulations (*72 Fed.Reg. 37107–37109 (July 9, 2007)*), and they have not been reissued. We have taken judicial notice that in May 2010, seeking to fill the regulatory vacuum, the State Water Board adopted a Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling (2010 Power Plant Cooling Policy). Under this policy, the State Water Board, rather than the regional water boards, will

[*539]

[107] DISPOSITION**

The Court of Appeal's judgment is affirmed. To the extent the Court of Appeal decisions in *Ashford v. Culver City Unified School Dist., supra, 130 Cal.App.4th 344*, *Sierra Club v. Contra Costa County, supra, 10 Cal.App.4th 1212*, *Newman v. State Personnel Bd., supra, 10 Cal.App.4th 41*, and *Resource Defense Fund v. Local Agency Formation Com., supra, 191 Cal. App. 3d 886*, are inconsistent with the views expressed herein, those decisions are disapproved.

Cantil-Sakauye, C. J., Kennard, J., Werdegar, J., Chin, J., Corrigan, J., and Kitching, J.,* concurred.

Concur by: Werdegar

Concur

WERDEGAR, J., Concurring.—I fully concur in the majority opinion. I write separately only to point out a limitation on the scope of our decision today.

The majority correctly holds that *Code of Civil Procedure section 1094.5*, governing the procedure to be followed in adjudicating petitions for writ of administrative mandate, does not preclude a trial court from ordering an interlocutory remand requiring agency reconsideration of one or more specific findings or decisions; nor is the agency precluded, under this statute, from considering new evidence on such a remand. (Maj. opn., *ante*, at pp. 529–530.) Because the remand order at issue in this case related to compliance with a provision of the federal Clean Water Act of 1977 (*33 U.S.C. § 1326(b)*) rather than to compliance with the California Environmental Quality Act (CEQA; *Pub. Resources Code, § 21000 et seq.*), the majority has no occasion here to consider whether a trial court may, similarly, order remand for reconsideration of an agency decision for compliance with CEQA without issuing a writ of mandate.

Public Resources Code section 21168.9, subdivision (a) **[****86]** provides that if a court finds a public agency's finding or decision to have been made in violation of CEQA, "the court shall enter an order that includes one or more of the following" mandates. The statute specifically outlines the scope of the mandate to be issued, including as necessary that the agency void its

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issue all NPDES permits to affected powerplants. Thermal powerplants with once-through cooling systems will be required, by specified **[****84]** compliance dates, to reduce intake flow rates to mandated levels, or to adopt other operational and/or structural controls to achieve commensurate reductions in impingement and entrainment mortality. In the interim, affected plants must adopt mitigating measures to control impingement and entrainment damage.

Several powerplant owners, including Dynegy, have filed a petition for mandate challenging the 2010 Power Plant Cooling Policy. (*Genon Energy, Inc. v. State Water Resources Control Board* (Super. Ct. Sacramento County, Oct. 27, 2010, No. 2010-80000701).)

* Associate Justice of the Court of Appeal, Second Appellate **[****85]** District, Division Three, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

findings **[*540]** and decisions, take any actions required to come into compliance with CEQA, and in the meantime suspend any part of the project at issue that might cause an adverse environmental effect. (Pub. Resources Code, § 21168.9, subd. (a)(1)–(3).) **[***690]** Balancing these commands with protections against an overbroad writ, the statute limits the order to "only those mandates which are necessary to achieve compliance with this division and only those specific project activities in noncompliance with this division," provided the noncomplying portion of the decision or finding is severable from the complying portion. (*Id.*, subd. (b).) The order is to be made by "peremptory writ of mandate," and the trial court is to retain jurisdiction "by way of a return to the peremptory writ" to ensure agency compliance. (*Ibid.*)

Consequently, while CEQA challenges are often brought through a petition **[****87]** for administrative mandate under *Code of Civil Procedure section 1094.5*, CEQA contains its own detailed and balanced remedial scheme, offering protections for both agencies and those challenging agency action under CEQA. I do not read the majority's analysis of the administrative mandate procedure in this non-CEQA case as speaking to the procedures to be followed when an agency's action is found to have violated CEQA.

Cantil-Sakauye, C. J., concurred.

End of Document

EXHIBIT 12

Vorse v. Sarasy

Court of Appeal of California, First Appellate District, Division Three

March 26, 1997, Decided

No. A070505.

Reporter
53 Cal. App. 4th 998 *; 62 Cal. Rptr. 2d 164 **; 1997 Cal. App. LEXIS 228 ***; 97 Cal. Daily Op. Service 2168; 97 Daily Journal DAR 4015

SCOTT VORSE, Plaintiff and Appellant, v. LEWIS SARASY, Defendant and Appellant.

Prior History: [*1]** APPEAL from the Superior Court of Marin County, Super. Ct. No. 148681. Beverly B. Savitt, Judge.

Disposition: The judgment is reversed, and the matter remanded to the trial court. Sarasy is awarded costs on appeal.

Case Summary

Procedural Posture

Appellant partner sought review of a judgment of the Superior Court of Marin County (California), which excluded the testimony of appellant's witness in his action against appellee co-partner concerning the existence of a valid partnership agreement.

Overview

Appellee co-partner brought an action against appellant partner in a dispute concerning the existence of a valid partnership agreement. At trial appellant presented a witness who was the alleged third party of the partnership agreement. He testified as to whether a partnership agreement had been effectuated between the parties. However, the testimony contained several confusing and conflicting statements. As a result, the trial court dismissed the witness because it believed that he was untruthful and instructed the jury not to consider his testimony. The jury returned a verdict in favor of appellee and appellant sought review. On review the court reversed. The court held that the trial court abused its discretion when it conclusively assessed the credibility of the witness and excluded his testimony. In so doing, the trial court had overstepped the jury's role as fact finder. The court also held that the trial court's actions were prejudicial to appellant. The trial court dismissed appellant's key witness on the pivotal issue of whether a partnership agreement existed. Thus, the dismissal of the witness constituted reversible error.

Outcome

The court reversed the judgment and remanded for further proceeding because the trial court had overstepped the jury's role as factfinder when it excluded the testimony of appellant's key witness.

Counsel: Patrick M. Macias and Bruce W. Blakely for Plaintiff and Appellant.

Bien & Summers and Elliot L. Bien for Defendant and Appellant.

Judges: Opinion by Corrigan, J., with Phelan, P. J., and Walker, J., concurring.

Opinion by: CORRIGAN

Opinion

[*1001] [166] CORRIGAN, J.**

INTRODUCTION

May a trial court strike a witness's live testimony under *Evidence Code section 352* [1] because the court concludes the witness is lying? No. Under all but the most limited circumstances, credibility of witnesses is a question of fact to be resolved by the jury. Here, the court invaded that province and exceeded the discretion granted under the code. Because the error was prejudicial, the judgment is reversed.

[*1002] *BACKGROUND*

[*2]** I. *THE DISPUTE*

This suit revolved around the acquisition of a business known as Dynatex. David Vorse [2] sued Lewis Sarasy, alleging various causes of action in tort and in contract stemming from Sarasy's purchase of Dynatex. [3] The complaint alleged that Vorse, Sarasy, and nonparty Donald Schmidt formed a partnership for the purpose of engaging in various business enterprises. The three subsequently decided to acquire Dynatex, with each partner acquiring an ownership interest. When Sarasy alone acquired Dynatex, Vorse sued for damages flowing from Sarasy's failure to acquire Dynatex on behalf of the partnership.

[*3]** Sarasy defended, arguing there was no agreement to jointly acquire Dynatex. Instead, Sarasy claimed the three men agreed only to broker Dynatex to a third party and to divide any resulting commissions. Sarasy presented evidence that they worked with a potential purchaser, Winfield Polytek, to raise funds for the acquisition. When the deal with Polytek failed, the three tried unsuccessfully to find other buyers. Ultimately, Sarasy purchased Dynatex with his own assets. The central issue at trial was whether Vorse, Sarasy, and Schmidt orally agreed to acquire and share in the equity of Dynatex.

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[1] Unless otherwise indicated, all statutory citations are to the Evidence Code.

[2] Scott Vorse was substituted as party plaintiff after David Vorse died in 1993. Unless otherwise indicated, our references to "Vorse" are to David Vorse, while our references to "plaintiff" are to Scott Vorse.

[3] The first amended complaint also alleged various causes of action against attorneys of the law firm Miller, Starr & Regalia; Dynatex; Barrie Regan, the president and principal shareholder of Dynatex; James Fusco and Richard Corbett, business associates of Sarasy; and Does 1-100. Only the claims against appellant, Lewis Sarasy, are before this court on appeal.

On December 31, 1991, after Vorse had filed suit but before trial, Schmidt signed a declaration faxed to him by Vorse's attorneys. The declaration, filed in connection with a discovery dispute, supported Vorse's interpretation of the partnership agreement: "David Vorse, Lewis Sarasy and I formed an oral partnership . . . in 1989 to engage in certain business ventures. One of these ventures was the acquisition of a high-tech company by the name of Dynatex Corporation . . . by the partnership. The partnership planned to form a corporation . . . in order to acquire the assets of Dynatex. Pursuant **[***4]** to our oral agreement, the partners were to be the shareholders in [the corporation]." According to the declaration, the law firm of Miller, Starr & Regalia was retained to complete the purchase on the partnership's behalf.

Schmidt was deposed in late 1994, three years after he had signed the declaration. In marked contrast to that document, Schmidt claimed there had **[*1003]** been *no* partnership agreement to acquire the assets of Dynatex and that he never believed Miller, Starr & Regalia represented him with regard to any such acquisition. Schmidt failed to produce certain documents concerning the dispute. He asserted attorney-client privilege in response to questions about his alleged attempts to engage counsel to sue Sarasy independently or with Vorse. [4]

At deposition, Schmidt acknowledged signing a declaration faxed to him by Vorse's attorneys in **[***5]** December 1991. However, he claimed he had just moved to Florida, "things were very chaotic," and "I don't recall **[**167]** reading it . . . ." As to the body of the declaration, Schmidt claimed, "None of this verbiage is something I wrote or said. It's language more akin to what David Vorse would write or say."

More importantly, Schmidt claimed the substance of the declaration "is not fact" and "is totally contrary, not just what I think it is now versus what I thought it was then, but to the facts as they really happened." In a second declaration, signed the day after his deposition, Schmidt said: "Mr. Vorse suggested that I could prevent the [Sarasy/Dynatex] transaction from closing by claiming to be a Sarasy partner excluded from the deal, although the three of us had never had any agreement about our respective ownership interests, if any, in any acquiring entity."

Regarding Dynatex itself, Schmidt claimed in his deposition, "Yes, we were going to try to acquire the assets of Dynatex but it wasn't necessarily the three of us. . . ." Asked whether he expected any compensation after Sarasy acquired Dynatex by himself, Schmidt replied: ". . . I felt it would have been very nice had Sarasy **[***6]** reimbursed me at least my expenses, which at that point were quite substantial, and something for my time and effort during those months when I was endeavoring to raise financing and, in fact, did raise an offer, period."

Finally, in a third declaration signed November 9, 1994, Schmidt explained that since December 1991 he had come to realize that ". . . Mr. Vorse had made substantial misrepresentations with regard to his role in the Dynatex transaction, had lied to me repeatedly over the years, had been abusing my friendship and trust, and was manipulating me with respect to whether or not Mr. Sarasy had done anything to warrant a lawsuit. . . . In addition, Mr. Vorse has candidly acknowledged that he, Mr. Sarasy and I did not have a partnership with respect to the Dynatex matter, but that this 'could be worked out' with respect to a lawsuit."

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[4] Following contentious discovery proceedings, Schmidt was ultimately ordered to produce the documents and to answer many disputed questions.

[*1004] II. *THE REFEREE'S REPORT*

On December 27, 1994, a week before the scheduled trial date, a discovery referee issued a lengthy report to the trial court. The report concerned plaintiff's motion to compel Schmidt to answer questions and produce documents being withheld on the ground of attorney-client privilege, and Schmidt's **[***7]** motion for a protective order to limit the length of his deposition. In the motion to compel, plaintiff put Schmidt's credibility at issue by arguing that the attorney-client privilege should not apply when "the perjury of a witness in a civil proceeding can only be revealed through the disclosure of an attorney-client communication." Although the referee rejected this argument, the report included a finding that Schmidt "has intentionally decided with conscious disregard for both his past statements to others besides David Vorse and for his 1991 declaration (filed with this Court in 1992) to now present a totally contradictory version of what occurred before and after this litigation was commenced. This has occurred in at least two forms; Schmidt's November 4, 1994, declaration and his recent deposition testimony. I do not know which of Mr. Schmidt's versions of the past is truthful, but I find, based on abundant evidence in the form of documentary evidence, as well as Schmidt's own words, deeds, and convenient lapses of memory, that Mr. Schmidt is not a trustworthy witness." [5]

[*8]** Relying primarily on the referee's condemnation of Schmidt, plaintiff moved to exclude Schmidt as a trial witness but, at the same time, to introduce Schmidt's 1991 declaration into evidence. The court denied the motion, expressly permitting Schmidt to testify.

III. *THE TRIAL TESTIMONY*

During plaintiff's case-in-chief, with no objection from Sarasy, Schmidt's 1991 declaration was admitted into evidence. The court instructed the jury: "A declaration under **[**168]** oath again is given under penalty of perjury. If it's introduced into evidence, it's as if the person testified to that." The jury was shown an enlarged copy of the declaration while counsel read the text aloud. In cross-examining Sarasy, counsel suggested Sarasy had subsequently "prevailed upon" Schmidt to change his 1991 testimony only because Vorse had since died and could no longer defend his own position.

Sarasy called Schmidt to testify for the defense. According to Schmidt, in April of 1989, he, Sarasy, and Vorse began to help Winfield Polytek raise **[*1005]** funds to purchase Dynatex. The three men orally agreed that, if Polytek completed the purchase, they would take their commission in stock, divided equally **[***9]** among themselves. Polytek withdrew in the summer of 1989, and the three agreed to look for another buyer. While they discussed different ideas about compensation for these efforts, they did not reach any formalized understanding on that point.

In late 1989, after a deal with another potential purchaser failed, Sarasy, Schmidt, and Vorse discussed whether Sarasy himself would purchase Dynatex. The three discussed, but reached no agreement upon, their respective participation if Sarasy were to buy the company with his

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[5] The report ultimately recommended that plaintiff's motion to compel be granted in part and denied in part, and that Schmidt's motion for a protective order be denied. Over Sarasy's objection, the court adopted the recommendations, findings, and conclusions of the referee and awarded sanctions against Schmidt in connection with the document production portion of the motion to compel.

own assets. Schmidt understood he would not share in any commission if Sarasy made the purchase.

Schmidt testified Vorse called him in March 1990 to report that "Sarasy had gone into contract for the acquisition of Dynatex . . . and that we needed to do something about it." The court sustained an objection to any further questions on direct examination about what Vorse and Schmidt may have discussed about suing Sarasy. [6]

[*10]** Sarasy's counsel turned to questioning Schmidt about the faxed 1991 declaration, exhibit 143. By December of 1991, Schmidt had "pretty much decided against" pursuing litigation against Sarasy, and his interest level in Vorse's suit was "close to zero." Nonetheless, when Vorse called in late December and said his attorney would be sending him a document to sign, Schmidt agreed. Schmidt admitted the handwriting and signature on the last page of the declaration were his, as was the fax strip at the top of the page. However, he did not recall whether he had received or seen the first two pages.

Schmidt was asked whether the substance of the declaration was "consistent with your recollection of the transactions in which you were involved with the Dynatex Corporation." The court sustained plaintiff's objection that the "document speaks for itself. He's trying to impeach his own witness. [7] It's a sworn statement by Mr. Schmidt."

[*11]** Sarasy's attorney then turned to exhibit 144, purportedly the later-filed original of the faxed declaration. Sarasy's counsel had earlier indicated **[*1006]** Schmidt would testify that the original signature page of exhibit 144 was a forgery. Essentially, Schmidt intended to testify that the declaration faxed to him by Vorse's counsel was different from exhibit 144, the purported original of the faxed declaration. This testimony would support an inference that counsel had fraudulently altered the preceding pages of the faxed declaration to induce Schmidt to sign the declaration, and then forged Schmidt's signature on the later-filed original of the faxed declaration. Plaintiff's attorney stated he had no objection to the document itself, but requested and was granted a section 402 hearing outside the presence of the jury as to the upcoming line of questioning.

The court excused the jury and opined it was "offensive" for Sarasy's counsel to suggest that the filed declaration had been altered. [8] The court pointed out that the direct effect of Schmidt's testimony was to accuse opposing counsel of falsifying Schmidt's declaration, an accusation that could force counsel **[**169]** to testify **[***12]** and possibly result in a mistrial at virtually the end of the case. [9] The court added that "without hearing more, I can only tell you so far I don't

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[6] The court explained the ruling by stating: "Seems to me on redirect after he goes, you can't go into what happened after February 19th with Sarasy except regarding the declaration that was signed except how he happened to have signed this declaration. And then depending upon what he does in cross-examination, you might be able to bring that out on redirect."

[7] We note that California law does not prohibit a party's impeachment of its own witness. (§ 785.)

[8] When asked, Sarasy's counsel confirmed Schmidt would testify he did not retain a copy of the declaration Vorse's counsel faxed to him.

[9] In this regard, the Supreme Court's admonition should be borne in mind: "Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it." (*People v. McDonald (1984) 37 Cal. 3d 351, 372 [208 Cal. Rptr. 236, 690 P.2d 709, 46 A.L.R.4th 1011]*.)

believe Mr. Schmidt." When Sarasy's counsel made an offer of proof that Schmidt would testify that the verification on exhibit 144 was not his signature, the court responded: "You're accusing these two people who could be disbarred, could be disbarred for filing false documents, for forging the documents. And I'm not going to allow that in front of this jury, I'm going to tell you that, unless you have strong evidence. And since I do not believe this witness, I'm not going to allow him to testify to that." The court also precluded Schmidt from testifying that statements in his 1991 declaration were inconsistent with his recollection of the transaction, ruling that "he has not answered questions truthfully and either--and I'm going to strike his testimony."

[*13]** At that point, Sarasy's counsel offered to "move to another line of questioning that doesn't involve Exhibit 144." He intended to inquire about an alleged admission by Vorse, made in November 1991, that there was never a partnership agreement to buy Dynatex. Following further argument as to what, if any, of Schmidt's testimony should be stricken, the court made its ruling: "I've never done this before ever. It's extreme. Now, I've had people I didn't believe on the stand, but I never had a situation in which the credibility and the ethics of lawyers, not the parties, you could impugn Mr. Vorse, his testimony from here to kingdom come, it would be perfectly **[*1007]** appropriate. [P] But to imply so that the jury should infer that these two attorneys, who are not parties to this case but represent a party, forged documents, filed false documents is so prejudicial not only to them but to the plaintiff's case that it requires comment and possibly a dismissal for misconduct on your part. I consider it misconduct. . . . [P] . . . [P] . . . [E]ven though I respect [the discovery referee], I didn't want to take his word for the fact that Mr. Schmidt didn't tell the truth. I **[***14]** wanted to hear this myself, and I didn't--the impact of what you were doing with [exhibits] 143, 144 didn't really come through earlier today when you were telling me about it, or I would have stopped you then. [P] But it has come through now, and it is damaging to the plaintiff's case, let alone--let alone to counsel's reputation. That's not before the jury, but I think that I have to make some comment to the jury . . . ."

IV. *THE RULING*

When the jury was recalled, the trial court made the following statement. "Ladies and gentlemen, I have discharged the witness. I found that Mr. Schmidt's testimony was not to be believed, and therefore I have stricken it. And I am going to instruct you not to consider anything to which he testified. Just a minute. Exhibit 143 is already in evidence. That remains in evidence. But as to what he testified to orally, all of it is to be stricken from your minds." At the end of trial, the court instructed the jurors: "You are the sole and exclusive judges of the believability of the witnesses and the weight to be given the testimony of each witness." However, it added: "In this case I did comment on the veracity of one witness, and that witness' **[***15]** testimony was stricken. You are not to consider that witness in considering the evidence before you."

The jury found Vorse, Sarasy, and Schmidt had entered into a partnership to acquire the assets of Dynatex and found against Sarasy on all but one cause of action predicated on the alleged partnership agreement. Sarasy timely appealed.

Discussion

I. *THE COURT ABUSED ITS DISCRETION IN CONCLUSIVELY ASSESSING SCHMIDT'S CREDIBILITY*

(1a) This case compels consideration of how far a trial court may go in assessing the credibility of proffered testimony during a *section 352* analysis without overstepping the jury's role as fact finder. Here, the court **[**170]** found a witness untruthful and struck his testimony for that reason. Such action is not generally permitted.

[*1008] It appears from the record that, in striking Schmidt's testimony, the trial court relied on the discretion granted by *section 352*, which permits exclusion of evidence when its probative value is substantially outweighed by the likelihood that its admission will unduly consume time or create a substantial danger of unduly prejudicing, confusing, or misleading the jury. The trial court erred here, because it weighed **[***16]** the probative value of the evidence against an inaccurate standard of prejudice and because it misconstrued its role in the factfinding process.

There is no dispute here that Schmidt's testimony was relevant. There were only three people involved in the alleged partnership: Vorse, Sarasy, and Schmidt. The existence and nature of a partnership among the three were central issues in the case. Schmidt offered to testify about his understanding of the Dynatex negotiations and to recount the actions of the alleged partners. Such testimony clearly falls within section 210's definition of relevant evidence as that "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

The probative value of Schmidt's testimony, if true, was also quite high. Schmidt, as the third party to the alleged agreement, could offer direct testimony pertaining to the existence of the partnership, an ultimate fact at issue. Sharply conflicting versions of the relevant events were presented by the parties. Thus, what Schmidt had to say, and his demeanor while saying it, were singularly important to the jury's evaluation. It is against this **[***17]** high degree of probative value that the trial court was required to weigh the substantial danger of undue prejudice. The court failed, first, by applying an improper understanding of that latter concept.

(2) "Prejudice" as contemplated by *section 352* is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a *section 352* context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption " 'substantially outweigh' " the probative value of relevant evidence, a *section 352* objection should fail. (*People v. Cudjo (1993) 6 Cal. 4th 585, 609 [25 Cal. Rptr. 2d 390, 863 P.2d 635]*.) " 'The "prejudice" referred to in *Evidence Code section 352* applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying *section 352*, "prejudicial" is not synonymous with "damaging." ' [Citation.]" (*People v. Karis (1988) 46 **[***18]** Cal. 3d 612, 638 [250 Cal. Rptr. 659, 758 P.2d 1189]*.)

[*1009] **(3)** The prejudice that *section 352* " 'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]" (*People v. Zapien (1993) 4 Cal. 4th 929, 958 [17 Cal. Rptr. 2d 122, 846 P.2d 704]*.) In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating

them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.

(1b) Here, the court focused on the fact that the evidence hurt one party's case. That is what opposing evidence is generally supposed to do. Further, the court expressed concern that the proffered testimony would impugn the reputation, thus **[***19]** inure to the prejudice, of plaintiff's counsel. The good faith presentation of an assertive defense may legitimately require such a tactic. The court may not prevent a party from a robust attack on the credibility of the other side merely because counsel's reputation might be impugned.

[171]** Having misconstrued "prejudice," the court went on to evaluate the testimony's probative value and, in doing so, improperly invaded the jury's role as fact finder. The court apparently concluded Schmidt's testimony was of limited probative value because the court did not believe it. Such an analysis overlooks the essential differences between the roles of judge and jury. It is axiomatic that questions of credibility are exclusively within the province of the jury. (§ 312, subd. (b); see also *Pen. Code, § 1127*.) The court may not set itself up as a gatekeeper excluding otherwise competent and relevant evidence simply because the court finds it unbelievable.

The Supreme Court has spoken often on this topic in the context of criminal trials. Third party culpability cases, in which the defense offers evidence that someone other than the defendant actually committed the offense, are analogous to the **[***20]** issue presented here. "We recognize that an inquiry into the admissibility of such evidence and the balancing required under *section 352* will always turn on the facts of the case. Yet courts must weigh those facts carefully. They should avoid a hasty conclusion . . . that evidence of [the third party's] guilt was 'incredible.' Such a determination is properly the province of the jury." (*People v. Hall (1986) 41 Cal. 3d 826, 834 [226 Cal. Rptr. 112, 718 P.2d 99]*.)

In *People v. Alcala (1992) 4 Cal. 4th 742, 755 [15 Cal. Rptr. 2d 432, 842 P.2d 1192]*, the defendant was convicted of the kidnapping and murder of a **[*1010]** young girl. At trial, he sought to call Tim Fallen to testify he had seen the girl on the particular day. If believed, Fallen could have undercut the prosecution's theory of when the girl was kidnapped, thus raising the possibility that someone other than the defendant had killed her. The prosecution moved to exclude Fallen's testimony because he had also identified a photograph of a different little girl. "The trial court accepted the prosecution's argument and excluded the testimony . . . on the ground of relevancy and pursuant to *Evidence Code section **[***21]** 352*. Relying upon the language of that statute, the court stated that Fallen's positive misidentification of the other girl destroyed whatever probative value his testimony might have had, and that allowing such testimony only would 'confuse the issues.' " (*Id. at p. 790*.)

The Supreme Court concluded the trial court's action was error: "Although the court was vested with wide discretion in determining the relevance and weighing the prejudicial effect of proffered evidence against its probative value [citation], the circumstance that Fallen's testimony readily was subject to impeachment did not afford the court a legitimate basis for excluding this evidence. Eyewitness testimony may be vulnerable to impeachment for numerous reasons,

including the possible existence of prior, conflicting testimony; such vulnerability, however, does not render the evidence irrelevant or unduly prejudicial." (*People v. Alcala, supra, 4 Cal. 4th at p. 790*.)

Often a criminal defendant, seeking to suggest another might be guilty, must rely upon hearsay testimony from witnesses whose credibility is vulnerable. Our Supreme Court, however, has made it very clear that a trial court must proceed **[***22]** cautiously in excluding evidence when it questions the veracity of the *testifying witness*. In *People v. Cudjo, supra, 6 Cal. 4th 585*, the trial court excluded the testimony of John Lee Culver, who claimed the defendant's brother, Gregory, had confessed to the murder. Gregory, having invoked his right against self-incrimination, was unavailable to testify. (*Id. at pp. 604-606*.) The statements attributed to Gregory by Culver were, however, clearly against Gregory's penal interest. (*§ 1230*.) Consequently, Culver's testimony, though hearsay, came within the exception. "It is true, as the People suggest, that the alleged statement was inconsistent to some extent with the physical evidence . . . . However, such discrepancies might be attributable to Gregory's agitation or Culver's misunderstanding of what he was told. They did not negate all possibility that if Gregory claimed to be the murderer, he was telling the truth. Hence, the court could properly have found that 'a reasonable [person] in [Gregory's] position would not have made the **[**172]** statement unless he believed it to be true.' (*Evid. Code, § 1230*.) [P] But the trial court did not focus exclusively, or even **[***23]** primarily, on **[*1011]** whether Gregory's *hearsay statement* might be false. Instead, the court apparently accepted the prosecution's contention that *Culver* was probably a liar who should therefore be excluded as a *live witness*. In doing so, the court erred. [P] The People argue that in considering the admissibility of evidence offered under the hearsay exception for declarations against interest, the trial court could properly consider the credibility of the in-court witness, Culver. We disagree. The credibility of the in-court witness is not a proper consideration in this context." (*Id. at pp. 607-608*, italics and brackets in original.)

(4) The trial court's ability to exclude hearsay testimony based upon an evaluation of the testifying witness's credibility is limited to circumstances in which "the testimony is physically impossible or its falsity is apparent 'without resorting to inferences or deductions.' [Citations.] Except in these rare instances of *demonstrable falsity*, doubts about the credibility of the in-court witness should be left for the jury's resolution; such doubts do not afford a ground for refusing to admit evidence under the hearsay exception **[***24]** for statements against penal interest. [Citations.]" (*People v. Cudjo, supra, 6 Cal. 4th at pp. 608-609*, italics added.)

Similarly, in *People v. Jackson (1991) 235 Cal. App. 3d 1670 [1 Cal. Rptr. 2d 778]*, Division Four of this district held it was error to exclude, under *section 352*, hearsay evidence of a third party's culpability. "We know of no rule that excludes testimony on the ground that it could be a fabrication . . . . It is the duty of the trier of fact to assess credibility. 'Objection, your honor, this could be perjury!' has not yet made it into the Evidence Code." (*Jackson, supra, at p. 1679*.)

Plaintiff defends the court's action by relying on *People v. Blankenship (1985) 167 Cal. App. 3d 840, 848-849 [213 Cal. Rptr. 666]* (*Blankenship*), and *People v. Love (1977) 75 Cal. App. 3d 928, 939-940 [142 Cal. Rptr. 532]* (*Love*). Before considering those two cases, we turn to *People v. Chapman (1975) 50 Cal. App. 3d 872 [123 Cal. Rptr. 862]* (*Chapman*), upon which the courts in *Blankenship* and *Love* relied.

In *Chapman*, the trial court excluded evidence of hearsay statements by a third party confessing to the crime. **[***25]** In making a preliminary factual determination as required by the hearsay exception for statements against penal interest (§ 405, 1230), the trial court determined the hearsay statements were untrustworthy. The appellate court agreed: "The record here strongly suggests the existence of a plan by three fellow prisoners to have one person take the blame for another's crime under circumstances where the one taking the blame could not suffer any real detriment to his own interests." (*Chapman, supra, 50 Cal. App. 3d at p. 880*.) Because the trial court also relied **[*1012]** upon *section 352*, the appellate court addressed that section as well, concluding that the exclusion of evidence was proper: "Thus in applying *Evidence Code section 352*, the trial court in weighing 'probative value' necessarily considers, among other things, credibility of the witnesses who testify to the proffered evidence." (*Chapman, supra, at p. 881*.) Not only was this statement unnecessary to the court's resolution of the case, it was inaccurate and has since become the source of great mischief.

In *Love, supra, 75 Cal. App. 3d 928*, the defendant sought to implicate a third party, Walton, **[***26]** for the crime. Walton was called as a witness and denied involvement. Thereafter, the defendant attempted to call two witnesses who would testify that Walton had confessed to them. The trial court denied this request under *section 352*, without specifying its reasoning. (*Love, supra, at pp. 934-935*.) The appellate court upheld that ruling, holding that an assessment of the *testifying* witness's credibility is not only a preliminary fact determination when assessing the admissibility of a hearsay statement as a prior inconsistent statement (§ 1235) but is also necessary to assessing the probative value of the evidence in light of *section 352*. (*Love, supra, at p. 939*.) On this point, the *Love* court cited *Chapman, supra, **[**173]** 50 Cal. App. 3d at page 881*. However, the *Love* court went on to assess the credibility of not only the testifying witnesses but of the hearsay *declarant*, Walton, as well. (*Love, supra, at pp. 940-941*.)

In *Blankenship, supra, 167 Cal. App. 3d 840*, the defendant was prevented from testifying that a third party, Hahn, had confessed to him. The appellate court affirmed: ". . . [N]othing in the offer of proof concerning **[***27]** defendant's proposed testimony provided an internal indication of veracity. As the proposed testimony was to come from defendant himself it was highly suspect both because defendant had a motive to falsify and because accurate details concerning the crime could be explained by defendant's own knowledge and guilt rather than Hahn's. . . . The trial court's finding that the proposed testimony [about the hearsay statement] lacked trustworthiness is reasonable in light of the evidence and the exclusion of the proposed testimony was not error." (*Id. at p. 849*.)

The reasoning of *Chapman*, *Love*, and *Blankenship* is contrary to the Supreme Court's analyses in both *People v. Alcala, supra, 4 Cal. 4th 742* and *People v. Cudjo, supra, 6 Cal. 4th 585*. We recognize that the majority in *Cudjo* mentioned *Blankenship* and *Chapman*. (*6 Cal. 4th at p. 610*.) The court did not engage in a lengthy analysis of those cases, however, and did distinguish them factually. Rejecting the *section 352* analysis of the courts in *Chapman, Love*, and *Blankenship*, we instead follow the Supreme Court's more recent reasoning. **(5)** A trial court may exclude the live testimony **[***28]** **[*1013]** of a witness whom the court disbelieves only in "rare instances of demonstrable falsity." (See *People v. Cudjo, supra, 6 Cal. 4th at p. 609*.) The court may not exclude evidence when the court simply does not believe the testifying witness. (*People v. Alcala, supra, 4 Cal. 4th at pp. 790-791*.) By contrast, the trial court must assess the

credibility of the hearsay *declarant* because that person is not under oath and subject to cross-examination before the jury. (*Cudjo, supra, at p. 608*.)

(1c) Here, the court refused admission of Schmidt's live testimony. The court then struck *all* of Schmidt's previous testimony because the court did not believe him. There is no case law to support plaintiff's contention that an assessment of Schmidt's credibility was a proper component of the *section 352* balancing test in this context. Schmidt may or may not have been lying. Such a decision, however, was for the jury to make.

II. *THE ERROR WAS PREJUDICIAL*

(6) The test for prejudice in such cases is well settled. ". . . [N]o judgment shall be reversed . . . unless it appears, upon examining the entire cause including the evidence, a miscarriage of justice **[***29]** has resulted. [Citations.] A miscarriage of justice should be declared only when the reviewing court is convinced after an examination of the entire case, including the evidence, that it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.]" (*In re Marriage of Smith (1978) 79 Cal. App. 3d 725, 751 [145 Cal. Rptr. 205]*.)

(7) In arguing that Sarasy has not established prejudice, plaintiff details at some length evidence supporting Vorse's version of the alleged partnership agreement. He is correct that there was substantial evidence the jury could have interpreted in his favor. On the other hand, he cannot dispute that Schmidt was a unique and important witness on the pivotal issue. Indeed, his attorneys acknowledged, in two separate declarations submitted to the trial court, that Schmidt was a "key witness" in the action.

Nor can plaintiff dispute the damage inflicted on Sarasy's case when the court let Schmidt's 1991 declaration stand unchallenged and unexplained. Shortly after the ruling, Schmidt's wife testified that Vorse had encouraged her and her husband to join in his lawsuit against Sarasy. According **[***30]** to Mrs. Schmidt, Vorse admitted that, although there had never been a partnership between the three men to purchase Dynatex, Sarasy **[**174]** would be unable to prove it and they could expect a "real kill" from suing Miller, Starr & Regalia, Sarasy, and others. On cross-examination, plaintiff's counsel called Mrs. Schmidt's attention to an enlarged copy of exhibit 143, then repeatedly **[*1014]** asked Mrs. Schmidt whether she knew her husband had declared under penalty of perjury that he, Sarasy, and Vorse had formed a partnership to acquire Dynatex.

Plaintiff's closing arguments also highlighted the Schmidt declaration: "In 1991 Don Schmidt executed a declaration stating unequivocally he was a partner with Mr. Vorse and with Mr. Sarasy. This is in evidence. *In fact, Mr. Schmidt's declaration is the only evidence which you have been presented regarding Mr. Schmidt's position in this case*. Mr. Schmidt testified that there was a partnership, and that he was a partner with Mr. Vorse and Mr. Sarasy." (Italics added.) In arguing the existence of a partnership, counsel again stressed that "Mr. Schmidt's declaration, which we already had on the easel, states under oath that there was a partnership." **[***31]** Again, in his rebuttal argument, plaintiff's attorney either read from or paraphrased the 1991 declaration: "Mr. Schmidt testified in 1991 in his declaration, which I read to the jury, David Vorse, Lewis Sarasy formed an oral partnership by the name of LDD in 1989 to engage in

certain business for the acquisition of [a] high tech company by the name of Dynatex Corporation by the partnership . . . . Mr. Schmidt testified there was a partnership."

Not only did the trial court exclude evidence of an important defense witness, it allowed to remain in evidence a statement that very witness was prepared to disavow. Despite the existence of countervailing evidence, the error was prejudicial.

Plaintiff's remaining contentions are not persuasive. He protests that, had the court not condemned Schmidt as a liar and jettisoned his testimony outright, it could have commented on Schmidt's veracity as permitted by *BAJI No. 15.21*. Such permissible comment, however, would not have deprived the jurors of the opportunity to hear the pertinent testimony and make their own assessments of Schmidt's credibility. (See *BAJI No. 15.21* and com. (8th ed. 1994 bound vol.) pp. 364-365 [court must make clear **[***32]** that its comments on evidence are not binding, as jury is exclusive arbiter of questions of fact and witness credibility].) Here, the court's action prevented the jury from discharging its role as fact finder.

Last, plaintiff asserts Sarasy waived the error by not objecting when the declaration was originally admitted in evidence. We disagree. At the time the declaration was admitted, the court had expressly ruled Schmidt would be permitted to testify. The defense was prepared to have Schmidt attack Vorse's credibility. Such a course involves a legitimate tactical choice. The failure of Sarasy's counsel to object to admission of the declaration cannot be construed as a waiver of his right to challenge the court's subsequent ruling.

[*1015] Plaintiff's point that Sarasy's counsel should have asked the court to strike the declaration after its ruling on Schmidt's testimony has more resonance but, ultimately, is not persuasive. First, the court made quite clear its belief that Schmidt had told the true story in the 1991 declaration and that this assessment was at the core of its decision to preclude his oral testimony as recent fabrication. In light of the court's statements, **[***33]** Sarasy's counsel could reasonably have believed a request to strike would have been futile. Moreover, as the jury had already been read and shown the declaration, an order from the court that it be stricken would, realistically, have had marginal utility.

Because the error requires reversal, we do not reach the additional issues and arguments raised on appeal and cross-appeal.

Disposition

The judgment is reversed, and the matter remanded to the trial court. Sarasy is awarded costs on appeal.

Phelan, P. J., and Walker, J., concurred.
