S210804

No. _____

In the Supreme Court of California

Even Zohar Construction & Remodeling, Inc.,

Plaintiff and Appellant,

vs.

Bellaire Townhouses, LLC, et al.,

Defendants and Respondents.

PETITION FOR REVIEW

From A Published Opinion Reversing An Order Vacating
Defaults And A Default Judgment
Court of Appeal, Second Appellate District, Division Four, No. B239928

Appeal From An Order Vacating Defaults And A Default Judgment
Los Angeles Superior Court, No. BC458347
The Honorable Ralph Dau

Paul D. Fogel (SBN 70859)
Dennis Peter Maio (SBN 99894)
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659
Telephone: 415.543.8700
Facsimile: 415.391.8269

Daniel Andrew Gibalevich (SBN 217116)
GIBALEVICH & ASSOCIATES
5455 Wilshire Boulevard, Suite 1701
Los Angeles, CA 90036
Telephone: 323.930.2020
Facsimile: 323.930.2225

James S. Link (SBN 94280)
COUNSELOR AND ADVOCATE AT LAW
215 N. Marengo, 3rd Floor
Pasadena, CA 91101-1504
Telephone: 626.793.9570
Facsimile: 626.356.7414

Attorneys for Defendants and Respondents Bellaire Townhouses, LLC, and Samuel Fersht, Individually and as Trustee of the Fersht Family Living Trust

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I.
PETITION

Defendants and respondents Bellaire Townhouses, LLC, and Samuel Fersht, individually and as trustee of the Fersht Family Living Trust (collectively, defendants), petition this Court for review of the published opinion of the Second Appellate District, Division Four (Willhite, J., with Epstein and Suzukawa, JJ., conc.) (Opn.). The Court of Appeal reversed an order entered by the Los Angeles County Superior Court (Hon. Ralph Dau, Judge) that vacated, under Code of Civil Procedure section 473(b), two defaults and a $1.7 million default judgment that had been entered against defendants for failing to file a responsive pleading to a complaint filed by plaintiff and appellant Even Zohar Construction & Remodeling, Inc. (EZ). (All unspecified statutory references are to the Code of Civil Procedure.) The Court of Appeal summarily denied defendants' petition for rehearing. Copies of the opinion and the denial order are attached as Exhibits A and B, respectively.

II.
ISSUE

When a defendant has previously but unsuccessfully moved to vacate a default or default judgment under section 473(b) but files a subsequent and proper motion for mandatory relief from the default or default judgment under section 473(b) based on his or her

attorney's admission of fault and does not present new or different facts, circumstances, or law under section 1008(b):

— must the trial court grant that motion, as the Sixth District held in *Standard Microsystems Corp. v. Winbond Electronics Corp.*, 179 Cal.App.4th 868 (2009)?

— or must the court deny that motion, as the Second District, Division Four here held, disagreeing with and refusing to follow *Standard Microsystems*?

III.
BACKGROUND

Defendants adopt the Court of Appeal's recitation of the factual and procedural background. (*See* Opn. 3-13) We briefly summarize that background below.

Defendants filed two motions for mandatory relief from default under section 473(b) based on attorney fault. They accompanied the first motion with a declaration by their attorney, Daniel Gibalevich, who expressly admitted fault (characterized as "excusable neglect"), attributing it largely to unexplained personal and professional omissions. (Opn. 4) The trial court denied that motion. (Opn. 6) (We discuss the motion and ruling in greater detail, *post*.)

Defendants accompanied their second motion with another declaration by Gibalevich in which Gibalevich again expressly admitted his fault. (Opn. 7-8) This time, he did not characterize his neglect as "excusable," and but explained his personal and professional omissions:

> On August 25, 2011, investigators with the Los Angeles District Attorney's office served [a] search warrant ... at my office .... The investigation focused on medical providers and not on me or my practice.... [O]ne of my associates, Mr. Savransky, resigned his position right after the search. That left me and Ms. Gina Akselrud as [the] only attorneys [in my office]...
>
> In my effort to secure the return of my client files, I engaged Mr. Shkolnikov, a criminal defense attorney. I volunteered to assist him in his research and drafting efforts....
>
> ... I spent all of my time on efforts to return my client's files. I researched and wrote many drafts of the motions that were filed. This consumed me. I was working on this most of the day, every day. When I wasn't in front of the computer, I thought of nothing else.

I began to obsess over my reputation and the disclosures that I had to make to Judges and opposing counsel alike [about the search].... I have to confess that this feeling of embarrassment is the reason why I failed to set out these facts in the declaration previously filed. I will never forget that day or the hell that followed.... I did experience a period of time, from middle of September through October of 2011, where I stayed away from the office, for days at a time.... I was ashamed and embarrassed. I was embarrassed in front of my employees, opposing counsel and judges that I had to face. This feeling of embarrassment is still with me.

Due to my frequent absences, my state of mind and obsession with getting my client files back, I neglected this matter. I failed to enter a responsive pleading and did not respond to [plaintiff's] emails notifying me of the default. Since the responsive pleading was never entered, defaults and default judgments were taken against my clients, the Defendants.

Had I filed the responsive pleading on time, prior to defaults being taken, the defaults and default judgments would have been avoided. It is clear that my mistake, inadvertence and neglect resulted in the entry

of defaults and default judgments against my clients, the Defendants herein.

Id. (boldface and ital. omitted). The trial court granted this motion. (Opn. 12) It concluded that, under *Standard Microsystems*, section 473(b) prevails over section 1008(b), and stated that "[t]he legislature has determined that even in cases involving conduct such as that demonstrated by attorney Gibalevich, where no part of the fault is shown to be attributable to the defendant clients, relief is mandatory." (Opn. 13) (We also discuss this motion and ruling in greater detail, *post*.)

EZ appealed the order vacating the defaults and default judgment. (Opn. 13) The Court of Appeal reversed, holding that section 1008(b) prevails over section 473(b). Thus, it held, under section 1008(e), because neither defendants nor Gibalevich presented new or different facts, circumstances, or law under section 1008(b), the trial court lacked jurisdiction to grant the motion. (Opn. 16, 19-22)

IV.

REVIEW IS NEEDED TO RESOLVE THE CONFLICT BETWEEN *STANDARD MICROSYSTEMS* AND THE OPINION BELOW ON THE INTERPLAY BETWEEN SECTIONS 473(b) AND 1008(b)

Section 473(b) permits a court, "upon any terms as may be just," to relieve a party from a default, default judgment, or dismissal "taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." But section 473(b) requires a court to grant relief from a default, default judgment, or dismissal in cases of mistake, inadvertence, surprise, or neglect by the party's attorney, as follows:

> Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.

Id. Section 473(b) goes on to state that, "whenever relief is granted based on an attorney's affidavit of fault," "[t]he court shall ... direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties."[1]

On the other hand, section 1008(b) permits a party "who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms," to "make a subsequent application for the same order" only upon a showing of

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[1] Section 473 contains other conditions relevant to the grant of mandatory relief based on attorney fault. Section 473(c) states:

> (1) Whenever the court grants relief from a default, default judgment, or dismissal based on any of the provisions of this section, the court may do any of the following:
>
> (A) Impose a penalty of no greater than one thousand dollars ($1,000) upon an offending attorney or party.
>
> (B) Direct that an offending attorney pay an amount no greater than one thousand dollars ($1,000) to the State Bar Client Security Fund.
>
> (C) Grant other relief as is appropriate.
>
> (2) However, where the court grants relief from a default or default judgment pursuant to this section based upon the affidavit of the defaulting party's attorney attesting to the attorney's mistake, inadvertence, surprise, or neglect, the relief shall not be made conditional upon the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or upon compliance with other sanctions ordered by the court.

"new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown."

Section 1008(e) deprives the court of jurisdiction to grant such a renewed motion without the requisite new or different facts, circumstances, or law: "This section specifies the court's jurisdiction with regard to applications for ... renewals of previous motions, and applies to all applications ... for the renewal of a previous motion, whether the order deciding the ... motion is interim or final. No application ... for the renewal of a previous motion may be considered by any judge or court unless made according to this section."

Given these two statutes, when a party has unsuccessfully moved to vacate a default or default judgment under section 473(b), may a court nevertheless grant relief when the party again moves for mandatory relief based on an admission of attorney fault even though the party does not present new or different facts, circumstances, or law, as section 1008(b) requires? In other words, in such a situation, does section 473(b) prevail over section 1008(b) or does section 1008(b) prevail over section 473(b)?

The Court of Appeal's opinion here creates a direct conflict with *Standard Microsystems* in the answer to that question. *Standard Microsystems* holds that section 473(b) prevails over

section 1008(b). But the Court of Appeal here holds that section 1008(b) prevails over section 473(b).

Which statute prevails presents an important question worthy of review. For one thing, litigants frequently invoke sections 473(b) and 1008(b) in the trial courts, and those statutes are frequently discussed in Court of Appeal opinions. According to Westlaw, some 40 published opinions have cited section 1008(b) in its present form, while some 165 published opinions have cited section 473(b) in *its* present form. Consequently, any conflict, like the one between *Standard Microsystems* and the opinion of the Court of Appeal below, threatens substantial mischief as courts and litigants are forced to guess which statute governs. And should that guess prove wrong in a court that believes section 1008(b) governs, a litigant faces sanctions and punishment by contempt under section 1008(d). To avoid such results, this Court should intervene.

Considerations of public policy confirm the need for review. Section 473(b)'s mandatory relief is intended to relieve the innocent client of the consequences of its attorney's fault, to place the burden on the errant attorney rather than the defaulted client, to discourage additional litigation in the form of malpractice actions by the client against the attorney, and to thereby permit the client to have its day in court and a decision on the merits. Section 1008(b)'s purpose is to reduce the number of renewal motions and thus conserve judicial resources. Each of these policies is strong. Each, however, is in

tension with the other, one potentially favoring litigants over courts, the other potentially favoring courts over litigants.

At the time *Standard Microsystems* was decided, only three other published opinions had addressed the interplay between section 473(b) and 1008(b) as to mandatory relief from default based on attorney neglect—*Gilberd v. AC Transit*, 32 Cal.App.4th 1494 (1995); *Lee v. Wells Fargo Bank, N.A.*, 88 Cal.App.4th 1187 (2001); and *Wozniak v. Lucutz*, 102 Cal.App.4th 1031 (2002), *disapproved on another point in Le Francois v. Goel*, 35 Cal.4th 1094, 1107 n.5 (2005). With minimal analysis, *Gilberd* expressed the view that that section 1008(b) prevailed over 473(b), stating only that to hold otherwise would "undermine the intent of the Legislature as specifically expressed in section 1008, subdivision (e) ...." *Gilberd*, 32 Cal.App.4th at 1501. With similarly minimal analysis, and without addressing *Gilberd, Lee* and *Wozniak* expressed the opposite view. *Lee*, 88 Cal.App.4th at 1191 n.6; *Wozniak*, 102 Cal.App.4th at 1043.

With the publication of the Court of Appeal's opinion here—and its several-paragraph explanation of why it disagrees with *Standard Microsystems*—there is now a direct and irreconcilable conflict among the courts of appeal. This Court should resolve that conflict and settle the important question as to which statute prevails over which.

In the sections that follow, we explore both court of appeal decisions and explain why this Court should grant review and resolve the conflict in favor of *Standard Microsystems*. Well-settled rules of statutory construction establish that section 473(b) prevails over section 1008(b): the former is remedial and more specific, whereas the latter effects a procedural forfeiture and is more general. Public policy confirms that conclusion: even though the policy of ensuring a litigant its day in court and a decision on the merits and the policy of conserving judicial resources are each strong, the latter should yield to the former, since courts exist for litigants, and not the other way around.

A. *Standard Microsystems* And The Court Of Appeal Opinion Here Conflict On The Interplay Between Sections 473(b) And 1008(b)

1. Section 473(b)

Section 473(b) is comprehensive in its scope, broadly covering relief from default based on attorney fault in "[a]ll civil actions and special proceedings, including summary proceedings," in "all trial courts." 8 Bernard E. Witkin, *California Procedure* Attack on Judgment in Trial Court § 145(1), (3) (5th ed. 2008) (Westlaw).

Before 1988, section 473(b) permitted a court to grant a party relief from default only if any fault by the party's attorney was *excusable*. *E.g.*, *Metropolitan Service Corp. v. Casa de Palms, Ltd.*, 31 Cal.App.4th 1481, 1486-87 (1995); *Beeman v. Burling*,

216 Cal.App.3d 1586, 1602 (1990). The statute prohibited the court from granting relief from default if such attorney fault was *inexcusable*. Rather, "[t]he attorney's inexcusable neglect was traditionally imputed to the client, whose redress was a malpractice action against the attorney." *Metropolitan Service Corp.*, 31 Cal.App.4th at 1487.

With the enactment of the mandatory relief provisions in 1988, however, an "entirely different standard" was created. *Id.* Those provisions "*require* the court to grant relief if the attorney admits neglect, even if the neglect was *inexcusable*. [Citations.] The purpose of this law is to relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits. [Citation.]" *Id.* (ital. orig.). More broadly, the law's purpose is to permit the client to have its day in court and obtain a decision on the merits. *See, e.g., Zamora v. Clayborn Contracting Group, Inc.*, 28 Cal.4th 249, 256 (2002) (section 473(b) is " 'to be liberally construed and sound policy favors the determination of actions on their merits' "); *Elston v. City of Turlock*, 38 Cal.3d 227, 233 (1985) ("because the law strongly favors trial and disposition on the merits, any doubts in applying" section 473(b) "must be resolved in favor of the party seeking relief from default"); *accord Maynard v. Brandon*, 36 Cal.4th 364, 371-72 (2005).

Three years later, in 1991, the Legislature modified section 473(b)'s timeliness/diligence requirement. Stats. 1991, ch. 1003, § 1. While the 1988 version required a "timely" application for mandatory relief, which was construed to incorporate a diligence requirement, *Billings v. Health Plan of America,* 225 Cal.App.3d 250, 258 (1990), the 1991 version required—and still requires—only that the application be made within six months after entry of judgment. *Metropolitan Service Corp.*, 31 Cal.App.4th at 1487; *Douglas v. Willis*, 27 Cal.App.4th 287, 292 (1994).

Specifically, section 473(b) provides that, "even if the [attorney] neglect was inexcusable," the trial court *must* grant relief from default so long as the application for relief complies with the conditions specified, *Metropolitan Service Corp.*, 31 Cal.App.4th at 1487—or, more accurately, so long as the application complies with the conditions at least "substantially," *Carmel, Ltd. v. Tavoussi*, 175 Cal.App.4th 393, 396 (2009). To quote section 473(b), the court "*shall*" grant relief from default or a default judgment "*whenever* an application for relief [1] is made no more than six months after entry of judgment, [2] is in proper form, and [3] is accompanied by an attorney's sworn affidavit attesting to his or her ... neglect." (Ital. added). Section 473(b) specifies a single exception: relief is required "unless the court finds that the default ... was not in fact caused by the attorney's ... neglect."

Section 473(b) is a "remedial statute." *People ex rel. Reisig v. Broderick Boys*, 149 Cal.App.4th 1506, 1517 (2007); *accord*

Fasuyi v. Permatex, Inc., 167 Cal.App.4th 681, 698 (2008). It aims to avoid procedural forfeiture and to permit a client, as stated, to have its day in court and obtain a decision on the merits.

2. Section 1008(b)

In 1992, the Legislature amended section 1008, making it applicable to "all" "application[s] ... for the renewal of a previous motion," specifying "the court's jurisdiction with regard to [such] applications," and declaring that "[n]o [such] application ... may be considered by any judge or court unless made according to this section." Stats. 1992, ch. 460, § 4 (quoting § 1008(e)). "Before these changes," section 1008 " 'purported to be neither jurisdictional nor exclusive.' " *Le Francois*, 35 Cal.4th at 1099. Afterwards, it purported to be both. *See id.*

The Legislature's purpose in amending section 1008(b) into its present form was " 'to reduce the number of ... renewals of previous motions heard by judges in this state' " in order " 'to conserve the court's resources by constraining litigants who would attempt to bring the same motion over and over.' " *Id.* at 1098, 1100.

By limiting a party's ability to complain of error and restricting the jurisdiction of a court to correct it, section 1008(b) " 'effect[s] ... procedural forfeiture.' " *California Correctional Peace Officers Assn. v. Virga*, 181 Cal.App.4th 30, 48 (2010) (ital. omitted). By doing so, the statute is thus in derogation of the

" 'strong public policy' " that "seeks to dispose of litigation on the merits rather than on procedural grounds." *Barrington v. A. H. Robins Co.*, 39 Cal.3d 146, 152 (1985).

B. *Standard Microsystems* Properly Construes, While The Court Of Appeal Opinion Here Erroneously Construes, The Interplay Between Sections 473(b) And 1008(b)

1. *Standard Microsystems* Holds That Section 473(b) Prevails Over Section 1008(b)

In *Standard Microsystems*, two clients failed to respond to a complaint based on their attorney's advice, which proved erroneous, that the complaint's service was ineffective. 179 Cal.App.4th at 874-76, 880. After defaults were entered against the clients, they unsuccessfully moved for discretionary relief from default under section 473(b), arguing the attorney's excusable neglect. *Id.* at 877-79. The trial court denied the motion and entered a default judgment. *Id.* The clients then discharged their attorney, retained a new one, and moved for mandatory relief from the defaults and the default judgment based on their former attorney's inexcusable neglect, with that attorney filing a declaration attesting to his inexcusable neglect. *Id.* at 879-80. The trial court denied the motion on the ground, among others, that it was an improper motion for reconsideration. *Id.* at 884.

The Sixth District reversed. *Id.* at 873, 908. First, it concluded that the motion for mandatory relief was not an application for reconsideration of their motion for discretionary

relief because it "did not ask the court to reconsider its previous order"—it rested on a different theory and ground (inexcusable rather than excusable neglect) and relied on different facts (that the neglect was inexcusable). *Id.* at 891. Second, the court stated it was reluctant to find that the mandatory relief motion was an application to renew the discretionary relief motion under section 1008(b)—i.e., sought the "same order" as the earlier motion—because it rested on a different theory and ground and sought different relief (i.e., vacation of the default judgment as well as the defaults). *Id.* at 891-93.

Third, it concluded that even if the mandatory relief motion *was* an application to renew the discretionary relief motion under section 1008(b), it would not matter, since in the case of conflict, section 473(b) prevails over section 1008(b). *Id.* at 893-96; *see id.* at 893 ("Even if section 1008 applied by its terms to defendants' second motion—or that motion could on some other coherent rationale be held to come within the statute's scope—we would decline to attribute to the statute a legislative intention to bar the operation, under the circumstances shown here, of the mandatory relief provisions of section 473(b).").

As to this last point, *Standard Microsystems* held that "[i]nsofar as ... a conflict actually exists, it must be resolved in favor of allowing relief under section 473(b), not denying it under section 1008." *Id.* at 894. Section 1008(b), the court said, "inflicts a procedural forfeiture, such that uncertainties should be resolved

against its application." *Id.* (ital. orig.). "Section 473(b), in contrast, is a *remedial* statute, and as such is to be construed liberally, which is to say expansively, to favor its object that cases be adjudicated on the merits rather than determined by default." *Id.* (citations omitted; ital. orig.). "The same result follows from the familiar principle that in the event of conflict, specific provisions must prevail over more general ones." *Id.* at 895 (citations omitted). "Section 1008 deals with the general subject of motions to reconsider previous orders and renewals of previous motions. Section 473(b) deals with applications for relief from a default or default judgment entered through the fault of the defendant's attorney. As the latter subject is considerably narrower and more specific than the former, the latter provision will, absent some countervailing consideration, govern in any conflict." *Id.*

Standard Microsystems also explained the policy reason why section 473(b) should prevail over section 1008(b). It noted that when the mandatory relief provision was enacted in 1988, the Legislature "manifestly intended to end the prior regime insofar as it had relegated victims of inexcusable attorney neglect to a separate action for malpractice. [Citation.]" *Id.* at 894. The Court continued:

> That remedy was not only uncertain and expensive for the client, but extremely inefficient for the justice system as a whole, in that it generated a complex second lawsuit, typically involving the virtual recreation of the

> first in order to prove causation and damages, rather than simply litigating the first one on the merits by lifting the default—having due regard, in the process, for any harm suffered by the opposing party as the result of the attorney's conduct. The Legislature's solution—which makes up in elegance what section 1008 so sorely lacks—was to mandate relief upon the attorney's attestation to his own fault, while minimizing prejudice to the opposing party by entitling him to reasonable compensation for his fees and costs. (§ 473(b).)

Id.[2]

2. The Court Of Appeal Here Rejects *Standard Microsystems* And Holds That Section 1008(b) Prevails Over Section 473(b)

The Court of Appeal here "decline[d] to follow *Standard Microsystems*," stating that "we do not find *Standard Microsystems* persuasive" (Opn. 3, 17, 21) It gave five reasons why it believed section 1008(b) prevails over section 473(b).

First, section 1008's language "is clear and unambiguous." (Opn. 17) Section 1008(e) "provides that section 1008's provisions 'appl[y] to *all* applications ... for the renewal of a previous motion'

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2 Standard Microsystems petitioned this Court for review of the Sixth District's opinion. (No. S179107 (Dec. 31, 2009 Dkt. Entry)) The Court denied review, although Justice Corrigan voted to grant. (Feb. 24, 2010 Dkt. Entry)

and that '*[n]o application* ... for the renewal of a previous motion may be considered by any judge or court unless made according to this section' "; the "use of 'all' and 'no' in section 1008 conveys the clear meaning that every renewal motion, without exception and not excluding one for mandatory relief from default based upon an affidavit of attorney fault, is governed by section 1008's requirements"; therefore, "[u]nless the moving party meets those criteria, the trial court lacks jurisdiction to consider the motion." (Opn. 18 (ital. orig.))

Second, having amended section 473(b) to provide for mandatory relief in 1988 but having "enacted the relevant amendments to section 1008 in 1992," the Legislature was "deemed to be aware of existing statutes." (Opn. 18-19) Had it "intended to exempt renewed motions for mandatory relief ... from the requirements of section 1008, it could have done so through appropriate language in either statute. But it did not." (Opn. 19)

Third, the court "disagree[d] with *Standard Microsystems*'s conclusion that [the two statutes] are in conflict." (Opn. 19) "To the contrary, the statutes are complimentary [sic]." (*Id.*) Section 473(b) "states the requirements of making a motion for relief from default in the first instance," and "says nothing about second or subsequent motions made on the same grounds"; "[t]hat situation is governed by section 1008 for *all* renewed motions of every type, without exception." (*Id.* (ital. orig.))

Fourth, the court was "not persuaded by *Standard Microsystems'* conclusion that to resolve the purported conflict, section 473 must prevail over section 1008, because the former is a remedial statute whereas the latter creates a procedural forfeiture." (Opn. 19) Even though section 473(b) is a "remedial statute," section 1008(b) does "not work a forfeiture for parties who bring second or successive motions," but "simply state[s] the conditions under which second or successive motions can be granted, in addition to the specific requirements" of section 473(b). (Opn. 19-20)

Fifth and final, according to the court, "*Standard Microsystems*' remedial/forfeiture analysis, if accepted, 'would create a proverbial "slippery slope" and foment even more litigation concerning what is in fact "remedial." ' " (Opn. 20 (apparently quoting EZ's briefs)) "Carried to its logical conclusion," the court said, "*Standard Microsystems*' analysis would exclude from the reach of section 1008 any renewal motion claimed to be remedial, thereby nullifying the plain language of section 1008 that it applies to *all* renewal motions and thwarting the Legislature's intent to limit repetitive motions." (Opn. 21, ital. orig.)

3. *Standard Microsystems* Is Right And The Opinion Below Is Wrong

The conflict between *Standard Microsystems* and the Court of Appeal below is direct and irreconcilable. That conflict threatens substantial mischief as courts and litigants are forced to guess which

statute governs, and threatens litigants with sanctions and punishment by contempt if a court rules the litigant has guessed wrong. This Court should settle the conflict now—and hold that *Standard Microsystems* was correct and the Court of Appeal's opinion below was incorrect.

In construing a statute, the court's "fundamental task" is to "ascertain the intent of the Legislature" in order to "effectuate" the statute's "purpose." *Cummins, Inc. v. Superior Court*, 36 Cal.4th 478, 487 (2005); *Day v. City of Fontana*, 25 Cal.4th 268, 272 (2001). This entails "ascertain[ing] and declar[ing] what is in terms or in substance contained" in the statute, "not ... insert[ing] what has been omitted" or "omit[ting] what has been inserted." *Manufacturers Life Ins. Co. v. Superior Court*, 10 Cal.4th 257, 274 (1995). When the statute's words are "clear and unambiguous," that task begins and ends with its words. *Solberg v. Superior Court*, 19 Cal.3d 182, 198 (1977). That said, different kinds of statutes are construed differently. Remedial statutes are construed "liberally," *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal.4th 524, 533 (2011), while procedural forfeiture statutes are construed "strictly," *People v. United Bonding Ins. Co.*, 5 Cal.3d 898, 906 (1971).

The potential conflict between the two statutes here, each of which is comprehensive in its scope, appears at the macro level. Section 473(b) broadly covers relief from mandatory default based on attorney fault, while section 1008(b) broadly covers applications for the renewal of a previous motion—i.e., for the "same order"

that the court has already declined to make. But section 473(b) and section 1008(b) overlap when a party applies to renew a previous motion for relief from default based on attorney fault. Both statutes, therefore, cannot be comprehensive in the area in which they overlap.

The potential conflict also appears at the micro level. Section 1008(b) limits repetitive applications *generally*. But section 473(b) does *not* limit repetitive applications for mandatory relief from default based on attorney fault. Rather, section 473(b) requires such relief "*whenever* an application for relief is made no more than six months after entry of judgment" and is in the proper form and is accompanied by the proper affidavit. "Whenever" means "as often as," "at any time," "at any time when," "at whatever time," "at whatever time it shall happen," and "at what time soever." *Morse v. Custis*, 38 Cal.App.2d 573, 576-77 (1940) (internal quotation marks omitted); *accord, e.g.*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/whenever?show=0&t-=1367958576 (last visited May 13, 2013).

By requiring relief "whenever" the party properly applies for relief within six months, section 473(b) does not examine whether or not the party's application was dilatory. *See Milton v. Perceptual Development Corp.*, 53 Cal.App.4th 861, 868 (1997) (section 473(b) does not "include a requirement of diligence"). Likewise, section 473(b) does not examine whether or not the party's application was repetitive.

To be sure, by requiring such relief, section 473(b) may invite repetitive applications. But that "invitation" would be limited to applications "made no more than six months after entry of judgment." *See* § 473(b). And "accepting" that "invitation" could prove costly, since upon granting such relief, the court must "direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties" and may "[i]mpose a penalty" of up to "one thousand dollars ($1,000) upon an offending attorney or party," "[d]irect that an offending attorney pay an amount" of up to "one thousand dollars ($1,000) to the State Bar Client Security Fund," and "[g]rant other relief as is appropriate." § 473(b), (c).

As *Standard Microsystems* concluded, two rules of statutory construction compel the conclusion that section 473(b) prevails over section 1008(b). One is that a specific statute prevails over a more general one—and here, section 1008(b) deals with applications for renewal of previous motions in all kinds of cases, while section 473(b) deals with mandatory relief from default based on attorney fault. The other rule is that a remedial statute prevails over one that effects a procedural forfeiture—and here, section 473(b) relieves a party from an attorney-caused default, while section 1008(b) limits a party's ability to complain of error and restricts the court's jurisdiction to correct it.

Moreover, none of the five reasons the Court of Appeal here gave in finding *Standard Microsystems* unpersuasive withstands scrutiny.

First, even though section 1008(b)'s language "is clear and unambiguous" in broadly covering applications for renewal of previous motions, section 473(b)'s language is no less so in broadly covering mandatory relief from default based on attorney fault. The clarity of the language in both statutes is what creates the conflict; it does not resolve it.

Second, that the Legislature amended section 1008(b) more recently than section 473(b) does not mean it intended to impliedly repeal section 473(b). A later statute is "not construed as an 'implied repeal' " of an earlier statute "unless it is clear" that the later statute was "intended to supersede" the earlier one. *California Oak Foundation v. County of Tehama*, 174 Cal.App.4th 1217, 1221 (2009). There is no evidence that the Legislature intended section 1008(b) to supersede section 473(b). Similarly, an earlier statute "dealing with a narrow, precise, and specific subject is not submerged" by a later statute "covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *see also Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553, 568 (1998) ("the implied repeal doctrine applies '[w]hen two or more statutes [enacted by the same legislature] *concern the same subject matter* and are in irreconcilable conflict' " (ital. added)). Section 473(b) is the earlier statute "dealing with [the] narrow, precise, and specific subject" of mandatory relief from default based on attorney fault. Section 1008(b) is the later statute "covering [the] more generalized spectrum" of applications for renewal of previous motions. While the two statutes can overlap in

their application, on their face they do not deal with the "same subject matter."

Third, as shown, section 473(b) and section 1008(b) *are* "in conflict" whenever they both apply in any given case.

Fourth, as also shown, section 1008(b) *would* "work a forfeiture" for any party who made a "second or successive motion[ ]" for mandatory relief from default based on attorney fault if, notwithstanding the severity of the fault, the party could not satisfy section 1008(b)'s requirements.

Fifth and finally, *Standard Microsystems*' "remedial/forfeiture analysis" would *not* create a "slippery slope." As noted, the "slope" the Court of Appeal below purported to discern was that, "[c]arried to its logical conclusion, *Standard Microsystems*' analysis would exclude from the reach of section 1008(b) any renewal motion claimed to be remedial, thereby nullifying the plain language of section 1008(b) that it applies to *all* renewal motions and thwarting the Legislature's intent to limit repetitive motions." (Opn. 21 (ital. orig.))

But that "slope" does not exist. *Standard Microsystems* held only that *section 473(b),* a remedial *statute*, governs over section 1008(b), a procedural forfeiture statute. It went no further. That is, it did not suggest that "*any* renewal *motion* claimed to be remedial" automatically defeats section 1008(b)'s requirements. To be sure, if

such a "renewal motion" was based on a statute that *requires* relief "whenever" the litigant complies with its requirements, that motion should succeed, as the Legislature's "intent to limit repetitive motions" should take a back seat. But the Court of Appeal was wrong to suggest that *any* renewal motion "claimed to be remedial" would trump section 1008(b) when that motion, unlike the motion here, lacks a specific, statutorily-endorsed basis for relief.

The Court of Appeal's reliance on *Ron Burns Construction Co., Inc. v. Moore*, 184 Cal.App.4th 1406, 1418-20 (2010) in support of its "slippery slope" point was misplaced. (Opn. 20) In *Ron Burns Construction,* the Fourth District, Division Two, held that a section 473(b) motion for discretionary relief based on excusable neglect was not a prohibited motion seeking to reconsider an earlier order denying attorney fees under section 1008(a) because it "did not seek to 'modify, amend, or revoke' the order denying attorney fees." *Id.* at 1419-20. Rather, that motion "accepted that the order denying attorney fees was correct when made; it rested on a different legal theory, invoked a different statute, and relied on different and additional facts." *Id.* at 1420. Furthermore, section 1008(b) "did not apply, because the fee motion and the motion for relief under section 473 did not seek 'the same order.' " *Id.* Finally, the court said, "to the extent that section 473 conflicts with section 1008, section 473 must prevail." *Id.* The court explained that even though *Standard Microsystems* was limited to section 473(b)'s mandatory provision, its "reasoning also applies to the *discretionary* provisions of section 473, subdivision (b)." *Id.* (ital.

orig.). According to the court, section 473, in both its mandatory and discretionary provisions, "is remedial and thus is to be construed liberally, whereas section 1008 inflicts a forfeiture and thus is to be construed narrowly," and "section 473 is specific, whereas section 1008 is general." *Id.*[3]

Like *Standard Microsystems, Ron Burns Construction* did not hold that "any renewal motion claimed to be remedial" defeats section 1008(b). Rather, it involved a motion based on a remedial *statute* whose policy—to ensure that cases are tried on the merits—should prevail over a statute that effects a procedural forfeiture. Nothing in *Ron Burns Construction* suggests that a remedial "motion" could defeat section 1008(b) in every instance.

Finally, as noted, public policy favors *Standard Microsystems* over the Court of Appeal here. Section 473(b) favors litigants over courts, while section 1008(b) favors courts over litigants. Although section 1008(b)'s policy is strong, section 473(b)'s policy is stronger, since "[t]he courts exist for litigants. Litigants do not exist for courts." *Neary v. Regents of University of California*, 3 Cal.4th 273, 280 (1992). As a result, a statute that requires that a litigant have his or her day in court and that saves the system and the

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3 The question whether *Ron Burns Construction* is correct in holding that section 473(b)'s discretionary provision prevails over section 1008(b) is not implicated here. This case involves only section 473(b)'s mandatory provision.

litigant from a second lawsuit for legal malpractice should prevail over another statute that seeks to deter repetitive motions.

C. In Erroneously Construing The Interplay Between Sections 473(b) And 1008(b), The Court Of Appeal Erroneously Reversed The Trial Court's Order

While an appellate court generally reviews de novo an order granting mandatory relief for default under section 473(b) based on attorney fault, to the extent the order resolves disputed facts, review is for substantial evidence. *Carmel*, 175 Cal.App.4th at 399. Review here shows the trial court correctly granted defendants mandatory relief from the defaults and the default judgment.

As noted, section 473(b) requires the trial court to grant relief from default based on attorney fault "whenever an application for relief [1] is made no more than six months after entry of judgment, [2] is in proper form, and [3] is accompanied by an attorney's sworn affidavit attesting to his or her ... neglect." The only exception is if the "court finds that the default ... was not in fact caused by the attorney's ... neglect."[4]

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4 The courts of appeal are divided over whether, under section 473(b)'s mandatory provision, the attorney's fault must be the "sole" or only "a" cause of the default. As *Gutierrez v. G & M Oil Company, Inc.*, 184 Cal.App.4th 551, 557-58 (2010) states, some courts restrict mandatory relief "to cases where the party against whom the judgment is taken is 'totally innocent of any wrongdoing and the attorney was the *sole* cause of the default ....' (E.g., *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1248, original italics.)

(fn. continued on next page)

On December 16, 2011, eight days after entry of the judgment in question, defendants filed their first motion for mandatory relief from default based on Gibalevich's fault. 1AA/178-80. The motion was in proper form, 1AA/180-88, and was accompanied by a declaration in which Gibalevich admitted that his "excusable neglect resulted in the entry of the defaults and default judgments [*sic*]," 1AA/186, albeit without mentioning the search warrant that he would discuss in his second motion.

On January 12, 2012, the trial court denied that motion, stating that "[t]he Gibalevich declaration is not credible, in light of the showing made by plaintiff [that any neglect was inexcusable], and it is entirely too general. It does not show attorney Gibalevich is solely at fault in not filing a timely responsive pleading.

(fn. continued from previous page)

[¶] By contrast, other [courts] have indicated that the provision is available to clients who may be at some fault in allowing the ... default, just as long as the client is not guilty of intentional misconduct in contributing to the adverse result. (E.g., *SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 520 ... [because 'the evidence does not support' a 'finding of any intentional misconduct on' on the client's part, 'we find that the trial court erred in not granting' the client 'mandatory relief from dismissal']; *Benedict v. Danner Press* (2001) 87 Cal.App.4th 923, 932 [while client's mistakes 'were an additional cause in fact of the entry of default,' since those mistakes were not intentional, relief was properly granted].)"

This case does not implicate this conflict. The trial court found on substantial evidence that "no part of the fault" was attributable to defendants. 3AA/555; *see post*, at 31.

Moreover, attorney Gibalevich tries to have it both ways: see ... his declaration, which claims he has demonstrated 'excusable neglect.' He has not demonstrated excusable neglect." 2AA/340.

The Court of Appeal concluded that this order was correct. (Opn. 14) There are, however, compelling reasons to question that conclusion.[5]

Ultimately, however, it does not matter. That is because defendants filed another motion, which the trial court properly granted, for mandatory relief from default under section 473(b) based on attorney fault. They filed that motion on January 18,

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5 The Court of Appeal erred in reviewing the order for abuse of discretion (*id.*), when de novo review applies to orders denying mandatory relief from default based on attorney fault. *Carmel*, 175 Cal.App.4th at 399.

The Court of Appeal also erred on the merits. It stated that, to establish entitlement to mandatory relief based on attorney fault, a "party must submit an affidavit from the attorney containing a straightforward admission of fault," and that Gibalevich's declaration "did not meet that test." (Opn. 14) Here, however, Gibalevich expressly admitted his "neglect." 1AA/186. That he happened to characterize his "neglect" as "excusable" did not make his admission of fault any less "straightforward." After all, an attorney need only "attest[ ]" to his own "neglect," § 473(b), whether excusable or inexcusable, *see, e.g., Metropolitan Service Corp.*, 31 Cal.App.4th at 1487, to trigger the client's entitlement to mandatory relief. Nor was the Court of Appeal's reliance on *State Farm Fire & Casualty Co. v. Pietak*, 90 Cal.App.4th 600 (2001) proper. (Opn. 14) There, an attorney executed two declarations, neither of which contained *any* "admission of fault" and submitted a legal memorandum expressly *denying any* "neglect on his part." *Id.* at 609.

2012, still well within the six-month period after judgment. 1AA/178-79; 2AA/342; 3AA/56. It was in proper form, included a proposed answer to the complaint, and was accompanied by a declaration in which Gibalevich attested to his fault.

This time, Gibalevich recounted extensive facts about the execution of the search warrant at his office and about his reaction to the warrant's execution and its consequences for both him and his practice. 2AA/342-57. Gibalevich admitted that his "neglect resulted in the entry of the defaults and default judgments [sic]," but did not characterize his neglect as "excusable." 2AA/353. The motion was also accompanied by declarations by Akselrud, Gibalevich's sole associate in the period following the search warrant's execution, and Shkolnikov, the attorney Gibalevich retained to represent him with respect to the warrant's execution and its consequences. Akselrud and Shkolnikov confirmed the "search warrant" facts that Gibalevich's declaration had recounted. 2AA/354-57.

Subsequently, Dr. Fersht filed a declaration. Dr. Fersht, a man of advanced age whose sole means of support was his savings, pension, and social security, is married to Gibalevich's mother, and a $1.7 million judgment would deprive Dr. Fersht of any means to support himself and Gibalevich's mother. 1AA/178-79; 2AA/350, 370. In his declaration, Dr. Fersht stated:

> I did not know of [Gibalevich's] issues until late January of 2012.... [¶] It is important to state that I have never advised, counseled conspired, contemplated, ordered, suggested or even thought of not filing a responsive pleading in this case timely. I never directed anyone, especially Mr. Gibalevich, to avoid filing an answer in this matter. [¶] I would never contemplate or agree to allow Even Zohar to take my default and default judgement [*sic*]. I always believed that I am right and my cause is just. I want my day in Court and would not do anything to jeopardize an opportunity to prove my position.

3AA/549.

On March 2, 2012, although it repeated and ratcheted up its criticism of Gibalevich, the trial court nevertheless granted the motion. 3AA/554-55. It concluded that, under *Standard Microsystems*, section 473(b) prevails over section 1008(b), and stated that "the legislature has determined that even in cases involving conduct such as that demonstrated by attorney Gibalevich, where no part of the fault is shown to be attributable to the defendant clients, relief is mandatory." 3AA/555. It then directed the filing of the proposed answer and ordered Gibalevich to pay EZ some $34,000 in attorney's fees and costs incurred in obtaining the defaults and the default judgment and in resisting the attempts to vacate them. *Id.*

Ample evidence supports the trial court's finding that "no part of the fault" was "attributable to" defendants. Indeed, Dr. Fersht's declaration alone constitutes substantial evidence in that regard, since it would have been irrational for him to do anything to cause the default and reduce himself to penury in his old age. Likewise, there was no evidence that Gibalevich caused the default through some strategic decision or deliberate tactic. As Gibalevich stated in his declaration, to have done so would be "committing familial suicide," impoverishing both his mother and step-father Dr. Fersht.

The Court of Appeal's sole ground for reversing the order was that section 1008(b) governed defendants' second motion for mandatory relief rather than section 473(b). According to the Court of Appeal, defendants needed to submit an affidavit showing "new or different" facts and a "satisfactory explanation" for failing to produce those facts earlier. Because he failed to do so, the trial court's grant of the section 473(b) motion was reversible error. (Opn. 19-21)

The Court of Appeal's reasoning and conclusion all flow from its legally erroneous premise that defendants needed to comply with section 1008(b) to obtain mandatory relief from default. As noted, that premise is unsound. The trial court was therefore correct in granting the second motion based on *Standard Microsystems*, and the Court of Appeal's reversal cannot stand.

V.

CONCLUSION

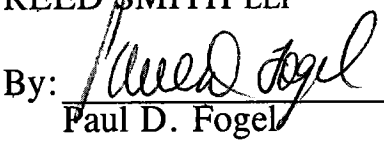
The conflict between *Standard Microsystems* and the Court of Appeal's published disagreement with that decision leaves the law in direct and irreconcilable conflict, leaving trial courts without clear direction whether a party may obtain relief from a default or default judgment under section 473(b)'s mandatory provision if the party previously but unsuccessfully sought section 473(b) relief. Because the conflict warrants this Court's plenary attention and *Standard Microsystems* correctly resolves the conflict between sections 473(b) and 1008(b), this Court should grant review and reverse the Court of Appeal's judgment.

DATED: May 17, 2013.

GIBALEVICH AND ASSOCIATES

JAMES S. LINK

REED SMITH LLP

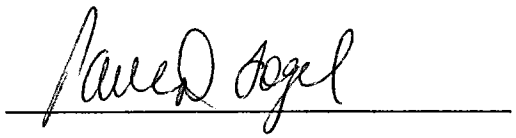
By: 
Paul D. Fogel

Attorneys for Defendants and Respondents Bellaire Townhouses, LLC, and Samuel Fersht, Individually and as Trustee of the Fersht Family Living Trust

WORD COUNT CERTIFICATE

This Petition for Review contains 7,570 words (including footnotes, but excluding cover, tables, the signature block, and this certificate). In so stating, I have relied on the word count of Microsoft Office Word 2010, the computer program used to prepare the petition.

Executed on May 17, 2013, at San Francisco, California.



Paul D. Fogel

Filed 4/10/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

EVEN ZOHAR CONSTRUCTION & REMODELING, INC., Plaintiff and Appellant, v. BELLAIRE TOWNHOUSES, LLC et al., Defendants and Respondents.	B239928 (Los Angeles County Super. Ct. No. BC458347)

APPEAL from an order of the Superior Court of Los Angeles County, Ralph W. Dau, Judge. Reversed.

Daniel B. Harris for Plaintiff and Appellant.

Gibalevich & Associates and Daniel Andrew Gibalevich; James S. Link for Defendants and Respondents.

INTRODUCTION

Plaintiff Even Zohar Construction & Remodeling, Inc. sued Bellaire Townhouses, LLC and Samuel N. Fersht, individually and as trustee of the Fersht Family Living Trust (collectively defendants), in a dispute regarding development and construction of a condominium project.

After the trial court denied defendants' motion to compel arbitration, defendants failed to file a responsive pleading to plaintiff's complaint. Pursuant to plaintiff's requests, the trial court ultimately entered a $1.7 million default judgment against defendants.

Citing section 473, subdivision (b),[1] defendants moved for mandatory relief, relying upon an affidavit of fault executed by their attorney. The trial court denied the motion, finding the attorney affidavit "not credible" and "too general."

Several weeks later, defendants filed a motion to renew their request for relief, supported by a more detailed attorney affidavit of fault. Plaintiff opposed the motion on multiple grounds, including defendants' failure to satisfactorily explain why they had not presented the evidence contained in the more detailed affidavit in their first motion for relief. On several separate occasions, the trial court stated that it did not find the attorney's second affidavit credible and that defendants had failed to meet the foundational requirements for a motion to renew found in section 1008, subdivision (b). Nonetheless, the trial court felt bound by *Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868 (*Standard Microsystems*), a decision that held that section 1008, subdivision (b) does not apply to a renewed section 473, subdivision (b) motion for mandatory relief based upon an affidavit of attorney fault. As a result, the trial court granted defendants' motion and set aside the defaults and default judgment.

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

We reverse. First, we find that the trial court correctly concluded that defendants did not satisfactorily explain their failure to present earlier the evidence proffered in their attorney's second affidavit of fault. Second, we decline to follow *Standard Microsystems*. Its conclusion that section 1008's requirements do not apply to a renewed motion for mandatory relief from default based upon an affidavit of attorney fault ignores section 1008's clear and unambiguous language that it applies to *all* renewal motions and undermines the Legislature's goal to limit repetitive motions based upon facts that, with the exercise of due diligence, could have been but were not presented at the first hearing. We therefore conclude that the trial court lacked jurisdiction to consider the renewed motion. On that basis, we reverse and direct the trial court to reinstate the defaults and default judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Lawsuit and Entry of the Default Judgment*

In March 2011, plaintiff filed and served its lawsuit.

In May 2011, defendants filed a petition to compel arbitration.

On August 29, 2011, the trial court denied the petition to compel arbitration. On August 31, 2011, plaintiff properly served defendants by mail with notice of entry of that order. As a result, defendants had until September 20, 2011 to respond to plaintiff's complaint. (§§ 1281.7, 1013, subd. (a).) Defendants did not file any responsive pleading.

On September 23, 2011, plaintiff notified defendants' attorney Daniel Andrew Gibalevich (Gibalevich) by email and FAX that it would request entry of default the following week unless a responsive pleading was filed immediately. No pleading was forthcoming.

On September 29, 2011 and October 4, 2011, at plaintiff's requests, the clerk of the superior court entered defendants' defaults.

On November 22, 2011, plaintiff moved for entry of a default judgment.

On December 8, 2011, the trial court, after conducting a prove-up hearing, entered a $1,701,116.70 default judgment (plus interest) against defendants.

2. *Defendants' First Motion for Relief*

On December 16, 2011, defendants moved for relief. Their pleading is entitled "Notice of Motion for Mandatory Relief Under C.C.P. § 473 to Vacate Defaults and Default Judgments." Notwithstanding the reference in the motion's caption to mandatory relief, the body of the motion argued that Gibalevich had committed both excusable neglect and inexcusable neglect. Gibalevich's declaration, offered in support of the motion, also improperly conflated the two concepts. He averred:

> "3. Beginning the end of August and through the first part of November of 2011, I had to spend substantial amounts of time away from the office. *I had to attend to certain personal issues that required my undivided attention. I believed that I had sufficient staff to assure competent handling of client files*. My associates were instructed to notify me immediately of issues that would require my personal attention. *It appears that my staff failed to maintain this file in accordance with this firm's policies and procedures*.
>
> "4. *Due to my frequent absences, I failed to file and serve the responsive pleading.* Since the responsive pleading was never filed or served, defaults were taken against the Defendants. Had I filed the responsive pleading on time, prior to defaults being taken, the defaults and possible default judgments would have been avoided. *It is clear that my mistake and excusable neglect resulted in the entry of defaults and default judgments against the Defendants*." (Italics added.)

Plaintiff opposed the defense request for relief. Essentially, plaintiff urged that Gibalevich was not credible to the extent that his declaration suggested that he was unaware of the deadline to file a responsive pleading. Plaintiff submitted

multiple documents (court orders, emails, FAXes) to establish: (1) Gibalevich had been aware that his clients' response to the complaint was due by September 20; and (2) when defendants failed to file a pleading by September 20, plaintiff informed Gibalevich that it intended to request entry of a default unless the deficiency was cured immediately.

Further, plaintiff noted that Gibalevich's claim of inattentiveness was not credible given that his mother is married to defendant Fersht. Plaintiff opined that the defaults "were part of a concerted plan in which [defendants] engaged with Mr. Gibalevich to delay this matter and drive up the attorney's fees and costs for plaintiff."

In addition, a declaration from Even Zohar, plaintiff's sole owner, impeached Gibalevich's claim that, during the relevant time period, he had spent substantial time away from his law practice. Zohar averred that during his "numerous communications . . . in the fall of 2011," defendant Fersht "repeatedly told [him] that during this period that Mr. Gibalevich was very successful, busy in his law practice and frequently in court."

On January 9, 2012, the trial court conducted a hearing on the motion. It noted that while the motion was predicated upon the mandatory relief section of section 473, Gibalevich's declaration "fuzzes up the issue by referring to his mistake and excusable neglect in paragraph 4. [¶] . . . As far as the mandatory relief aspect, it's entirely too vague and conclusory."

In regard to the language about excusable neglect in his declaration, Gibalevich told the court: "[T]hat was a mistake in the language, because there was no intent on my behalf to ask for any kind of discretionary relief, it was always under mandatory relief." Although Gibalevich asked if he could file "an additional declaration outlining the extent of the personal problems [he] was having and what mandated [his] absence . . . from the office and [his] failure to follow up on this

matter," he made no offer of proof as to what that declaration would aver. The court rejected Gibalevich's request, stating it would rule upon the motion as submitted.

The trial court denied the motion. Its order explains:

> "Defendants . . . have moved for mandatory relief under Code of Civil Procedure section 473.
>
> "The motion is denied. The Gibalevich declaration is not credible, in light of the showing made by plaintiff, and it is entirely too general. It does not show attorney Gibalevich is solely at fault in not filing a timely responsive pleading. Moreover, attorney Gibalevich tries to have it both ways: see paragraph 4 of his declaration, which claims he has demonstrated 'excusable neglect.' He has not demonstrated excusable neglect."

3. *Defendants' Second Motion for Relief*

On January 18, 2012, defendants filed their second motion, entitled, as was their earlier unsuccessful motion, "Notice of Motion for Mandatory Relief under C.C.P. § 473 to Vacate Defaults and Default Judgments." The motion contained no reference to the statutory provision governing renewals of previously denied motions: section 1008, subdivision (b). Instead, the motion simply explained that during the hearing on the first motion, "the [trial] Court made an observation that although in his motion, defense counsel was requesting mandatory relief under C.C.P. section 473(b), defense counsel's declaration was not sufficiently clear and made contentions under the discretionary portion of section 473(b). Despite [defense] counsel's argument, the Court denied the motion. [¶] In order to address Court's concerns regarding the perceived generality of defense counsel's declaration, and to avoid harm to the defendants, at the hands of their attorney, this motion follows."

To support the claim for mandatory relief, defendants offered another declaration from Gibalevich in which he averred the following:

> "On August 25, 2011, investigators with the Los Angeles District Attorney's office served [a] search warrant . . . at my office . . . . The investigation focused on medical providers and not on me or my practice. . . . [O]ne of my associates, Mr. Savransky, resigned his position right after the search. That left me and Ms. Gina Akselrud as [the] only attorneys [in my office]. . . .
>
> "In my effort to secure the return of my client files, I engaged Mr. Shkolnikov, a criminal defense attorney. I volunteered to assist him in his research and drafting efforts. . . .
>
> ". . . . *I spent all of my time on efforts to return my client's files.* I researched and wrote many drafts of the motions that were filed. *This consumed me. I was working on this most of the day, every day.* When I wasn't in front of the computer, I thought of nothing else.
>
> "I began to obsess over my reputation and the disclosures that I had to make to Judges and opposing counsel alike [about the search]. . . . ***I have to confess that this feeling of embarrassment is the reason why I failed to set out these facts in the declaration previously filed.*** I will never forget that day or the hell that followed. . . . *I did experience a period of time, from middle of September through October of 2011, where I stayed away from the office, for days at a time.* . . . I was ashamed and embarrassed. I was embarrassed in front of my employees, opposing counsel and judges that I had to face. This feeling of embarrassment is still with me.
>
> "*Due to my frequent absences, my state of mind and obsession with getting my client files back, I neglected this matter. I failed to enter a responsive pleading and did not respond to [plaintiff's] emails notifying me of the default.* Since the responsive pleading was never entered, defaults and default judgments were taken against my clients, the Defendants.
>
> "Had I filed the responsive pleading on time, prior to defaults being taken, the defaults and default judgments would have been

avoided. *It is clear that my mistake, inadvertence and neglect resulted in the entry of defaults and default judgments against my clients, the Defendants herein.*" (Italics and boldface added.)

Defendants' motion included two additional declarations.

The first declaration was from Akselrud, Gibalevich's associate. She confirmed the execution of the search warrant on August 25, 2011 and Savransky's resignation the following day. In addition, Akselrud averred that Gibalevich was "frequently absent" from the office from the end of August through November 2011 and that "approximately in the middle of September of 2011, [she] noticed that the stress of the situation was taking its toll on Mr. Gibalevich. . . . He stayed away from the office preferring to work at home. *It seemed that he only worked on getting his client files back. All else took a back seat.* He began to obsess over it. He didn't answer his phone nor respond to email." (Italics added.) However, the next portion of Akselrud's declaration contradicted her claim (as well as that made by Gibalevich in his declaration) that Gibalevich worked *only* on the search warrant issue. She explained: "Because so many of the files taken [when the search warrant was executed] were active litigation files, Mr. *Gibalevich and I, had to make many appearances, in the civil matters, to continue hearings and trials. Much of my and his time was spent in attempts to recreate files and throw ourselves on the sword by explaining what transpired to clients, opposing counsel and judges.*" (Italics added.)

The second declaration was from Shkolnikov, the attorney representing Gibalevich "in a matter of In Re Search Warrant." Shkolnikov averred, as had Akselrud, that Gibalevich was "frequently absent" from his office through November 2011. In addition, Shkolnikov made the same contradictory averments that Akselrud and Gibalevich had made as to what Gibalevich did and did not do.

On the one hand, Shkolnikov declared that Gibalevich "devoted all of his time and effort to getting the files and his property back" but, on the other hand, Shkolnikov declared that Gibalevich and Akselrud "had to make all appearances to continue hearings and trials," many "on shortened notice or on ex parte basis."

On January 30, 2012, defendants filed an ex parte application seeking an order to stay plaintiff's execution on its $1.7 million default judgment pending a ruling on its renewed motion for relief. The motion's caption[2] as well as a declaration from Gibalevich[3] acknowledged, for the first time, that the second motion for relief was brought pursuant to section 1008, subdivision (b).[4]

On January 31, 2012, the court conducted a hearing on the defense application. It granted the application to stay execution on the judgment and continued the matter for a hearing on the merits of the renewed motion for relief.

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[2] The motion is entitled, in pertinent part: "*Ex Parte* Application for an Order on a Renewed Motion (C.C.P. 1008(b)) for Mandatory Relief under C.C.P. 473(b) Vacating Defaults and Default Judgments."

[3] Gibalevich's declaration averred, in part: "On January 9, 2012, a motion for mandatory relief under C.C.P. section 473(b) came regularly on calendar before this Court. The Court found that my declaration was not credible, in light of the showing made by the plaintiff, and that my declaration was too general. *The different facts, in accordance with C.C.P. section 1008(b)*, set forth below deal with the circumstances surrounding my failure to file a responsive pleading in this matter." (Italics added.) The remainder of Gibalevich' s declaration: (1) repeated the averments found in his declaration filed earlier in support of the second motion for relief and (2) included additional averments relating to the defense request to stay plaintiff's execution on the judgment.

[4] At the hearing conducted on the ex parte motion, Gibalevich reiterated that the second request for relief complied with section 1008, subdivision (b). He stated: "As far as the procedural issues with this motion, I've complied with [section] 1008 (b) in all respects. We notified the court of the previous motion made. We provided the court with the previous order. I set forth what additional facts we're providing in my declaration, which fully complies with the jurisdictional requirements of [section] 1008 (b)."

In the course of the hearing, the court stated that the facts contained in Gibalevich's second declaration "are not new facts." "You could have presented all of that with your original [motion]." The court further indicated that it did not find Gibalevich's new declaration credible. The court told Gibalevich: "[Y]ou are presenting an entirely different story with this application than you have presented to the court originally. [¶] . . . [In your first declaration,] [y]ou tried to blame it on a miscalendaring when the evidence is that your office received multiple, multiple notices before the defaults were entered in all different kinds of ways. [¶] *And, frankly, your story about being obsessed with this search warrant for the entire period of time is just not credible*. You originally told the court you had to be out of the office for substantial periods of time. Now you're saying you're conducting all kinds of research on your computer in your office. [¶] *You're not credible, Mr. Gibalevich.*" (Italics added.) Gibalevich responded: "[D]uring the original hearing [on the first motion], Your Honor, I did not blame it on a miscalendaring. . . . [¶] . . . At no time am I placing blame on anybody else." The court replied: "That's directly contrary to your [first] declaration."

Plaintiff's opposition to the renewed motion made several arguments. First, it argued that defendants had failed to comply with section 1008, subdivision (b) because they had failed to demonstrate why the new information (Gibalevich's stress caused by the execution of the search warrant) had not been presented in the first motion. Next, it argued that Gibalevich's latest explanation was not credible. Lastly, it claimed that the decision not to file a responsive pleading to the complaint "was a deliberate choice [defendants and Gibalevich] made together as part and parcel of their continuing gambit of delay."

Defendants' reply to plaintiff's opposition cited, for the first time, *Standard Microsystems, supra,* 179 Cal.App.4th 868, a case decided more than two years earlier. Essentially, *Standard Microsystems* held that section 1008, subdivision (b)

does not apply to renewed motions for mandatory relief brought pursuant to section 473 subdivision (b). (We will discuss the opinion in detail when evaluating plaintiff's contention.) Defendants' reply also included a declaration from Fersht denying any complicity in Gibalevich's failure to file a responsive pleading.[5]

At the hearing on the renewed motion, the trial court again expressed its disbelief of Gibalevich.[6] Gibalevich argued that the "only difference between [his first and second] declarations . . . was that [he] provided additional facts to [the court] setting the background as to why [he] was unavailable and why [he] did not file it." Gibalevich claimed that "[t]he story never changed." The trial court responded: "It changed every time you presented it, Mr. Gibalevich. [¶] . . . You do not have a footing in reality, sir."

As to whether defendants were complicit in Gibalevich's failure to respond to the complaint, plaintiff argued the court should find that Fersht's declaration denying any such complicity not to be credible because it had not been filed earlier. That is, plaintiff suggested that were Fersht telling the truth, defendants would have proffered his declaration at the outset of the section 473 litigation. In regard to its theory that defendants were involved in the decision to let the matter

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[5] Fersht averred:

"It is important to state that I have never advised, counseled, conspired, contemplated, ordered, suggested or even thought of not filing a responsive pleading in this case timely. I never directed anyone, especially Mr. Gibalevich, to avoid filing an answer in this matter.

"I would never contemplate or agree to allow Even Zohar to take my default and default judgment. I always believed and continue to believe that I am right and my cause is just. I want my day in Court and would not do anything to jeopardize an opportunity to prove my position."

[6] The trial court's tentative ruling indicated that it lacked jurisdiction to consider the renewal motion because, as the judge explained later at the hearing, "[t]here's been a failure to make a 1008 (b) proper showing."

go to default, plaintiff relied upon defendants' actions and statements, from both before and after the complaint was filed, that plaintiff believed indicated a defense intent to thwart any effort by plaintiff to recover any money from defendants.

In an order filed after the hearing, the trial court granted the motion. In relevant part, the order explains:

> "Before the court is the second attempt by Daniel A. Gibalevich, attorney at law, to obtain vacation of his clients' default (entered September 29, 2011) and default judgment (filed December 8, 2011).
>
> "Attorney Gibalevich first blamed the default and default judgment entered against defendants . . . on the lawyers he employed in his office. . . . In this first motion, attorney Gibalevich argued both that he was entitled to mandatory relief on the ground of attorney fault and on the ground of excusable neglect on his part.
>
> "When he lost the first motion, attorney Gibalevich filed another motion. *The second motion fails to comply with the requirements of section 1008(b). In this motion, attorney Gibalevich changed his story and blamed the default and default judgment on his having become obsessed with the consequences of a search warrant executed on his office* by the Los Angeles County District Attorney. (Neither the search warrant nor its consequences concerned the files of the defendants in this action.) . . . .
>
> "The associate [Akselrud] in Mr. Gibalevich's office did not support the claim in attorney Gibalevich's December 15, 2011 declaration that she failed to maintain the [case] file or notify Mr. Gibalevich of the entry of default and default judgment against [defendants].
>
> "[D]efendants cite *Standard Microsystems Corp. v. Winbond Electronics Corp.*, 179 Cal.App.4th 868, 893-894, which holds that insofar as any conflict actually exists between section 1008 and section 473(b), it must be resolved in favor of section 473(b). Plaintiff argues that this case is an outlier, but the court does not agree. *The decision seems correct, and this court is bound to follow*

it. The legislature has determined that even in cases involving conduct such as that demonstrated by attorney Gibalevich, where no part of the fault is shown to be attributable to the defendant clients, relief is mandatory." (Italics added.)

The court vacated the defaults and default judgment, directed the clerk to file defendants' proposed answer, and ordered Gibalevich to pay to plaintiff the attorney fees ($30,940) and costs ($2,961.62) it had incurred "in connection with the default[s] and default judgment and defendants' attempts to have [them] vacated."

This appeal by plaintiff follows.

DISCUSSION

Plaintiff contends: "Defendants' failure to comply with Section 1008 deprived the lower court of jurisdiction to reach the merits of their renewed Section 473(b) motion as a matter of law. (Cal.Civ.Pro. § 1008(e).)" We agree.

Section 473, subdivision (b) provides for *mandatory* relief from default if the moving party's request is supported by "an attorney's sworn affidavit attesting to his . . . mistake, inadvertence, surprise, or neglect . . . unless the court finds that the default . . . was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).) The purpose of the mandatory relief provision is "'to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys.' [Citation.] Thus, the Legislature created a narrow exception to the discretionary relief provision for default judgments. . . . [Citation.]" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257.) "The range of attorney conduct for which relief can be granted in the mandatory provision is broader than that in the discretionary provision, and includes inexcusable neglect." (*Leader v.*

Health Industries of America, Inc. (2001) 89 Cal.App.4th 603, 616.) But if the default occurred as a result of "an 'intentional strategic decision'" by defense counsel, relief is not available. (*Jerry's Shell v. Equilon Enterprises, LLC* (2005) 134 Cal.App.4th 1058, 1073.)

Here, the trial court denied defendants' first motion for relief because it found that Gibalevich's declaration was far too conclusory to require the grant of relief based upon a theory of attorney fault. This ruling was not an abuse of discretion. In order to obtain relief, the moving party must submit an affidavit from the attorney containing a straightforward admission of fault. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 609-610.) Gibalevich's first declaration did not meet that test.

Defendants' second motion proffered a declaration from Gibalevich that purported to explain his fault as an inattentiveness caused by an obsessive reaction to the execution of a search warrant at his office. But, as Gibalevich later acknowledged, because the motion sought to renew the previously denied motion, the motion was governed by section 1008, subdivision (b).[7]

"Section 1008 is designed to conserve the court's resources by constraining litigants who would attempt to bring the same motion over and over." (*Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1157.) To that end, subdivision (b) of section 1008, as amended in 1992,[8] provides, in relevant part: "A party who originally made an application for an order which was refused . . . may make a subsequent application for the same order upon new or different facts [or]

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[7] Defendants' reply to plaintiff's opposition to their second motion conceded: "[D]efendants herein are making a motion for an order that was exactly the same as the one that was requested in the first motion to vacate the default and default judgment."

[8] Statutes of 1992, chapter 460, section 4, pages 1832-1833.

circumstances . . . in which case it shall be shown by affidavit . . . what new or different facts [or] circumstances . . . are claimed to be shown." Case law has included the additional requirement that the party seeking to renew a previously denied motion based upon new or different facts "must provide a satisfactory explanation for the failure to produce the evidence at an earlier time." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212; see also *California Correctional Peace Officers Assn. v. Virga* (2010) 181 Cal.App.4th 30, 46-47, fn. 15, and 6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 47, pp. 470-471.) The trial court's finding that the moving party did not establish the predicate facts for a section 1008 motion is reviewed for abuse of discretion. (*Lucas v. Santa Maria Public Airport Dist.* (1995) 39 Cal.App.4th 1017, 1027-1028.)

Subdivision (e) was added to section 1008 in 1992 at the same time subdivision (b) was amended. (Stats. 1992, ch. 460, § 4, pp. 1832-1833.) Subdivision (e) provides: "This section specifies the court's jurisdiction with regard to . . . renewals of previous motions, *and applies to all applications . . . for the renewal of a previous motion. . . . No application . . . for the renewal of a previous motion may be considered* by any judge or court *unless made according to this section.*" (Italics added.) If the predicate requirements set forth in subdivision (b) are not met, the trial court lacks jurisdiction to consider the renewal motion. (See, e.g., *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 383-391.)

These 1992 amendments were intended to clarify that no renewal motion can be heard "unless the motion is based on new or different facts, circumstances, or law" because the Legislature sought "to reduce the number of . . . renewals of previous motions heard by judges in this state." (Stats. 1992, ch. 460, § 1.)

In this instance, Gibalevich's declaration failed to adequately explain why he had not included the facts about the search warrant execution and his response thereto in his first declaration. These events took place from September to November 2011. Information about them was obviously in Gibalevich's possession when he filed the first motion in December 2011 and the relevance of the events (if true) was patent. Gibalevich's only explanation for not having presented this information earlier was that he was embarrassed. The trial court did not find this explanation credible. That finding—a finding defendants do not contest—is binding upon us. (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622-623.) Given the inadequacy of the defense showing, the trial court did not abuse its discretion in finding that defendants had failed to establish the predicates for relief under section 1008, subdivision (b). However, rather than denying the renewed motion, the trial court proceeded to address the motion on its merits and grant relief, finding it was bound by *Standard Microsystems.*

The relevant facts in *Standard Microsystems*, *supra*, 179 Cal.App.4th 868 are the following. Attorney A advised the defendants that they did not have to answer the plaintiff's complaint because he believed that the plaintiff's attempt to serve them by mail was ineffective. (*Id.* at pp. 874-876.) Defendants followed that advice and no responsive pleading was filed. (*Id.* at p. 880.) As a result, plaintiff took their default. (*Id.* at p. 876.) The defendants, still represented by Attorney A, then filed a motion for *discretionary* relief under section 473, subdivision (b) to set aside the default. The motion claimed excusable neglect and mistake of law (the defendants' erroneous belief that the service by mail had been ineffective). (*Id.* at pp. 877-878.) The trial court denied the motion and proceeded to enter a default judgment. The defendants discharged Attorney A and hired Attorney B. (*Id.* at p. 895.) Attorney B moved to set aside the default and the default judgment based upon the *mandatory* relief provision of section 473, subdivision (b). The motion,

supported by an affidavit from Attorney A, relied upon the theory that Attorney A's fault (failure to provide proper legal advice and to take steps to avoid the entry of default) directly led to the default and default judgment. (*Id.* at p. 880.) The trial court denied the motion, finding, in part, that it was an improper motion for reconsideration.

The Court of Appeal reversed the trial court. First, it found that the second motion was not a motion for reconsideration because it "rested on an entirely different legal theory, invoked a different statutory ground, and relied in very substantial part on markedly different facts." (*Standard Microsystems, supra*, 179 Cal.App.4th at p. 891.) Next, it stated that it was reluctant to conclude that the second motion was a renewal motion because it sought relief different from that requested in the first motion (set aside the default *and* the default judgment versus moving only to set aside the default) and relied upon a different theory (mandatory relief relying upon an affidavit of attorney fault versus discretionary relief based upon a claim of excusable neglect). (*Id.* at pp. 892-893.) Lastly, it found—and this is the portion of the opinion upon which the trial court in this case relied—that even if the second motion was construed to be a renewal motion, to the extent that section 1008 conflicts with section 473, section 473 must prevail because it is a "remedial statute" whereas section 1008 "inflicts a procedural forfeiture." (*Id.* at p. 894.) In addition, the court held that section 473, as a more specific statute, must take precedence over the more general provisions of section 1008. (*Id.* at p. 895.)

For several reasons, we do not find *Standard Microsystems* persuasive.

First, the language of section 1008 is clear and unambiguous. A court must construe a statute so as to give effect to the Legislature's intention. (§ 1859; *Landrum v. Superior Court* (1981) 30 Cal.3d 1, 12.) In order to do so, we look first to the words of the statute. (*Moyers v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) The statutory language used is to be given its usual, ordinary

meaning and, where possible, significance should be given to every word and phrase. (*Ibid.*) "The words must be construed in context in light of the nature and obvious purpose of the statute where they appear." (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 354.)

In that regard, subdivision (e) provides that section 1008's provisions "appl[y] to *all* applications . . . for the renewal of a previous motion" and that "*[n]o application* . . . for the renewal of a previous motion may be considered by any judge or court unless made according to this section." (§ 1008, subd. (e), italics added.) ""'If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls."'" (*Catlin v. Superior Court* (2011) 51 Cal.4th 300, 304.)

"All" and "no" are clear and unambiguous words. "'All' means everyone or the whole number [citation], and it does not 'admit of an exception or exclusion not specified' [citation]." (*Stewart Title Co. v. Herbert* (1970) 6 Cal.App.3d 957, 962.) "No," used as an adjective, means "Not any; not one." (American Heritage Dictionary (1985 2d. ed.), p. 844.) Taken together, the use of "all" and "no" in section 1008 conveys the clear meaning that every renewal motion, without exception and not excluding one for mandatory relief from default based upon an affidavit of attorney fault, is governed by section 1008's requirements. Unless the moving party meets those criteria, the trial court lacks jurisdiction to consider the motion. This conclusion supports the legislative goal to impose "a limitation on the parties' ability to file repetitive motions." (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105.)

Second, the Legislature authorized section 473, subdivision (b) motions for relief based upon attorney fault through a statutory amendment enacted in 1988 (*Rodrigues v. Superior Court* (2005) 127 Cal.App.4th 1027, 1032-1033), four years *before* the Legislature enacted the relevant amendments to section 1008 in

1992. The Legislature is deemed to be aware of existing statutes. (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 212.) Had the Legislature intended to exempt renewed motions for mandatory relief based upon attorney fault from the requirements of section 1008, it could have done so through appropriate language in either statute. But it did not. "'It is . . . against all settled rules of statutory construction that courts should write into a statute by implication express requirements which the Legislature itself has not seen fit to place in the statute.' [Citations.] The court must follow the language used in a statute and give it its plain meaning.'" (*In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1011.)

Third, we disagree with *Standard Microsystems's* conclusion that sections 473, subdivision (b), and 1008 are in conflict. To the contrary, the statues are complimentary. Section 473, subdivision (b) states the requirements of making a motion for relief from default in the first instance. It says nothing about second or subsequent motions made on the same grounds. That situation is governed by section 1008 for *all* renewed motions of every type, without exception. That a second or subsequent motion for relief from default based on attorney fault under section 473, subdivision (b) cannot be granted unless the requirements for renewed motions set forth in section 1008 are met does not mean that the statutes are in fatal conflict. That is simply the result of the statutes working together as the Legislature intended. Therefore, the conclusion of *Standard Microsystems*' that the purported conflict must be resolved by giving effect to section 473, subdivision (b), as the more specific statute, is incorrect.

Fourth, in similar fashion, we are not persuaded by *Standard Microsystems*' conclusion that to resolve the purported conflict, section 473 must prevail over section 1008, because the former is a remedial statute whereas the latter creates a procedural forfeiture. The Legislature's 1992 amendments to section 1008 defined the class of parties entitled to seek relief in a renewed motion, namely, those who

can show new or different facts. Case law has added the requirement that the moving party show that the evidence could not have been presented previously.[9] These mandatory conditions do not work a forfeiture for parties who bring second or successive motions, but rather simply state the conditions under which second or successive motions can be granted, in addition to the specific requirements of section 473, subdivision (b). "[I]f a statute announces a general rule and makes no exception thereto, the courts can make none. [Citation.] A court may not insert into a statute qualifying provisions not intended by the Legislature and may not rewrite a statute to conform to an assumed legislative intent not apparent. [Citation.]" (*Burnsed v. State Bd. of Control* (1987) 189 Cal.App.3d 213, 217.)

Finally, we agree with plaintiff that *Standard Microsystems'* remedial/forfeiture analysis, if accepted, "would create a proverbial 'slippery slope' and foment even more litigation concerning what is in fact 'remedial.'" As a matter of fact, this process has begun. *Ron Burns Construction Co., Inc. v. Moore* (2010) 184 Cal.App.4th 1406, 1418-1420, without significant discussion or analysis, applied *Standard Microsystems'* reasoning to a section 473 motion for *discretionary* relief based upon a claim that counsel had committed excusable neglect, holding that "to the extent that section 473 conflicts with section 1008, section 473 must prevail." (*Id.* at p. 1420; see also *California Correctional Peace Officers Assn. v. Virga, supra,* 181 Cal.App.4th at p. 48 [apparently agreeing with *Standard Microsystems'* "forfeiture" analysis but declining to apply it to two

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[9] *Standard Microsystems* declined to follow the requirement created by case law that the moving party in a section 1008 motion must provide a satisfactory explanation for failing to present the evidence earlier (*Standard Microsystems, supra,* 179 Cal.App.4th at pp. 895-896) and criticized the concept that the moving party's failure to comply with section 1008 deprived the trial court of jurisdiction to rule upon the motion (*id.* at p. 889). Needless to say, we also disagree with *Standard Microsystems* on those points.

repetitive motions for attorney fees because each motion relied upon a different statute authorizing recovery of attorney fees].) Carried to its logical conclusion, *Standard Microsystems*' analysis would exclude from the reach of section 1008 any renewal motion claimed to be remedial, thereby nullifying the plain language of section 1008 that it applies to *all* renewal motions and thwarting the Legislature's intent to limit repetitive motions.[10]

For the reasons stated above, we decline to follow *Standard Microsystems*.[11] Its conclusion undermines the Legislature's goal to limit repetitive motions and to provide "an important incentive for parties to efficiently marshall their evidence" in the first instance. (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 689.) As explained earlier, the trial court did not abuse its discretion in finding that defendants failed to meet section 1008's predicate requirements. Based upon that finding, the trial court should have denied defendants' renewal motion for lack of

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[10] *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494 stated: "To hold, under the circumstances presented in this case, that the general relief mechanism provided in section 473 could be used to circumvent the jurisdictional requirements for reconsideration found in section 1008 would undermine the intent of the Legislature as specifically expressed in section 1008, subdivision (e): 'No application to reconsider any order . . . may be considered by any judge or court unless made according to this section.' Therefore, we decline to so hold." (*Id.* at p. 1501.)

[11] Defendants also cite *Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031 (disapproved on another ground in *Le Francois v. Goel, supra,* 35 Cal.4th at p. 1107, fn. 5), a pre-*Standard Microsystems* case, to support the trial court's order granting their renewal motion. *Wozniak* stated: "If the requirements for relief under section 473 are met, the viability of relief under section 473 cannot be defeated because the requirements for relief under section 1008 may not also have been met." (*Id.* at p. 1043.) The court cited no pertinent authority for its conclusion. In any event, as explained above, we do not agree with it. Further, that holding was rendered in circumstances clearly distinguishable from this case. It did not arise in the context of a renewed motion for relief under section 473, subdivision (b) but, instead, involved a motion brought for the first time under the excusable neglect or surprise provisions of section 473. Second, it did not involve repetitive motions seeking identical relief but adding new facts.

jurisdiction. We will direct the trial court to set aside its order granting the motion and to reinstate the defaults and default judgment.

DISPOSITION

The trial court's March 2, 2012 order is reversed and the trial court is directed to reinstate the previously entered defaults and default judgment. Appellant is to recover its costs on appeal.

CERTIFIED FOR PUBLICATION

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 4 April 29, 2013

James S. Link
Counselor & Advocate at Law
215 N. Marengo Avenue, 3rd Floor
Pasadena, CA 91101

EVEN ZOHAR CONSTRUCTION & REMODELING, INC.,
Plaintiff and Appellant,
v.
BELLAIRE TOWNHOUSES, LLC et al.,
Defendants and Respondents.

B239928
Los Angeles County No. BC458347

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

PROOF OF SERVICE

Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC, et al.
California Supreme Court No. S_____;
Second Appellate District, Division Four, No. B239928;
Los Angeles County Superior Court No. BC458347

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, California 94105-3659. On May 17, 2013, I served the following document(s) by the method indicated below:

PETITION FOR REVIEW

☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

☑ by transmitting via email to the party whose email address is listed below:

Daniel B. Harris, Esq. 3450 Sacramento Street, Suite 108 San Francisco, CA 94118	Attorneys for Plaintiff and Appellant Even Zohar Construction & Remodeling, Inc. Tel: 415.994.1727 Fax: 415.723.7411 dbh2007@sbcglobal.net
Second Appellate Dist., Division Four California Court of Appeal Second Floor, North Tower 300 South Spring Street Los Angeles, CA 90013-1213	
Los Angeles County Superior Court 111 North Hill Street Los Angeles, CA 90012-3014	

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 17, 2013, at San Francisco, California.

Myra R. Taylor