No. S210804
In The Supreme Court Of California

Even Zohar Construction & Remodeling, Inc.
Plaintiff and Appellant,

v.

Bellaire Townhouses LLC, et al.,
Defendants and Respondents.

ANSWER TO 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

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INTRODUCTION – WHY REVIEW IS NOT WARRANTED

The petition for review filed by defendants Bellaire Townhouses LLC ("Bellaire") and Samuel N. Fersht ("Fersht"), Bellaire's president, should be denied. The Court of Appeal held that Code of Civil Procedure section 1008 deprived the trial court of jurisdiction to consider the renewed motion defendants brought under Code of Civil Procedure section 473(b) for relief from the defaults and default judgment that had been entered against them. It thus reversed the trial court's order granting defendants' motion, which the trial court had issued even though it had found that defendants' "second motion fails to comply with the requirements of section 1008(b)." (3AA-554.)

The Court of Appeal's ruling was both correct and completely unremarkable. It was predicated on the plain language of section 1008, which makes the statute applicable to "any" and "all" repeat motions, and provides that "[n]o application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section." In *Le Francois v. Goel*, 35 Cal.4th 1094 (2005), this Court affirmed that section 1008 applies to all renewed motions brought by parties.

Defendants readily concede that their second motion did not comply with section 1008. (*E.g.*, Pet. 1-2, 8.) But because the Court of Appeal disagreed with dicta in *Standard Microsystems Corp. v. Winbond*

Electronics Corp., 179 Cal.App.4th 868 (2009) ("*Standard Microsystems*") regarding the intersection of sections 1008 and 473(b), defendants now argue that review is necessary to resolve a purported "direct and irreconcilable" conflict between the Court of Appeal's ruling and the decision in *Standard Microsystems*.

In fact, given the fundamentally different procedural postures of this case and *Standard Microsystems*, there is no true conflict between the holdings of the respective cases. Review is therefore not warranted on that ground (or on any other basis). Notwithstanding the disagreement of the Court of Appeal with the *Standard Microsystems* analysis, the decisions are fully reconcilable.

In *Standard Microsystems*, the defendants first moved to vacate the court *clerk's ministerial entry of the defendants' defaults* under the *client fault* provisions of section 473(b). *Id.* at 873, 876-78. After that motion was denied and a default judgment was entered, the defendants retained new counsel and moved to vacate the *default judgment* under the *attorney fault* provisions of the statute. *Id.* at 873, 879-80. The trial court denied that motion for two separate reasons, because it found that defendants' counsel had acted deliberately and also because it found that the second motion was an improper motion for reconsideration. *Id.* at 884.

The *Standard Microsystems* court held that the trial court erred because "the undisputed facts" established that section 473(b) relief was

warranted. *Id.* at 873. It also found that the defendants' second motion was not a motion for reconsideration under subdivision (a) of section 1008. *Id.* at 889-90. As to whether the second motion was a renewed motion under section 1008, subdivision (b), the *Standard Microsystems* court stated it was "hesit[ant]" to so conclude because the "two motions rested on entirely distinct factual and legal predicates." *Id.* at 891. It also noted that "insofar as two motions do *not* seek the 'same order,' the second one is not subject to section 1008(b)." *Id.* at 892 (emphasis original). Nevertheless, it *assumed* "without deciding" that "the second motion sought the 'same order' as the first *in part*." *Id.* (emphasis original).

The court in *Standard Microsystems* therefore addressed the limited question of "what effect such overlap [between the two motions] should have." *Id.* It resolved this question as follows:

> We conclude that assuming the second motion was a renewal of the first motion insofar as it sought relief from the underlying default, it was not barred by that fact, in whole or part, because the relief thus sought was ancillary to, and would be necessary to carry into effect, the order vacating the judgment, which was subject to no such constraint.

Id. at 893.

In reaching this conclusion, the *Standard Microsystems* court pointed out the absurdity that would result if, on the one hand, a party could seek and obtain relief from a default *judgment*, because a motion for that relief had not been sought before and thus was *not* constrained by section

1008, but, on the other hand, it could not at the same time obtain relief from the underlying default because that relief had been sought before. *Id.* at 891-93. In this respect, the court stated: "[w]e emphatically reject the proposition that a motion seeking a previously denied order *in addition to* newly requested relief is thereby *entirely barred,* as if its repetitive aspect somehow tainted the whole." *Id.* at 891-92 (emphasis original).

The procedural backdrop in the instant case is critically different. Here defendants filed a motion for mandatory relief under section 473(b). When that motion was denied after it was found that their attorney's "declaration of fault" was "not credible" (2AA-340), defendants renewed the very same motion, seeking the very same relief based on the very same legal ground. (*Compare* 1AA-180-185 *with* 2AA-342-349.) As defendants put it themselves, by their renewed motion they were seeking "*an order that was exactly the same as the one requested in the first motion.*" (3AA-541:10-11 (emphasis added).)

This was *not* the scenario presented in *Standard Microsystems*. In fact, the *Standard Microsystems* court *itself* made it clear that its holding did *not* address a renewed section 473(b) motion of the sort at issue in this case:

> We observe that this is not a case where a party invokes the mandatory provisions of section 473(b) unsuccessfully, and then seeks to invoke them again.

Standard Microsystems, *supra*, 179 Cal.App.4th at 895.

In short, even though the Court of Appeal here declined to follow *Standard Microsystems*, there is actually no conflict between the square holding of this case, on the one hand, and the qualified alternative ruling of *Standard Microsystems*, on the other. The two cases are fully reconcilable. In this case, the Court of Appeal correctly held that defendants' renewed motion (seeking "exactly the same" order as the initial motion) was governed by section 1008(b). In *Standard Microsystems*, the court held that *assuming* a collateral aspect of the defendants' second motion was *in part* a renewed motion, that did not render the entire motion subject to the requirements of section 1008(b) because the defendants were not seeking the "same order."

In addition to the lack of a true conflict between this case and *Standard Microsystems*, the Court should deny review for several other reasons. *First*, the ultimate question to be resolved were the Court to grant review is whether section 1008 means exactly what it unambiguously states –*i.e.*, that it applies to "any" and "all" repeat motions. This question already has been dispositively answered by this Court, and review is not needed to "re-settle" it. *Le Francois, supra,* 35 Cal.4th at 1096, 1107-08 (2005) (section 1008 prohibit[s] a *party* from making renewed motions not based on new facts or law;" "a party may not file a written *motion* to

reconsider that has procedural significance if it does not satisfy the requirements of section . . . 1008" (emphasis original).)

Second, this case involves a unique set of facts; it is truly "one of a kind." Here, defendants' attorney submitted an "affidavit of fault" on defendants' first section 473(b) motion that was demonstrably untrue and which the trial court found was "not credible." (2AA-340.) On defendants' renewed section 473(b) motion, the attorney then "present[ed] an entirely different story," which the trial court also found not credible. (RT-B-1:16-B-2:5.)

A case with this factual composite or one even remotely similar to it simply is not likely to recur. Indeed, the possibility that *any* defendant would file multiple motions for mandatory relief under section 473(b) is exceedingly small. Assuming a default were truly caused by an attorney's "mistake, inadvertence, surprise, or neglect," as is required by the statute, and the attorney were forthright in explaining the same, it is hard even to conceive of a circumstance in which a renewed section 473(b) motion would be necessary. An attorney invoking the "mandatory provisions" of section 473(b) and thereby claiming responsibility for the default would necessarily know at the time of the filing of a first section 473(b) motion the reasons his or her conduct caused the default. Put another way, there should only be one "story" that explains a default, not two "entirely

different" (and incredible) stories advanced in successive motions, as was the case here.

For the same reasons, defendants' argument that unless the Court resolves the (non-existent) conflict between the Court of Appeal's decision in this case and *Standard Microsystems* "substantial mischief" will occur "as courts and litigants are forced to guess which statute governs" is dubious. (*See* Pet. 20-21.) The pertinent provisions of sections 473 and 1008 have lived peacefully together for over twenty years. There has not been, nor in the future is there likely to be, a storm of litigation concerning their "interplay." Indeed, the *only* case to squarely deal with the intersection of the two statutes in the context of a full renewed section 473(b) motion is this one.

In sum, review is unwarranted and defendants' petition should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Lawsuit

Plaintiff-appellant Even Zohar Construction & Remodeling, Inc. ("EZ") filed this lawsuit in March 2011 after defendants failed to pay EZ what it was owed for having successfully constructed a condominium project in Southern California. (1AA1-40.) At the request of defendants, EZ had performed substantial additional work beyond that provided for by the original construction contract. (1AA-2, ¶2; 1AA-6-8, ¶¶21-25; 1AA-

22-40; AA-126-149, ¶¶5-12.) EZ was entitled to receive about $1.3 million (beyond the original $4.1 million contract) for such additional work. (1AA-22-40; AA-149-150, ¶¶12-14.)

Defendants repeatedly promised EZ that it would be paid for all the additional work once the Project was completed. (1AA-2, ¶2; AA-6-9, ¶¶21-28; AA-149, ¶13.) Defendants, however, reneged on their promises and categorically refused to compensate EZ or approve that EZ be compensated for *any* such additional work. (*Id.*) Fersht apparently had previously engaged in such misconduct with other real estate development partners. (2AA-293, ¶5.)

B. Defendants' Defaults

After they were served with EZ's complaint to recover the compensation for the additional work it performed, defendants responded by appearing through attorney Daniel Gibalevich and petitioning to compel arbitration. (*See* 1AA-44-45, 68.) In the meantime, defendant Fersht threatened EZ's principal, Even Zohar ("Zohar"), that if EZ were to prevail in this lawsuit, it would never "see one dime" from Fersht and would not be able to collect. (2AA-293, ¶6.) Fersht also advised Zohar that EZ would not be able to afford the attorney's fees to fight him. (*Id.*) Finally, Fersht told a third party that he intended to "fry" Zohar in the litigation. (*Id.*)

Ultimately, the lower court denied defendants' arbitration petition. (1AA-44-45.)

EZ's counsel served attorney Gibalevich in multiple ways with notice of entry of the trial court's order denying the arbitration petition. (2AA-209-210, ¶8; 2AA-233-238, 240-241.) Despite such notices, defendants failed to file responsive pleadings. EZ's counsel warned Mr. Gibalevich in multiple ways, including by email and facsimile, that Bellaire and Fersht were in default. (2AA-208, ¶3; AA-210, ¶9; AA-218-219, 243-245; *see also* 1AA-55 [item #18], 57.) Mr. Gibalevich indisputably received such warnings. He later responded directly to the email warning, which he admitted having received. (2AA-289-290; AA-352:9-10.) Yet, defendants still failed to file responsive pleadings, and therefore EZ requested the clerk to enter defendants' defaults. (1AA-58-109.)

Several weeks later, Mr. Gibalevich requested that EZ stipulate to vacating the defaults. (2AA-289.) EZ's counsel replied: "Please provide me with a copy of the declaration of fault you intend to submit so I can meaningfully evaluate your request." (2AA-288 [11/19/11, 21:45 email].) Mr. Gibalevich, however, refused to explain the basis of the default and instead asserted "that the court *will* vacate the default." (*Id.* [11/19/11, 4:01 email] (emphasis added).)

Thereafter, EZ sought and obtained entry of a default judgment against defendants after presenting substantial "prove up" evidence. (1AA-115-179.)

C. Defendants' First Motion for Relief From Default

Defendants filed their first motion to vacate the defaults and the default judgment under the so-called "mandatory"—"attorney fault" — provisions of section 473(b) in mid December 2011. (1AA-180-188.) At that time, Mr. Gibalevich attributed defendants' failure to file responsive pleadings to his staff, which he claimed had not calendared or alerted him to the deadline, and, therefore, Mr. Gibalevich suggested he was not aware of it. (1AA-182:18-20; 1AA-186:14-17.)

Plaintiff EZ opposed defendants' motion by demonstrating that Mr. Gibalevich's explanation was untrue. (1AA-189-206; 2AA207-306.) EZ showed that its counsel had warned Mr. Gibalevich *directly* in an email to Mr. Gibalevich's *own account* as well as by facsimile—*not* through his staff—and in other ways that his clients were in default and that EZ would request the entry of their defaults if they did not respond to the complaint. (2AA-208, ¶3; 2AA-210, ¶9; 2AA-218-219, 243-245; 2AA-211, ¶12; 2AA-274 [at item 18], 276.)

EZ also adduced substantial evidence of, *inter alia*, the close relationship between defendant Fersht and Mr. Gibalevich, and their long pattern of concerted behavior. These facts gave rise to a strong inference that they had acted together to deliberately allow defendants' defaults to be taken in an effort to further engender delay, increase EZ's attorney's fees and prevent EZ from recovering on its claims. (2AA-208-209, ¶¶4-7; 2AA-

291-306.) This showing also included Fersht's above-described threatening of EZ's principal. (2AA-293, ¶6.)

Defendants filed a tardy reply, falsely claiming that they had not been timely served with plaintiff EZ's opposition papers. (*Compare* AA-309:9-27 *with* AA-321-337.) In their late-filed reply, defendants did little more than restate the text of their original motion. (2AA-307-320.) Significantly, they presented *no* declaration—not from Fersht, Bellaire, Mr. Gibalevich or anyone else—even addressing, let alone refuting, the showing EZ made in its opposition to defendants' motion. (*Id.*)

At the hearing on defendants' first Section 473(b) motion, Mr. Gibalevich did not contest any of the evidence that EZ had proffered in opposition to defendants' motion. (RT A-1-1-6.) Nor did he offer *any* other information or explanation for defendants' failure to file responsive pleadings beyond what he provided in his untrue declaration of fault. (*Id.*) Mr. Gibalevich also made no mention of the "search warrant" story (discussed below) on which he would later rely. (*Id.*)

Not surprising, the trial court denied defendants' motion. (2AA-340.) It found, among other things, that Mr. Gibalevich's declaration of fault was "not credible." (*Id.*)[1]

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[1] Section 473 "clearly involves an assessment of credibility by the trial court." *Johnson v. Pratt & Whitney Canada, Inc.* 28 Cal.App.4th 613, 622 (1994); *accord Cowan v. Krayzman*, 196 Cal.App.4th 907, 915 (2011). Furthermore, an attorney's "*straightforward* admission of fault" is required

D. Defendants' Renewed Motion

In mid-January 2012, Bellaire and Fersht filed a renewed motion for relief under the "attorney fault" provisions of section 473(b). (2AA-342-357.) Defendants sought the identical relief they had requested in their earlier motion. (*Compare* AA-180-185 *with* AA-342-349.) They later acknowledged:

> [D]efendants herein are making a motion for an order that was exactly the same as the one requested in the first motion to vacate the default and default judgment. ...

(3AA-541:10-11.) Defendants conceded that their second section 473(b) motion was a renewed motion governed by section 1008(b). Among other things, they argued in their papers that they had complied with the latter statute. (3AA-540:26-541:19.)

According to the "declaration of fault" Mr. Gibalevich submitted with the renewed motion, the reason defendants purportedly failed to file responsive pleadings was *not* because Mr. Gibalevich's office failed to properly calendar their due dates, as he had originally declared. In his new declaration, Mr. Gibalevich *admitted that* he received the express warnings he was given by EZ's counsel that his clients were in default. (2AA-352:9-10 ["I . . . did not respond to Mr. Harris's emails notifying me of the default".].)

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for Section 473(b) mandatory relief. *State Farm Fire & Casualty Co. v. Pietak*, 90 Cal.App.4th 600, 609-10 (2001) (emphasis added).

Instead, defendants and Mr. Gibalevich claimed for the first time that defendants had failed to file responsive pleadings because Mr. Gibalevich purportedly was focused for almost three months *exclusively* on a search warrant that had been executed at his office. (2AA-346:19-347:10, 350:17-352:3, 354:7-26; 356:6-16.) Mr. Gibalevich claimed he was too "embarrassed" to tell the trial court this story on defendants' original section 473(b) motion. (2AA-351, ¶10.)

Significantly, however, defendants *again* did not submit any declaration or other evidence from Fersht or on Bellaire's behalf denying that they had allowed their defaults to be taken as a strategy of delaying the litigation on the assumption that the defaults would later be vacated automatically. (2AA-342-357; *see also* 2AA-288 [11/19/11, 4:01 email].)

By an "*Ex Parte* Application for an Order on a **Renewed Motion (C.C.P. 1008(b))** For Mandatory Relief Under C.C.P. 473(b). . . ." defendants sought an early determination of their renewed section 473(b) motion. (RT-B-1; AA-358 (bold added).) At the hearing on the *ex parte* application, the trial court once again found Mr. Gibalevich not to be credible:

> THE COURT: ***Mr. Gibalevich, you are presenting an entirely different story with this application than you have presented to the court originally.***
>
> MR. GIBALEVICH: Actually, it's not an entirely different story, Your Honor–
>
> THE COURT: Will you wait until I finish?

MR. GIBALEVICH: I apologize, Your Honor.

THE COURT: I think it is. You tried to blame [the defaults] 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 say you're conducting all kinds of research on your computer in your office.

You're not credible, Mr. Gibalevich.

(RT-B-1:16-B-2:5 (emphasis added).)[2]

The trial court held a further hearing on defendants' renewed motion several weeks later. (RT-C-1-C-22.) In their reply papers filed a few days before that hearing, defendants submitted for the first time a short declaration of defendant Fersht in which he claimed very generally that he had not acted to avoid filing a responsive pleading or agreed to allow to have his default taken. (3AA-548-549.) Fersht, who had been *completely*

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[2] Mr. Gibalevich's contentions that he focused on nothing else but the search warrant from late August to November 2011, and that he was too embarrassed to tell the truth to the trial court, also were flatly inconsistent with the declaration of his own associate, who stated that during the period in question:

> 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.

(2AA-356, ¶6.)

silent in the four previous submissions proffered by defendants in support of their successive motions, did not address *any* of the specifics of the evidence EZ had presented—including Fersht's threats—showing that he intended to attempt to delay resolution of EZ's claims and try to win a "battle of attrition." (*Id.*)

At the hearing, the trial court again questioned Mr. Gibalevich's credibility and rejected his claim that his "story never changed." The court stated that Mr. Gibalevich's story "changed every time [he] presented it." (RT-C-8:4-11.) When Mr. Gibalevich disputed this, the lower court told him that he did "not have a footing in reality" and that he and the court were "not going to reach accord here." (RT-C-8:12-20) (emphasis added).)

In its order, the trial court found that defendants' renewed motion was based on a "changed" "story" by Mr. Gibalevich and that defendants' "**second motion fails to comply with the requirements of section 1008(b).**" (3AA-554 (emphasis added).) Nevertheless, citing *Standard Microsystems,* which defendants had presented for the first time in their reply brief, the court granted defendants' renewal motion. (3AA-555.) Consequently, it vacated the defaults and default judgment that had been entered against Bellaire and Fersht. (*Id.*)

E. The Court of Appeal's Decision

The Court of Appeal reversed the trial court's ruling and directed the lower court to reinstate the default and default judgment. (Slip Op. 22.) It

held that the trial court lacked jurisdiction under section 1008, subsection (e) to consider defendants' renewed motion. (*Id.* 3,13,15,21-22.) The Court of Appeal concluded that section 1008 applies to "any" and "all" renewed motions, and that the trial court had correctly found that defendants' "second motion fail[ed] to comply with the requirements of section 1008(b)"—a finding defendants had not even contested. (*Id.* 3, 16, 18.)

Although defendants repeatedly claim in their petition that the Court of Appeal held that "section 1008(b) prevails over section 473(b)" (Pet. 5, 8-9), the court did *not* so hold. Rather, the Court of Appeal found that the two statutes were not in conflict, were complementary, and were intended to and did work together. (Slip. Op. 19.)

ARGUMENT

I. REVIEW IS NOT WARRANTED BECAUSE THERE IS NO ACTUAL CONFLICT BETWEEN THE COURT OF APPEAL'S HOLDING IN THIS CASE AND *STANDARD MICROSYSTEMS*

A. *Standard Microsystems* Did Not Involve A Renewed Motion Seeking Identical Relief On The Same Grounds

Defendants principally argue that review is necessary because the decisions of the Court of Appeal in this case and in *Standard Microsystems* are in "direct and irreconcilable" conflict regarding the "interplay" of sections 473(b) and 1008(b). (Pet. 8, 20-21.) While the Court of Appeal certainly disagreed with and declined to follow *Standard* Microsystems,

there is no fundamental conflict between the two decisions. To the contrary, the decisions are reconcilable and can be applied consistently.

In *Standard Microsystems*, two foreign corporations were served with a complaint by mail. 179 Cal.App.4th at 874. Their attorney advised them (incorrectly) that service was ineffective. *Id.* They did not respond to the complaint, and the clerk entered their defaults. *Id.* at 874-76. The defendants then filed a motion for ***discretionary relief from the entry of such defaults by the clerk*** under the "***client fault***" provisions of section 473(b). *Id.* at 873, 877-79. The court denied that motion and entered a default judgment. *Id.* at 879-80.

Retaining new counsel, the defendants then moved for ***mandatory relief*** under the "***attorney fault***" provisions of section 473(b) ***not only from the clerk's entry of the defaults, but also from the default judgment entered by the trial court.*** *Id.* at 873, 880-84. The trial court denied that motion, holding that the defendants' showing under section 473(b) was insufficient because their conduct had been deliberate. *Id.* at 884. It also found that the motion was an improper motion for reconsideration of the trial court's previous denial of the motion for relief from the clerk's entry of defaults, and that such circumstance afforded an additional ground on which the defendants' second motion should be denied. *Id.*

The Sixth Appellate District reversed. It first held that "the undisputed facts plainly established the attorney fault necessary to trigger a

right to mandatory relief" under section 473(b). *Id.* at 873. The court also concluded that defendants' second motion for relief was not a motion for reconsideration governed by subdivision (a) of section 1008 because it did not seek to modify or set aside the court's previous order. *Id.* at 891.

In the portion of its opinion at issue here, the *Standard Microsystems* court then assumed, without deciding, that the defendants' second motion *may have been* a renewed motion *in part*, but that if it were, section 1008, subdivision (b), would not have prevented the trial court from considering it:

> We conclude that assuming the second motion was a renewal of the first motion insofar as it sought relief from the underlying *default*, it was not barred by that fact, in whole or part, because the relief thus sought was ancillary to, and would be necessary to carry into effect, the order vacating the *judgment*, which was subject to no such constraint.

Id. at 893 (emphasis added).

Put another way, in its alternative holding, the *Standard Microsystems'* court ruled that because the defendants' second motion principally requested relief they had not sought before *at all* (relief from the *default judgment entered by the court*), and relief based on a provision of section 473 they had not invoked in the earlier motion *at all* (the statute's *attorney fault provisions*), the trial court should not have denied the defendants' second motion under section 1008(b). The *Standard Microsystems* court "emphatically reject[ed] the proposition that a motion

seeking a previously denied order *in addition to* newly requested relief is thereby *entirely barred,* as if its repetitive aspect somehow tainted the whole." *Id.* at 892 (emphasis original). It also "assum[ed] the statute means what it says, at least to the extent that insofar as two motions do *not* seek the 'same order,' the second one is not subject to section 1008(b)." *Id.* (emphasis original).

As defendants concede (*see* Pet. 16), the *Standard Microsystems* court even "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)." (Pet. 16 [citing *Standard Microsystems*, 179 Cal.App.4th at 891-93].) As the court stated, "[w]e hesitate to finally so conclude, however, for insofar as the two motions rested on entirely distinct factual and legal predicates, we find in the phrase 'same order,' as used to define the sweep of section 1008(b), a latent ambiguity." *Standard Microsystems*, 179 Cal.App.4th at 891.

The instant case stands in stark contrast to *Standard Microsystems*. By their second motion to the trial court here defendants themselves stated that they were seeking "**an order that was exactly the same as the one requested in the first motion to vacate the default and default**

judgment." (3AA-541:10-11 (emphasis added).)[3] Moreover, unlike the defendants in *Standard Microsystems*, Bellaire and Fersht's second motion was also based on the same legal theory and statutory predicate they had advanced in their first motion. (*Compare* 1AA-180-185 *with* 2AA-342-349.) In short, defendants' second motion indisputably was a *full* renewed motion governed by section 1008(b).[4]

This *very* scenario was *expressly* carved out of the ambit of the alternative holding in *Standard Microsystems*:

> We observe that this is not a case where a party invokes the mandatory provisions of section 473(b) unsuccessfully, and then seeks to invoke them again.

179 Cal.App.4th at 895.[5] Thus, the *very* question the Court of Appeal resolved here—whether section 1008 applies "where a party invokes the mandatory provisions of section 473(b) unsuccessfully, and then seeks to invoke them again"—was expressly *not* decided by *Standard Microsystems*.

Conversely, the Court of Appeal in the instant case did *not* address the question resolved in *Standard Microsystems*, namely, whether "a

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[3] At the hearing, Mr. Gibalevich readily admitted "a renewed motion [] is one that's seeking exactly the same relief as was sought in the original motion, and that's exactly what were talking about here..." (RT-C-2:9-12.)

[4] In fact, defendants labeled their second motion as a "Renewed Motion (C.C.P. 1008(b)) For Mandatory Relief Under C.C.P. 473(b)" (2AA-358) and claimed they had complied with section 1008(b) (2AA-540:26-541:19). (*See also* Slip. Op. 9, n.4.)

[5] The court in *Standard Microsystems* also distinguished the case before it from cases—like the instant one—involving applications "forthrightly labeled" as repeat motions. 179 Cal.App.4th at 888.

motion seeking a previously denied order *in addition to* newly requested relief is thereby *entirely barred,* as if its repetitive aspect somehow tainted the whole."

Furthermore, the court in *Standard Microsystems* made it abundantly clear that the character of the second motion in the case before it being, at most, only a "partial" renewal motion was integral to its holding. First, it framed the issue it was resolving as follows:

> Assuming (without deciding) that defendants' second motion sought the "same order" as the first *in part*, the question becomes what effect such overlap should have.

179 Cal.App.4th at 892 (emphasis original).

The *Standard Microsystems* decision was also clearly driven in large measure by the potential anomalies that could result if, in view of the *partial* nature of the renewed motion, the defendants were permitted to seek vacation of the judgment (because they had not sought that relief in the first motion) but could not seek relief from the underlying defaults (because that relief had been sought before):

> If the judgment were vacated because defendants had shown an entitlement to relief, but the default were deemed beyond relief under section 1008(b), the injunction—currently operating in plaintiff's favor—would cease to have effect. Plaintiff of course could apply for another judgment, but if defendants remained in default, they would be barred from contesting it. Any ensuing judgment would thus continue to be marred by whatever cause had placed them in default in the first place. Since we would have already held that cause sufficient to sustain mandatory relief under section 473(b), defendants would seemingly be entitled, once again, to vacate

> any new judgment. Thus an order vacating the judgment, but leaving defendants in default, would effectively prevent *either* party from advancing its own position, or the lawsuit.

Id. at 893 (emphasis original).

The court determined that because of these "absurd" potential results that might ensue from such an application of section 1008, the statute should not be literally applied to the aspect of the second motion in that case seeking as a collateral matter relief from the underlying *defaults*, because to do so would prevent the court from addressing the thrust and principal object of the motion, *i.e.*, seeking relief from the *judgment*, which had not been previously sought and was not a renewal of the earlier motion at all:

> Although the later motion may have been, in part, a renewal of the first motion within the terms of section 1008, the relief that made it so was ancillary to, and necessary to effectuate, the greater object of the second motion, which neither sought reconsideration nor the issuance of an order the court had previously declined to grant.

Id. at 873.

Again, since the instant case involves a full renewal motion, it is not only plainly distinguishable from *Standard Microsystems*, but there was and is no potential for the absurdities of the sort that could have resulted in *Standard Microsystems* from the application of section 1008 to only part of the second motion filed in that case.

B. The Court Of Appeal Did *Not* Hold That "Section 1008(b) Prevails Over Section 473(b)"

Defendants contend "*Standard Microsystems* holds that "section 473(b) prevails over section 1008" and that the Court of Appeal here held exactly the opposite, *i.e.*, that "section 1008(b) prevails over section 473(b)." (Pet. 5, 8-9.) Defendants' characterizations are not accurate, and their effort to manufacture a conflict between the two cases is unavailing.

The essential holding of *Standard Microsystems* was not that "section 473(b) prevails over section 1008." Rather, the court held that, *assuming* the second motion could be deemed a renewal of the first motion in part given the *partial* overlap of the two motions, the second motion was not barred by section 1008. The *Standard Microsystems* court did conclude that "*to the extent* a literal application of section 1008 *might* conflict with the provisions of section 473(b), the latter must prevail." 179 Cal.App.4th at 873 (emphasis added). But that aspect of the court's opinion and the analysis leading to its conclusion were dicta.[6]

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[6] That the Standard Microsystems' consideration of the potential conflict between sections 1008 and 473(b) was dicta is made clear from the outset of the court's analysis:

> *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).

179 Cal.App.4th at 893 (emphasis added).

Defendants' repeated assertion that the Court of Appeal in this case held that "section 1008(b) prevails over section 473(b)" [*see* Pet. 5, 9] is also not accurate. The court did not so hold. Rather, it concluded that the two statutes could be applied consistently and together in the same case *without* conflict:

> [W]e disagree with *Standard Microsystems*' conclusion that sections 473, subdivision (b), and 1008 are in conflict. To the contrary, the statutes 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.

(Slip. Op. 19 (italics original).)

As discussed further below, the Court of Appeal's conclusion is entirely consistent with the fundamental principle of statutory construction that courts must harmonize statutory provisions, if possible, giving each provision full effect. *Cacho v. Boudreau*, 40 Cal.4th 341, 352 (2007).

C. The Holdings Of This Case And *Standard Microsystems Are* Reconcilable

The Court of Appeal here did not find *Standard Microsystems* "persuasive." (Slip Op. 17.) Nevertheless, as discussed above, the *holdings* of the two cases themselves are fully reconcilable even though in reaching them the respective appellate courts employed different analyses

and came to different subsidiary determinations (*e.g.*, whether sections 473(b) and 1008 are actually in conflict).

To reiterate, the Court of Appeal's holding in this case is that an indisputable *full* renewed section 473(b) motion is governed by section 1008(b). *Standard Microsystems*' holding is that a second 473(b) motion that at best may be deemed a renewed motion only in part as to a collateral matter is not barred by section 1008. These holdings may be applied consistently with each other. If confronted with a full renewed motion, a trial court could apply the holding of this case without undercutting *Standard Microsystems* (which, again, *expressly* did not address such a posture). Concomitantly, if a court were presented with the "partial" renewed motion scenario at issue in *Standard Microsystems* but not in the instant case, it could apply the rationale of *Standard Microsystems*, *i.e.*, that the character of the second section 473(b) motion as a partial renewed motion does not render the entire motion subject to the requirements of section 1008(b) and does not bar a court's consideration of the second motion.

D. "Substantial Mischief" Will Not Ensue From The Holding Of This Case

Defendants assert that review is warranted because the purported conflict between this case and *Standard Microsystems* "threatens substantial mischief as courts and litigants are forced to guess which statute

governs." [Pet. 9, 20-21.] This argument is hyperbolic and falls under its own weight.

Sections 473(b) and 1008 have been on the books together for more than twenty years. In all that time, as defendants concede, there have been only *two* cases that have discussed the "interplay" (as defendants put it) between the two statutes– this case and *Standard Microsystems*.[7] Given this history, the specter of a flood of new cases that defendants raise clearly will not materialize.

Defendants' speculation that "litigants [will be] forced to guess which statute governs" is also a red herring. No "guess" should ever be necessary, as a repeat Section 473(b) motion should rarely if ever be necessary. All a litigant need do, which was *not* done here, is to present a truthful, straightforward declaration of fault in the first instance, and one that establishes (as the statute requires) that the attorney's "mistake, inadvertence, surprise, or neglect" actually caused the default.

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[7] Defendants' assertion regarding the "frequency" with which litigants invoke one statute or other (*see* Pet. 9) is irrelevant. Indeed, defendants later admit there are only a handful of cases that have "addressed the interplay between section 473(b) and 1008(b)," and that other than this case only *Standard Microsystems* has considered the "interplay" in any meaningful way. (Pet. 10.) In fact, the other three cases defendants cite, *Gilberd v. AC Transit*, 32 Cal.App.4th 1494 (1995); *Wozniak v. Lucutz*, 102 Cal.App.4th 1031(2002), disapproved in part by *Le Francois v. Goel*, 35 Cal.4th 1094 (2005); and *Lee v. Wells Fargo Bank, N.A*, 88 Cal.App.4th 1187 (2001), did not even involve repeat section 473(b) motions.

E. The Unique Facts Of This Case Also Militate Strongly Against Review

As discussed above, the factual composite of this case is unique. It is very rare that a default judgment is entered in the first place; even more rare that a motion for mandatory relief is denied as "not credible;" and rarer still for an attorney seeking relief from a default judgment to advance an untruthful explanation in an initial motion and then to present an "entirely different" story on a renewed motion that (even if true) could have been but was not presented before.

The unique character of this case, and the exceedingly small likelihood that one similar to it would occur in the future, also strongly compel denial of review. Again, there should ever only be a single truthful "explanation of fault" that substantiates the reasons an attorney's "mistake, inadvertence, surprise, or neglect" caused his or her client's default.

II. THE COURT OF APPEAL CORRECTLY HELD THAT SECTION 1008 APPLIES TO "ANY" AND "ALL" RENEWED MOTIONS, AS THE STATUTE PLAINLY AND UNAMBIGUOUSLY STATES, AND AS THIS COURT LONG AGO AFFIRMED

The Court of Appeal correctly decided the question before it, which was whether section 1008 applies to "any" and "all" renewed motions, including renewed motions for relief under section 473(b). Section 1008 brooks no exception:

> *This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of*

> *previous motions*, and applies to ***all*** applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. *No application to reconsider **any** order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section.*

Code of Civ. Proc. § 1008(e) (emphasis added).

As the Court recently reiterated:

> The basic rules of statutory construction are well established. 'When construing a statute, a court seeks to determine and give effect to the intent of the enacting legislative body.' [Citation.] '"We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." [Citation.] *If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls.*' [Citation.]

Catlin v. Superior Court, 51 Cal.4th 300, 304 (2011) (emphasis added).

As is crystal clear from the "plain, commonsense meaning" of section 1008's words, the statute "applies to ***all*** applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final." Code Civ. Proc. § 1008(e) (emphasis added). Moreover, as this Court long ago affirmed, "a party may not file a written *motion* to reconsider that has procedural significance if it does not satisfy the requirements of section . . . 1008." *Le Francois, supra*, 35 Cal.4th at 1107-08 (emphasis original). The question whether section 1008 excepts any particular renewed motion therefore does not need to be "re-settled."

Nevertheless, defendants contend the Court of Appeal's straightforward application of section 1008 was wrong. In short, defendants' argument is that sections 1008 and 473(b) themselves are in conflict and that this conflict must be resolved by completely ignoring the existence of section 1008 whenever a renewed section 473(b) motion is filed.

Defendants' argument suffers from several critical defects. *First*, it is based on the false premise that sections 473(b) and 1008 are in conflict. They are not; as the Court of Appeal stated in this case, and as shown above, they can be applied in a complementary manner. (Slip Op. 19.)[8]

In fact, the statutes were applied consistently in this case. Defendants filed a first section 473(b) motion. When that was denied because Mr. Gibalevich's affidavit of fault was found "not credible," defendants were able to and did file a renewed section 473(b) motion. Had, on defendants' renewed motion, Mr. Gibalevich been able to adduce facts, circumstances or law that he could not have presented at the time of defendants' initial motion, the trial court would have had jurisdiction to consider the renewed motion. The fact that the Court of Appeal held (as

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[8] The *Standard Microsystems* court itself never definitively concluded sections 473(b) and 1008 were in conflict. Rather, its analysis was expressly qualified and predicated on an assumption. *See id.*, 179 Cal.App.4th at 873 ("*to the extent a literal application* of section 1008 *might* conflict with the provisions of section 473(b), the latter must prevail") and 894 ("[*i*]*nsofar as such a conflict actually exists*. . . ").

did the trial court) that the "search warrant" story defendants advanced in their second motion could have and, if true, should have been submitted at the time of defendants' first motion, but was not, did not place sections 473(b) and 1008 in conflict.

Second, even if sections 473(b) and 1008 could be deemed to be in conflict, that conflict is not properly resolved in the manner defendants suggest, *i.e.*, by completely ignoring the application of one of the two statutes. Rather, under the most basic of statutory construction rules, which defendants tellingly do not even mention, two statutes are to be read together so as to effectuate the terms of both as much as possible *and* to avoid nullifying one or the other. *Cacho*, 40 Cal.4th at 352.

As the Court stated seventy years ago in *Rose v. State of* California, 19 Cal.2d 713 (1942):

> Certainly the language of a statute should never be construed as to nullify the will of the legislature. . . Such a result would be inconsonant with the rule that statutes must be given a reasonable interpretation, one which will carry out the intent of the legislators and render them valid and operative, rather than defeat them. In so doing, sections of the Constitution, as well as of the codes, will be harmonized where reasonably possible, in order that all may stand.

Id. at 723.

Third, resolving the conflict in the manner proposed by defendants, *i.e.*, ignoring section 1008 altogether, would flatly undercut the very reason that statute was amended in the first place. "[T]he stated legislative

purpose behind the 1992 amendment to section 1008 was to conserve judicial resources. . . " *Le Francois, supra,* 35 Cal.4th at 1106 (citation omitted).) Section 1008 was designed to accomplish this goal by "reduc[ing] the number of motions to reconsider and renewals of previous motions heard by judges in this state." *See id.* at 1099.

Clearly, these objectives would be directly compromised were renewed section 473(b) or any other types of motions excluded from the reach of section 1008. In other words, ignoring section 1008 when a renewed section 473(b) motion is filed would have an effect that is diametrically opposite to the one the Legislature intended. This result certainly cannot be countenanced under any rule of statutory construction.

Indeed, carrying defendants' analysis to its logical extreme, a litigant could file any number of repeat section 473(b) motions without any constraint, continue to lose the earlier ones (including because his or her counsel had been untruthful) and not stop until he or she found the "winning hand." Apart from defeating the express purpose of the Legislature in amending section 1008, this outcome could, to paraphrase the statement of the court in *Jerry's Shell v. Equilon Enterprises, LLC*, 134 Cal.App.4th 1058, 1074 (2005), reward[] and encourag[e] . . . wholly improper conduct."

Finally, for the above reasons, the Court of Appeal got it right when it found that carving out exceptions to section 1008 never specified by the

Legislature, would create the "proverbial slippery slope." This is particularly true under defendants' effective contention that any repeat motion brought under a statute deemed "remedial" would not be subject to section 1008.[9]

III. THE TRIAL COURT'S RULINGS ON DEFENDANTS' MOTIONS FOR RELIEF FROM DEFAULT DO NOT PRESENT ANY GROUNDS FOR REVIEW

Defendants argue at the end of their petition that the trial court's order vacating defendants' defaults on their renewed motion was correct. In fact, they go so far as to assert that the trial court should not have denied their initial motion. (Pet. 29-33.) These contentions are not properly presented here because they have no bearing on whether review is warranted.

While defendants assert in their petition that there are reasons to question the Court of Appeals' conclusion that the trial court properly denied defendants' first section 473(b) on the basis, *inter alia*, that Mr. Gibalevich's explanation of fault was "not credible" (*see* Pet. 30), they

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[9] There also is no merit in defendants' "implied repeal" argument. (*See* Pet. 24.) While defendants suggest that the Court of Appeal concluded that, in amending section 1008, the Legislature "impliedly" repealed section 473(b), the Court of Appeal did no such thing. (Slip Op. 18-19). In reality, the court set forth the well-established proposition that the legislature "is deemed to be aware of existing statutes." (*Id.* [citing *Shirk v. Vista Unified School Dist.*, 42 Cal.4th 201, 212].) It then concluded that because the Legislature amended 1008 to include its jurisdictional restrictions several years after it enacted the attorney fault provisions of section 473(b) without exempting section 473(b) motions, it did not intend to carve such motions out of the ambit of section 1008.

never challenged this finding in the courts below, either in the way of a protective cross appeal or otherwise. Thus, aside from the fact that such holding was well-founded (as outlined above) and the trial court's credibility determination was entitled to substantial deference and is not reweighed on appeal,[10] defendants cannot challenge it now. Cal. R. Ct. 8.500(c)(1) (Court "normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal").

Nor does the propriety of the trial court's determination whether defendants and their counsel satisfied the requirements of section 473(b) in connection with their renewed motion present any grounds for review.

But even if the substance of the trial court's grant of defendants' renewed section 473(b) motion were relevant at this juncture, that determination was clearly erroneous. In short, there was a complete absence of a credible, straightforward explanation of fault supporting the court's grant of defendants' renewed section 473(b) motion,[11] and the eleventh-hour glib declaration of defendant Fersht, who had been completely silent in the defendants' first four submissions, did not constitute substantial evidence. Concomitantly, there was no basis for the lower court to determine that the defaults were actually caused by Mr.

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[10] *See, e.g., Johnson, supra*, 28 Cal.App.4th at 622 ("[c]redibility is an issue for the fact finder" and "we do not reweigh evidence or reassess the credibility of witnesses").

[11] *See* note 1, *supra*.

Gibalevich's "mistake, inadvertence, surprise or neglect," as opposed to his willful or deliberate conduct. Indeed, the trial court expressly stated it did not believe Mr. Gibalevich's "search warrant" story on which defendants renewed motion was wholly predicated. (*E.g.*, RT-B-1:16-B-2:5.)

Because defendants' renewed motion failed the credibility test imbued in Section 473, the trial court's grant of their renewed motion was erroneous and reversible even if defendants had complied with section 1008 and the court had jurisdiction to consider the motion. *Johnson, supra*, 28 Cal.App.4th at 622; *Cowan, supra,* 196 Cal.App.4th at 915; *see also Jerry's Shell, supra*, 134 Cal.App.4th 1058, 1073-74); *Todd v. Thrifty Corporation*, 34 Cal.App.4th 986, 991-92 (1995). Ironically, as the *Standard Microsystems* court stated, "[i]n considering whether the trial court properly denied relief under section 473(b), the first question is the sufficiency of defendants' showing of attorney fault, *if believed*, to trigger the mandatory relief provisions of that statute." 179 Cal.App.4th at 896 (emphasis added). No believable explanation was ever advanced in this case.[12]

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[12] Finally, in addition to being irrelevant to whether review should be granted, defendants' assertion that reinstatement of the $1.7 million judgment would deprive Fersht of "any means to support himself and Gibalevich's mother" (Pet. 31) is squarely contradicted by his own allegations in his cross-complaint. There, Fersht represented that he "was the only member of Bellaire who could qualify for a construction loan" and "in obtaining the loan, [he] had to sign a personal guarantee and pledge his substantial assets as security for a $5,500,000 construction loan." (2AA-429, ¶9.)

CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

Dated: June 5, 2013

Respectfully submitted,

Daniel B. Harris

Attorney for Plaintiff and Appellant

Even Zohar Construction & Remodeling, Inc. dba EZ Construction & Remodeling, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) or 8.504(d) of the California Rules of Court, as counsel of record, I hereby certify that this Answer contains **8,185** words, including footnotes (but excluding the table and this certificate). In preparing this Certificate, I relied on the word count of the computer program used to prepare this Answer.

Dated: June 5, 2013

Respectfully submitted,

Daniel B. Harris

Attorney for Plaintiff and Appellant

Even Zohar Construction & Remodeling, Inc. dba EZ Construction & Remodeling, Inc.

PROOF OF SERVICE

Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC, et al.
California Supreme Court No. S210804;
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 One California Street, Suite 900, San Francisco, California 94111. On June 5, 2013, I served the following document(s) by the method indicated below:

ANSWER TO PETITION FOR REVIEW

X By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United State mail at San Francisco, California addressed as set forth below. 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.

Paul D. Fogel Dennis Peter Maio REED SMITH LLP 101 Second Street, Suite 1800 San Francisco, CA 94105-3659	Attorneys for Defendants and Respondents Bellaire Townhouses, LLC, and Samuel Fersht
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Second Appellate Dist., Division Four California Court of Appeal Second Floor, North Tower 300 South Spring Street Los Angeles, CA 90013-1213	
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on June 5, 2013, at San Francisco, California.

Sheralyn Tuiasosopo