SUPREME COURT
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No. S233526
(Court of Appeal No. D067383)
(San Diego Superior Court Case No. 37-2014-00025070-CU-MC-CTL)

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SWEETWATER UNION HIGH SCHOOL DISTRICT,
Plaintiff and Respondent

v.

GILBANE BUILDING COMPANY, et al.
Defendants and Appellants.

On Answer to Petition for Review from a Decision of the Court of Appeal,
Fourth Appellate District
Hon. Eddie C. Sturgeon, Judge

RESPONDENT SWEETWATER UNION HIGH SCHOOL DISTRICT'S ANSWER TO PETITION FOR REVIEW

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1. ISSUE PRESENTED FOR REVIEW

Did the trial judge abuse his discretion when he considered the evidence proffered by Sweetwater Union High School District in opposition to Petitioners' anti-SLAPP motion, including signed guilty plea forms and transcripts from grand jury testimony in the criminal case against many of the individuals involved in the alleged "pay-to-play" contracting scheme?

2. INTRODUCTION

The Fourth District Court of Appeal's Opinion did not create or revive a conflict in decisions of the courts of appeal. The Court of Appeal correctly upheld the trial court's discretion to consider the Sweetwater Union High School District's evidence in denying an anti-SLAPP motion. Opn. pg. 3-4. The Appellate Court correctly noted that the signed guilty plea forms and transcripts from grand jury testimony in criminal cases against many of the individuals involved in the "pay to play" contracting scheme were "in all material respects, indistinguishable from evidence presented by way of a declaration." Opn. pg. 4. Because this Opinion did not create a conflict in decisions of the courts of appeal much less open the floodgates to allow all former testimony to be admissible in motion hearings (as Gilbane and its joint venture claim) the School District respectfully requests that this Court deny this Petition.

3. FACTUAL AND PROCEDURAL BACKGROUND

The School District accepts the Court of Appeal's recitation of the facts and requests that this Court adopt the Opinion's statements of facts and procedural background, pursuant to California Rule of Court 8.500(c)(2).

4. THERE ARE NO GROUNDS FOR GRANTING REVIEW

Supreme Court review is discretionary. *People v. Davis* (1905) 147 Cal. 346, 347-49. The grounds for Supreme Court review are exclusively

provided for in California Rule of Court 8.500(b). Contrary to the Petitioners' petition, no conflict exists between decisions in the Courts of Appeal. No previous Court of Appeal ruling addressed a trial court's discretion on an anti-SLAPP motion to consider (1) signed guilty pleas made under penalty of perjury and (2) transcripts from criminal grand jury testimony given by many of the individuals involved in the underlying scheme that gave rise to the Government Code § 1090 civil action the Petitioners challenged in their motion. Because there were no prior rulings about this, there can be no conflict between non-existent rulings. Thus, there is no need for Supreme Court review.

The Petitioners overstate the breadth of the Court of Appeal's ruling in order to try to create a conflict between the Courts of Appeal where none exists. It is critical to understand what the Opinion actually held, in order to understand that the Petitioners' threat that the Opinion grants "carte blanche" authority to "allow[] all former testimony to be admissible in motion hearings" (see Petition pg. 4) is unfounded.

A. What the Opinion Held.

The Opinion addressed the specific evidence in the record and held that the trial court could "consider evidence presented in hearsay form for purposes of deciding pretrial motions, as long as that evidence is not otherwise barred by another substantive rule of evidence." Opn. pg. 16. The Court then held that because the evidence that the School District offered met the material requirements of a declaration or affidavit that would be presented in opposition to the Petitioners' anti-SLAPP motions, the trial court did not err in considering that evidence.

Pages 17-19 of the Opinion reviewed in great detail the criminal guilty plea made by Gilbane's former employee Amigable and another contractor's employee Flores as well as those from former school board governing members Ricasa, Quinones, and Sandoval and former

superintendent Gandara. At the end of this analysis, the Opinion noted that each plea includes language to the effect that the individual entering the plea attests to the truth of the statements made in the plea under penalty of perjury and under the laws of the State of California and is signed and dated by that individual. Opn. pg. 19-20.

Based upon this analysis, the Court of Appeals held that these plea forms "meet all requirements of declarations which are admissible as a hearsay exception" (Opn. pg. 20) because "each individual who signed and dated a plea form attested to the truth of the contents, including the factual basis of his or her plea, under penalty of perjury under the laws of California." Opn. pg. 21.

Pages 23-24 of the Opinion reviewed in great detail the admissibility of transcripts from the grand jury testimony of eight witnesses, holding that the transcripts are also of the same nature as a declaration in that the testimony is given under penalty of perjury and thus may be used in the same manner as declarations for purposes of motion practice.

B. The Opinion Did Not Create a Split in Authority Among the Circuits.

The Petition attempts to manufacture a split in authority where there is none. The cases that the Petition cites as allegedly being in conflict are distinguishable. Furthermore, this is not carte blanche to allow all former testimony to be admissible in motion hearings but instead a specific, limited application of correct law to the facts of this case.

The Opinion cites and analyzes *Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142 at length. Rather than reviving a conflict in decisions of the Courts of Appeal by citing *Williams*, the following paragraph in the Opinion confirms that no conflict has been revived or created:

> We recognize that the plea forms and incorporated written factual narratives may not be admissible at trial, unless they meet the evidentiary rules for evidence that may be admitted despite its hearsay nature. However, declarations and affidavits, which are a cornerstone of civil motion practice, are also typically not admissible at trial. A trial court should be able to consider out of court statements that meet the material requirements of a declaration and/or affidavit for purposes of deciding a pretrial motion.

Opinion pg. 23, footnote omitted.

After addressing the *Gatton* opinion at length, the Court of Appeals noted that this appeal arose from an anti-SLAPP motion, not on a summary judgment motion after written discovery and depositions had occurred, as in *Gatton* and the other cases cited by Petitioners. Because of the anti-SLAPP procedures, this case arose in a vacuum before any discovery was available, which was an important factor in the court's analysis.

> [A]dmitting sworn documents and testimony in relation to an anti-SLAPP motion may be particularly warranted, in view of the discovery hurdles imposed by the filing of an anti-SLAPP motion. Given the automatic stay on discovery when an anti-SLAPP motion is filed (see § 425.16, subd. (g) ["[U]pon the filing" of an anti-SLAPP motion, "[a]ll discovery proceedings" shall be stayed unless the court orders otherwise "for good cause"]), there is a strong argument that a party should be permitted to oppose the motion with evidence that has all of the material characteristics of a declaration.

Opn. pg. 29. This Opinion opens no floodgates for "every imaginable form of former testimony" to be "thrust upon superior courts", as forecast by Petitioners at page 5. To the contrary, this Opinion simply confirms that

the trial court properly considered evidence with all of the material characteristics of a declaration in ruling on Petitioners' anti-SLAPP motion. Supreme Court review of this decision is not appropriate.

C. Gilbane's Petition For Review Dramatically Overstates the Import of The Court of Appeal Opinion and Does Not Consider the Very Unique Factual Context in Which This Case Was Decided.

In its attempt to make a case for Supreme Court review, the Petition makes sweeping generalizations which are unsupported by language found in the Opinion. For example, Gilbane states the Opinion "requires superior courts to receive any former statement under oath as the equivalent of a declaration" and "compels receiving plea narratives and grand jury testimony in a civil case, although the criminal defendants and grand jury witness are not party to the civil case..." Petition pg. 4. The Petition goes on to assert that "lawyers will thrust upon superior courts every imaginable form of former testimony" even where the party making the proffer did not have any contact with the declarant and regardless of the declarant being available or unavailable, alive or dead, competent or demented. Petition pg. 5. The petition then goes on to assert that the Fourth District Opinion and *Williams v. Saga Enterprises* makes all former testimony the equivalent of a declaration regardless of whether a judge or jury rejected it or objections to it have been sustained, shifting the burden "to the other party to find the records of the case in which the testimony was given and show the court that the declaration is filled with sawdust." Petition pgs. 5-6. The Opinion made none of these holdings and leads to none of these consequences, as is shown in the prior page.

The Petition significantly underestimates the ability of the trial courts and the courts of appeal to make and review evidentiary rulings within the specific factual context of each case. As previously noted, what is significantly different about this Opinion and the others citied in the

Petition is that it arose in the context of an anti-SLAPP motion where the discovery is automatically stayed, severely limiting the ability and access to obtain evidence to oppose the motion. In this sense, many important witnesses may indeed be "unavailable" if they do not wish to cooperate with the party opposing the anti-SLAPP motion by providing a declaration. This may be especially true where the key witnesses have pled guilty to criminal offenses.

Further, the factual context in which the evidence in this case was ruled on is very different from *Gatton v. A.P. Green Services* and more closely aligned *Williams v. Saga Enterprises*. In *Gatton*, the proffered evidence was in the form of two depositions, one of which was ten years old and was from a case wholly unrelated to any of the parties in the case in which it was being offered. A second deposition transcript offered in *Gatton* was from the decedent's personal injury case, which had a limited purpose and utility. *See Gatton v. AP Green Services, Inc.* (1998) 64 Cal.App.4th 688, 694, 696.

In contrast, in *Williams v. Saga*, the testimony was from a reporter's transcript of the criminal trial that gave rise to and dealt with the same facts as the civil case. The testimony was that of the night manager of the defendant in the civil case. In *L&B Real Estate v. Superior Court* (1998) 67 Cal.App.4th 1342, the testimony was from a criminal trial of an alleged co-conspirator with the victim, who was killed during an alleged robbery attempt. The alleged conspirator was not a party or an employee of a party in the civil case.

The factual context of the discretionary evidentiary rulings made by the trial court and upheld by the Court of Appeal in the present case is much more in line with *Williams*. The plea statements and grand jury testimony were given in circumstances that are inherently reliable. As noted in the Opinion, Mr. Amigable was an employee of Petitioner Gilbane

at the time in which he was giving the extravagant gifts to the former members of the Board of Trustees and the former superintendent. Opn. pgs. 42-43. Mr. Amigable pled guilty to offenses that involved the giving of these gifts "on behalf of my employers with the intent to influence the boards' decisions in granting construction contracts..." Opn. pgs. 17-19. Again, as noted in the Opinion, the persons who awarded the contracts in violation of Government Code § 1090 pled guilty and provided a factual basis for the guilty pleas by admitting taking gifts from this former Gilbane employee as well as an employee from Gilbane's joint venture partner SGI. Opn. pgs. 18-19, 43. Both Mr. Ortiz of SGI and Mr. Flores of SGI also testified at the grand jury about their company's records while under oath. Opn. pg. 23.

In the context of an anti-SLAPP motion, Gilbane's attorneys would have had access to its former employee Amigable and their joint venture partner's employees Flores and Ortiz to offer declarations if indeed the factual basis of their pleas and/or their grand jury testimony, both given under oath and the penalty of perjury, was not accurate or truthful. For the witnesses its attorneys had access to, the School District submitted declarations from its employees attesting that their grand jury testimony was true and correct about the circumstnaces in which the contracts at issue in this lawsuit were awarded. *See* AA 1245, 1231, and 1234.

Thus, the evidence which the trial court ruled on and the Court of Appeal upheld was given in circumstances which makes that testimony inherently reliable. That evidence is directly related to the same facts and circumstances that gave rise to the civil case. Understanding that evidentiary rulings are almost always made in the context of the facts of a particular case is what makes this case easily distinguishable from *Gatton v. A.P. Green Services* and does not require the Supreme Court to step in to secure uniformity in the case law, as such uniformity already exists. If this

Opinion of the Fourth District Court of Appeals is misapplied in the future in a manner that "thrusts upon superior courts every imaginable form of former testimony," (as predicted by the Petition p. 5) then the Supreme Court can rein in such misuse at that time, rather than prospectively where no such misuse has yet occurred.

D. The Admissibility of Guilty Plea Forms and Incorporated Written Factual Narratives Does Not Present An Important Legal Question Warranting Review.

As pointed out in footnote 20 on page 24 of the Opinion, three of the judgments of conviction were for felonies which could be admitted at trial pursuant to the hearsay exception provided in Evidence Code § 1300. Even as to the misdemeanors, the admissibility of guilty pleas has a long judicial history that presents no new or novel question warranting Supreme Court review.

For example, in *People v. Miles* (2008) 43 Cal.4th 1074, 1082-1083, the court document prepared contemporaneously with the conviction was admitted pursuant to the hearsay exception for contemporaneous official records prepared by a public officer charged with that duty. That document described the nature of the prior conviction for official purposes and was deemed relevant and admissible. *Id.* In *People v. Lee* (2011) 51 Cal.4th 620, 650-651, the trial court properly took judicial notice that the defendant had pled guilty to a misdemeanor offense and held that the guilty plea fell within the exception to the hearsay rule for admission of a party. Thus the court properly determined that the plea document was not inadmissible hearsay when offered to prove the defendant's involvement in the incident in question. *Id.* In *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1349-1351, the plea change transcript and the statements in the transcript were deemed admissible under Evidence Code § 1280 and 1220. The court noted that the guilty plea form was signed under penalty of perjury, stating

the party understood the charges against him and the records contained declarations against penal interest, thus on their face these documents disclose nothing inherently unreliable and were admissible. *Id.*

Courts here long held that court documents associated with guilty pleas can be admissible evidence. Thus, the portion of the Opinion upholding the admissibility of the plea forms and incorporated written factual narratives does not present any new or important legal question, nor is review necessary to secure uniformity in the case law regarding the admissibility of plea forms and their incorporated written factual narratives.

E. Error is Not Grounds for Review.

Mere disagreement with the outcome of an appeal is not grounds for review. If a party believes that the Court of Appeal made an error in its decision, a petition for rehearing is available. Indeed, if the party asserts that the Court of Appeal misstated (or misunderstood) facts, then it is *obligated* to first bring such asserted error to the Court of Appeal's attention through a petition for rehearing before seeking review. Rule 8.500(c)(2).

Petitioners admit that they did not file a Petition for Rehearing with the Court of Appeal. Petition, pg. 10. Nevertheless, they offer a proposed statement of facts that not only omits information contained in the challenged evidence (pages 11-14), but also they argue that the Court of Appeal's decision misread or misinterpreted the pleas. *See* Petition pg. 14-17. In those pages, the Petition proposes a different basis for Supreme Court review—that somehow the Court of Appeals was mistaken in finding that the School District showed a probability of prevailing on the merits here.

Even though Petitioners did not expressly seek rehearing on this issue and thus it is improperly included in their Petition, the School District addresses this issue here with the following, lengthy citation to the Court of

Appeal's Opinion. The Court of Appeals already addressed this issue concisely and appropriately, as follows:

> The evidence of the plea forms detailing the guilty and no contest pleas by various former Sweetwater officials and former employees of defendants, as well as the grand jury testimony of a number of the individuals involved, is circumstantial evidence from which one could reasonably conclude that the gifts and contributions were made in order to sway the board members to vote in favor of awarding contracts to Gilbane and the Joint Venture. Amigable, a Gilbane employee, stated under penalty of perjury that he "provided the meals, tickets and gifts upon [his] initiative as sanctioned and encouraged by [his] employers," and that these "meals, tickets and gifts were made on behalf of [his] employers with the intent to influence the boards' decisions in granting construction contracts from the Sweetwater Union High School District to the firms for which [he] was working." SGI's CEO, Flores, stated that he provided donations, meals, gifts, and tickets to entertainment events to certain Sweetwater officials, "as requested by these public officials," and admitted that none of the officials reimbursed him for the meals, gifts, tickets, or donations. Many of the same officials to whom Amigable and Flores admitted giving meals, tickets and gifts admitted that they received the gifts. For example, Quinones and Sandoval acknowledged not only that they received gifts from Amigable, but that they were aware that Amigable "provided these gifts with the intent to influence my vote on business awarded to Gilbane, his employer." Ricasa admitted that in 2009, she accepted gifts

from Flores with a value of more than $2000, and that she was aware that Flores "provided these gifts with the intent to influence my vote on business awarded to Seville Group, Inc." Gandara also admitted to accepting gifts of significant value from Flores, and that he was aware that Flores had provided the gifts "with the intent to influence my decision on business awarded to SGI, his company."

In addition, there is evidence that Sweetwater, through the actions of its Board, which at the time included the members whose conduct is at issue here, not only awarded the Proposition O construction work to defendants, but also replaced the contractor that had been the program manager on Proposition BB construction projects with the Joint Venture, despite the fact that the original contractor had been performing well, and that hiring a different contractor to do the Proposition O work would cause a significant delay. The evidence presented in opposition to the anti-SLAPP motion demonstrates that the Sweetwater Board had hired Harris/Gafcon to be the program manager for the Proposition BB construction projects. There is also evidence that Harris/Gafcon "finished the Prop[osition] BB projects that they were managing ahead of time," and "[t]heir work quality was very good." Katy Wright, Sweetwater's Director of Planning and Construction, and at one point Interim Assistant Superintendent, who "was directly involved with the management of the Proposition BB construction bond," attested that when she heard that Gandara was not planning to use Harris/Gafcon for the new Proposition O construction work, she informed Gandara that "the District would

essentially lose a year because it would take a while for a new team to get up to speed and understand what happened at each of the campuses." She also "relayed" to Gandara "the good quality of work that [Harris/Gafcon] performed for the District on Proposition BB." In addition, despite Wright's expertise "with respect to managing the work done under the bond measures," she was "not asked to participate or provide the criteria by which the program manager was to be selected," and was "not allowed to participate" in the decision to select the Joint Venture even after she asked to participate. Sweetwater officials, including the officials whose conduct is alleged to have been unlawful, ultimately voted to replace Harris/Gafcon with the Joint Venture to manage the bond projects.

One could reasonably infer from the chronology of campaign contributions and excessive gift giving, together with Sweetwater's action in awarding to the Joint Venture the contract for management of the Proposition O projects, as well as removing management of the Proposition BB projects from Harris/Gafcon in favor of the Joint Venture, that the former Sweetwater officials identified in the complaint were influenced to award contracts to the Joint Venture as a result of the gifts and contributions that Gilbane and the Joint Venture provided to them. Sweetwater has thus made a prima facie showing of facts sufficient to sustain a favorable judgment in its favor. We conclude that Sweetwater has demonstrated a probability of prevailing on its Section 1090 claims against defendants, thereby defeating defendants' anti-

SLAPP motion with respect to the second prong of the anti-SLAPP analysis.

Opinion pg. 42-45. Despite Petitioners' claims to the contrary, the Court of Appeal did not err when it interpreted and relied upon the cited evidence to find that the School District has a probability of prevailing on the merits of its claims here. To the extent the Petition raises issues not related to the evidentiary ruling, the School District seeks affirmance of all aspects of the Opinion including any non-evidentiary issues that may be deemed raised by the Petition.

5. CONCLUSION

This Petition presents no ground for Supreme Court review. The Opinion did not create or revive a split in authority among the districts of the Court of Appeal. The factual context of this case is such that the Opinion is limited to these unique circumstances. Review is not necessary to secure uniformity of decision. Petitioners failed to request rehearing by the Court of Appeal, thus they cannot now seek review of that Court's interpretation of the plea documents. Thus, the School District respectfully requests that the Petition for Review be denied and that the opinion of the Court of Appeal be left undisturbed.

Dated: April 21, 2016

Respectfully submitted,
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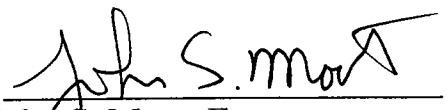
By: 

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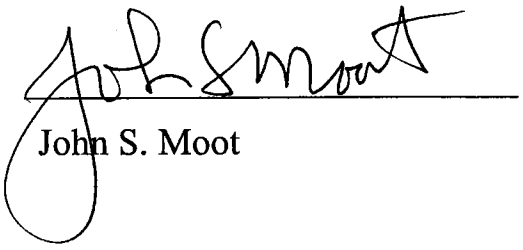
CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d)(1) of the California Rules of Court, I hereby certify that this brief contains 3,775 words including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: 

John S. Moot

PROOF OF SERVICE

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Supreme Court Case No. S233526
Court of Appeal, Fourth Appellate District, Division One Case No. D067383
San Diego Superior Court Case No. 37-2014-00025070-CU-MC-CTL

I, Allison Haraguchi, declare as follows: I am employed in the City and County of San Diego, California. I am over the age of 18 and not a party to the within action. My business address is 101 W. Broadway, Suite 810, San Diego, California 92101.

On April 22, 2016, I served the foregoing document(s) described below as:

RESPONDENT SWEETWATER UNION HIGH SCHOOL DISTRICT'S ANSWER TO PETITION FOR REVIEW

[_x_] (BY MAIL) By placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is place for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 22, 2016, at San Diego, California.

Allison Haraguchi

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