No. S214058

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PATRICIA J. BARRY

Plaintiff and Appellant,

v.

THE STATE BAR OF CALIFORNIA,

Defendant and Respondent.

After a Published Decision by the Court of Appeal Second Appellate District, Division Two Case No. B242054, Reversing a Judgment Entered by the Superior Court for the County of Los Angeles, Case No. BC452239, The Honorable Dierdre Hill presiding

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REQUEST FOR JUDICIAL NOTICE

Volume III of IV

Exhibits X-CC

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No. S214058

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Attorneys for Defendant and Respondent
THE STATE BAR OF CALIFORNIA

REQUEST FOR JUDICIAL NOTICE

Pursuant to rule 8.54 of the California Rules of Court, Evidence Code section 452, subdivision (d), and Evidence Code section 459, Petitioner The State Bar of California ("State Bar") moves for judicial notice of the following Superior Court actions, all of which were brought against the State Bar, its officials or employees:

1. *Alexander, Jon v. State Bar, et al,* San Francisco Sup. Ct., Case No. CGC-12-525073, filed October 12, 2012 (Exs. A-B).

2. *Brown, James Earl v. Guitierrez, et al.,* Los Angeles Sup. Ct., Case No. BC369840, filed April 23, 2007 (Exs. C-D).

3. *Chavarela, Nicholas v. State Bar et al.,* Orange County Sup. Ct. Case No. 30-2009-00311346, filed October 4, 2009, Fourth Dist. Ct. of App. Case No. G043727 (Exs. E-F).

4. *Dickson, Lorraine v. State Bar, Board of Governors, Streeter, Kim, et al.,* Los Angeles Sup. Ct., Case No. BC470523, filed September 28, 2011(Exs. G-H).

5. *Dydzak, Daniel v. Dunn, Joseph, et al.,* Orange County Sup. Ct., Case No 30-2012-00558031, filed May 2, 2012 (Exs. I-J).

6. *Fletcher, Michael v. State Bar et al.,* Los Angeles Sup. Ct., Case No. BS129414, filed November 24, 2010 (Exs. K-L).

7. *Foley, Natalia v. State Bar, B. Rodriguez,* Los Angeles Sup. Ct., Case No. BC445288, filed September 9, 2010 (Exs. M-N).

8. *Gjerde, Sean v. State Bar, et al.,* Sacramento Co. Sup. Ct., Case No. 34-2012-00134070, filed October 19, 2012 (Exs. O-P).

9. *Gottshalk, Ronald v. Public Defender et al,* Orange County Sup. Ct., Case No. 30-2010-00359752-CU-NP-CJC, filed April 5, 2010 (Exs. Q-R).

10. *Henschel, Bradford v. State Bar, et al.,* Los Angeles Sup. Ct., Case No. BC379051, filed December 4, 2007, Second Dist. Ct. of App., Case Nos. B206984, B213595 (Exs. S-T).

11. *Joseph, Joel v. the State Bar of California,* Los Angeles Sup. Ct., Case No. SC103749, filed June 26, 2009, Second Dist. Ct. of App., Case No. B221236 (Exs. U-V).

12. *Kay, Philip E. v. State Bar, et al.*, San Francisco Sup. Ct., Case No. CGC-10-496869, filed February 16, 2010, First Dist. Ct. of App., Case No. A129515, Cal. Supreme Court Case No. S198578 (Exs.W-X).

13. *Kay, Philip E. v. State Bar, et al.,* San Francisco Sup. Ct., Case No. CGC-10-502372, filed August 6, 2010, First Dist. Ct. of App., Case Nos. A132643, A134111, A137989 (Exs. Y-Z).

14. *Kay, Philip E. v. State Bar, et al.,* San Francisco Sup. Ct., Case No. CGC-11-510717, filed May 4, 2011, First Dist. Ct. of App., Case Nos. A134205, A137989 (Exs. AA-BB).

15. *Kay, Philip E., Robin Kay, Chris Enos v. State Bar, et al.,* San Francisco Sup. Ct., Case No. CGC-11-514255, filed September 4, 2011 (Exs. CC-DD).

16. *Missud, Patrick v. State Bar of California,* San Francisco Sup. Ct., Case No. CGC-13-533811, filed September 3, 2013 (Ex. EE).

17. *Morris, Gregory A. v. State Bar of California, et al.,* San Francisco Sup. Ct., Case No. CGC-06-450766, filed November 29, 2006 (Exs. FF-GG).

18. *Morris, Gregory A. v. State Bar of California, et al.* San Francisco Sup. Ct., Case No. CGC-08-471504 (Exs. HH-II).

19. *Morrowatti, Nasrin v. State Bar of California,* Los Angeles Sup. Ct., Case No. BC 347921, filed February 23, 2006, Second Dist. Ct. of App., Case No. B196392 (Exs. JJ-KK).

20. *Oxman, Brian v. Chang, Alec, et al.,* Los Angeles Sup. Ct., Case No. BC516601, filed July 29, 2013 (Ex. LL).

21. *Scurrah, Robert v. State Bar et al.,* Orange County Sup. Ct., Case No. 30-2012-00595756, filed September 5, 2012 (Exs. MM-NN).

22. *Spadaro, Charlotte v. Phyllis Williams, The State Bar of California,* San Bernardino Co. Sup. Ct. , Case No. CIVRS1203310, filed April 30, 2012 (Ex. OO-PP).

23. *Taylor, Swazi v. State Bar,* Los Angeles Sup. Ct., Case No. BC476842, filed January 18, 2012 (Exs. QQ-RR).

24. *Viriyapanthu, Paul v. The State Bar of California, Viveros,* Orange County Sup. Ct., Case No. 30-2010-00418393, filed October 15, 2010 (Exs. SS-TT).

DATED: October 21, 2013

KERR & WAGSTAFFE LLP

By _____
MICHAEL VON LOEWENFELDT
Attorneys for Respondent
The State Bar of California

MEMORANDUM OF POINTS AND AUTHORITIES

This request seeks judicial notice of all of the cases in in which Petitioner and its officials, agents and employees have been sued in superior court regarding the attorney admissions and discipline process despite an absence of jurisdiction. Pursuant to California Rules of Court, rule 8.252(a)(2)(A), these lawsuits are relevant because they demonstrate that the State Bar has been sued numerous times in superior court regarding attorney admissions and discipline despite a lack of jurisdiction. The volume of these cases demonstrate the corresponding time and effort the State Bar has had to expend in order to get these cases dismissed.

As required under California Rules of Court, rule 8.252(a)(2)(B), Petitioner avers that these documents were not the subject of judicial notice at either the trial court or the appellate court level because the merits of the trial court's order granting the State Bar's special motion to strike were not at issue. See Declaration of Danielle Lee, attached hereto.

Judicial notice is the appropriate procedure for bringing these lawsuits before this court. (California Rules of Court, rule 8.252(a)(2)(C); see Evid. Code, §452, subd. (d); *Szetelea v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1098; *Taus v. Loftus* (2007) 40 Cal.4th 683, 726 (records from other state court proceedings involving plaintiff relevant to discredit plaintiff's present intrusion-into-private-matters lawsuit);

Based on the foregoing legal authority, and for the foregoing reasons, the State Bar respectfully requests this court to grant the motion for judicial notice.

DATED: October 21, 2013

Respectfully submitted,

KERR & WAGSTAFFE LLP

By _____
Michael von Loewenfeldt

Attorneys for Respondent
THE STATE BAR OF CALIFORNIA

DECLARATION OF DANIELLE LEE

I, Danielle Lee, hereby declare:

1. I am an attorney licensed to practice before all federal and state courts in the State of California, and am an attorney in the Office of the General Counsel of The State Bar of California, one of the attorneys of record for the State Bar of California. I have personal knowledge of the facts stated herein, and, if called as a witness, could and would competently testify to them under oath.

2. I was counsel of record in this matter for The State Bar of California when this matter was in Los Angeles Superior Court, Case number BC452239. I did not request judicial notice of the other cases to which the State Bar, its officials, agents and employees have been a party because the trial court had already granted that the State Bar's special motion to strike pursuant to Code of Civil Procedure section 425.16. The only issue for the hearing on the State Bar's motion for attorney's fees was the reasonableness of the State Bar's fee request.

3. I was counsel of record for the State Bar at the time Ms. Barry appealed the attorney fees award, Second District Court of Appeal, Case number B242054. Because Ms. Barry admitted that she was not appealing the order granting the State Bar's special motion to strike, and was only appealing the order granting the State Bar attorney fees, I did not

request judicial notice of the other cases to which the State Bar, its officials, agents and employees.

4. The State Bar's Office of General Counsel was counsel in each of the cases referenced in this Motion for Judicial Notice. The documents attached hereto are all true and correct copies from the court files in those cases.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 18, 2013, at San Francisco, California.

DANIELLE LEE

PROOF OF SERVICE

I, Lisa Ramon, declare that 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 100 Spear Street, 18th Floor, San Francisco, California 94105.

On October 21, 2013, I served the following document(s):

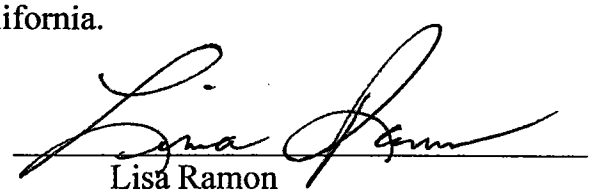
- **REQUEST FOR JUDICIAL NOTICE, VOLUME III OF IV, EXHIBITS X-CC**

on the parties listed below as follows:

Patricia J. Barry 634 Spring Street, #823 Los Angeles, CA 90014	Los Angeles Superior Court Stanley Mosk Courthouse 111 North Hill St. Los Angeles, CA 90012
California Court of Appeal 2nd Appellate District, Division 2 Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013 *Via Electronic Submission to California Court of Appeal (Petition for Review only)*	

By first class mail by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 21, 2013 at San Francisco, California.



Lisa Ramon

TABLE OF CASES

Exhibit	Case
A.	*Alexander, Jon v. State Bar, et al.,* San Francisco Sup. Ct., Case No. CGC-12-525073, Complaint filed October 12, 2012.
B.	*Alexander, Jon v. State Bar, et al.,* San Francisco Sup. Ct., Case No. CGC-12-525073, dismissal filed November 16, 2012.
C.	*Brown, James Earl v. Guitierrez, et al.,* Los Angeles Sup. Ct., Case No. BC369840, Complaint filed April 23, 2007.
D.	*Brown, James Earl v. Guitierrez, et al.,* Los Angeles Sup. Ct., Case No. BC369840, dismissal of action field September 16, 2008.
E.	*Chavarela, Nicholas v. State Bar et al.,* Orange County Sup. Ct. Case No. 30-2009-00311346, Fourth Dist. Ct. of App. Case No. G043727, Complaint filed October 4, 2009.
F.	*Chavarela, Nicholas v. State Bar et al.,* Orange County Sup. Ct. Case No. 30-2009-00311346, Fourth Dist. Ct. of App. Case No. G043727, order granting special motion to strike filed April 29, 2010.
G.	*Dickson, Lorraine v. State Bar, Board of Governors, Streeter, Kim, et al.,* Los Angeles Sup. Ct., Case No. BC470523, Complaint filed September 28, 2011.
H.	*Dickson, Lorraine v. State Bar, Board of Governors, Streeter, Kim, et al.,* Los Angeles Sup. Ct., Case No. BC470523, judgment of dismissal filed April 10, 2012.
I.	*Dydzak, Daniel v. Dunn, Joseph, et al.,* Orange County Sup. Ct., Case No 30-2012-00558031, First Amended Complaint filed May 2, 2012.
J.	*Dydzak, Daniel v. Dunn, Joseph, et al.,* Orange County Sup. Ct., Case No 30-2012-00558031, voluntary request for dismissal filed October 9, 2012.
K.	*Fletcher, Michael v. State Bar et al.,* Los Angeles Sup. Ct., Case No. BS129414, petition for writ of mandate filed November 24, 2010.

L. *Fletcher, Michael v. State Bar et al.,* Los Angeles Sup. Ct., Case No. BS129414, dismissal minute order filed March 29, 2011.

M. *Foley, Natalia v. State Bar, B. Rodriguez,* Los Angeles Sup. Ct., Case No. BC445288, Complaint filed September 9, 2010.

N. *Foley, Natalia v. State Bar, B. Rodriguez,* Los Angeles Sup. Ct., Case No. BC445288, voluntary dismissal filed December 28, 2010, and minute order following voluntary dismissal filed February 14, 2011.

O. *Gjerde, Sean v. State Bar, et al.,* Sacramento Co. Sup. Ct., Case No. 34-2012-00134070, Complaint filed October 19, 2012.

P. *Gjerde, Sean v. State Bar, et al.,* Sacramento Co. Sup. Ct., Case No. 34-2012-00134070, Judgment of Dismissal following granting of special motion to strike filed April 11, 2013.

Q. *Gottshalk, Ronald v. Daniels et al.,* Orange County Sup. Ct., Case No. 30-2010-00359752-CU-NP-CJC, Complaint filed April 5, 2010.

R. *Gottshalk, Ronald v. Daniels et al.,* Orange County Sup. Ct., Case No. 30-2010-00359752-CU-NP-CJC, Notice of Dismissal filed August 22, 2011.

S. *Henschel, Bradford v. State Bar, et al.,* Los Angeles Sup. Ct., Case No. BC379051, Second Dist. Ct. of App., Case Nos. B206984, B213595, Complaint filed December 4, 2007.

T. *Henschel, Bradford v. State Bar, et al.,* Los Angeles Sup. Ct., Case No. BC379051, filed December 4, 2007, Second Dist. Ct. of App., Case Nos. B206984, B213595, order granting special motion to strike filed January 17, 2008.

U. *Joseph, Joel v. the State Bar of California,* Los Angeles Sup. Ct., Case No. SC103749, Second Dist. Ct. of App., Case No. B221236, Complaint filed June 26, 2009.

V. *Joseph, Joel v. the State Bar of California,* Los Angeles Sup. Ct., Case No. SC103749, Second Dist. Ct. of App., Case No. B221236 2009, Order sustaining demurrer without leave to amend October 27, 2009.

W. *Kay, Philip E. v. State Bar, et al.*, San Francisco Sup. Ct, Case No. CGC-10-496869, First Dist. Ct. of Appeal, Case No. A129515, California Supreme Court, Case No. S198578, Complaint filed February 16, 2010.

X. *Kay, Philip E. v. State Bar, et al.*, San Francisco Sup. Ct, Case No. CGC-10-496869, First Dist. Ct. of Appeal, Case No. A129515, California Supreme Court, Case No. S198578, order sustaining demurrer and taking special motion to strike off calendar filed July 29, 2010.

Y. *Kay, Philip E. v. State Bar, et al.,* San Francisco Sup. Ct., Case No. CV 10-502372, First Dist. Ct. Appeal, Case Nos. A132643, A134111, A137989, Complaint filed August 6, 2010.

Z. *Kay, Philip E. v. State Bar, et al.,* San Francisco Sup. Ct., Case No. CV 10-502372, First Dist. Ct. Appeal, Case Nos. A132643, A134111, A137989, order sustaining demurrer filed September 20, 2011.

AA. *Kay, Philip E. v. State Bar, et al.,* San Francisco Sup. Ct., Case No. CGC-11-510717, First Dist. Ct. Appeal, Case Nos. A134205, A137989, Complaint filed May 4, 2011.

BB. *Kay, Philip E. v. State Bar, et al.,* San Francisco Sup. Ct., Case No. CGC-11-510717, First Dist. Ct. Appeal, Case Nos. A134205, A137989, order sustaining demur filed August 5, 2011.

CC. *Kay, Philip E., Robin Kay, Chris Enos v. State Bar et al.,* San Francisco Sup. Ct., Case No. CGC-11-514255, Complaint filed September 14, 2011.

DD. *Kay, Philip E., Robin Kay, Chris Enos v. State Bar et al.,* San Francisco Sup. Ct. , Case No. CGC-11-514255, voluntary dismissal filed February 17, 2012.

EE. *Missud, Patrick v State Bar of California,* San Francisco Sup. Ct., Case No. CGC-13-533811, First Amended Complaint filed September 3, 2013.

FF. *Morris, Gregory A. v. State Bar of California, et al.,* San Francisco Sup. Ct., Case No. CGC 06-450766, fifth Amended Complaint filed

October 9, 2009.

GG. *Morris, Gregory A. v. State Bar of California, et al.,* San Francisco Sup. Ct., Case No. CGC 06-450766, order sustaining demurrer filed May 18, 2010.

HH. *Morris, Gregory A. v. State Bar of California, et al.,* San Francisco Sup. Ct., Case No. CGC 08-471504, Complaint filed January 29, 2008.

II. *Morris, Gregory A. v. State Bar of California, et al.,* San Francisco Sup. Ct., Case No. CGC 08-471504, order dismissing entire action filed January 12, 2009.

JJ. *Morrowatti, Nasrin v. State Bar of California, et al.,* Los Angeles Sup. Ct., Case No. BC 347921, Second Dist. Ct. Appeal, Case No. B196392, Complaint filed February 23, 2006.

KK. *Morrowatti, Nasrin v. State Bar of California, et al.,* Los Angeles Sup. Ct., Case No. BC 347921, Second Dist. Ct. Appeal, Case No. B196392, minute order sustaining demurrer filed November 17, 2006.

LL. *Oxman, Brian v. Chang, Alec, et al.,* Los Angeles Sup. Ct., Case No. BC516601, Complaint filed July 29, 2013.

MM. *Scurrah, Robert v. State Bar et al.,* Orange County Sup. Ct., Case No. 30-2012-00595756, Complaint filed September 5, 2012.

NN. *Scurrah, Robert v. State Bar et al.,* Orange County Sup. Ct. , Case No. 30-2012-00595756, Minute order sustaining demurrer filed August 27, 2013.

OO. *Spadaro, Charlotte v. Phyllis Williams, The State Bar of California,* San Bernardino Co. Sup. Ct., Case No. CIVRS1203310, Complaint filed April 30, 2012.

PP. *Spadaro, Charlotte v. Phyllis Williams, The State Bar of California,* San Bernardino Co. Sup. Ct., Case No. CIVRS1203310, order sustaining demurrer filed October 3, 2013.

QQ. *Taylor, Swazi v. State Bar,* Los Angeles Sup. Ct., Case No. BC476842, Complaint filed January 18, 2012.

RR. *Taylor, Swazi v. State Bar,* Los Angeles Sup. Ct., Case No. BC476842, judgment of dismissal filed August 23. 2012.

SS. *Viriyapanthu, Paul v. The State Bar of California, Viveros,* Orange County Sup. Ct., Case No. 30-2010-00418393, Complaint filed October 15, 2010.

TT. *Viriyapanthu, Paul v. The State Bar of California, Viveros,* Orange County Sup. Ct., request for dismissal filed April 1, 2011.

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Attorneys for Defendants
THE STATE BAR OF CALIFORNIA, BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA, THE OFFICE OF THE CHIEF TRIAL COUNSEL, LUCY ARMENDARIZ, SCOTT J. DREXEL, JEFF DAL CERRO, AND ALLEN BLUMENTHAL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

PHILIP E. KAY,

Plaintiff,

v.

THE STATE BAR OF CALIFORNIA, BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA, THE OFFICE OF THE CHIEF TRIAL COUNSEL, LUCY ARMENDARIZ, IN HER OFFICIAL CAPACITY, SCOTT J. DREXEL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ALLEN BLUMENTHAL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, JEFF DAL CERRO INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, AND DOES 1 THROUGH 50 INCLUSIVE.

Defendants.

Case No. CGC-10-496869

~~[PROPOSED]~~ ORDER ~~GRANTING~~ SUSTAINING DEMURRER TO PLAINTIFF KAY'S FIRST AMENDED COMPLAINT AND TAKING SPECIAL MOTION TO STRIKE OFF CALENDAR

DATE: April 30, 2010
TIME: 9:30 a.m.
DEPT: 302

The Honorable Ernest H. Goldsmith

The following matters came on regularly for hearing in Department 302 of this Court on April 30, 2010:

1. Defendants The State Bar of California, The State Bar of California Board of Governors, The Office of the Chief Trial Counsel, Lucy Armendariz, Scott J. Drexel, Jeff Dal Cerro, and Allen Blumenthal's Demurrer to the First Amended Complaint; and

2. Defendants The State Bar of California, The State Bar of California Board of Governors, The Office of the Chief Trial Counsel, Lucy Armendariz, Scott J. Drexel, Jeff Dal Cerro, and Allen Blumenthal's Special Motion to Strike the First Amended Complaint.

Danielle Lee appeared on behalf of the Defendants The State Bar of California, The State Bar of California Board of Governors, The Office of the Chief Trial Counsel, Lucy Armendariz, Scott J. Drexel, Jeff Dal Cerro, and Allen Blumenthal. Plaintiff Philip E. Kay appeared pro se. The Honorable Ernest H. Goldsmith, judge of the San Francisco County Superior Court, presided.

The Court, having heard arguments of counsel, and having reviewed all papers supporting and opposing the demurrer and the special motion to strike, and all judicially noticeable materials, and good cause appearing, rules as follows:

1. The demurrer is sustained without leave to amend based on lack of jurisdiction;
2. The Special Motion to Strike is taken off calendar as moot; and
3. Plaintiff's request for judicial notice is granted.

IT IS SO ORDERED.

DATED: JUL 22 2010

ERNEST H. GOLDSMITH

HONORABLE ERNEST H. GOLDSMITH
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM:

PHILIP E. KAY, PLAINTIFF PRO SE

DATED: _____

SUMMONS ISSUED

FILED
San Francisco County Superior Court
AUG - 6 2010
CLERK OF THE COURT
BY: _____ Deputy Clerk

Philip E. Kay
736 43rd Avenue
San Francisco, California 94121
(415)387-6622
(415)387-6722 (fax)

In Pro Per

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

PHILIP E. KAY,

Plaintiff,

vs.

STATE BAR OF CALIFORNIA, THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA, OFFICE OF CHIEF COUNSEL, LUCY ARMENDARIZ, in her official capacity and individually, SUPREME COURT OF CALIFORNIA, RONALD GEORGE, in his official capacity and individually, SCOTT J. DREXEL, ALLEN BLUMENTHAL, JEFF DAL CERRO, MICHAEL ANELLO, JOAN WEBER, in their official capacity and individually and DOES 1 - 50,

Defendants.

Case No. CGC-10-502372

VERIFIED

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF - COLLATERAL ATTACK TO VACATE VOID CONTEMPT, DEFAULT, DECISION, ORDER AND JUDGMENT, EXTRINSIC AND COLLATERAL FRAUD - VIOLATIONS OF CIVIL RIGHTS - DUE PROCESS - DAMAGES

[Business & Profession Code §§6043.5(a) 6068(i) & 6085(b); Code of Civil Procedure §§170.4, 473, 585, 1060, 1065, 1068 & 1102; Penal Code §166(a)(7)]

Violation of 42 U.S.C. §1983 - Fifth, Sixth and Fourteenth Amendments to the United States Constitution (Procedural Due Process)

Violation of 42 U.S.C. §1983 (Free Speech)

Violation of 42 U.S.C. §1983 (Substantive Due Process)

Violation of 42 U.S.C. §1983 (Equal Protection)

CASE MANAGEMENT CONFERENCE SET

JAN - 7 2011 - 9:00 AM

DEPARTMENT 212

I. INTRODUCTION

The State Bar Defendants Have Charged and Found Kay Guilty by VOID *Ab Initio* Default of Criminal Contempt in the *Gober* and *Marcisz* cases Based upon a Finding of Contempt in the State Bar Proceeding, without Standing and in the Absence of all Jurisdiction

1. Plaintiff is Philip E. Kay ("Kay"). At the center of this ***collateral attack*** proceeding is the entry of the Default in the State Bar proceeding, with Kay's Answer on file and having appeared for trial and testified, which renders it **void** *ab initio*. See *Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857. This Complaint is brought as a ***collateral attack*** to the **void** Default and subsequent Decision, Order and Judgment issued by the State Bar of California and Supreme Court defendants collectively ("State Bar") defendants. See Exhibits 1-3, Default, Decision and Order to be entered as a Judgment in this Court, which will cause irreparable harm to Kay and his clients. The State Bar defendants have violated Kay's rights as a licensed attorney in the State of California and illegally seek to deny him of his property interest in the right to practice law. See *Neblett v. State Bar* (1941) 17 Cal.2d 77, 81 [". . . the right to practice law is a valuable one which should not be taken away or cancelled under circumstances that have even the slightest tendency to suggest any possible unfairness or disadvantage therein to the attorney whose right to remain in his profession is challenged."]; *Woodard v. State Bar* (1940) 16 Cal.2d 755, 758 ["(t)he right to practice law is a valuable one which should be suspended or revoked only on charges alleged and proved and as to which full notice and opportunity to defend have been accorded."].

2. The Default, Decision, Order and Judgment ("DDOJ") are all *void ab nitio*. State Bar judges have **not** been given the power to **cite** (charge) and/or sanction respondents and litigants appearing before them for contempt. (*Matter of Lapin* (Rev.Dept. 1993) 2 Cal. State Bar Ct.Rptr. 279, 295 and discussion below.) Regardless, State Bar judge Armendariz found Kay in contempt in the State Bar proceeding as the basis for entering the **void** Default, without standing and in the absence of all jurisdiction. The DDOJ are further void, because they violate fundamental constitutional rights of due process, in which Kay was denied a trial and appeal in

the State Bar proceeding. See *In Re Rose*, 22 Cal.4th 430 (2000). See also *Kruetzer v. San Diego County* (1984) 153 Cal.App.3d 62, 71-72:

> "The Fourteenth Amendment protects individuals from being deprived of life, liberty and property without due process of law. The Fourteenth Amendment's requirement of due process applies to the revocation or suspension of licenses (see Rios v. Cozens (1972) 7 Cal.3d 792, 795 [103 Cal.Rptr. 299, 499 P.2d 979], reinstated at 9 Cal.3d 454, 455 [107 Cal.Rptr. 784, 509 P.2d 696] [driver's license]; Slaughter v. Edwards (1970) 11 Cal.App.3d 285, 295 [90 Cal.Rptr. 144] [real estate broker's license]; Angelopulos v. Bottorff (1926) 76 Cal.App. 621, 625 [245 P. 447] [restaurant license]).
>
> Violations of procedural due process may be redressed under section 1983 (Carey v. Piphus (1978) 435 U.S. 247 [55 L.Ed.2d 252, 98 S.Ct. 1042]). The right to procedural due process is 'absolute' in that it does not depend upon the merits of the underlying substantive allegations (id.. at p. 266 [55 L.Ed.2d at pp. 266-267]). Rigorous procedural rules are particularly important when First Amendment rights are implicated (Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 561 [43 L.Ed.2d 448, 460-461, 95 S.Ct. 1239, 1247-1248])."[1]

3. **Solely by void Default**, with Kay's Answer on file and having appeared for trial and testified, the State Bar has ordered Kay to be suspended for three years, serve five years probation and pay the State Bar's costs. State Bar costs have been determined to be a criminal fine (punishment) and non-dischargeable in bankruptcy. (See *Findley v. State Bar of California*, 59 Fed.3d 248 (2010). Thus, without standing and in the absence of all jurisdiction, the State Bar has charged and found Kay guilty of criminal contempt and imposed a criminal and non-dischargeable fine by **Default – all of which are void**. Conviction of a nonexistent crime results in a void judgment not subject to waiver. See *People v. McCarty*, 94 Ill.2d 28, 37 (1983).

4. There are no client complaints against Kay. Moreover, the State Bar proceeding was

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[1] See *Greene v. Zank* (1986) 158 Cal.App.3d 497, in which the Court held claims for declaratory and injunctive relief are <u>not</u> barred by quasi-judicial immunity.

commenced without any underlying orders from the Superior Court of contempt, sanctions or new trial, which establishes that there was no "reportable action" for the State Bar to investigate, charge or impose any discipline against Kay. See Business & Professions Code §6086.7. This further establishes that no client, party or the public was harmed by any of Kay's conduct. Without any such complaints or trial and/or appellate court findings of misconduct, all of Kay's conduct, which has been found to be legitimate and permissible advocacy by the trial and appellate courts, was carried out within the course and scope of his employment and representation of his clients, with their informed consent. Kay's refusal to disclose his privileged communications with his clients was the primary basis for Judge Armendariz' *ultra vires* contempt finding in the State Bar proceeding. However, Kay's communications with his clients, resulting in the actions carried out on behalf of clients, are privileged and not subject to discovery or disclosure in State Bar proceedings. See *McKnew v. Superior Court of San Francisco*, 23 Cal.2d 58, 67 (1943):

> "We are in thorough accord with the rule of privilege under which an attorney is prohibited from disclosing information received by him in his professional relations with his client, and believe it should be rigidly enforced."

Incredibly, in its Opposition to Kay's Petition for Writ of Review to the Supreme Court, the State Bar **admitted** to these facts. Thus, the State Bar admitted that the central charges and (default) findings in the State Bar proceeding that Kay denied the defendants in the *Gober v. Ralphs Grocery Company* and *Marcisz v. UltraStar Cinemas* cases fair trials (obstructed justice) are **fabrications**. In addition, the alleged *contemptuous* misconduct during these trials did not take place in the presence of the State Bar Court, which means it was conducting indirect contempt proceedings, without standing and in the absence of all jurisdiction.

5. With the Answer on file and Kay having appeared for trial and testified, Judge Armendariz entered an illegal, **void** and incurable (*ultra vires*) Default based on an *ultra vires* and **void** finding of contempt in the State Bar proceeding. See Exhibit 1. Then, after entering the Default, Judge Armendariz, in another void and *ultra vires* act, *sua sponte* struck his Answer. The policy of the law is it have every litigated cause tried on its merits. *Barri v. Rigero*, 168 Cal,

736, 740 (1914). After the entry of the Default, the Judge Armendariz ordered additional punishment based on matters not charged in the Notice of Disciplinary Charges ("NDC"). This resulted in an amendment of the NDC, which further voids the Default. Rather, service of the NDC with the new charges must take place, which affords Kay the right to answer and contest the NDC. (See *Jackson v. Bank of America* (1986) 188 Cal.App.3d 375, 387; *Engebretson & Company, Inc. v. Harrison* (1981) 125 Cal.App.3d 426, 443.) A default judgment for greater relief or a different form of relief than demanded in the complaint is beyond the State Bar's jurisdiction. (See *Marriage of Lippel* (1990) 51 Cal.3d 1160, 1167, 276 Cal.Rptr. 290, 293; *Electronic Funds Solutions v. Murphy* (2005) 134 Cal.App.4th 1161, 1176.) A default judgment for an amount in excess of the *prima facie* evidence produced at the default hearing is likewise beyond the State Bar's jurisdiction. (See *Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361-362.)

6. The DDOJ impose a money judgment through a Default, without any claim for damages in the NDC. When recovering damages by a default judgment, the plaintiff is limited to the damages specified in the complaint further renders the DDOJ **void**. See *Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 206; fn. 4:

> Plaintiffs' attempt to correct the first amended complaint's lack of any claim for damages through service of a statement of damages provides an alternate ground for reversal. Statements of damages are used only in personal injury and wrongful death cases, in which the plaintiff may not state the damages sought in the complaint. (Code Civ. Proc., § 425.11.) In all other cases, when recovering damages in a default judgment, the plaintiff is limited to the damages specified in the complaint. (In re Marriage of Lippel (1990) 51 Cal.3d 1160, 1167, 276 Cal.Rptr. 290, 801 P.2d 1041; Heidary v. Yadollahi (2002) 99 Cal.App.4th 857, 864-865, 121 Cal.Rptr.2d 695.)
>
> Here, plaintiffs' first amended complaint did not specify any amount of damages. If plaintiffs could remedy that failure through service of a statement of damages after entry of default , the statement of damages would serve as the functional equivalent of an amendment to the complaint, which would open the default s. (Cole v. Roebling

Construction Co. (1909) 156 Cal. 443, 446, 105 P. 255; Ostling v. Loring (1994) 27 Cal.App.4th 1731, 1743, 33 Cal.Rptr.2d 391.)"

(See also, *Electronic Funds Solutions v. Murphy* (2005) 134 Cal.App.4th 1161, 1176-1177; *Levine v. Smith* (2006) 145 Cal.App.4th 1131, 1137.)

II. JURISDICTION AND VENUE TO PURSUE COLLATERAL ATTACK ON VOID DEFAULT ORDERS AND JUDGMENT

7. This is an action brought pursuant to the laws of the State of California, including Business & Profession Code §6068(i), §6043.5(a); Code of Civil Procedure §§170.4, 473, 585, 1060, 1065, 1068 & 1102; Penal Code §166(a)(7) and federal law, pursuant to 42 U.S.C. §1983. The California Supreme Court, in denying (summarily) Kay's Petition for Writ of Review in the State Bar proceeding, has relinquished jurisdiction in this matter.

8. The entry of the void Default based on the void contempt after Kay filed the Answer and appeared for trial and testified in the State Bar proceeding are void orders, resulting in the unconstitutional denial of due process. Following the entry of the void Default, Judge Armendariz entered a series of void orders further denying Kay his due process rights - culminating in the Decision, Order and Judgment, all of which are based on the void Default. Thus, the DDOJ are void, a legal nullity and without effect. A void order is void *ab initio* and can be ***collaterally attacked*** in this proceeding. California Courts have long recognized the propriety of collateral attacks on void orders. See *People v. Gonzalez* (1996) 12 Cal.4th 804, 824:

"The People argue the trial court should not entertain collateral attacks on injunctive orders, because of the danger of piecemeal derogation of superior court orders resulting in judgments without precedential value. Permitting a collateral attack only in the Court of Appeal, the argument continues, would at least produce an opinion binding on all parties involved in the litigation over the injunction. This is, indeed, a substantial concern, yet it is one overbalanced by the need to protect the individual's interest in being free from the coercive effects of unconstitutional orders. In Berry itself, we

> acknowledged the authority of the municipal court, by sustaining a demurrer, to prevent trial on a charge of violation of an invalid order. (Berry, supra, 68 Cal.2d at p. 146.) Such an order would have no precedential value. Nevertheless, as we established in Berry, and as the very wording of section 166 makes clear, in this state, **the interest of the individual in avoiding the coercive effect of void injunctive orders is more substantial than the interest of society in vindicating a court's power by maintaining deference even to void orders through the contempt power.**" (Emphasis.)

See also *Rochin v. Pat Johnson Mfg. Co.* (1998) 67 Cal.App.4th 1228, 1239 [an amended judgment entered without notice to plaintiff violated due process and was subject collateral attack. Thus, a judgment void on its face because rendered when the court lacked personal or subject matter jurisdiction or exceeded its jurisdiction in granting relief, as here, which the court had no power to grant, is subject to collateral attack at any time].

A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. A void order can be challenged in any court. *Old Wayne Mut. L. Assoc. v. Mcdonough*, 204 U. S. 8 (1907). A void order or judgment is void even before reversal. *Valley v. Northern Fire & Marine Co.*, 254 U.S. 348 (1920). No court has the authority to validate a void order. *U.S. v. Throckmorton*, 98 U.S. 61 (1878). If the underlying order is void, the judgment based on it is also void. *Austin v. Smith*, 312 F. 2d 337, 343 (1962). (See *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950; *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 314.) Void judgments are those rendered by a court which lacked jurisdiction, either of the subject matter or the parties. See *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339 (1940). A void judgment entered by a court, which lacks jurisdiction over the parties or the subject matter, or lacks inherent power to enter the particular judgment, or an order procured by fraud, can be attacked at any time, in any court, either directly or collaterally, provided that the party is properly before the court. *Long v. Shorebank Development Corp.*, 182 Fed.3d 548 (C.A. 7 Ill. 1999). A void judgment is one which, from its inception, was a complete nullity and without legal effect. *Lubben v. Selevtive Service System Local Bd. No. 27*, 453 Fed.2d 645 (C.A. 1 Mass. 1972). A void judgment is one in which the rendering court lacked subject matter jurisdiction,

jurisdiction over the parties, acted in a manner inconsistent with due process of law or otherwise acted unconstitutionally in entering a judgment. *Hays v. Louisiana Dock Co.*, 452 N.E.2d 1383 (Ill. App. 5 Dist. 1983). A void judgment is one that has been procured by extrinsic or collateral fraud or entered by a court that did not have jurisdiction over the subject matter or the parties. *Rook v. Rook*, 233 Va. 92, 95, 353 S.E.2d 756, 758 (1987). An act beyond a court's jurisdiction in the fundamental sense is void; it may be set aside at any time and no valid rights can accrue thereunder. *People v. Ruiz* (1990) 217 Cal. App. 3d 574. See *American Surety Co. v. Baldwin*, 287 U.S. 156, 166-67 (1932) (applying *res judicata* to action seeking to set aside judgment for lack of jurisdiction); *Browning v. Navarro*, 887 F.2d 553, 558-59 (5th Cir. 1989) (*res judicata* applies to actions to void a judgment for fraud).

The Supreme Court further lost jurisdiction over Kay's conduct in *Gober* and *Marcisz* after denying review in those cases. In *Gober* and *Marcisz*, there are no new facts or orders granting writs of *coram nobis* or *vobis*. The Supreme Court has no jurisdiction to reclaim jurisdiction through its administrative arm (State Bar) in the very same matters that they relinquished jurisdiction over based on the exact same record. Thus, both the State Bar and the Supreme Court were without standing and all jurisdiction to act, which further renders the DDOJ void.

9. Venue is proper in this Court because the harm was caused to Kay in this County and the State Bar maintains corporate headquarters in this County.

III. PARTIES

Plaintiff

10. Kay is, and at all times mentioned herein was, a citizen and resident of the State of California, residing in this County. He is licensed to practice law in the State of California and has been an active member of the State Bar of California since 1981. He has no prior disciplinary record with the State Bar. Rather, he has been singled out by numerous courts in orders awarding attorney's fees, pursuant to Government Code §12965(b) for exemplary courtroom conduct and advocacy, including the *Gober* case, for which he is being suspended

from the practice of law.

The State Bar Defendants

11. The State Bar of California is a public corporation in the judicial branch of the State of California, incorporated under the laws of the State of California with its principal place of business in the State of California. The State Bar acts through the Board of Governors of the State Bar of California. The Board of Governors makes rules, regulates and operates the State Bar, which is **not** empowered to reverse the final orders and decisions of the article VI courts in the *Gober* and *Marcisz* cases, as it has done here. See *Lady v. Worthingham* (1943) 61 Cal.App.2d 780, 782:

> "So far as the Decisions of this Court and the Supreme Court are concerned, it is utterly immaterial what conclusion the State Bar, or any investigating committee thereof, may have reached relative to a judgment of this Court or of the Supreme Court. **The Decisions and judgments of the District Court of Appeal and the Supreme Court are not subject to review by the State Bar or a committee thereof.**" (Emphasis.)

12. The State Bar Court is the adjudicative tribunal acting as an administrative arm of the California Supreme Court to hear and decide attorney disciplinary and regulatory proceedings and to make recommendations to the Supreme Court regarding those matters. State Bar judge Armendariz, without standing and in the absence of all jurisdiction and/or administratively and, thus without immunity, issued and entered the **void** Default and Decision. (See *Mireles v. Waco*, 502 U.S. 9, 11-12, 112 S.Ct. 286 (1991).) Justice George issued and enterd the **void** Order based on the void Default and Decision, without standing and in the absence of all jurisdiction and/or administratively and thus, without immunity. Judge Armendariz is being sued in her official and individual capacity. Justice George is being sued in his official and individual capacity. Defendant Scott J. Drexel was Chief Trial Counsel of the Office of the Chief Trial Counsel (OCTC), the office within the State Bar, which is the prosecutorial arm of the State Bar in attorney discipline and regulatory matters. The OCTC functions under the direction of the Chief Trial Counsel. Allen Blumenthal and Jeff Dal Cerro are Deputy Trial Counsel in the OCTC. Messrs. Drexel, Blumenthal and Dal Cerro are being sued in their official and individual

capacities. During the investigation, the State Bar prosecutors engaged in a series of acts and omissions, which are not immune from prosecution, as discussed below.

Disqualified Judges Anello and Weber

13. At the relevant times alleged herein, defendant Michael Anello was a disqualified judge, formerly with the Superior Court of San Diego County. At the relevant times alleged herein, defendant Joan Weber was a disqualified judge from the Superior Court of San Diego County. When disqualified judges Anello and Weber falsely reported and complained about Kay to the State Bar, as alleged herein, they did so privately and not in a judicial capacity and/or administratively and thus, without immunity. Disqualified judges Anello and Weber are being sued in their official and individual capacities. When disqualified judge Weber engaged in *ex parte* communications with Judge Anello, she did so privately and not in a judicial capacity and/or did so administratively and thus, without immunity.

14. The true names and capacities of Defendants named herein as Does I through 50, inclusive, whether individual, corporate, associate, or otherwise, are unknown to plaintiff, who therefore sues such defendants by such fictitious names. Plaintiff will amend this Complaint to show true names and capacities when they have been determined.

IV. ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

The Individual State Bar Defendants and Disqualified Judges Anello and Weber Engaged in Conduct, which is Not Immune from Prosecution

15. The State Bar officials, including the individual State Bar defendants judge Armendariz, justice George and prosecutors Drexel, Dal Cerro and Blumenthal, knowingly acted without standing and in the absence of all jurisdiction and/or administratively and thus, without immunity. Said defendants used false information and falsely claimed there existed evidence of non-existent orders and misconduct during the six-year investigation of Kay. The false information was provided by disqualified judges Anello and Weber. Moreover, during the investigation, the State Bar ignored and withheld exculpatory evidence establishing no grounds for filing any charges. From the outset of its investigation, the State Bar knew this matter did not

involve a reportable action (Business & Professions Code §6086.7), because no orders exist or were ever presented to the State Bar establishing the existence of a reportable action. In fact, the State Bar **admitted** this matter does not involve a reportable action at the time it opened the investigation[2] and in its Opposition to Kay's Petition for Writ of Review to the Supreme Court. Moreover, the State Bar knew judges Anello and Weber lied in their reports and complaints that Kay engaged in sanctionable and contemptuous misconduct and that Anello granted a new trial based on Kay's misconduct, which if true, would have resulted in a reportable action.

Because the State Bar knew that Judge Anello lied in his complaint, it did not open the investigation as a reportable action or charge Kay with failing to report the alleged misconduct, pursuant to Business & Professions Code §6068(o)(3). The investigation lasted six years, because the State Bar could not establish any legitimate grounds to charge Kay based on Judge Anello's false complaint. During the investigation, the State Bar prosecutors fabricated and continually lied, stating there was evidence of orders and misconduct, which do not exist and are contrary to the record and "law of the case" in the trial and appellate courts in the underlying *Gober* and *Marcisz* cases. During the investigation, the State Bar prosecutors solicited knowingly false statements from disqualified judges Anello and Weber and other witnesses. During the investigation, the State Bar prosecutors reviewed inadmissible hearsay trial transcripts, which cannot serve as the basis for charges and then included them in the charges. During the investigation, the State Bar prosecutors falsely stated there existed orders, of which none were produced and do not exist, along with misconduct, which did not occur. During the investigation, the State Bar prosecutors threatened Kay that the OCTC would file charges unless

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[2] Exhibit 4, OCTC prosecutor Allen Blumenthal's declaration in support of OCTC's closing brief, paragraph 7:

> "7. The files show that on October 30, 2002, the received Judge Anello's October 29, 2002 letter and that, on or about November 1, 2002, the opened an investigation into Mr. Kay's conduct in the *Gober* v. *Ralphs* matter as a SBI. (A true and correct copy of a memo by William W. Davis, then the Special Assistant to the Chief Trial Counsel, requesting that a SBI investigation be opened is attached hereto as Exhibit 221.) This investigation is Case Number 02-0-15326. **While it was not identified by the Intake Department as a reportable action**, it was identified as a SBI." (Emphasis.)

he admitted to the fabricated and manufactured charges of misconduct to serve as an apology to Judge Anello and to rehabilitate Judge Anello's alleged damaged reputation. During the investigation, the State Bar prosecutors withheld exculpatory evidence in violation of Business & Professions §6085(b); *Brady v. Maryland* (1963) 373 U.S. 83, 87; *In re Lessard* (1965) 62 Cal.2d 497, 508-509 ["(I)n some circumstances, the prosecution must, without request, disclose substantial material evidence favorable to the accused"].) During the investigation, the State Bar lied about and withheld the identity of the complaining witness Judge Anello to protect Judge Anello and avoid the application of the statute of limitations, pursuant to Rule 51 of the State Bar Rules of Procedure. This conduct by the individual State Bar officials is not immune from prosecution. See *Millstein v. Cooley*, 257 Fed.3d 1004 (2001); *Buckley v. Fitzimmons*, 509 U.S. 259, 278 (1993).

State Bar proceedings are criminal and/or quasi-criminal. Kay was charged and found culpable/guilty of criminal contempt of court. The public prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88; accord, *People v. Eubanks* (1996) 14 Cal.4th 580, 589; *People v. Conner* (1983) 34 Cal.3d 141, 148; *People v. Superior Court* (*Greer*) (1977) 19 Cal.3d 255, 266; see Corrigan, *On Prosecutorial Ethics* (1986) 13 Hastings Const. L.Q. 537, 538-539.) *See In re Herron* (1931) 212 Cal. 196, 200, which states: "... the preliminary investigation is an inquiry by officers of this court selected for the purpose of ascertaining the **probable truth** of the charge made." (Emphasis)

16. Had the fabricated misconduct occurred, it would have been addressed by the article VI trial and appellate courts.

See 7 Witkin, Procedure (5th ed.) Trial, § 210:

Control over misconduct, or protection against its effect, is achieved mainly in the following ways:

(1) Admonition and Instruction. The trial judge's admonition to counsel and corrective

instruction to the jury. (See infra, §212.)

(2) Mistrial or New Trial. The trial judge's order declaring a mistrial (supra, §167) or granting a new trial (see 8 Cal. Proc. (5th), Attack on Judgment in Trial Court, §26).

(3) Reversal. Reversal on appeal. (See infra, §213; 9 Cal. Proc. (5th), Appeal, §§450, 451.)

(4) Contempt Adjudication. If counsel engages in a course of improper questioning or argument that is misconduct, and, after being ordered to desist, nevertheless continues, the misconduct may ripen, so to speak, into contempt. (See DeGeorge v. Superior Court (1974) 40 C.A.3d 305, 114 C.R. 860,supra, §190; 82 A.L.R.4th 886 [argument of evidence previously ruled inadmissible as contempt].) However, just as in contempt cases (supra, §190 et seq.), a line must be drawn between misconduct and proper aggressive advocacy. (See Marcus v. Palm Harbor Hosp. (1967) 253 C.A.2d 1008, 1013, 61 C.R. 702 [vigorous cross-examination and argument that witnesses were untrustworthy, based on matters in evidence; no misconduct].)

(5) Sanctions. Imposition of sanctions for improper conduct. (See infra, §226 et seq.)

(6) **Disciplinary Action. A court must report the following to the State Bar**[3]:

(a) A final contempt order involving grounds warranting discipline. (B. & P.C. 6086.7(a)(1).)

(b) The modification or reversal of a judgment for misconduct, incompetent representation, or wilful misrepresentation of an attorney. (B. & P.C. 6086.7(a)(2).)

(c) The imposition of judicial sanctions against an attorney, except for sanctions for failing to make discovery and monetary sanctions of less than $1,000. (B. & P.C. 6086.7(a)(3).) . . . .

With the same exceptions applicable to B. & P.C. 6086.7(a)(3), the attorney has his or her own obligation to report the imposition of judicial sanctions. (B. & P.C.

[3] No court reported any such orders finding misconduct to the State Bar.

6068(o)(3); see 14 Pacific L. J. 383; 1 Cal. Proc. (5th), Attorneys, §§347, 575.)[4]

17. Without any such orders and referral from the underlying article VI courts, the State Bar had no (predicate authority) standing and jurisdiction to open the investigation, investigate, charge misconduct and/or find misconduct in the State Bar proceeding. Because there was no reportable action, no party or member of the public was harmed and the State Bar was acting without standing and in the absence of all jurisdiction. Moreover, fabricating claims of non-existent orders and evidence of misconduct results in the false reporting of the underlying record. This false reporting of the record is a crime. (Penal Code §166(a)(7) "(t)he publication of a false or grossly inaccurate report of the proceedings of any court.")

18. Without this criminal false reporting, the State Bar could not have investigated or charged Kay, to which they have **admitted**. In response to Kay's complaints against defense counsel in the very same underlying cases, the State Bar refused to open an investigation – citing the very defenses raised by Kay – not a reportable action and statute of limitations. (Exhibit 5, Erin Joyce letter, which states in part):

> " . . . it is clear that the trial court in both cases did not make any finding that any of the attorneys intentionally violated the courts' in limine orders warranting censure by the court or discipline by the the State Bar. The trial courts did not make any findings against any of the attorneys sufficient to warrant a State Bar investigation. The trial Courts are in the best position to determine if an attorney has committed a violation of Business & Professions Code section 6103, or if an attorney has provided false testimony in violation of Business & Professions Code section 6068(d). **There appears to be no basis for the State Bar to investigate your allegations absent such findings by the Courts in question**.
>
> As for your complaint against Mr. Chambers, it is **barred by the statute of limitations**. . ." (Emphasis.)

19. The *gravamen* of the false charges *fabricated* during the investigation is "criminal

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[4] Kay was never charged with violating section 6068(o)(3), which if in fact the State Bar proceeding involved a reportable action, would have been mandatory, because he did not self-report.

contempt of court," which denied the civil defendants in the *Gober* and *Marcisz* cases fair trials and/or "obstructed justice." The State Bar does not have standing or jurisdiction to charge and adjudicate criminal contempt. The State Bar does not have standing or jurisdiction to adjudicate whether civil defendants were denied fair trials. Rather, these issues were **finally** adjudicated in the article VI courts where the alleged conduct took place. Moreover, the article VI judges and justices rejected these very same charges, which were raised by the losing defendants. These final judgments are not subject to reversal or comment by the State Bar. See *Lady v. Worthingham, supra,* 61 Cal.App.2d at 782.

20. The false charges *fabricated* during the investigation are lifted from the losing civil defendants' new trial motions. In *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872, the Supreme Court defined attorney misconduct resulting in prejudice such that it is "reasonably probable that the jury would have arrived at a different verdict in the absence of the [attorney misconduct] . . .." In *Simmons v. Southern Pac. Transp.* Co.1976) 62 Cal.App.3d 341, 351 the Court of Appeal stated: "(t)he ultimate determination of this issue (misconduct) rests upon this court's 'view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances.' (citations).") Where a new trial is ordered as a result of misconduct by the adverse party or counsel, the court has both the power and inherent *duty* to impose monetary sanctions in an amount sufficient to cover all the costs incurred, including attorney's fees, "in going through a trial which must now be redone." (See *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1155.) No such sanctions were issued, because no trials were reversed based on attorney misconduct.

21. In the article VI courts, all claims of misconduct that Kay interfered with the civil defendants receiving a fair trial or harmed the public were rejected by the trial and appellate courts. To the contrary, Kay was awarded his full attorney's fees and costs by a neutral trial court judge in *Gober,* who reviewed all his trial work in the case. In *Marcisz*, the Court of Appeal expressly rejected any such claims.

"In its motion UltraStar argued, among other things, that the misconduct of Plaintiffs' counsel necessitated a new trial, but the trial court rejected this argument by not granting a new trial on this ground and it noted at oral argument that this, and the other grounds argued by UltraStar as a basis for a new trial, were not meritorious.

* * * * *

As a threshold matter, the parties presented no juror declarations and the trial court cited no evidence to support its statements that the jury may have improperly awarded compensatory damages based on the conduct of Plaintiffs' counsel . . . The trial court's statements amount to improper speculation regarding the subjective reasoning processes of the jury. (See Evid. Code, § 1150 [evidence concerning the mental processes of the jury is inadmissible].) Moreover, "[a]bsent some contrary indication in the record, we presume the jury follows its instructions [citations] 'and that its verdict reflects the legal limitations those instructions imposed.' [Citation.]" (Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780, 803-804.)"

(See Exhibit 6, Marcisz Opinion, at pgs. 10-11.)

The *Marcisz* Court analysis applies equally to the conflation that non-existent juror "passion and prejudice" resulted in attorney misconduct in the *Gober* punitive damages retrial presided over by Judge Anello. This is the record in *Gober* and *Marcisz*, which the State Bar falsely reported the record to claim standing and jurisdiction.

Moreover, in *Gober* and *Marcisz*, the defendants repeated the same allegations in the NDC (lifted from defendants' losing post-trial motions), which plaintiffs' counsel addressed at that time and resulted in no orders finding misconduct. The defendants did not appeal from the denials of their motions for new trial based on attorney misconduct. Despite not appealing the issue of misconduct, the defendants, without standing, repeated the same allegations on appeal in the Court of Appeal and Supreme Court, which appellate counsel for the plaintiffs addressed once again, and resulted in no findings of misconduct in the Court of Appeal or Supreme Court. See *Dolley v. Ragon* (1924) 68 Cal.App.2d 223, 228):

"Where a man has been a recognized, active, and honorable member of the bar for a long

series of years, and someone, whether in good faith or otherwise, puts on record a charge of misconduct, the person so charged is entitled to a careful examination of the charges. And unless there is something to sustain the charges, he is entitled to a full and distinct vindication." (Emphasis.)

The lack of any such findings in the underlying article VI trial and appellate courts and the charges and finding of criminal contempt in the State Bar based on the very same conduct is a legal non-sequitur. Such divergent and diametrically opposed results cannot both be true and coexist in the same universe, because it is not possible that all of the article VI trial court judges and appellate justices failed to issue any orders finding contemptuous misconduct or issuing any sanctions, but the State Bar charged found criminal contempt on the same record. Moreover, the majority of the charges are based on allegations of criminal contempt of court during the underlying trials, which can only be adjudicated in the article VI courts where the alleged conduct took place and standing and jurisdiction existed. (See *Otis v. Superior Court of Los Angeles* (1905) 148 Cal. 129, 130:

"Every court is the exclusive judge of its own contempts, and its judgment is subject to review only upon the point of jurisdiction."

It is "law of the case" and *res judicata* that Kay did not engage in *contemptuous* misconduct. See *In re: Applicant A* (1995) 3 Cal. State Bar Ct. 318, p.5, fn.7:

"Certain narrow civil issues resolved in prior proceedings have previously been recognized in State Bar proceedings as binding between the parties to the prior proceeding. (See, e.g., *Lee v. State Bar, supra,* 2 Cal.3d at p. 941 [civil decision deemed a conclusive legal determination that attorney gave no consideration for a promissory note]; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 729 [[[[arbitration award deemed ***res judicata*** between the parties thereto on the issue of offset for costs].)" (Emphasis.)

The elements of *res judicata* are: 1) a final judgment; 2) identity of parties; and 3) identity of a primary right. *Windsor Square Homeowners Association v. Citation Homes* (1997) 54 Cal.App.4th 547, 550. As stated in *Amin v. Khazindar* (2003) 112 Cal.App.4th 582, "'If the

matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged.... The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable. [Citations.]' [Citation.]" *Id.* at 589-590. Thus, the issues determined in an appealable judgment or order from which no timely appeal was taken are *res judicata*. See *In re Matthew C.* (1993) 6 Cal.4th 386, 393; *Law Offices of Stanley J. Bell v. Shine, Browne & Diamond* (1995) 36 Cal.App.4th 1011, 1023-1026; *In re Cicely L.* (1994) 28 Cal.App.4th 1697, 1705. The doctrine of *res judicata* "is not a matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts. . ." *Federated Dep't. Stores v. Moitie* (1981) 452 U.S. 394, 401 (quoting, Hart Steel Co. v. R.R. Supply Co. (1917) 244 U.S. 294, 299. See also *Lady v. Worthingham, supra,* 61 Cal.App.2d at 782.

The State Bar Defendants Have Acted without Standing and in the Absence of all Jurisdiction

22. The State Bar, without standing and in the absence of all jurisdiction[5] charged and found Kay guilty by Default of engaging in (serial) criminal contempt of court during three trials (*Gober* and *Marcisz*), which were the subject of six appeals, without one order, sanction or finding issuing from the trial or appellate courts, who are exclusively empowered to maintain respect in their courts as part of their duties and authority as article VI court judges. The State Bar is not empowered to carry out this judicial function on their behalf. The State Bar Court judge Armendariz made these findings **based solely on the entry of an illegal, void and**

[5] See *Townsend v. State Bar* (1930) 210 Cal. 362, 365: "inasmuch as petitioner was not required to meet a charge under these rules, we must hold that such contention is not appropriate in this proceeding."

incurable[6] Default, without standing and in the absence of all jurisdiction and in violation of due process. See *Giddens v. State Bar* (1981) 28 Cal.3d 730, 735:

> **"The circumstances of this case underscore the fact that a fair hearing did not take place. Petitioner was not afforded the right to "defend against the charge by the introduction of evidence."** (Bus. & Prof.Code, s 6085, subd. (a).) Although petitioner challenged the veracity of the complainants' testimony, he never had an opportunity to cross-examine those witnesses. Since petitioner participated in the very meetings those witnesses discussed, his presence at the hearing might well have ensured the full and fair presentation of all the facts. Additionally, since he was not present to testify, the hearing officers could not evaluate his demeanor and credibility. The issue before the bar was petitioner's continued suitability for legal practice. **Without any representation of petitioner's views, a fair hearing was not possible.**" (Emphasis.)

23. During the State Bar trial, Kay properly objected to providing answers and testimony in response to a succession of questions seeking privileged and confidential client and work product information. In response, the State Bar judge Armendariz found Kay in contempt and entered a Default in the State Bar proceeding, without standing and in the absence of all jurisdiction and then subsequently *sua sponte* struck his Answer a month later. All of these acts were *ultra vires* and void.

The Supreme Court has delegated to the State Bar Court judges limited powers to act on its behalf in disciplinary matters, subject to review by the Supreme Court. (Business & Professions Code §6087.) The State Bar Court is an administrative agency affiliated with the State Bar, established by the State Bar Board of Governors to act in place of the State Bar Board of Governors in disciplinary and reinstatement proceedings. (Business & Professions §6086.5.) However, State Bar Court judges do not possess the powers or authority of an article VI judge to

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[6] Code of Civil Procedure § 473(b)): "The court is empowered to relieve a party "upon such terms as may be just . . . from a judgment, dismissal, order or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect."

rule on the matters of law ruled upon by Judge Armendariz.[7] For example, State Bar Court judges have not been given power to impose monetary sanctions upon or cite for contempt litigants appearing before them. (State Bar Rule of Procedure 187 and Business and Professions Code §6051; see *Matter of Lapin, supra*, 2 Cal. State Bar Ct.Rptr. at 295.)

These *ultra vires* acts were carried out to punish Kay in violation of his constitutional and statutory rights of due process for refusing to answer questions and provide further testimony in response to questions and rulings, which required him to violate his duties not to disclose privileged and confidential client information and for asserting his 5th Amendment rights in a criminal proceeding conducted in the State Bar, which can only be considered criminal contempt, and can only be determined, by an article VI court of general jurisdiction. Moreover, these *ultra vires* acts violated Business & Professions Code §6068(i):

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[7] According to official State Bar records, Judge Armendariz is an **inactive** member of the State Bar, pursuant to Rules and Regulations of the State Bar, Rule 2.30. The Official State Bar Transfer form regarding application to inactive status -- states on page 2 in pertinent part:

> ". . .[T]ransferring from active to inactive status may have significant consequences. For example transferring to inactive status: **Precludes a member from...occupying a position wherein he...is called upon to...examine the law or pass upon the legal effect of any act, document or law.** (Rules and Regulations of the State Bar, Title 2, Rule 2.30). . . Precludes a member from engaging in certain activities in California, including but not limited to **working as a. . .referee**... law clerk, paralegal, real estate broker or CPA. This is based on the presumption that these activities call upon a member to give legal advice or counsel or **examine the law or pass upon the legal effect of any act, document or law.**" (Emphasis.) (See **Exhibit 2**, Application for Transfer to Inactive Membership Status, RJN, filed herewith.)

See, also Business & Profession Code §6006 ["Inactive members are not entitled to . . . practice law."]; Section 6125 ["No person shall practice law in California unless the person is an active member of the State Bar."]. Thus, as an inactive member of the State Bar, the court - Judge Armendariz cannot "examine" or "pass upon" the issues of law involved in the findings and rulings she made in the Contemt, Default and Decision. Moreover, the court in which an action is filed must be competent under California law to render a judgment; i.e., the state constitution or statutes must empower it to adjudicate the type of lawsuit involved and to render a judgment for the amount in controversy. (See *Marriage of Jensen* (2003) 114 Cal.App.4th 587, 593.) See also *Mileikowsky v. West Hills Hospital and Medical Center* (2009) 45 Cal.4th 1259, 203 P.3d 1113, 1124, power afforded to a hearing officer in a physician peer review matter, pursuant to Business & Profession Code §809.2, for failure to provide information, pursuant to subsection (d), does not include terminating sanctions against the physician. Here, Judge Armendariz, as an inactive member of the State Bar, was incompetent to try this matter, because she ruled on matters of law in violation of Rule. 2.30.

"Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her." (Emphasis.)

24. State Bar judge Armendariz entered the void Default, without standing and in the absence of all jurisdiction and with the Answer on file and Kay having appeared for trial and testified, which no court in California can do, let alone an administrative court. See *Wilson v. Goldman* (1969) 274 Cal.App.2d 573, 576-578 [where answer filed, default order based on failure to appear at trial is "**void on its face**" and thus subject to direct or collateral attack at any time]. Moreover, after taking the void Default, the Judge Armendariz further refused Kay the right to participate and failed to require OCTC to prove the contested charges.

"Where a defendant has filed an answer, neither the clerk nor the court has the power to enter a default based upon the defendant's failure to appear at trial, and a default entered after the answer has been filed is void (Warden v. Lamb, Supra, 741, 277 P. 867;Barbaria v. Independent Elevator Co., Supra, 133 Cal.App.2d 657, 659, 285 P.2d 91;Miller v. Cortese, 110 Cal.App.2d 101, 104-105, 242 P.2d 84), and is subject to expungement at any time either by motion made pursuant to Code of Civil Procedure, section 473 or by virtue of the court's inherent power to vacate a judgment or order void on its face. (Potts v. Whitson, 52 Cal.App.2d 199, 125 P.2d 947;Reher v. Reed, 166 Cal. 525, 528, 137 P. 263; Baird v. Smith, 216 Cal. 408, 409-411, 14 P.2d 749.) Here the plaintiffs did not proceed to trial on the date set and for which notice of trial had been served. Instead they obtained an entry of defendant's default beyond the power and authority of the court to grant. Such a void 'entry of default' cannot excuse compliance with Code of Civil Procedure, section 594, subd. 1. Defendant's answer placed in issue factual questions concerning liability and damages. When the trial of those matters actually took place at plaintiffs' instance on October 16, 1967, some 5 months after the trial date, defendant was not in default and was entitled to notice of the hearing as provided in the code section. No such notice was given. A judgment made after a trial held without the notice prescribed by Code of Civil Procedure, section 594, subd. 1 is not merely error; **it is an act in**

excess of the court's jurisdiction. (Perini v. Perini, 225 Cal.App.2d 399, 37 Cal.Rptr. 354.)" (Emphasis.) (*Id.*, at 577.)

See also *Heidary v. Yadollahi, supra,* 99 Cal.App.4th at 864, citing to *Wilson* ["(w)here a defendant has filed an answer, neither the clerk nor the court has the power to enter a default based upon the defendant's failure to appear at trial, and a default entered after the answer has been filed is **void** ." (Emphasis.)

> "Since Wilson, the legislature has expanded the law pertaining to default, which now specifically allows an answer to be stricken and a default entered as a sanction for the **defendant's extreme misuse of the discovery process**. (§ 2023, subdivision (b)(4); see, e.g., Greenup v. Rodman (1986) 42 Cal.3d 822, 231 Cal.Rptr. 220, 726 P.2d 1295.) However, that provision has no application to the situation where defendant simply fails to appear at trial. Moreover, even if the default here could otherwise be properly characterized as a "sanction," analogous to the discovery sanctions, it could not be sustained. Section 2023 specifically requires notice to the affected party and an opportunity to be heard before imposition of any sanction. (§ 2023, subdivisions (b) and (c).)" (Emphasis) (*Id.*)

Following the entry of the Default, Kay briefed Judge Armendariz on the illegality and voidness of the Default, which she rejected. Then, Kay moved to cure the Default by agreeing to provide further testimony; however, the Judge Armendariz denied this relief. Thus, once the Default was entered, it became irrevocable terminating sanctions. Moreover, Judge Armendariz further acted without standing and in absence of all jurisdiction by finding culpability and applying aggravating discipline for uncharged matters. However, evidence of uncharged facts cannot be considered in aggravation in a default matter because the attorney has not been "fairly apprised of the fact that additional uncharged facts will be used against him." (See *Matter of Johnston* (Rev.Dept. 1997) 3 Cal. State Bar Ct.Rptr. 585, 589.)

The State Bar Lacked Standing and All Jurisdiction to Enter the Default in the State Bar Proceeding

25. The State Bar moved to enforce a subpoena to compel Kay's testimony in the State Bar

proceeding, which Judge Armendariz states is the basis for entering the terminating sanctions in the Default and Decision. See Exhibits 1 & 2.

> "Kay's disobedience of the order to take the stand has deprived the State Bar of Kay's testimony, which is evidence in Kay's control to which the State Bar is entitled. Any sanction imposed should not exceed that which is required to protect the interests of the party entitled to, but denied, the evidence. (Cf. Deyo v. Kilbourne (1978) 84 Cal.App. 3d 771, 793 [sanctions for failing to provide discovery].) The purpose of a sanction 'is to enable a party to obtain evidence under a party opponent's control, as well as to further the efficient and economical disposition of cases on the merits.' (In the Matter of Torres, supra, 5 Cal.State Bar Ct. Rptr. at p. 24.)" See Exhibit 1, pgs. 5-6.

Judge Armendariz acted without standing and in the absence of all jurisdiction to create new procedural rules as a *de facto* Legislative body – extrapolating and fabricating in the spur of the moment and without any due process -- discovery sanctions into terminating sanctions at trial. [It is obvious that if the Court had jurisdiction to adjudicate the alleged contempt, it would not have to invent a procedure to do so.] This *ultra vires* conduct is without standing and in the absence of all jurisdiction. Moreover, Judge Armendariz created a contempt, which cannot be expunged and is contrary to Section 6051 of the Business & Professions, set forth in the State Bar Act, which allows for this eventuality.

> "On the return of the attachment, and the production of the person attached, the superior court has jurisdiction of the matter, and the person charged may purge himself or herself of the contempt in the same way, and the same proceedings shall be had, and the same penalties may be imposed, and the same punishment inflicted, as in the case of a witness subpoenaed to appear and give evidence on the trial of a civil cause before a superior court." (Section 6051.)

See *Jacobs v. State Bar* (1977) 20 Cal.3d 191, in which the Supreme Court held the provisions of section 6051 are "directory" in enforcing an investigation subpoena -- only where the State Bar does not attempt to enforce the subpoena.

> "The State Bar accordingly urges us to hold that the superior court's jurisdiction is limited

to cases in which enforcement of subpoenas is sought." (*Id.*, at 196.)

"Section 6051, upon which Jacobs primarily relies, clearly seems restricted to contempt proceedings initiated by the State Bar to enforce compliance with its subpoenas." (*Id.*, at 197.)

". . . we construe the use of the word "shall" as directory in this context, for certainly the Legislature did not intend to foreclose the State Bar or local committee from exercising its discretion in determining whether or not to enforce a subpoena." (*Id.*, at 197.)

". . . we hold that, unless and until the State Bar seeks to enforce its subpoena, superior courts have no jurisdiction to review the validity thereof." (*Id.*, at 198.)

HERE, the State Bar enforced its own subpoena in violation of its mandatory duties imposed by Section 6051 and *Jacobs*, requiring and mandating referral to the Superior Court. See *McKnew v. Superior Court* (1943) 23 Cal.2d 58, 67:

"Section 6051 of the Business and Professions Code makes it the duty of the chairman of a local administrative committee which has a disciplinary proceeding pending before it, to "report the fact that a person under subpoena is in contempt of the ... committee to the superior court in and for the county in which the proceeding ... is being conducted and thereupon the court shall issue an attachment ... directed to the sheriff ... commanding the sheriff to attach such person and forthwith bring him before the court." (Emphasis.)

See also discussion in Rutter, Professional Responsibility §§11:717-20:

§11:720] Comment: The State Bar Court has no power to impose a fine or imprisonment for contempt. Therefore, although the statute does not expressly say so, the contempt proceedings must be referred to the local superior court.

[Cross-refer: Contempt of court procedure is discussed in Wegner, Fairbank, Epstein & Chernow, Cal. Prac. Guide: Civil Trials & Evidence (TRG), Ch. 12.]

The State Bar took this very position (resulting in judicial admissions) in its petition for hearing and decision to the Supreme Court the appeal. See Exhibit 14, *Jacobs* Petition for Hearing and Decision.

"It is evident from this original language of the State Bar Act that the Legislature did not

intend the State Bar to have power to enforce its own subpoenas. Instead, the Legislature intended that the contempt powers of the superior courts be used to enforce State Bar subpoenas and limited the State Bar's role to reporting the fact of contempt of a State Bar subpoena to the appropriate superior court." (*Id.*, pg. 14.)

The ruling of the article VI court in a contempt proceeding cannot be reviewed by any other court. (See *People v. Latimer* (1911) 160 Cal. 716, 720.) Thus, knowing that it could not appeal from the ruling of the Superior Court regarding Kay's well-founded objections based on the attorney-client, work product privileges and 5th Amendment; the State Bar acted without standing and in the absence of all jurisdiction and violated its mandatory duty to refer the alleged contempt to the Superior Court's jurisdiction.

These *ultra vires* acts were carried out by the State Bar without standing and in absence of all jurisdiction and in violation of constitutional and statutory rights. The State Bar Court judge Armendariz further exceeded its authority by later *sua sponte* striking[8] the Answer, but after it heard only the limited evidence it would allow, which resulted in dismissal of co-respondent John Dalton, because the evidence did not support the charges. Moreover, the void Default has done away with the attorney client, work product and 5th Amendment privileges and the right to have an article VI court determination and writ of *habeas corpus* in alleged contempt proceedings, required by State Bar Rules of Procedure rules 152(b) & 187; Business & Profession Code §§6050, 6051, 6068(i), Code of Civil Procedure §1991, in which a timely claim of privilege furnishes an automatic ground for exclusion or non-disclosure of the privileged information unless and until an article VI court overrules the claims of privilege and orders disclosure.

26. The State Bar Rules of Procedure do not allow the State Bar Court to enter a Default and

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[8] The Court has the limited power either on motion of a party or *sua sponte* to "correct **clerical mistakes** in its judgment . . . so as to conform to the judgment . . . directed." (Emphasis.) Code of Civil Procedure § 473(d); *APRI Insurance Co. v. Superior Court (Schatteman)* (1999) 76 Cal.App.4th 176, 185. "Clerical error" refers to inadvertent errors in entering or recording the judgment rather than in rendering the judgment (judicial error). (*In re Candelario* (1970) 3 Cal.3d 702, 705. Code of Civil Procedure §1008 governing reconsideration allows courts to act *sua sponte* to enter a different order only **where there has been a change in the law**, which did not occur here.

then later *sua sponte* strike the Answer, once it has been filed. Even, under (unconstitutional) Rule 201, which allows the entry of default for failing to appear at trial (not applicable here), there is no provision allowing the striking of the Answer. Kay was never provided with the Notice requirements under Rule 201 regarding the entry of his Default nor was he allowed to vacate or cure[9] the Default under Rule 203 by agreeing to provide further testimony, or was he afforded the rights under Rule 205, as stated in the Decision. Moreover, Kay's refusal to answer questions and provide further testimony at trial is an **alleged contempt and must be treated as such**, as set forth in the State Bar Rules of Procedure, Business & Professions Code §§6000, *et seq.* (State Bar Act), Code of Civil Procedure, Evidence Code and Decisions of the State Bar Court, Court of Appeal and the Supreme Court.

Business & Professions Code §6050 **Disobedience of subpoena as contempt**

"Whenever any person subpoenaed to appear and give testimony or to produce books, papers or documents refuses to appear or testify before the subpoenaing body, or to answer any pertinent or proper questions, or to produce such books, papers or documents, he or she is in **contempt** of the subpoenaing body."

See *Waterman v. State Bar* (1936) 8 Cal.2d 17, 18 [failure to appear pursuant to subpoena is a contempt]; discussion in Rutter, Professional Responsibility, §§11:717, et seq.) Rules 152(b) and 187 of the Rules of Procedure and Business & Professions Code §6051, set forth the procedure for having an alleged contempt in the State Bar Court determined by an article VI court, which the State Bar Court admits in the order entering the Default. See Exhibit 1.

In addition, the Supreme Court has criticized the State Bar's application of its default rules. See Exhibit 7, Colin Wong memo, pg. 2, re: Proposed Revisions to the Rules of Procedure of the State Bar of California – Request for Authority to Release for Public Comment:

"1. Revise the Default Process

Under the current process, if a respondent fails to file a response to the notice of

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[9] (See *Wilson v. Goldman, supra*, 274 Cal.App.2d at 576-578 [where answer filed, default order based on failure to appear at trial is void and thus subject to direct or collateral attack].)

disciplinary charges, the deputy trial counsel may file a motion to enter default. Once default is entered, the factual allegations are deemed admitted and the respondent is placed on involuntary inactive status. An expedited hearing may be held where the deputy trial counsel presents evidence. The judge then prepares a decision. There can be two or three default proceedings against one respondent before he or she is ultimately disbarred.

The default procedure is one of the processes that the Supreme Court has explicitly criticized. The proposal provides that once a default is entered, the respondent is placed on inactive status pending a timely motion to set aside the default. There would be no hearing or decision. If the respondent fails to move to set aside the default within a specified amount of time (six months if no response or 90 days for failure to appear at trial), the Office of Trials can file a petition requesting the respondent's disbarment. The revisions can be found at proposed rules 7.1– 7.7."

Under both the existing and the proposed rules of the State Bar, Kay could not be defaulted, having answered and appeared for and testified at trial. Moreover, the proposed rules would afford Kay the absolute right to set aside the Default, which was denied to him by Judge Armendariz.

27. The State Bar Court judge Armendariz' rationale for disregarding the State Bar Rules of Procedure (due process) was **because it would take time**; thereby, placing due process rights on the clock. See Exhibit 1, Default, pg. 5: "A contempt referral will add further **delay** in disposing of this case." (Emphasis.)

28. Judge Armendariz admits in the Default there is no existing law to support her order, which she deems to be "unique." See Exhibit 2, Decision, pg. 45:

"The default was not entered because respondent failed to file a response to the NDC or failed to appear at trial. Accordingly, the court concludes that the procedures set forth in rule 205 (duration and termination of actual suspension in default proceedings) are not applicable or appropriate under the **unique** circumstances presented here." (Emphasis.)

Thus, Judge Armendariz, legislating from the bench, created a one-time and one-off special

Default, which is not authorized in the State Bar Act, State Bar Rules of Procedure and State Bar Rules of Practice. This Default applies only to Kay, which is further evidence of selective prosecution, denial of due process and violation of equal protection under the law. Moreover, this Default is like no other, because it cannot be cured. Kay could not cure the Default in the approved manner by demonstrating excusable neglect for failing to file an answer or appear for trial, because he did those things. Rather, he briefed the State Bar Court judge Armendariz regarding its legal error in entering the Default based on the finding of contempt in the State Bar proceeding, without standing and in the absence of all jurisdiction and when Judge Armendariz denied that relief, he agreed to resume testifying; however, she denied this relief as well. Thus, once the Default was entered, it became irrevocable terminating sanctions.

Further establishing that the State Bar Court judge Armendariz acted without standing and in the absence of all jurisdiction is that the contempt finding resulting in the Default, Decision, Order and Judgment result in *ultra vires* punishment beyond the contempt power of any court. As discussed, Section 1991 of the Code of Civil Procedure limits the State Bar's authority to enforcing subpoenas as an alleged contempt, which under State Bar Rules of Procedure 152(b) and 187 and Sections 6050, 6051 of the Business & Professions Code, must be referred to an article VI court and can be only punished as a contempt and by way of monetary fine or incarceration. See *People v. Gonzales, supra*, 12 Cal.4th at 816-817. Here, Judge Armendariz used a contempt finding to strip Kay of his property interest in the right to practice law, which is an unconstitutional denial of due process, further resulting in a void order of Contempt.

The State Bar Lacked Standing and All Jurisdiction to Charge and Find Contempt in the *Gober* and *Marcisz* Cases

29. The State Bar lacked standing and all jurisdiction to charge and adjudicate Kay's alleged contempt in the *Gober* and *Marcisz* cases, because there are no underlying orders finding any misconduct establishing the State Bar proceeding as a reportable action, pursuant to Business & Professions Code §6086.7. Thus, no party or the public were ever harmed. Regardless, the State Bar charged and found Kay guilty (solely by void Default) of the crime of "significantly

obstructed the orderly administration of justice," which is criminal contempt of court, for which Kay was never charged, tried or convicted in any article VI court having exclusive jurisdiction at the time and where the alleged contempt took place. Thus, without any due process, the State Bar has *criminalized* legitimate advocacy (speech) and found "moral turpitude," resulting from winning advocacy in the trial and appellate courts, which was never found to be improper, harm any party or the public. The State Bar has conducted this unauthorized - *ultra vires* contempt proceeding by adding the language of contempt found in the penal code regarding criminal contempt (Penal Code §166) to "disrespect to the court," under Section 6068(b) of the Business & Professions Code, which it cannot do. See *People v. Woodhead* (1987) 43 Cal.3d 1002, 1010:

> "It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided. (Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].) (8) **It is an equally settled axiom that when the drafters of a statute have employed a term in one place and omitted it in another, it should not be inferred where it has been excluded. (Ford Motor Co. v. County of Tulare (1983) 145 Cal.App.3d 688, 691 [193 Cal.Rptr. 511].)"** (Emphasis.)

In any prosecution for direct or indirect contempt, the court must strictly adhere to the due process to be afforded to alleged contemnors, which has been denied here. Worse, the State Bar has gone beyond the punishment afforded in a contempt proceeding, which can only result in the incarceration or sanctioning of the contemnor to coerce their cooperation in the judicial proceeding. There is no civil equivalent for contempt, which is a criminal proceeding. (*Wilde v. Superior Court of San Diego* (1942) 53 Cal.App.2d 168, 177.) Rather, the alleged contempt can only be cited and prosecuted in the underlying trial courts, where the conduct took place, where jurisdiction existed and where due process must be afforded, in which alleged contemnors are innocent of such conduct until proven guilty "beyond a reasonable doubt." (*Id.*) Here, the State Bar demanded that Kay waive privileges to prove his innocence and found culpability by a lesser standard of proof. The State Bar cannot charge or seek to have an attorney charged with alleged contempt, under the guise of "disrespect to the court," occurring in article VI courts, which

entered no such orders. See, e.g., the Supreme Court's decision in *State Bar of California v. Superior Court in and for Los Angeles County* (1935) 4 Cal.2d 86, 87-88, which rejected the State Bar writ of mandate to have the Superior Court determine a contempt.

30. Since the alleged contemptuous misconduct did not take place in the presence of the State Bar Court, this means Judge Armendariz was conducting indirect contempt proceedings, without standing and in the absence of all jurisdiction and in which an *affidavit* by a party present at the time of the alleged conduct was required; however, none exist. As stated, the State Bar Court has **not** been given the power to **cite** (charge) and/or sanction respondents and litigants before them for contempt. (*Matter of Lapin, supra*, 2 Cal. State Bar Ct.Rptr. at 295.)

The DDOJ are subject to the equitable relief sought in this proceeding. See *Olivera v. Grace* (1942) 19 Cal.2d 570, 575:

> "Equity's jurisdiction to interfere with final judgments is based upon the absence of a fair, adversary trial in the original action. 'It was a settled doctrine of the equitable jurisdiction-and is still the subsisting doctrine except where it has been modified or abrogated by statute ... that where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part, or on the part of his agents, then a court of equity will interfere at his suit, and restrain proceedings on the judgment which cannot be conscientiously enforced. ... The ground for the exercise of this jurisdiction is that there has been no fair adversary trial at law.' (5 Pomeroy, Equity Jurisprudence (Equitable Remedies [2d ed.]), pp. 4671, 4672.) Typical of the situations in which equity has interfered with final judgments are the cases where the lack of a fair adversary hearing in the original action is attributable to matters outside the issues adjudicated therein which prevented one party from presenting his case to the court, as for example, where there is extrinsic fraud (Caldwell v. Taylor, 218 Cal. 471 [23 Pac. (2d) 758, 88 A. L. R. 1194]; McGuinness v. Superior Court, 196 Cal. 222 [237 Pac. 42, 40 A. L. R. 1110]; (1921) 9 Cal. L. Rev. 156; (1934) 23 Cal. L. Rev. 79; 15 Cal.

Jur. 14, et. seq.; 3 Freeman, Judgments [5th ed.], p. 2562, et. seq.) or extrinsic mistake. (Bacon v. Bacon, 150 Cal. 477 [89 Pac. 317]; Sullivan v. Lumsden, 118 Cal. 664 [50 Pac. 777]; Antonsen v. Pacific Container Co., 48 Cal. App. (2d) 535 [120 Pac. (2d) 148]; 15 Cal. Jur. 23; 3 Freeman, Judgments [5th ed.], 2593, et. seq.)"

(See also *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290-291.)

The State Bar's Selective Prosecution and Discipline of Kay Based on the Alleged Contemptuous Misconduct of Other Lawyers

31. Without standing and in the absence of all jurisdiction, the State Bar found Kay vicariously culpable for the alleged contemptuous misconduct of other lawyers[10], while refusing to charge or discipline these lawyers for this conduct. In addition, the State Bar dismissed the very same charges against Kay's co-counsel Mr. Dalton, without any discipline whatsoever. The selective prosecution and discipline of Kay is an unconstitutional denial of due process and equal protection under the law. (See, e.g., *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (1995):

> "'To establish impermissible selective prosecution, [Freeman] must show that others similarly situated have not been prosecuted and that the prosecution is based on an impermissible motive.'" United States v. Lee, 786 F.2d 951, 957 (9th Cir.1986). See United States v. Bourgeois, 964 F.2d 935, 938 (9th Cir.), cert. denied, 506 U.S. 901, 113 S.Ct. 290, 121 L.Ed.2d 215 (1992).]

The bias (impermissible motive) arises from the State Bar acting as a proxy for the complainant Judge Anello to regain his "public" reputation following his disqualification and reversal by the Court of Appeal, in which the State Bar re-writes the record to claim that Judge Anello should not have been disqualified and committed no legal error. The State Bar secretly acted as the proxy for judges Anello and Weber, who issued no orders of contempt, sanctions or new trial based on attorney misconduct. Contrary to the State Bar Decision (Exhibit 2), Judge Anello was disqualified by the Court of Appeal "in the interests of justice" the Court of Appeal reversed his

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[10] Kay has been found *vicariously* culpable for the alleged conduct of his co-counsel, appellate counsel, opposing defense counsel and his own counsel in the State Bar proceeding. (See 7 Witkin Procedure (4th ed.) Trial § 187, p.215, citing *Cantillon v. Superior Court* (1957) 150 Cal.App.2d 184,190.)

rulings excluding the Gober Plaintiffs' evidence of defendant Ralphs' reprehensible conduct in the punitive damages retrial. The State Bar **admitted** in memoranda and emails that the purpose of the State Bar proceeding was to coerce an apology from Kay to repair Judge Anello's damaged reputation.

Exhibit 8, memo of OCTC prosecutor Alan Konig, which states on page 2:

"I (Konig) was more interested in having him (Kay) admit responsibility as that would serve as an apology to Judge Anello and that I would consider entirely stayed suspension if that occurred." (Emphasis.)

Exhibit 9, email of Mr. Konig:

"If Judge Anello is not entitled to know why the NDC hasn't been filed and why he hasn't been able to reclaim his reputation publicly, then I think someone else needs to explain that to him."

The State Bar's Criminal False Reporting of the Underlying Record in *Gober and Marcisz*

32. The State Bar falsely reported the record in the underlying trials and appeals in the *Gober* and *Marcisz* cases to *fabricate* the false charges and findings that orders exist in the trial court and appellate record of findings of contempt, of which none exist. This false reporting of the record is criminal contempt. (Penal Code §166(a)(7): "The publication of a false or grossly inaccurate report of the proceedings of any court.") The State Bar Court judge Armendariz allowed disqualified and embroiled judges (reversed on appeal) to falsely testify in the State Bar trial regarding their personal opinions, which were never reduced to written orders, to augment the record and create imaginary and non-existent orders, which conflict with their orders and statements on the record during trial, when they were qualified jurists. Moreover, the State Bar admitted to these facts in its Opposition to Kay's Petition for Writ of Review to the Supreme Court.

The Decision, based solely on the void Default, re-writes the law and facts – reversing and revising Judge Anello's disqualification by the Court of Appeal - "in the interests of justice," pursuant to Code of Civil Procedure §170.1(c). A retrial on remand is not required to take place

before a judge different than the one who presided at the prior trial. In fact, the retrial typically occurs before the original judge. (See *Behniwal v. Mix* (2005) 133 Cal.App.4th 1027, 1046-1047 ["(The trial judge) has experienced this case in a way no other judge has, and is the only one with first-hand knowledge bearing on the (remand issue)" (parentheses added)]. Here, the Court of Appeal exercised its rarely invoked discretion to order Judge Anello disqualified "in the interests of justice," based on the motion to disqualify executed and filed by appellate counsel Charles Bird, pursuant to §170.1(c), which was based primarily on the allegation of bias in the Verified Statements, executed and filed by Mr. Dalton.[11] (See *Marriage of Iverson* (1992) 11 Cal.App.4th 1495, 1502; *Hernandez v. Super.Ct. (Acheson Indus., Inc.)* (2003) 112 Cal.App.4th 285, 303, which states that the appellate court power to disqualify a trial judge under §170.1(c) should be "exercised sparingly," in denying the request because the challenged orders "do not suggest bias or whimsy on behalf of the court, only frustration and a desire to manage a complex case.")

Disqualified Judges Anello and Weber's Criminal False Reports and Complaints to the State Bar

33. While a member of the Superior Court of San Diego Count, Judge Anello was disqualified by the Court of Appeal as a judge in the *Gober* case "in the interests of justice" on April 19, 2005. (See Exhibit 10, Court of Appeal Order of Disqualification.) Then, two years after his disqualification, while acting in a private and non-judicial capacity, Mr. Anello sent a letter dated June 5, 2007 to State Bar Chief Trial Counsel, Scott Drexel. Mr. Anello falsely reported and complained that he previously reported Kay, pursuant to Business & Professions Code §6086.7 and granted a new trial based on Kay's misconduct, which are fabrications of non-existent orders.

"As required by applicable provisions of the Business & Professions Code, I reported the above-referenced attorneys to your office back in October of 2002 (after granting a

[11] Kay has been found vicariously culpable for Mr. Bird's executing and filing the motion to disqualify in the Court of Appeal and Mr. Dalton's executing and filing the Verified Statements in the trial court.

motion for new trial based upon attorney misconduct)."

See Exhibit 11, Anello June 5, 2007 letter.

However, Judge Anello granted a conditional new trial (a remittitur as to punitive damages only), which was based solely on the ground of excessive damages (§657(5)), and denied on all other grounds, including §657(1) – attorney misconduct. (See *Gober v. Ralphs Grocery Company* (2006) 137 Cal.App.4th 204.) As discussed, the State Bar admitted to these facts and that no such order exists in its Opposition to Kay's Petition for Writ of Review. In addition to violating Penal Code §166(a)(7), Mr. Anello's false report and complaint of June 5, 2007 to the State Bar constitutes a misdemeanor, pursuant to Business & Professions Code §6043.5(a) ["[e]very person who reports to the State Bar or causes a complaint to be filed with the State Bar that an attorney has engaged in professional misconduct, knowing the report or complaint to be false and malicious, is guilty of a misdemeanor"].) As stated, when Mr. Anello made this false report and complaint, he was no longer a judge in the *Gober* case, having been disqualified by the Court of Appeal; thus, he acted in a private and non-judicial capacity.

While a member of the Superior Court of San Diego County, Judge Weber was disqualified in the *Gober* case prior to Judge Anello. Following her disqualification, Ms. Weber engaged in admitted judicial misconduct[12] involving ongoing *ex parte* communications regarding Kay with Judge Anello, as set forth in the State Bar Feher memo and their own correspondence. See Exhibit 12, Feher memo. These admitted *ex parte* communications further resulted in Judge Anello's disqualification in the *Gober* case -- rendering the underlying trial record **void**, which cannot serve as grounds for misconduct. (See *Christie v. City of El Centro* (2003) 135 Cal.App.4th 767, 776.) (See also 2 Witkin, Cal. Proc. 5th (2008) Courts, § 61, p. 96; *Lapique v. Superior Court* (1924) 68 Cal.App. 418, 420.) A disqualified judge cannot communicate regarding counsel in any direct or related matter. (Code of Civil Procedure §170.4.)

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[12] See *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1315-1316 (citing *Gubler v. Commission on Judicial Performance* (1984) 37 Cal.3d 27, 54-55 [communications by disqualified judge with replacement judge constituted "willful misconduct"]; *Gubler* was disapproved on another point in *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294.)

See State Bar Rules of Procedure, rule 116(c):

For purposes of this rule, a "related proceeding" is any civil....or State Bar Court proceeding in which a party, real party in interest, or witness is also a party or witness in the proceeding before the Court, or any civil, criminal, administrative, or State Bar Court proceeding which involves the subject matter of the proceeding before the Court.]

Rule 684(c):

For purposes of this rule, a "related proceeding" is any civil, criminal, administrative, or licensing proceeding involving conduct by the applicant which is or is likely to be an issue in the proceeding before the Court.

"Except in very limited circumstances, not applicable here, a disqualified judge has no power to act in any proceedings after his or her disqualification." (*Christie v. City of El Centro, supra.*) (See also *Roscoe Holdings, Inc. v. Bank of America* (2007) 149 Cal.App.4th 1353, 1364, citing to *Christie, supra.*) Thus, the *Gober* record is void and cannot serve as the basis for discipline.

In the Feher memo and correspondence, Ms. Weber, acting in a private and non-judicial capacity, falsely reported and complained about Kay and his co-counsel John Dalton to the State Bar. However, at the State Bar trial, Ms. Weber testified that there were no grounds to discipline either Kay or Dalton. In fact, Ms. Weber testified to the following:

Q. And if a lawyer is violating your lawful court orders, in order to maintain order and decorum in your courtroom, you would have to issue contempt citations to correct those abuses; right?

A. In the abstract, yes.

Q. And in the abstract, you would also have to issue sanctions to get that order under control; correct?

A. Depending on the circumstances, yes.

Q. You never issued any sanctions against Mr. Dalton or me, did you?

A. No.

Q. And you would also have to make sure that the defendant was getting a fair trial in the face of this misconduct that you have testified to; correct?

A. Defendant and plaintiffs, yes.

Q. You made no finding that defendant Ralphs was denied a fair trial based on attorney misconduct; correct?

A. I think when we looked at it, I ruled that it was a very close call, but that I was not going to grant a new trial on that basis.

Q. On a preponderance standard; right?

A. Right. (Exhibit 13, State Bar trial transcript.)

In jury trials, each party in fact has two hearings, one before the jury and the other before the court as "a thirteenth juror." (*Norden v. Hartman* (1952) 111 Cal.App.2d 751, 758.) "In weighing and evaluating the evidence, the court is a trier-of-fact and is not bound by factual resolutions made by the jury. The court may grant a new trial even though there be sufficient evidence to sustain the jury's verdict on appeal, so long as the court determines the weight of the evidence is against the verdict." (*Candido v. Huitt* (1984) 151 Cal.App.3d 918, 923.) It is not only the right, but the duty of the trial judge to grant a new trial when he or she believes the weight of the evidence to be contrary to the finding of the jury. (*Tice v. Kaiser Co.* (1951) 102 Cal.App.2d 44, 46.) Appellate cases rarely "second guess" the trial judge's determination as to the weight of the evidence. If any appreciable conflict exists in the evidence, the trial court's action will not be disturbed on appeal. *Id.* This is particularly true where the court's discretion has been exercised in favor of granting a new trial. (*Candido v. Huitt, supra*, 151 Cal.App.3d at 923.) In addition, the court need not wait for objection by opposing counsel when confronted with potentially prejudicial misconduct; rather, the court may intercede on its own initiative to admonish the offending lawyer and jury. (*Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 321.) This did not happen either.

Rather, Judge Weber granted a conditional new trial (a remittitur as to punitive damages only), which was based solely on the ground of juror misconduct (§657(1)) and denied on all other grounds, including attorney misconduct. See *Gober v. Ralphs Grocery Company, supra,* 137 Cal.App.4th 204.) As discussed, the State Bar admitted to these facts and that no such order exists in its Opposition to Kay's Petition for Writ of Review. In addition to violating Penal Code §166(a)(7), Ms. Weber's false report and complaint in the Feher memo and correspondence to the State Bar constitute a misdemeanor, pursuant to Business & Professions Code §6043.5(a). When Ms. Weber made these false reports and complaints, she was no longer a judge in the *Gober* case, having been disqualified; thus, she acted in a private and non-judicial capacity. Moreover, Ms. Weber's *ex parte* communications with Judge Anello were carried out while she no longer a judge, having been disqualified in the *Gober* case, under the guise of her position as presiding judge in an administrative capacity. Thus, these *ex parte* communications are not subject to immunity, because Ms. Weber was acting privately and not in a judicial capacity and/or administrative acts of judges are not immune from prosecution. See *Clinton v. Jones*, 520 U.S. 681, 694-695, 117 S.Ct. 1636 (1997).

V. CAUSES OF ACTION

FIRST CAUSE OF ACTION - Declaratory Relief against State Bar defendants

34. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

35. There is an actual controversy between Kay and the State Bar defendants. In perpetrating the above described acts and omissions, without standing and in the absence of all jurisdiction and/or administratively, defendants State Bar and Supreme Court were, at all relevant times herein, a governmental agency and/or entity of the State of California, and defendants Armendariz, George, Drexel, Blumenthal, and Dal Cerro were, at all relevant times herein, its agents/employees. Kay seeks a declaration of his rights to be free of the unlawful, illegal and void DDOJ, not limited to but including a declaration of his rights to be afforded under Business & Professions Code §6068(i); Code of Civil Procedure §§170.4, 473, 585 & 1060.

SECOND CAUSE OF ACTION - Injunctive Relief against State Bar defendants

36. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

37. For the foregoing reasons, injunctive relief is appropriate in this matter. Kay requests this Court to vacate the DDOJ, because they are void and were entered without standing and in the absence of all jurisdiction and/or administratively in violation of his statutory and constitutional rights. Kay requests this Court to enjoin any further State Bar proceeding, because it was brought without standing and in the absence of all jurisdiction. Kay has no adequate remedy at law. Kay seeks injunctive relief under the laws of equity to remedy his injuries and prevent any future injury to his person, including rights afforded under Code of Civil Procedure §§1065, 1068 &1102.

THIRD CAUSE OF ACTION - VIOLATION OF 42 U.S.C. §1983 - PROCEDURAL DUE PROCESS against individual State Bar defendants and disqualified judges Anello and Weber

38. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

39. In perpetrating the above described acts and omissions, the State Bar and Supreme Court were at all relevant times herein, governmental agencies and/or entities of the State of California, and the individual State Bar defendants [Armendariz, George, Drexel, Blumenthal, and Dal Cerro] were, at all relevant times herein, its agents/employees. Defendants Anello and Weber were disqualified judges of the Superior Court of San Diego County. Thus, defendants' above-described acts and omissions constitute cognizable state action under color of state law. These acts were carried out without standing and in the absence of all jurisdiction and/or administratively and thus, without immunity.

40. In perpetrating the above-described acts and failures to act, the individual State Bar defendants, disqualified judges Anello and Weber, and each of them, engaged in a pattern, practice, policy, tradition and/or custom of depriving Kay of his right to adequate notice and a fair trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution,

without standing and in the absence of all jurisdiction. Because rights under the United States Constitution are federally protected, defendants also violated Kay's rights under 42 U.S.C. §1983 and the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and California Constituion.

41. At all relevant times herein, there existed within the State Bar, as promulgated by the Board of Governors, a pattern, policy, practice, tradition, custom, and usage of conduct of depriving Kay his right to adequate notice and a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and California Constitution, which resulted in deliberate indifference to Kay's procedural due process rights.

42. The acts set forth herein constitute a policy, practice, or custom of ordering, ignoring, encouraging, causing, tolerating, sanctioning, and/or acquiescing in the violation by State Bar personnel of the constitutional right of Kay to adequate notice and a fair trial, without standing and in absence of all jurisdiction.

43. The acts and failures to act as alleged herein also result from a custom, practice or policy of inadequate training and supervision in a deliberate indifference to their right to adequate notice and a fair trial, and the injuries suffered by Kay as alleged herein were caused by such inadequate training and supervision. Defendants, and each of them, exhibited deliberate indifference to the violation of Kay's protected procedural due process rights by failing to properly investigate or provide protection from unlawful conduct, including the false reports and complaints of defendants Anello and Weber. The acts and failures to act as alleged herein were done pursuant to policies and practices instituted by these defendants pursuant to their authority as policymakers for the State Bar.

44. As a result of the acts and failures to act as alleged herein, and as a result of the State Bar's customs, traditions, usages, patterns, practices, and policies, Kay was deprived of his constitutional rights to due process, and suffered damages. As a direct and foreseeable consequence of these deprivations, Kay has suffered economic loss, physical harm, emotional trauma, damage to his law practice, and irreparable harm to his reputation. As a further consequence of these deprivations, Kay was required to retain counsel to represent him in the

State Bar proceeding pursued against him and incurred attorney's fees and expenses associated with defending against the unlawful State Bar proceeding initiated and sustained by defendants. Defendants' actions were carried out with a conscious disregard of Kay's rights and with the intent to vex, injure or annoy Kay; such as to constitute oppression, fraud or malice under California Civil Code §3294; entitling Kay to exemplary or punitive damages.

FOURTH CAUSE OF THE ACTION - VIOLATION OF 42 U.S.C. §1983 - FREE SPEECH against individual State Bar defendants and disqualified judges Anello and Weber

45. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

46. In perpetrating the above-described acts and failures to act, the individual State Bar defendants, disqualified judges Anello and Weber, and each of them, engaged in a pattern, practice, policy, tradition and/or custom of restraining and enacting impermissible prior restraints on Kay's free speech on matters of public concern in violation of the First Amendment to the United States Constitution and the California Constitution, without standing and in the absence of all jurisdiction. Because rights under the federal and state Constitutions are federally protected, defendants also violated Kay's rights under 42 U.S.C. §1983. These acts were carried out without standing and in the absence of all jurisdiction and/or administratively and thus, without immunity.

47. At all relevant times herein, there existed within the State Bar, a pattern, policy, practice, tradition, custom, and usage of conduct of restraining the free speech of and enacting impermissible prior restraints on attorneys practicing law in California on matters of public concern, which resulted in a deliberate indifference to Kay's rights to free speech.

48. The acts set forth herein constitute a policy, practice, or custom of ordering, ignoring, encouraging, causing, tolerating, sanctioning, and/or acquiescing in the violation by State Bar personnel of the constitutional rights to free speech of attorneys practicing law in California on matters of public concern. The United States Supreme Court in *New York Times v. Sullivan* (1964) 376 U.S. 254, 272-73 declared, "(w)here judicial officers are involved, this Court has

held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision." The highest Court explained that "judges are to be treated as 'men of fortitude, able to thrive in a hardy climate.'" The highest Court, and many others, have upheld the right of citizens, and lawyers, to be critical -- even harshly critical -- of judges. (See also *Standing Committee on Discipline of U.S. Dist. Ct. for Cent. Dist. of Calif. v. Yagman* (9th Cir. 1995) 55 Fed.3d 1430, 1438 ["(A)ttorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense."].)

Where as admitted by the State Bar here, the statements do not create a substantial likelihood of materially prejudicing the adjudicatory process, attorney "speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034, 1075 (1991). Vigorous advocacy is to be encouraged, not condemned, and persistence in pursuing a point or maintaining a position in good faith, even though in error as to the law, will not of itself amount to contempt. (*Gallagher v. Municipal Court* (1948) 31 Cal.2d 784; *Curran v. Superior Court* (1925) 72 Cal.App. 258, 265; *Raiden v. Superior Court* (1949) 34 C.2d 83, 86 [statement that judge's action "defeats the ends of justice," if made in good faith and in respectful manner, is not contemptuous]; *Bennett v. Superior Court* (1950) 99 Cal.App.2d 585, 594 ["interruptions of opposing counsel are not always improper"]; see *People v. Cole* (1952) 113 Cal.App.2d 253, 260 [defendant in criminal case arguing in pro per.]; *Cooper v. Superior Court* (1961) 55 Cal.2d 291; *In re Grossman* (1972) 24 Cal.App.3d 624, 634; *In re Carrow* (1974) 40 Cal.App.3d 924; 35 So. Cal. L. Rev. 104; 68 A.L.R.3d 314 [conduct in connection with making objections].) However, Kay was denied the right and ability to defend his advocacy in the State Bar, which the trial and appellate courts determined were carried out within the bound of proper advocacy.

49. The acts and failures to act as alleged herein also result from a custom, practice or policy of inadequate training and supervision in a deliberate indifference to the rights of attorneys practicing law in California who speak out on matters of public concern, and the injuries suffered by Kay as alleged herein were caused by such inadequate training. Defendants, and each of

them, exhibited deliberate indifference to the violation of Kay's protected speech rights by failing to properly investigate or provide protection from unlawful conduct, including the false reports and complaints of defendants Anello and Weber. The acts and failures to act as alleged herein were done pursuant to policies and practices instituted by these defendants pursuant to their authority as policymakers for the State Bar.

50. As a result of the acts and failures to act as alleged herein, and as a result of the State Bar's customs, traditions, usages, patterns, practices, and policies, Kay was deprived of his constitutional rights to free speech, and suffered damages caused thereby as more particularly alleged above. As a result of the acts and failures to act as alleged herein, and as a result of the State Bar's customs, traditions, usages, patterns, practices, and policies, Kay was deprived of his constitutional rights to due process, and suffered damages caused thereby as more particularly alleged above. As a direct and foreseeable consequence of these deprivations, Kay has suffered economic loss, physical harm, emotional trauma, damage to his law practice, and irreparable harm to his reputation. As a further consequence of these deprivations, Kay was required to retain counsel to represent him in the State Bar proceeding pursued against him and incurred attorney's fees and expenses associated with defending against the unlawful State Bar proceeding initiated and sustained by defendants. Defendants' actions were carried out with a conscious disregard of Kay's rights and with the intent to vex, injure or annoy Kay; such as to constitute oppression, fraud or malice under California Civil Code §3294; entitling Kay to exemplary or punitive damages.

FIFTH CAUSE OF ACTION - VIOLATION OF 42 U.S.C. §1983 - SUBSTANTIVE DUE PROCESS against individual State Bar defendants and disqualified judges Anello and Weber

51. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

52. In perpetrating the above-described acts and failures to act during, the individual State Bar defendants, disqualified judges Anello and Weber, and each of them, engaged in a pattern, practice, policy, tradition and/or custom of depriving Kay of his right to practice law without

undue and unreasonable government interference in violation of the Fourteenth Amendment to the United States Constitution, without standing and in the absence of all jurisdiction. Because rights under the federal Constitution are federally protected, defendants also violated Kay's rights under 42 U.S.C. §1983. These acts were carried out without standing and in the absence of all jurisdiction and/or administratively and thus, without immunity.

53. At all relevant times herein, there existed within the State Bar, a pattern, policy, practice, tradition, custom, and usage of conduct of depriving Kay, licensed to practice law in the State of California of his right to practice his profession without undue and unreasonable government interference in violation of the Fourteenth Amendment to the United States Constitution, which resulted in deliberate indifference to Kay's right to practice his profession.

54. The acts set forth herein constitute a policy, practice, or custom of ordering, ignoring, encouraging, causing, tolerating, sanctioning, and/or acquiescing in the violation by State Bar personnel of the constitutional rights of attorneys licensed to practice law in the State of California to practice law without undue and unreasonable government interference.

55. The acts and failures to act as alleged herein also result from a custom, practice or policy of inadequate training and supervision in a deliberate indifference to the rights of attorneys licensed to practice law in the State of California to practice law without undue and unreasonable government interference, and the injuries suffered by Kay as alleged herein were caused by such inadequate training, including the false reports and complaints by defendants Anello and Weber. In perpetrating the above-described acts and failures to act, the defendants, and each of them, also engaged in a pattern, practice, policy, tradition and/or custom of depriving Kay's clients of their right of access to the courts, which necessarily includes the right to be represented by the attorneys of their choice, in violation of the Fourteenth Amendment to the United States Constitution. Because rights under the federal Constitution are federally protected, defendants also violated Kay's rights under 42 U.S.C. §1983. As a result of the acts and failures to act as alleged herein, and as a result of the State Bar's customs, traditions, usages, patterns, practices, and policies, Kay was deprived of his constitutional rights to due process, and suffered damages. As a direct and foreseeable consequence of these deprivations, Kay has suffered economic loss,

physical harm, emotional trauma, damage to his law practice, and irreparable harm to his reputation. As a further consequence of these deprivations, Kay was required to retain counsel to represent them in the State Bar proceeding pursued against him and incurred expenses associated with defending against the unlawful State Bar proceeding initiated and sustained by defendants. Defendants' actions were carried out with a conscious disregard of Kay's rights and with the intent to vex, injure or annoy Kay; such as to constitute oppression, fraud or malice under California Civil Code §3294; entitling Kay to exemplary or punitive damages.

SIXTH CAUSE OF ACTION - VIOLATIONS OF PENAL CODE §166(a)(7) against individual State Bar defendants and disqualified judges Anello and Weber

56. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

57. In perpetrating the above-described acts and failures to act, the individual State Bar defendants, disqualified judges Anello and Weber, and each of them in falsely reporting the *Gober* and *Marcisz* records violated Penal Code §166(a)(7), without standing and in absence of all jurisdiction and/or administratively and thus, without immunity.

58. As a direct and foreseeable consequence of these violations, Kay has suffered economic loss, physical harm, emotional trauma, damage to his law practice, and irreparable harm to his reputation. As a further consequence of these deprivations, Kay was required to retain counsel to represent him in the State Bar proceeding pursued against him and incurred expenses associated with defending against the unlawful State Bar proceeding initiated and sustained by the State Bar defendants based on defendant Anello illegal and criminal report and complaint. Defendants' actions were carried out with a conscious disregard of Kay's rights and with the intent to vex, injure or annoy Kay; such as to constitute oppression, fraud or malice under California Civil Code §3294; entitling Kay to exemplary or punitive damages.

SEVENTH CAUSE OF ACTION - VIOLATIONS OF BUSINESS & PROFESSIONS CODE §6043.5(a) against disqualified judges Anello and Weber

59. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

60. In perpetrating the above-described acts and failures to act, disqualified judges Anello, Weber, and each of them in falsely reporting and complaining to the State Bar about Kay violated Business & Professions Code §6043.5(a), without standing and in absence of all jurisdiction and/or administratively and thus, without immunity.

61. As a direct and foreseeable consequence of these violations, Kay has suffered economic loss, physical harm, emotional trauma, damage to his law practice, and irreparable harm to his reputation. As a further consequence of these deprivations, Kay was required to retain counsel to represent him in the State Bar proceeding pursued against him and incurred expenses associated with defending against the unlawful State Bar proceeding initiated and sustained by the State Bar defendants based on defendant Anello illegal and criminal report and complaint. Defendants' actions were carried out with a conscious disregard of Kay's rights and with the intent to vex, injure or annoy Kay; such as to constitute oppression, fraud or malice under California Civil Code §3294; entitling Kay to exemplary or punitive damages.

EIGHTH CAUSE OF ACTION - VIOLATIONS OF CODE OF CIVIL PROCEDURE §170.4 against disqualified judges Anello and Weber

62. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

63. In perpetrating the above-described acts and failures to act, disqualified judges Anello and Weber violated Code of Civil Procedure §170.4 through their false reports and complaints to the State Bar, without standing and in the absence of all jurisdiction and/or administratively and thus, without immunity. Disqualified judge Weber violated Section 170.4 through her *ex parte* communications with Judge Anello regarding Kay, without standing and in the absence of all jurisdiction and/or administratively and thus, without immunity.

64. As a direct and foreseeable consequence of these violations, Kay has suffered economic loss, physical harm, emotional trauma, damage to his law practice, and irreparable harm to his reputation. As a further consequence of these deprivations, Kay was required to retain counsel to represent him in the State Bar proceeding pursued against him and incurred expenses associated with defending against the unlawful State Bar proceeding initiated and sustained by

the State Bar defendants based on defendant Anello illegal and criminal report and complaint. Defendants' actions were carried out with a conscious disregard of Kay's rights and with the intent to vex, injure or annoy Kay; such as to constitute oppression, fraud or malice under California Civil Code §3294; entitling Kay to exemplary or punitive damages.

NINTH CAUSE OF ACTION - VIOLATIONS OF BUSINESS & PROFESSIONS CODE §6068(i) against individual defendants Armendariz and George

65. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

66. In perpetrating the above-described acts and failures to act, the individual State Bar defendants Armendariz and George, in response to Kay asserting his constitutional and statutory rights in the State Bar proceeding, violated Business & Professions Code §6068(i) in seeking, ruling on and entering the DDOJ in response to Kay asserting statutory privileges and constitutional rights, without standing and in the absence of all jurisdiction and/or administratively and thus, without immunity.

67. As a direct and foreseeable consequence of these violations, Kay has suffered economic loss, physical harm, emotional trauma, damage to his law practice, and irreparable harm to his reputation. As a further consequence of these deprivations, Kay was required to retain counsel to represent him in the State Bar proceeding pursued against him and incurred expenses associated with defending against the unlawful State Bar proceeding initiated and sustained by the State Bar defendants based on defendant Anello illegal and criminal report and complaint. Defendants' actions were carried out with a conscious disregard of Kay's rights and with the intent to vex, injure or annoy Kay; such as to constitute oppression, fraud or malice under California Civil Code §3294; entitling Kay to exemplary or punitive damages.

WHEREFORE, plaintiff Kay prays for relief against defendants and of each of them, as alleged herein, as follows:

(1) Declaratory and injunctive relief as stated herein, not limited to, but vacating the void Default, Order, Decision and Judgment;

(2) For general and special damages stated herein and according to proof;

(3) For punitive or exemplary damages as stated herein and according to proof;

(4) For reasonable attorney's fees and costs of suit stated and incurred herein; and

(5) For each other such and further relief as the Court may deem proper.

Dated: August 6, 2010

By: _____
Philip E. Kay

VERIFICATION

1. I, am the plaintiff in this action.

2. I have read the foregoing Complaint. I make this declaration to verify the contents thereof; the factual allegations of which are true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on the 6 day of August 2010 at San Francisco, California.

_____
Philip E. Kay

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Attorneys for Defendants
THE STATE BAR OF CALIFORNIA, BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA, THE OFFICE OF THE CHIEF TRIAL COUNSEL, LUCY ARMENDARIZ, SCOTT J. DREXEL, JEFF DAL CERRO, AND ALLEN BLUMENTHAL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

PHILIP E. KAY,

Plaintiff,

v.

STATE BAR OF CALIFORNIA, THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA, OFFICE OF CHIEF COUNSEL, LUCY ARMENDARIZ, in her official capacity and individually, SUPREME COURT OF CALIFORNIA, RONALD GEORGE, in his official capacity and individually, SCOTT J. DREXEL, ALLEN BLUMENTHAL, JEFF DALCERRO, MICHAEL ANELLO, JOAN WEBER, in their official capacity and individually and DOES 1 - 50, Defendants.

Defendants.

Case No. CGC-10-502372

~~[PROPOSED]~~ **ORDER SUSTAINING STATE BAR DEFENDANTS' DEMURRER TO PLAINTIFF KAY'S SECOND AMENDED COMPLAINT WITHOUT LEAVE TO AMEND**

DATE: February 3, 2011
TIME: 9:30 a.m.
DEPT: 302

The Honorable Loretta Giorgi

This matter came before the court on February 3, 2011 for Defendants The State Bar of California, The State Bar of California Board of Governors, The Office of the Chief Trial Counsel, Lucy Armendariz, Scott J. Drexel, Jeff Dal Cerro, and Allen Blumenthal's Demurrer to the Second Amended Complaint.

Michael von Loewenfeldt and Danielle Lee appeared on behalf of the Defendants The State Bar of California, The State Bar of California Board of Governors, The Office of the Chief Trial Counsel, Lucy Armendariz, Scott J. Drexel, Jeff Dal Cerro, and Allen Blumenthal ("State Bar Defendants"). Plaintiff Philip E. Kay appeared in propria personam. Harry T. Gower, III, Deputy Attorney General, Office of the Attorney General of the State of California, appeared for defendants The Supreme Court of California, Ronald George, Michael Anello, and Joan Weber.

The Court, having heard arguments of counsel, and having reviewed all papers supporting and opposing the demurrer, and all judicially noticeable materials, and good cause appearing, rules as follows:

IT IS HEREBY ORDERED THAT the State Bar Defendants' demurrer to Plaintiff Kay's Second Amended Complaint is SUSTAINED WITHOUT LEAVE TO AMEND for the following reasons (as explained in more detail in the moving papers):

1. This Court has no jurisdiction over the subject of this action.
2. Kay's claims are barred by res judicata and collateral estoppels under the prior decision of the California Supreme Court.
3. The State Bar Defendants have absolute immunity for their actions in attorney disciplinary investigations and proceedings.
4. There is no private right of action to support Kay's eighth or eleventh causes of action.
5. The State Bar and its officers are not "persons" within the meaning of the federal civil rights laws and cannot therefore be sued under 42 U.S.C. §§1983.
6. Kay cannot bring a federal civil rights claim based on his attorney disciplinary decision because his disciplinary decision has not been overturned on appeal or otherwise rendered invalid.

CGC-10-507372

7. Statements or communications by the State Bar's employees in connection with their representation of the State Bar in Kay's disciplinary proceedings are absolutely privileged under the right to petition and California Code of Civil Procedure 47(b) and the Noerr-Pennington doctrine.

IT IS SO ORDERED.

Dated: 9/19/11

HONORABLE LORETTA GIORGI
JUDGE OF THE SUPERIOR COURT

Approved as to form only:

PHILIP E. KAY
Plaintiff

see next page
HARRY T. GOWER, III
Attorneys for Defendants The Supreme Court of California, Ronald George, Michael Anello, and Joan Weber

7. Statements or communications by the State Bar's employees in connection with their representation of the State Bar in Kay's disciplinary proceedings are absolutely privileged under the right to petition and California Code of Civil Procedure 47(b) and the Noerr-Pennington doctrine.

IT IS SO ORDERED.

Dated: _____

See previous page
HONORABLE LORETTA GIORGI
JUDGE OF THE SUPERIOR COURT

Approved as to form only:

PHILIP E. KAY
Plaintiff

3/3/11
HARRY T. GOWER, III
Attorneys for Defendants The Supreme Court of California, Ronald George, Michael Anello, and Joan Weber

CGC-10-502372

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[In Pro Per]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

PHILIP E. KAY, an individual and as a class representative for other persons similarly situated, Plaintiff, vs. STATE BAR OF CALIFORNIA, THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA, THE STATE BAR COURT, OFFICE OF CHIEF COUNSEL, LUCY ARMENDARIZ, SCOTT J. DREXEL, JAMES. E. TOWERY, DONALD STEEDMAN, JEFF DAL CERRO and ALLEN BLUMENTHAL, individually and their official capacity; HELENE WASSERMAN, RALPHS GROCERY COMPANY, and DOES 1 - 500, Defendants.	Case No. CGC-11-510717 CLASS ACTION COMPLAINT (Verified) CLASS CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF - Code of Civil Procedure §§ 1060, 1065, 1068 & 1102; VIOLATION OF STATE BAR ACT - §6001; CLASS AND INDIVIDUAL CLAIMS FOR VIOLATION OF CIVIL CODE §52.1(b); 42 USC § 1983 PROCEDURAL DUE PROCESS; FIFTH AMENDMENT; SIXTH AMENDMENT, SUBSTANTIVE DUE PROCESS; FREE SPEECH; INDIVIDUAL CLAIMS FOR VIOLATION OF PENAL CODE §182; STATE BAR ACT - §6068.1(b); Exhibits and Request for Judicial Notice; *Ex Parte* Application and Motion for Temporary Restraining Order and Preliminary Injunction Filed Herewith; Application for Complex Designation Filed Herewith

I. INTRODUCTION

1. Plaintiff Philip E. Kay ("Kay") Kay is a State Bar member and respondent, currently under suspension and probation. Kay is an individual and a class representative for other persons similarly [State Bar members and respondents] situated and brings this action on information and belief, except as to those allegations relating to himself, which are asserted on personal knowledge. This action is brought as a class action under the provisions of California Code of Civil Procedure §382. This action is brought to seek declaratory and injunctive relief and damages, pursuant to the holding in *Canatella v. State Bar of California*, 304 Fed.3d 843 (9th Cir. 2002) and Civil Code §52.1(b) to challenge and remedy impending and past unconstitutional, illegal and void (*ultra vires*) actions, threats, intimidation and coercion against Kay by the State Bar of California defendants collectively ("State Bar"), which has and will continue to cause irreparable harm to Kay and other persons similarly situated. (See also, *Kruetzer v. San Diego County* (1984) 153 Cal.App.3d 62, 71-72.)

2. During the prior State Bar proceeding, Kay's constitutional - due process rights and privileges, including the right not to be compelled as a witness against himself under the 5th Amendment and right to a jury trial in a criminal proceeding under the 6th Amendment to the United States Constitution and Calif. Const., Art. I, Secs. 15 and 16, Calif. Const., Art. III, Sec. 3.5, Calif. Const. Art. VI, were violated. Moreover, in response to Kay's assertion of his rights and privileges, the State Bar Court found him in contempt without a trial and entered a void (*ultra vires*) default, with his Answer on file and having appeared for trial. Based on the default, the State Bar issued a Decision containing completely fabricated findings, including the non-existent common law crime of "obstruction of justice." There are no common-law crimes in California since the enactment of the Penal Code, which took effect on January 1, 1873. Thereafter, no act or omission is criminal or punishable, except as prescribed or authorized by the Penal Code or analogous statute or ordinance. (See 17 Cal.Jur.3d Criminal Law: Core Aspects, §3.) "Obstruction justice" is criminal contempt of court. (Penal Code §166(a)(1) ["Disorderly,

contemptuous, or insolent behavior committed during the sitting of any court of justice, in the immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due to its authority"].) (7 Witkin, *Cal. Proc.* (2002 5th ed.) *Trial*, §174, p. 212.) Conviction of a nonexistent crime results in a void judgment not subject to waiver. (See *People v. McCarty*, 94 Ill.2d 28, 37 (1983).) Moreover, Kay was never cited, tried or convicted of contempt by an article VI court; nor was he ever charged or convicted of a Penal Code violation. Regardless, Hearing Department [administrative] judge Armendariz, without original jurisdiction, found Kay guilty of "obstruction of justice," without ever having been charged or convicted of any Penal Code violation. (See *In the Matter of Respondent D.*, 1 Cal. State Bar Ct. Rptr. 517, p. 3 (1991) ["Respondent can only be found culpable for conduct which is charged in the notice to show cause."]; 1 Witkin, *Cal. Proc.* (2008 5th ed.) Attorneys, § 606, p. 733, [Charges Dismissed] citing to *In the Matter of Mapps* (1990) 1 Cal. State Bar Ct. Rprt. 19, 24 [an attorney cannot be disciplined for uncharged Penal Code violations]; *In the Matter of Glasser*, 1 Cal. State Bar Ct. Rptr. 163, p. 1 (1990) ["Adequacy of notice is an essential element of due process. . . . This principle applies with equal force in State Bar proceedings."].) (See also *Baker v. State Bar* (1989) 49 Cal.3d 804, 814–815 [§6103[1] does not purport to define the duties of an attorney; rather, it merely provides that violation of duties defined elsewhere is ground for discipline].) Moreover, State Bar costs have been determined to be a criminal fine (punishment) and non-dischargeable in bankruptcy. (See *Findley v. State Bar of California*, 59 Fed.3d 248 (2010). (See also *Matter of Lapin* (Rev.Dept. 1993) 2 Cal. State Bar Ct.Rptr. 279, 295 [State Bar Court lacks contempt or sanction power].) The default resulted in a void order of suspension of his law license, probation and assessment of a criminal fine. The State Bar now seeks to

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[1] Section 6103: "A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

enforce the void order of suspension and criminal finding through another disciplinary action, rather than charge Kay with criminal contempt, pursuant to Rule of Court 9.20 and State Bar Act[2] - §6086.10, which would allow a collateral attack of the void order of suspension and criminal fine in the Superior Court.

3. In the prior State Bar proceeding, Kay was subjected to threats, intimidation and coercion to waive his constitutional rights - due process rights and privileges, including his rights under the 5th Amendment and 6th Amendment. Kay was then punished for asserting his constitutional - due process rights in violation of the State Bar Act - §§6068(i), 6079.5 and 6085(e). The State Bar is now threatening, intimidating and coercing Kay to admit to the fabricated [criminal] findings in the Decision by instituting a new disciplinary proceeding based on his failure to comply with the terms of his probation. (See Request for Judicial Notice (RJN) Ex. 1, State Bar letter of March 4, 2011.) For Kay to comply with the probation, he would be required to waive his 5th amendment rights, and commit perjury by admitting to the fabricated findings in the Decision, including but not limited to the non-existent crime of "obstruction of justice" and pay a criminal fine, without ever being charged or convicted with any Penal Code violation and having received no constitutional - due process in the State Bar.

CLASS CLAIMS (see paragraphs 46-103)

4. Kay, as an individual and as a class representative for other persons similarly situated brings claims for declaratory and injunctive relief. Such a representative action is necessary to prevent and remedy the unconstitutional, deceptive, unlawful and unfair practices alleged herein. There are predominant questions of law or fact between all similarly situated class members. The class consists of all State Bar member attorneys and respondents in State Bar proceedings; thus, the members of the class are so numerous that joinder of all class members is impracticable. Concentrating the litigation of the class members' claims is desirable because all of them will be subject to the same

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[2] Section (§) references are to the State Bar Act - Business and Professions Code §§6000, *et seq.*

procedural rules and substantive law. The class will be manageable because it is precisely defined and easily ascertained through State Bar records. The claims arising from defendants' violation of the class members' rights are suitable for certification under Code of Civil Procedure §382, because defendants have acted and/or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole. Kay, as class representative, has claims typical of the class and will adequately represent the entire class equally as no money damages are sought in this action for the class claims for declaratory and injunctive relief. As a result, the requirements of a class action are met for numerosity, commonality, typicality, and adequacy of representation of the entire class by Kay as the class representative.

5. The State Bar has denied and continues to deny members and respondents, including Kay, their constitutional - due process rights and privileges, including their 5th Amendment and 6th Amendment rights through the exercise of contempt powers[3] and "Discovery Sanctions" to enforce subpoenas, strike answers and enter defaults in violation of Calif. Const., Art. I, Secs. 15 and 16, Calif. Const., Art. III, Sec. 3.5; State Bar Act - §§6001, 6049, 6050, 6051, 6068(i), 6079.4, 6085, 6086.1(b), 6088; Civil Code §52.1(b); Code Civ. Proc. §1991; former SBRP 152(b) and 187; current SBRP 5.70; 42 USC § 1983 and United States Constitution. The State Bar has enacted rules of procedure in violation of the State Bar Act - §6001, with the intent to deny all State Bar members and respondents, including Kay their constitutional - due process rights and privileges, including their rights under the 5th and 6th Amendments. Moreover, the State Bar has publicly stated that it will continue to refuse to allow members and respondents, including Kay, their rights under the 5th and 6th Amendments. These matters are subject to claims for declaratory and injunctive relief and damages on behalf of all State Bar

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[3] State Bar Court lacks contempt or sanction power (*Matter of Lapin* (Rev.Dept. 1993) 2 Cal. State Bar Ct.Rptr. 279, 295).

members and respondents. (See Code of Civil Procedure §382; *Capitol People First v. Department of Developmental Services*, 155 Cal.App.4th 676, 690 (2007); *Canatella v. State Bar of California, supra*, 304 Fed.3d 843; Civil Code §52.1(b).) [Kay served notice of these claims, pursuant to Government Code §§900, *et seq.*]

II. JURISDICTION AND VENUE

6. This Court has jurisdiction under Code of Civil Procedure §410. This is an action brought under Code of Civil Procedure §§382, 1060, 1065, 1068 and 1102; 42 USC § 1983, Civil Code §52.1(b), State Bar Act - §§6000, *et seq.*] and State Bar Rules of Procedure (SBRP) to determine prospective constitutional - due process rights and remedies and claims for damages. This Court has jurisdiction to consider these claims for declaratory and injunctive relief and damages, because this action has been filed in advance of the State Bar filing the Notice of Disciplinary Charges ("NDC") to commence the new State Bar proceeding. (See *Canatella v. State Bar of California, supra*, 304 Fed.3d at 850-851; *Beltran v. State of California*, 871 Fed.2d 777, 782 (9th Cir.1988); *Hirsh v. Justices of Supreme Court of California*, 67 Fed.3d 708, 711-712 (9th Cir.1995).) This is the only court of original jurisdiction. (See also Calif. Const. Art. VI, Sec. 10 [Superior Courts have original jurisdiction in proceedings for extraordinary relief and in all other causes].) Claims for declaratory and injunctive relief are not subject to immunity. (See *Greene v. Zank* (1984) 158 Cal.App.3d 497, 508, FN 10.)

7. This Court has jurisdiction under *Hoffman v. State Bar* (2003) 113 Cal.App.4th 630, 639 [writ of mandate may be issued from the Superior Court to the State Bar regarding voting and candidacy rights under the State Bar Act, which was denied on the merits – not jurisdictional grounds].)

> "The State Bar is an inferior corporation (tribunal). Were Hoffman correct in his claims of unconstitutional deprivation of the right to vote and run for office, the State Bar could be compelled to discontinue its adherence to the election and candidacy scheme set forth in sections 6015 and 6018 and fashion a remedy to allow Hoffman to exercise his purported rights."

This Court has jurisdiction regarding the impending State Bar proceeding, which is subject to the equitable relief sought in this action. (2 Witkin, Cal. Proc. 5th (2008)

Courts, § 210, p. 294; Calif. Const., Art. VI, Sec.10; *Olivera v. Grace* (1942) 19 Cal.2d 570, 575; *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 290-291.)

8. This Court has jurisdiction to consider the 42 USC § 1983 claims under *Canatella v. State Bar of California, supra*, 304 Fed.3d at 853:

> On the record before us, we believe not only that "[t]he parties remain philosophically on a collision course," *Berner*, 129 F.3d at 24, but that there is a strong likelihood Canatella may again face discipline under the challenged provisions. His threat of future prosecution is not merely hypothetical and conjectural, but actual. In relying on Canatella's disciplinary record to reach our conclusion, we do not maintain that past "prosecution" by itself gives rise to a present case or controversy. But we have no reason to doubt that Canatella's interactions with the State Bar heretofore do not have at least some "continuing, present adverse effects," *Lyons*, 461 U.S. at 102, 103 S.Ct. 1660, whether these effects be further discipline, or the chilling of what may be constitutionally protected speech. Because the equitable relief he seeks would alleviate the harm he has alleged, Canatella demonstrates standing and his claims should be allowed to proceed.

There is "presumption in favor of concurrent state jurisdiction." (*Tafflin v. Levitt* (1990) 493 US 455, 458–459; *Chavez v. Keat* (1995) 34 Cal.App.4th 1406, 1413 [federal and state courts have concurrent jurisdiction over civil rights actions brought pursuant to 42 USC § 1983].) In such cases, state courts may not refuse to enforce the federal claim absent a valid excuse consistent with federal law. (*Donaldson v. National Marine, Inc.* (2005) 35 Cal.4th 503, 510.) (See also *Bach v. Butte* (1983) 147 C.A.3d 554, 560 [state courts have concurrent jurisdiction with federal courts over 42 USC §1983 actions, and the federal law determines what conduct gives rise to liability under the statute]; 5 Witkin, *Cal. Proc.* 5th (2008) *Plead*, § 928, p. 341.)

9. This Court has jurisdiction under Civil Code §52.1(b):

> Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, **injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.** (Emphasis.)
>
> §52(a):
>
> If a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation,

> or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the Attorney General, any district attorney, or any city attorney may also seek a civil penalty of twenty-five thousand dollars ($25,000). If this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated.

The claim for violation of Civil Code §52.1(b) **is not subject to immunity**. (See discussion in *Venegas v. County of Los Angeles*, 153 Cal.App.4th 1230, 1243-1247 (2007).) The claim does not require a plaintiff to allege violence or threats of violence. (See *Venegas v. County of Los Angeles*, 32 Cal.4th 820, 841 (2004); see also *Moreno v. Town of Los Gatos*, 267 Fed.Appx. 665, 666 (2008)[4].) Nor is there a requirement to establish a "hate crime" or protected class status. (*Venegas, supra*, at 841-842.)

10. Venue is proper in this Court because the harm was caused to Kay in this County and the State Bar maintains corporate headquarters in this County.

III. PARTIES

11. Plaintiff Kay is, and at all times mentioned herein was, a citizen and resident of the State of California, residing in this County.

Defendants

12. The State Bar of California is a public corporation in the judicial branch of the State of California, incorporated under the laws of the State of California, with its principal place of business in the State of California. The State Bar acts through the Board of Governors of the State Bar of California. The Board of Governors makes rules of procedure, regulates and operates the State Bar, which is not empowered to reverse the final orders and decisions of the article VI courts, as it has done here. (See §§ 6101,

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[4] FRAP 32.1(a)—courts may not prohibit or restrict citation of unpublished or nonprecedential federal court dispositions issued on or after 1/1/07]

6040[5].) The Board of Governors is not the Legislature and cannot give or take away powers, which can only be done by statute. The State Bar Court is the adjudicative tribunal acting as an administrative arm of the California Supreme Court to hear and decide attorney disciplinary and regulatory proceedings and to make recommendations to the Supreme Court regarding those matters. Lucy Armendariz is a Hearing Department judge in the State Bar Court. Judge Armendariz is being sued in her individual and official capacity. Judge Armendariz' actions alleged herein, taken in conjunction with Does 1 - 100, were without jurisdiction and not subject to immunity.

13. Scott J. Drexel is the former and James E. Towery is the current Chief Trial Counsel of the Office of the Chief Trial Counsel, the office within the State Bar, which is the prosecutorial arm of the State Bar in attorney discipline and regulatory matters. The Office of the Chief Trial Counsel functions under the direction of the Chief Trial Counsel. Donald Steedman, Jeff Dal Cerro and Allen Blumenthal are Deputy Trial Counsel in the Office of Chief Trial Counsel. Messrs. Drexel, Towery, Steedman and Blumenthal are being sued in their individual and official capacity. Their actions, taken in conjunction with Does 1 - 100, are not subject to immunity.

14. Upon information and belief, at all times mentioned herein, Helene Wasserman was an attorney licensed to practice in California, who represented Ralphs Grocery Company in the *Gober* case and a resident of California. Upon information and belief, Wasserman, at the time of her actions alleged and mentioned herein, was acting within the course and scope of her agency, employment and authority for Ralphs Grocery Company.

15. The true names and capacities of Defendants named herein as Does 1 through 500, inclusive, whether individual, corporate, associate, or otherwise, are unknown to plaintiff,

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[5] Sections 6010 (Powers) & 6040 (Jurisdiction of administrative committees) - Notes of Decisions: The decisions and judgments of the district court of appeal and the supreme court are not subject to review by the state bar or a committee thereof. Lady v. Worthingham (App. 2 Dist. 1943) 61 Cal.App.2d 780, 143 P.2d 1000.

who therefore sues such defendants by such fictitious names. At all times herein mentioned, each of the named Defendants and Does 1 through 500 were the agent, representative, employee, and/or partner, and/or conspirator, and/or joint venturer of each of the remaining Defendants, and in doing the things herein alleged, was acting within the purpose, course and scope of such agency, partnership, and/or employment, and/or conspiracy, and/or joint-venture and with knowledge of the conspiracy to violate plaintiff and the class members' constitutional - due process rights and committed overt acts pursuant thereto as alleged herein. Plaintiff will amend this Complaint to show true names and capacities when they have been determined.

IV. ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

Kay Was Denied Constitutional - Due Process Rights and Privileges in the Prior State Bar Proceeding

16. In the prior State Bar proceeding, Kay was falsely charged and then when he contested the false charges, he was denied his constitutional - due process rights and privileges. Kay was never found to have violated any orders in the article VI court cases; nor was he the subject on an order of contempt, sanctions or new trial based on misconduct, establishing jurisdiction in the State Bar to commence an investigation, pursuant to the State Bar Act - §6086.7, as admitted by Chief Trial Counsel Towery. (See discussion below.) The State Bar is *estopped* by these final judgments and decisions, based on the doctrines of *res judicata* and *collateral estoppel*, which gives stability to judgments and decisions after the parties and their privities, have had a fair opportunity to litigate their claims and defenses. In addition, the State Bar does not have original or plenary jurisdiction to litigate or review anything between private parties regarding tort or common law. (See e.g., *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 Cal.2d 47, 51; *Johnson v. Loma Linda* (2000) 24 Cal.4th 61, 77.)

17. The affirmance on appeal of these final judgments and the absence of any findings by the appellate and trial courts that Kay engaged in misconduct is final and preclusive. (See e.g., *In re Kittrell* (2000) 4 Cal. State Bar Ct. Rptr. 195, p.7 [". . .we conclude that

principles of collateral estoppel can properly be applied in this (State Bar) proceeding. . ."]; p. 8 ["Only final judgments and orders have preclusive effect."].) Thus, there is no evidence, nor can there be, for anything that the Decision says occurred. The only courts that had original jurisdiction for the "violations" were the trial and appellate courts, and they ruled in Kay's favor. (See *In the Matter of Respondent D,* 1 Cal. State Bar Ct. Rptr. 517, p. 4 (1991) ["Civil verdicts and judgments '... have no disciplinary significance apart from the underlying facts."].) The State Bar does not get to make up their own set of facts, as they did here; rather, it must accept the record [facts] of the article VI courts. For example:

- There are no article VI court orders of contempt, sanctions or new trial based on attorney misconduct establishing jurisdiction in the State Bar. (See State Bar Act[6] - §6086.7);
- There are no Court of Appeal remands based on attorney misconduct;
- There is no evidence that any of the alleged statements made during the article VI court trials are false. (See *U.S. v. Wunsch* (9th Cir.1996) 84 Fed.3d 1110, 1119, as cited in *Matter of Anderson* (Rev.Dept. 1997) 3 Cal. State Bar Ct.Rptr. 775, 785.);
- Kay was found *vicariously* culpable for the alleged contempt of other attorneys in violation of law[7];
- There are inherently preposterous findings of yelling at jurors, witnesses, bailiffs and judges throughout three trials and engaging in fisticuffs with opposing counsel during the first *Gober* trial. Of course, if any of this had occurred, there would orders of contempt and/or sanctions - none of which exist.

Moreover, the actual Court of Appeal Opinions from the underlying trials, one of which is published (see *Gober v. Ralphs Grocery Company* (2006) 137 Cal.App.4th 204), impeach the central findings - if not the entire Decision.

18. There are no common-law crimes in California since the enactment of the Penal Code, which took effect on January 1, 1873. Thereafter, no act or omission is criminal or punishable, except as prescribed or authorized by the Penal Code, or by some of the

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[6] Section (§) cites are to the State Bar Act - Business & Profession Code

[7] 7 Witkin *Procedure* (4th ed.) Trial § 187, p.215, citing *Cantillon v. Superior Court* (1957) 150 Cal.App.2d 184,190 [attorney NOT culpable for the contempt of other attorneys].

statutes. (See 17 Cal.Jur.3d Criminal Law: Core Aspects, §3.) "Obstruction justice" is criminal contempt of court. (Penal Code §166(a)(1) ["Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in the immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due to its authority"].) (7 Witkin, *Cal. Proc.* (2002 5th ed.) *Trial*, §174, p. 212.) Conviction of a nonexistent crime results in a void judgment not subject to waiver. See *People v. McCarty*, 94 Ill.2d 28, 37 (1983). Regardless, Hearing Department [administrative] judge Armendariz, without original jurisdiction, found Kay culpable of "obstruction of justice," without ever having been charged or convicted of any Penal Code violation. Said finding violated his constitutional - due process rights in violation of the 5th and 6th Amendments and is constitutionally deficient. (See *In the Matter of Respondent D.*, 1 Cal. State Bar Ct. Rptr. 517, p. 3 (1991) ["Respondent can only be found culpable for conduct which is charged in the notice to show cause."]; 1 Witkin, *Cal. Proc.* (2008 5th ed.) Attorneys, § 606, p. 733, [Charges Dismissed] citing to *In the Matter of Mapps* (1990) 1 Cal. State Bar Ct. Rprt. 19, 24 [an attorney cannot be disciplined for uncharged Penal Code violations]; *In the Matter of Glasser*, 1 Cal. State Bar Ct. Rptr. 163, p. 1 (1990) ["Adequacy of notice is an essential element of due process. . . . This principle applies with equal force in State Bar proceedings."].) (See also *Baker v. State Bar* (1989) 49 Cal.3d 804, 814–815 [§6103[8] does not purport to define the duties of an attorney; rather, it merely provides that violation of duties defined elsewhere is ground for discipline].) Moreover, State Bar costs have been determined to be a criminal fine (punishment) and non-dischargeable in bankruptcy. (See *Findley v. State Bar of California*, 59 Fed.3d 248 (2010). However, the State Bar does not provide respondents jury trials in these criminal matters.

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[8] Section 6103: "A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

19. In a contempt proceeding resulting in sanctions or punishment, all elements of the contempt must be established beyond a reasonable doubt. (1 Witkin, *Cal. Crim. Law* 3d (2000) *Intro--Crimes*, § 6, p. 17.) In conducting a substantial evidence review of a trial court contempt adjudication, "the evidence, the findings, and the judgment are all to be strictly construed in favor of the accused [contemnor] . . . , and no intendments or presumptions can be indulged in aid of their sufficiency . . . If the record of the proceedings, reviewed in the light of [those] rules, fails to show affirmatively upon its face the existence of all the necessary facts upon which jurisdiction depended, the order must be annulled." (See *Mitchell v. Super. Ct. (People)* (1989) 49 Cal.3d 1230, 1256; *In re Cassil* (1995) 37 Cal.App.4th 1081, 1086-1087.) Following the issuance of a contempt referral, the article VI court is required to make independent findings **on the sufficiency of the referral (affidavit)**. [No affidavit exists here.] In particular, the article VI court must determine (1) that the affidavit is based on a valid (written) order; (2) that the alleged contemnor had knowledge of the order; (3) that the alleged contemnor had ability to comply with the order; and (4) that the contemnor evidenced willful failure to comply with the order. (See *In re Marcus* (2006) 138 Cal.App.4th 1009, 1015–1016 ["a writing is essential to avoid the uncertainty that can arise when attempting to enforce an oral ruling. Indeed, an 'order' is defined by statute as the 'direction of a court or judge, made or entered in writing,....' (citation) italics added.)"].) (Code Civ. Proc. §§1212 & 1211.5.) Regardless, the State Bar Court found Kay violated "orders," without specifying any such orders, as the basis for finding him culpable of "obstruction of justice," which under California law is indirect contempt. In addition, the State Bar denied Kay the right to a jury trial. The person cited for contempt has a right to a jury trial where the punishment imposed is "serious," such as here, in which the State Bar has deprived Kay of his right to earn a living and imposed monetary sanctions. (See *International Union, United Mine Workers of America v. Bagwell* (1994) 512 U.S. 821, 826-827; *In re Kreitman* (1995) 40 Cal.App.4th 750, 753--applicable in state court proceedings.) The imposition of a "serious" fine triggers the right to a jury trial in a

contempt proceeding. (See *International Union, United Mine Workers of America v. Bagwell, supra*, 512 U.S. at 837.) Willful disobedience of a court order is also a misdemeanor. (Penal Code §166(a)(4).) If prosecuted as a criminal contempt, a right to jury trial exists regardless of the sentence imposed. (*See Mitchell v. Superior Court, supra*, at 1240.)

19. Before the unconstitutional - illegal contempt was found and void - illegal default was entered, Kay was required to prove a series of negatives regarding the fabricated charges to establish his "good moral character," based on outright lies, which harkens back to the McCarthy era and the "blacklist." See *Konigsberg v. State Bar of California*, 353 U.S. 252, 267 (1957):

> "Even if it be assumed that Konigsberg was a member of the Communist Party in 1941, the mere fact of membership would not support an inference that he did not have good moral character. **There was no evidence that he ever engaged in or abetted and unlawful or immoral activities-or even that he knew of or supported any actions of this nature**."

In *Konigsberg*, the applicant was allowed to stand mute and was not required to prove his "good moral character." However, when Kay asserted the same constitutional and statutory - rights and privileges, he was punished for doing so in violation of the State Bar Act - §§6068(i), 6079.4 and 6085(e) and was found **culpable by an illegal - void default**, in which the alleged facts were illegally deemed admitted in violation of §6088.

20. In the prior State Bar proceeding, without subject matter jurisdiction, Judge Armendariz threatened, intimidated and coerced Kay to waive the attorney-client, work product and 5th Amendment and 6th Amendment rights and privileges on behalf of his clients and himself - proclaiming that each question he refused to answer would be considered to be a contempt and serve as grounds for aggravation, resulting in additional discipline. The State Bar never obtained the requisite client approval, pursuant to Code Civ. Proc. §2018.070 to even discover this evidence, let alone compel it in the State Bar proceeding. Kay refused and continued to assert these rights and privileges. Kay further requested (repeatedly) that Judge Armendariz refer the matter to the Superior Court, pursuant to SBRP 152(b) and 187 and *Jacobs v. Superior Court* (1977) 20 Cal.3d 191,

196-198. In response, Judge Armendariz began admitting unanswered questions, in violation of law[9], as admissions of culpability against Kay. At this point, Kay asserted his rights under the 5th Amendment and State Bar Act - §§6068(i), 6079.4 and 6085(e) to refuse to provide any further testimony.

21. Judge Armendariz then summarily ruled Kay in contempt, without subject matter jurisdiction[10] and without the required constitutional - due process rights to be afforded to alleged contemnors[11], for asserting attorney-client, work product and 5th and 6th Amendment rights and privileges. Then, in violation of Kay's constitutional - due process rights and privileges[12], she entered an illegal and void default (through the unconstitutional application of "Discovery Sanctions") and struck Kay's Answer, which no court can do. (See e.g., *Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 864.) The default denied Kay *de novo* review in the State Bar Review Department, which the California Supreme Court held in *In re Rose* (2000) 22 Cal.4th 430, 457 was essential to providing constitutional - due process in the State Bar. **Threatening a respondent with aggravation and admitting unanswered questions as admissions of culpability and then entering a default, because he asserted his rights under the 5th and 6th**

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[9] (BAJI 1.02; Wegner et al., Civil Trials & Evidence (Rutter 2009), §8:202, *et seq.*)

[10] State Bar Court lacks contempt or sanction power (*Matter of Lapin* (Rev.Dept. 1993) 2 Cal. State Bar Ct.Rptr. 279, 295).

[11] See e.g., *In re Koehler*, 181 Cal.App.4th 1153.

[12] See Code of Civil Procedure §1991. In *Summerville v. Kelliher* (1904) 144 Cal.155, 160, the Court held that it was unconstitutional to strike the answer of a defendant (respondent) **not** appearing, pursuant to a subpoena, and/or refusing to testify. In *O'Neill v. Day* (1907) 152 Cal. 357, 362-363, the Court held a contempt proceeding must be held before striking the complaint of a plaintiff, appearing, pursuant to a subpoena, and refusing to testify. The Legislature then amended §1991 in conformance with these holdings to declare the same rights for defendants and plaintiffs, which states in relevant part:

> "The witness **shall not be punished for any refusal to be sworn or to answer a question** or to subscribe an affidavit or deposition, unless, after a hearing upon notice, the court orders the witness to be sworn, or to so answer or subscribe and then only for disobedience to the order." (Emphasis.)

Amendments is the very essence of coercion.

22. The default order states:

> "Kay's grounds for refusing to take the witness stand are 'claims of privilege and constitutional rights," the court's 'lack of jurisdiction to proceed,' 'prosecutorial misconduct,' and the court's 'cumulative reversible error' in its evidentiary rulings during the trial. Kay does not cite any authority, and the Court is aware of none, showing that Kay may refuse to take the stand based on the above reasons."

(See RJN, Ex. 2, State Bar default order, pg. 2, para.2.)

First, Kay did cite the 5th Amendment and State Bar Act - §§6068(i), 6079.4 and 6085(e) as the basis for refusing to provide any further testimony. Second, Judge Armendariz' ignorance of the law is not an excuse or grounds to deny Kay's constitutional - due process rights and privileges, including the 5th Amendment. Third, the default order states Kay cited "claims of privilege and constitutional rights," thereby impeaching Judge Armendariz' further statement that "Kay does not cite any authority, and the Court is aware of none, showing that Kay may refuse to take the stand based on the above reasons." Fourth, the default order cites to inapplicable, antiquated and overruled authority, while ignoring the controlling sections of the State Bar Act - §§6068(i), 6079.4 and 6085(e) to falsely claim Kay could not refuse to take the stand, and justification for her not sending this out to the Superior Court, and then entering the illegal and void default, which is a violation of RPC 5-200 and Bus. & Prof. Code §6068(d). Either Judge Armendariz is incompetent[13] or she is acting maliciously. Either way, Kay's constitutional - due process rights and privileges have been denied and will continue to be denied by the State in the impending proceeding. (See *Alvarez v. Sanchez*, 158 Cal.App.3d 709, 712-713 (1984) ["Appellants' principal contention on appeal is that the trial court committed prejudicial error by striking a portion of the answer and allowing the case to proceed as a default matter because the appellants invoked their Fifth Amendment rights at trial. We agree with appellants that such ruling denied them their day in court

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[13] For example, she found misconduct based on a "motion to strike," pursuant to CACI 106 ["An attorney may make a motion to strike testimony that you have heard. If I grant the motion, you must totally disregard that testimony. You must treat it as though it did not exist."].

and requires reversal."] *Id.* at 712.) (See *In re Pyle*, 3 Cal. State Bar Ct. Rptr. 929 (1998) [State Bar orders and decision subject to collateral attack]; see also *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950 ["Collateral attack is proper to contest [a judgment void on its face for] lack of personal or subject matter jurisdiction or the granting of relief which the court has no power to grant [citation omitted]."] It has long been held that no court has the authority to validate a void order. (*U.S. v. Throckmorton*, 98 U.S. 61 (1878); *Valley v. Northern Fire & Marine Co.*, 254 U.S. 348, 53-354 (1920). If the underlying order is void, the judgment based on it is also void. (*Austin v. Smith*, 312 Fed. 2d 337, 343 (1962).)

23. The State Bar notified Kay on March 4, 2011 that new charges based on the failure to abide by terms of the order of suspension and probation are to be filed seeking to impose further discipline. (See RJN, Ex. 1.) The State Bar is threatening, intimidating and coercing Kay with new disciplinary charges, including but not limited to criminal contempt. (See Rule of Court 9.20 ["A suspended member's willful failure to comply with the provisions of this rule is a cause for disbarment or suspension and for revocation of any pending probation. Additionally, such failure may be punished as a contempt or a crime."]; see also §6126(c).) To comply with the probation, Kay will have to waive his 5th and 6th Amendment rights and commit perjury by admitting to the fabricated findings in the Decision, including the criminal finding of "obstruction of justice," and pay a criminal fine. Thus, Kay will suffer irreparable harm from the impending State Bar proceeding involving criminal [felony] penalties, in which he will be denied constitutional - due process rights, including his rights under the 5th and 6th Amendment and a jury trial for criminal contempt charges.

24. In the prior State Bar proceeding, despite the clear and binding [constitutional] authority affording members and respondents, including Kay, their right to assert the 5th Amendment - not to be compelled as witness against themselves, the State Bar denied Kay his constitutional - due process rights and privileges and never intends to allow Kay to assert these rights and privileges in the impending proceeding. (See *Canatella v. State*

Bar of California, supra, 304 Fed.3d at 853.)

25. In the prior State Bar proceeding, Kay answered, appeared for trial and contested the charges; thus, he cannot be defaulted, pursuant to the SBRP and controlling case authority, which do not allow a default to be entered in this matter. (*Heidary v. Yadollahi, supra,* 99 Cal.App.4th at 863 ["Where a defendant has filed an answer, neither the clerk nor the court has the power to enter a default based upon the defendant's failure to appear at trial, and **a default entered after the answer has been filed is void**."].) (Emphasis.)

26. In the prior State Bar proceeding, no article VI court orders of contempt, sanctions or new trial based on attorney misconduct exist. As referenced, the State Bar has **admitted** that a court order establishing reversal of the trial court proceedings is necessary to investigate attorney misconduct. Chief Trial Counsel Towery has recently publicly stated that absent a ruling (reversal) where attorney misconduct "made a difference in the trial," the State Bar has **no jurisdiction** to investigate or charge prosecutors for misconduct.

> "Towery's office is analyzing approximately 130 cases the innocence project said were reversed because of prosecutorial misconduct. The office will not look at the matters identified by the report as harmless (not resulting in a reversal) because of the bar's "clear and convincing" burden of proof. Towery suspects that bar prosecutors did not know about many of the reversals, either because the case was not reported, as required, or did not meet the criteria for notifying the bar. To improve the requisite reporting, his office sent 1,900 letters to judges and is stepping up contacts with district attorneys' offices to educate them about reporting requirements."
> (RJN, Ex. 5, California Bar Journal, February 2011.)

See also, RJN, Ex. 6, February 22, 2011 Agenda Item from James Towery, Chief Trial Counsel, specifying that under the State Bar Rules of Procedure, the State Bar is required to specify in the notice of disciplinary charges and "cite the statutes, rules or **Court orders** that the member allegedly violated or that warrant the proposed action." (Emphasis.) This same standard applies to Kay's prior State Bar proceeding, in which no such order or ruling exists.

27. In the prior State Bar proceeding, in response to Kay's complaints against defense

counsel in the very same underlying cases, the State Bar refused to open an investigation – citing the very defenses raised by Kay – not a reportable action and statute of limitations. (See RJN, Ex. 7, State Bar Erin Joyce letter, which states in part):

> " . . . it is clear that the trial court in both cases did not make any finding that any of the attorneys intentionally violated the courts' in limine orders warranting censure by the court or discipline by the State Bar. The trial courts did not make any findings against any of the attorneys sufficient to warrant a State Bar investigation. **The trial Courts are in the best position to determine if an attorney has committed a violation of Business & Professions Code section 6103, or if an attorney has provided false testimony in violation of Business & Professions Code section 6068(d).** There appears to be no basis for the State Bar to investigate your allegations absent such findings by the Courts in question. As for your complaint against Mr. Chambers, it is barred by the statute of limitations. . ." (Emphasis.)

28. In the prior State Bar proceeding, the complainant was disqualified judge Michael Anello, who falsely reported and complained to the State Bar that he granted a new trial based on attorney misconduct by Kay and co-counsel John Dalton, pursuant to Code Civ. Proc. §657(1).

> "As required by applicable provisions of the Business & Professions Code, I reported the above-referenced attorneys to your office back in October of 2002 (after granting a motion for new trial based upon attorney misconduct)." (See RJN, Ex. 9, disqualified judge Anello's June 5, 2007 letter to the State Bar.)

However, disqualified judge Anello granted a conditional new trial (a remittitur as to punitive damages only), which was based solely on the ground of excessive damages (§657(5)), and denied on all other grounds, including §657(1) – attorney misconduct. (See *Gober v. Ralphs Grocery Company, supra,* 137 Cal.App.4th 204.) The State Bar admitted to these facts and that no such order exists in its Opposition to Kay's Petition for Writ of Review.

29. Disqualified judge Anello conspired with another disqualified judge Joan Weber to falsely report and complain to the State Bar. Both disqualified judges engaged in secret *ex parte* communications to carry out this criminal conspiracy, which is judicial misconduct. (See *Christie v. City of El Centro* (2003) 135 Cal.App.4th 767, 776; 2 Witkin, Cal. Proc. 5th (2008) Courts, § 61, p. 96; *Lapique v. Superior Court* (1924) 68 Cal.App. 418, 420.) (See also *Furey v. Commission on Judicial Performance* (1987) 43

Cal.3d 1297, 1315-1316 (citing *Gubler v. Commission on Judicial Performance* (1984) 37 Cal.3d 27, 54-55 [communications by disqualified judge with replacement judge constituted "willful misconduct"]; *Gubler* was disapproved on another point in *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294.)

30. Upon information and belief, Helene Wasserman conspired with her client Ralphs Grocery Company and others to disqualify Kay from the *Gober* punitive damages retrial by falsely reporting and complaining to the State Bar that the *Gober* case was remanded by the Court of Appeal based on attorney misconduct and/or the trial court granted a new trial based on attorney misconduct.

31. All the State Bar had to do was read the published opinion in *Gober v. Ralphs Grocery Company, supra,* 137 Cal.App.4th 204 to determine that disqualified judges Anello and Weber and Wasserman on behalf of Ralphs Grocery Company, falsely reported and complained to the State Bar. [There were no remands or motions granted based on attorney misconduct.] Filing a false complaint with the State Bar is a misdemeanor. (§6043(a).) Falsely reporting court proceedings is a misdemeanor. (Penal Code §166(a)(7).) Conspiring to file a malicious prosecution is a misdemeanor and/or felony. (Penal Code §182.) In addition to being a crime, these false reports and complaints fit the legal definition of a fraud on the court. (See *Aoude v. Mobile Oil Corporation* (1989) 892 Fed.2d 1115, 1118.)

32. In the prior State Bar proceeding, the State Bar officials lied about the final judgments and decisions of the article VI trial and appellate courts, while finding Kay vicariously culpable for the alleged contempt of other attorneys in violation of the law[14], which is the *sine qua non* of a malicious prosecution. This is disrespect of the court in violation of §6068(b).[15] The State Bar officials are now seeking to enforce the void

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[14] (See 7 Witkin. *Procedure* (4th ed.) Trial §187, p.215, citing *Cantillon v. Superior Court* (1957) 150 Cal.App.2d 184,190 [no vicarious culpability for the contempt of other attorneys].)

[15] Government attorneys, like other members of the bar, are subject to the California Rules of Professional Conduct and State Bar Act. (California Rule of Professional Conduct Rule 1-100; *Price*

order of suspension and probation, which they know is based upon *fabricated* evidence of non-existent remands and orders based on misconduct. These officials denied Kay his constitutional - due process rights and privileges, including his 5th and 6th Amendment rights in violation of law, not limited to but including §§6068(i), 6079.4 and 6085(e). Moreover, in seeking to enforce, the void order of suspension and probation, they will continue to deny Kay his constitutional - due process rights and privileges in violation of law and demand that he engage in criminal activity [perjury] to comply with the probation by admitting to fabricated misconduct in the Decision, including but not limited to, criminal [felony] "obstruction of justice."

33. In the prior State Bar proceeding, despite the clear record of the State Bar's denial of Kay's constitutional - due process rights and privileges by Kay in the Petition of Review, the Supreme Court summarily denied the Petition. Since the Supreme Court issued its *In re Rose* decision, petitions for review by respondent attorneys to the Supreme Court regarding matters decided in the Hearing and Review Departments are summarily denied. In the rare case in which review is granted, the Supreme Court either defers to the State Bar Court's decision or increases the discipline on the respondents (See *In re Silverton* (2005) 36 Cal.4th 81[16].)

34. The negative consequences "antithetical to the constitutional design" discussed in Justice Brown's dissent (*In re Rose, supra*, at 460-470), have come to pass under the

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v. State Bar (1982) 30 Cal.3d 537, 546-550.) In fact, prosecuting attorneys owe a special duty to see that the accused receives a fair and impartial trial. As representatives of the government, *prosecutors have discretionary power to decide what crimes are to be charged and how they are to be prosecuted.* The government's interest in a criminal case is to see that justice is done. Thus, it is the prosecutor's duty to seek justice, not merely to convict. (*Berger v. United States* (1935) 295 U.S. 78, 88; *United States v. LaPage* (9th Cir. 2000) 231 Fed.3d 488, 492. The duty to see that justice is done may restrict the behavior of government attorneys as advocates in certain cases. Prosecutors are held to a higher standard than other attorneys. (*People v. Espinoza* (1992) 3 Cal.4th 806, 820--"(a) prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State."

[16] This is the only known case in which the Supreme Court took up a State Bar matter after its decision of *In re Rose*.

current State Bar disciplinary system, in which Kay was falsely charged and then denied his constitutional - due process rights and privileges, including his 5th Amendment right not to be compelled as a witness against himself and 6th Amendment right to a jury, when he contested the false charges. He was further denied impartial judicial review. This lack of oversight is antithetical to the constitutional - due process, not to mention what the Supreme Court promises in its *In re Rose* decision, and accounts for the brazen denial of these constitutional rights and privileges by the State Bar, which is the subject of this Complaint.

35. In the prior State Bar proceeding, the defendants and each of them, acting in concert with disqualified judges Anello and Weber, conspired to falsely report the record in the underlying *Gober* and *Marcisz* trials and appeals to *fabricate* the false charges and findings regarding non-existent Court of Appeals remands and trial court orders finding attorney misconduct. This conspiracy and false reporting of the record are criminal acts in violation of State Bar Act - §6043.5, Penal Code §166(a)(7) and Penal Code §187. Moreover, the State Bar admitted to these facts in its Opposition to Kay's Petition for Writ of Review to the Supreme Court.

36. The State Bar Decision, based solely on the void default, re-writes the law and facts – reversing and revising; thereby, lying about history of the final article VI court trial court judgments - affirmed on appeal and Judge Anello's disqualification by the Court of Appeal - "in the interests of justice," pursuant to Code of Civil Procedure §170.1(c). A retrial on remand is not required to take place before a judge different than the one who presided at the prior trial. In fact, the retrial typically occurs before the original judge. (See *Behniwal v. Mix* (2005) 133 Cal.App.4th 1027, 1046-1047 ["(The trial judge) has experienced this case in a way no other judge has, and is the only one with first-hand knowledge bearing on the (remand issue)" (parentheses added)]. Here, the Court of Appeal exercised its rarely invoked discretion to order Judge Anello disqualified "in the interests of justice," based on the motion to disqualify executed and filed by appellate counsel Charles Bird, pursuant to §170.1(c), which was based primarily on the

allegation of bias in the Verified Statements, executed and filed by Mr. Dalton.[17] (See *Marriage of Iverson* (1992) 11 Cal.App.4th 1495, 1502; *Hernandez v. Super.Ct. (Acheson Indus., Inc.)* (2003) 112 Cal.App.4th 285, 303, which states that the appellate court power to disqualify a trial judge under §170.1(c) should be "exercised sparingly," in denying the request because the challenged orders "do not suggest bias or whimsy on behalf of the court, only frustration and a desire to manage a complex case.")

37. Upon information and belief, State Bar officials, including State Bar judges, State Bar prosecutors, Office of Chief Trial Counsel and General Counsel, acting in concert, secretly meet and communicate with Supreme Court officials, including private counsel for retired Chief Justice George, members of the Judicial Council, and Commission on Judicial Performance; to discuss pending cases and their outcome, including Kay's State Bar case. This matter was partially admitted in the Colin Wong memo. (See Ex. 4.) This matter was partially admitted in the investigation report of Charlotte Addington regarding former State Bar prosecutor Alan Konig's complaints against the State Bar.

> Page 47 of the report states:
> "(State Bar prosecutor) Mr. Dal Cerro occasionally has informal meetings with the State Bar Court judges to discuss matters relating to procedure and practice. At one such meeting, the judges spoke about the tendency of the OCTC to overcharge when preparing the initial NDC, which often causes problems later in the case." (See RJN, Ex. 10, Addington Report, pg. 47.)

This was also partially admitted in memoranda provided by the State Bar. Upon information and belief, in violation of the State Bar Act, Rules of Professional Conduct and Judicial Canons, State Bar prosecutors and investigators and State Bar judges and losing defendants, their counsel, courts and judges in the *Gober* and *Marcisz v. UltraStar Cinemas* cases engaged in secret meetings and communications to discuss pending cases and their outcome, including Kay's State Bar case in violation of §6086.1(b).

38. The State Bar officials threatened, intimidated, coerced and demanded that Kay admit to their made up charges of misconduct as an "apology" to Judge Anello for having

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[17] Kay has been found vicariously culpable for Mr. Bird's executing and filing the motion to disqualify in the Court of Appeal and Mr. Dalton's executing and filing the Verified Statements in the trial court.

him disqualified "in the interests of justice," as ordered by the Court of Appeal.[18] (See RJN, Ex. 11, State Bar prosecutor Alan Konig memo, pg. 2):

> "I (Konig) was more interested in having him (Kay) admit responsibility as that would **serve as an apology to Judge Anello and that I would consider entirely stayed suspension if that occurred**." (Emphasis.)

This admission established the State Bar never intended to allow Kay a defense; rather, it was demanding either an admission or finding of culpability by any means, which is why a default was entered, when he asserted his constitutional - due process rights. The Konig memo further shows the State Bar's willingness to obtain a coerced [false] admission or finding of culpability solely to appease disqualified judge Anello.

(See Ex. 11, State Bar prosecutor Alan Konig memo):

> "If Judge Anello is not entitled to know why the NDC hasn't been filed and why he hasn't been able to **reclaim his reputation publicly**, then I think someone else needs to explain that to him." (Emphasis.)

The Konig memo also states that with each decision to delay the filing of the NDC against me, Konig "lose[s] credibility with Judge Anello." *Id.* This illicit motive conflicts with the "mission" for imposing discipline listed on the State Bar's website: "(t)he most important and on-going mission of the State Bar of California's discipline system is to protect the public, the courts and the legal profession from those lawyers who fail to adhere to their professional responsibilities." This "mission" does not include concern for coercing an "**apology**" [admission] and assisting a disqualified judge's desire to "**reclaim his reputation publicly**."

39. Moreover, such an admission could be used to prosecute Kay for criminal [felony] "obstruction of justice" and by the losing defendants, their counsel, the courts and judges in the *Gober* and *Marcisz* cases to reverse the lawful and final judgments Kay obtained on behalf of his clients and/or have him disbarred or suspended to disqualify him from trying and retrying the cases and take away or deny his attorneys' fees, pursuant to writs of

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[18] The motion to disqualify Judge Anello in the Court of Appeal was drafted and filed by the *Gober* appellate counsel Charles Bird of Luce Forward, for which Kay was charged and found vicariously culpable. (See 7 Witkin *Procedure* (4th ed.) *Trial* §187, p. 215, citing *Cantillon v. Superior Court, supra*, 150 Cal.App.2d at190 [no vicarious culpability for the contempt of other attorneys].)

coram vobis and/or *coram nobis*. Unable to coerce this admission from Kay in the prior proceeding, the State Bar is threatening, intimidating and coercing Kay with the new disciplinary proceeding to obtain this admission, in which his constitutional - due process rights and privileges will be violated.

40. During the investigation in the prior proceeding, the State Bar prosecutors and investigators shared confidential and privileged information in violation of §6086.1(b)[19] with the losing defendants, their counsel, the courts and judges in the *Gober* and *Marcisz* cases. These State Bar prosecutors further attempted to coerce Kay to provide admissions and his work product in order to harm his clients by depriving them of the statutory award of attorneys' fees and overturn their lawfully obtained verdicts.

41. Prior to the *Gober* punitive damages retrial, Wasserman, on behalf of Ralphs, filed a false and perjured charging *affidavit* re: contempt, which sought to have Kay and Dalton disqualified. Judge Anello took on the character of a prosecutor rather than a neutral judge, just as he later did in the State Bar proceeding. On the strength of Ralphs' papers alone (Wasserman's charging *affidavit*), Judge Anello cited Kay and Dalton to appear and defend themselves on charges of criminal contempt, in which Wasserman and Ralphs were seeking to have Kay and Dalton disqualified from the punitive damages retrial in *Gober*. Judge Anello initiated this quasi-criminal contempt proceeding even though Ralphs' papers did not allege the first element of contempt (rendition of a valid order), which in this case was an invalid stipulated order sealing the documents that Kay and Dalton were accused of disclosing. [The affidavit admitted that Kay had no involvement in this matter; however, Wasserman and Ralphs sought to disqualify him based on vicarious liability for the alleged acts of Dalton, which is contrary law[20].] Dalton never disclosed anything until after the "documents" had been argued in open court and had

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[19] All disciplinary investigations are confidential until the time that formal charges are filed and all investigations of matters identified in paragraph (2) of subdivision (a) are confidential until the formal proceeding identified in paragraph (2) of subdivision (a) is instituted.

[20] (See 7 Witkin *Procedure* (4th ed.) *Trial* §187, p.215, citing *Cantillon v. Superior Court, supra*, 150 Cal.App.2d at 190 [no vicarious culpability for the contempt of other attorneys].)

become public. When Judge Anello was promptly informed in writing and during an *ex parte* hearing that the key element of his order was missing; thereby, rendering it invalid and unenforceable, and that no contempt was possible even if the facts alleged in the charging declaration were true, he pressed forward with the Order to Show Cause (OSC) against Kay and Dalton anyway, despite Kay being charged vicariously and never having been served with an OSC (contempt citation), which establishes the court's jurisdiction. Because Judge Anello would not consider vacating the orders to show cause (contempt citations), after it was shown they were demurrable, the quasi-criminal contempt proceeding ground on from the *ex parte* hearings in late October and early November 2001 through the final contempt hearing on January 18, 2002, requiring Kay and Dalton to retain criminal defense counsel and spend precious pretrial time preparing to defend themselves and expend substantial monies in attorneys' fees.

42. At various points in the OSC proceedings, Judge Anello falsely denied issuing any contempt citations, writing that "no contempt citations have issued from the court in this case." At the same time, he wrote that he clearly understood Ralphs' papers to be a "charging declaration," and therefore should have understood that the orders to show cause initiated a quasi-criminal proceeding against Kay and Dalton. Judge Anello persisted in downplaying the legal effect of the orders to show cause, mischaracterizing the nature of the hearing to which trial counsel were hailed as merely one "to review and analyze the issues raised in Ms. Wasserman's charging declaration." However, the OSC is a citation of contempt. (See e.g., *Cedars-Sinai [Imaging Medical Group v. Superior Court* (2000) 83 Cal.App.4th 1281, 1287.) However, there is no such procedure to hold a hearing to analyze the charging declaration. Rather, this analysis was required prior to issuing the OSC. Issuance of an OSC, without the required elements, is an abuse of contempt powers afforded to judicial officers.

43. A judge's ignorance of proper contempt procedures constitutes bad faith and thereby supports a finding of willful misconduct. (See *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 533.) In *Ryan,* a judge was removed from the bench,

in part due to the judge's failure to follow proper contempt procedures. The Supreme Court stated that the judge "should have known, or should have researched, the proper contempt procedures" and that "failure to do so constituted bad faith." *Ryan* also holds that "ignorance cannot be used as a mitigating factor" for judicial misconduct; however, it will be considered as exacerbation of his abuse of the contempt powers" (*Id.*) Judge Anello's abuse of his contempt powers occurred while he was engaging in illicit *ex parte* communications with disqualified judge Weber. A fair-minded judge in Judge Anello's position would have understood that his communications with disqualified judge Weber were information "the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification." (Cal. Code Jud. Ethics, canon 3E(2).) Even without knowing the substance of them, communications with a disqualified judge about counsel are facts that a reasonable person would carefully evaluate in determining whether reasonable doubt existed about a trial judge's ability to be impartial. (See § 170.1, subd. (a)(6)(C); *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170.)

44. Judge Anello's motivation to disqualify Kay and Dalton became clearer when, after extensive briefing and arguments from trial counsel's criminal defense counsel, he finally vacated the OSC's. However, he did so only after admitting on the record that he hated to agree with criminal defense counsel's correct reason why there was no jurisdiction to proceed. (See RJN, Ex. 8, *Gober* 2, Pretrial RT 2 359.) Moreover, in further statements on the record, Judge Anello continued to search for alternative ways to vindicate his void order. (Ex. 8, *Gober* 2, Pretrial RT 2, pp. 342-343, 349, 357-360, 362.)

45. Upon information and belief, the State Bar was acting in concert and at the behest of private counsel for retired Justice George, disqualified judges Anello and Weber and losing defendants, their counsel, the courts and judges in the *Gober* and *Marcisz* cases, acting in concert and jointly; all of whom sought to disqualify Kay from the *Gober* and *Marcisz* trial and punitive damages retrials by discussing legal strategies and to have him disbarred or suspended based on *fabricated* evidence and charges. Upon information and

belief, these actions took place prior to the *Marcisz* trial and while both cases were on appeal, both of which resulted in the cases being remanded for punitive damages retrials.

CLASS ACTION ALLEGATIONS

46. Kay, as an individual and as a class representative for other persons similarly situated brings claims for declaratory and injunctive relief. There are predominant questions of law or fact between all similarly situated class members. The class consists of all State Bar member attorneys and respondents in State Bar proceedings; thus, the members of the class are so numerous that joinder of all class members is impracticable. Concentrating the litigation of the class members' claims is desirable because all of them will be subject to the same procedural rules and substantive law. The class will be manageable because it is precisely defined and easily ascertained through State Bar records. The claims arising from defendants' violation of the class members' rights are suitable for certification under Code of Civil Procedure §382, because defendants have acted and/or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole. Kay, as class representative, has claims typical of the class and will adequately represent the entire class equally as no money damages are sought in this action for the class claims for declaratory and injunctive relief As a result, the requirements of a class action are met for numerosity, commonality, typicality, and adequacy of representation of the entire class by Kay as the class representative. The State Bar has denied and continues to deny members and respondents, including Kay, their constitutional - due process rights and privileges, including their 5th Amendment and 6th Amendment rights through prosecution of non-existent criminal charges, exercise of contempt powers[21] and exercise of "Discovery Sanctions" to enforce subpoenas, strike answers and enter defaults in violation of Calif. Const., Art. I, Secs. 15 and 16, Calif. Const., Art. III, Sec. 3.5; State Bar Act - §§6001, 6049, 6050, 6051, 6068(i), 6079.4, 6085, 6086.1(b), 6088; Civil Code

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[21] State Bar Court lacks contempt or sanction power (*Matter of Lapin* (Rev.Dept. 1993) 2 Cal. State Bar Ct.Rptr. 279, 295).

§52.1(b); Code Civ. Proc. §1991; former SBRP 152(b) and 187; current SBRP 5.70; 42 USC § 1983 and United States Constitution. The State Bar has enacted rules of procedure in violation of the State Bar Act - §6001, with the intent to deny all State Bar member and respondents, including Kay their constitutional - due process rights and privileges, including their rights under the 5th and 6th Amendments. Moreover, the State Bar has publicly stated that it will continue to refuse to allow members and respondents, including Kay, their rights under the 5th and 6th Amendments. These matters are subject to claims for declaratory and injunctive relief and damages on behalf of all State Bar members and respondents. (See Code of Civil Procedure §382; *Capitol People First v. Department of Developmental Services*, 155 Cal.App.4th 676, 690 (2007); *Canatella v. State Bar of California, supra*, 304 Fed.3d 843; Civil Code §52.1(b).)

47. The State Bar has denied and continues to deny members and respondents, including Kay, their right not to be compelled as a witness against themselves under the 5th Amendment and 6th Amendment right to a jury trial. However, in 1999, the California Legislature amended §§6068(i), 6079.4 and 6085(e) of the State Bar Act, and expressly added to these statutes the constitutional rights Kay exercised, with the intent to prevent the very abuse and denial of constitutional - due process rights and privileges he suffered in the State Bar.

See Legislative History: 1999 Cal. Legis. Serv. Ch. 221 (S.B. 143) (WEST)

"SB 143, Burton. Attorneys: discipline.
Existing law provides for disciplinary actions against attorneys.
Existing law imposes various duties on attorneys, including the duty to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the attorney. However, existing law provides that this requirement shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States or any other constitutional or statutory privileges.
This bill would also provide that this provision shall not be construed to require an attorney to cooperate with a request that requires the attorney to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. It would also provide that **any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her."**

See California Bill Analysis, S.B. 143 Sen., 6/24/1999

"ARGUMENTS IN SUPPORT: The author [Senator Burton] states that this bill is **needed to bring some basic fairness to the State Bar's disciplinary process. He reports of numerous complaints from attorneys who have asserted that the State Bar's process and procedures run roughshod over the constitutional and statutory rights of those being investigated for possible discipline.** This bill, he asserts, would reiterate that basic constitutional protections and statutory rules still apply and would ensure that attorneys receive basic due process in the disciplinary process. **The author notes that due process is a good idea in disciplinary actions in that an attorney facing disciplinary charges risks losing the ability to earn a livelihood. It seems fair that a person who may lose his or her ability to earn a living in a disciplinary proceeding should be entitled to due process and be given fair and adequate notice of the charges and a fair and adequate opportunity to defend against those charges."** (Emphasis.)

There has been no California Supreme Court case overruling these rights granted and enacted by the California Legislature. Moreover, how could they author such an opinion, by declaring constitutional rights to be unconstitutional? (*Spevack v. Klein*, 385 U.S. 511, 514 (1967) ["the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it **should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it.**"].) (Emphasis.)

48. There is a federal constitutional right to a jury trial in criminal contempt cases involving serious punishment. (See e.g., *Bloom v. Illinois* (1968) 391 U.S. 194, 198.) In *Codispoti v. Pennsylvania* (1974) 418 U.S. 506, the trial court (without a jury) found defendants guilty of multiple acts of contempt and imposed consecutive sentences exceeding six months. On appeal, defendants argued they were entitled to a jury trial. The United States Supreme court reversed, stating that the actual penalty imposed is determinative of whether a criminal contempt is a petty or serious offense. (*Id.* at 516.) "[C]rimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty." (*Id.* at 512.) The federal jury trial guaranty draws a distinction between "serious" and "petty" criminal offenses and requires a jury trial only for those offenses which fall into the "serious" category; in contrast, the right to trial by jury embodied in the California Constitution extends to the so-called "petty" as well as to "serious" criminal offenses to all misdemeanors as well as to all

felonies. Persons prosecuted for contempt under Penal Code §166, which by its express terms is a misdemeanor, have a state constitutional and statutory right to a jury trial. (*Mills v. Municipal Court* (1973) 10 Cal.3d 288, 298, fn. 8 ["our state Constitution guarantees every defendant faced with misdemeanor or felony charges a right to trial by jury"]; *Tracy v. Municipal Court* (1978) 22 Cal.3d 760, and cases cited ["A person charged with a misdemeanor is entitled to....a trial by jury (Penal Code § 689)."]; *Safer v. Superior Court* (1975) 15 Cal.3d 230, 241 ["the defendant facing a Penal Code (section 166) prosecution has the right to trial by jury"].)

49. In *Spielbauer v. County of Santa Clara*, 45 Cal.4th 704, 719-720 (2009), the California Supreme Court cited to the holding in *Spevack* [the right of lawyers to assert the 5th Amendment in disciplinary proceedings] for the very reason Kay asserted it - to protect his clients from the *coercion* by the State Bar to get him to waive the attorney-client and work product privileges. (See also, *In re Warburgh*, ___ Fed.3d ___, pg. 16, FN3, 2011 WL 1004911 (C.A.2) [attorney's refusal to answer questions or produce evidence in a disciplinary proceeding protected by the 5th Amendment privilege against self-incrimination, citing to *Spevack v. Klein*, *supra*, 385 U.S. 511, 514, 516, 520].)

50. In a "MCLE Article and Self-Assessment Test" entitled "Before the Bar," appearing in Los Angeles Lawyer, April 2010, the State Bar declared:

> "The respondent does not have the right to refuse to testify." [FN23 *Goldman v. State Bar*, 20 Cal. 3d 130, 140 (1977)]:
>
> > "Next, petitioners argue that their rights under the federal and state Constitutions (U.S.Const., Amends. V and XIV; Cal.Const., art. I, former s 13, now s 15) were violated because they were compelled to testify against themselves and to produce records in this proceeding. This court rejected similar contentions in Black v. State Bar (1972) 7 Cal.3d 676, 103 Cal.Rptr. 288, 499 P.2d 968 on the ground that an attorney in a disciplinary proceeding does not have the same immunities as a defendant in a criminal proceeding. The reasoning in Black is equally applicable here."

(See RJN, Ex. 3, Article from the LA Lawyer, and MCLE credit examination from April 2010.)

However, *Goldman* and *Black*, decided in 1977 and 1972, are no longer controlling based on *Spielbauer*, and the subsequent statutes adopted expressly by the Legislature, while

having been unconstitutional based on *Spevack*. Regardless, the State Bar refuses to recognize this and afford this seminal constitutional right in violation of the United States and California Constitutions, California Legislature, California Supreme Court and United States Supreme Court, while adopting a policy that it intends to violate the rights of all respondents in its proceedings. In addition to violating the law, the State Bar officials from the Office of Chief Trial Counsel, Board of Governors and counsel for the State Bar, are violating RPC 5-200 by citing overturned law.

Question 15 of the MCLE Test No. 191 in the article (RJN, Ex. 3) states:

> Attorneys in State Bar proceedings can invoke their right to remain silent.
> True. [answer deemed correct by the State Bar]
> False.

See also SBRP 5.104(B) Rights of Parties:

> (6) if the member does not testify in his or her own behalf, he or she may be called and examined as if under cross-examination.

Thus, the State Bar is denying members and respondents, including Kay, their constitutional - due process rights and privileges, including their 5th Amendment right not to be compelled as a witness against themselves and 6th Amendment right to a jury trial in violation of law.

51. The State Bar Act - §6001 states:

> No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies, or classes thereof, including, but not by way of limitation, the provisions contained in Division 3 (commencing with **Section 11000), Division 4** (commencing with Section 16100), and Part 1 (commencing with Section 18000) and Part 2 (commencing with Section 18500) of Division 5, of Title 2 of the **Government Code, shall be applicable to the State Bar, unless the Legislature expressly so declares**. (Emphasis.)

However, without the Legislature having done so, in violation of section 6001, the State Bar proposed revisions to the Rules of Procedure (see RJN, Ex. 4, Colin Wong memo, Proposed Revisions to the Rules of Procedure, pgs. 2-3):

> 3. Modify the Evidence Standard
> With some exceptions, the Evidence Code is applicable in discipline proceedings. In order to avoid excessive evidentiary disputes, we are proposing to streamline the process by adopting the standard in the **Administrative Procedure Act**, which allows for the admissibility of only relevant and reliable evidence.

The State Bar, in violation of section 6001, adopted the Administrative Procedures Act - Government Code§§11400-11529 in SBRP 5.104(C):

> Relevant and Reliable Evidence. The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

SBRP 5.104(C) replaces former SBRP 214[22] requiring the State Bar to adhere to the Evidence Code in disciplinary proceedings to ensure constitutional - due process.

52. Pursuant to the Wong memo (see RJN, Ex. 4), the Board of Governors adopted new discovery rules SBRP 5.65-5.71, which no longer adhere to the Civil Discovery Act in violation of the holding in *Brotsky v. State Bar of Cal.*, 57 Cal.2d 287, 298-305 (1962). Moreover, the State Bar has granted itself the power to use "Discovery Sanctions" in State Bar proceedings in SBRP 5.69(C):

> **Discovery Sanctions.** The Civil Discovery Act's provisions about misuse of the discovery process and permissible sanctions (except provisions for monetary sanctions and the arrest of a party) apply in State Bar Court proceedings. The Court may not order dismissal as a discovery sanction without considering the effect on the protection of the public.

The Discovery Act expressly states that "Discovery Sanctions" can only be assessed under the Act. pursuant to Code Civ. Proc. §2023.010. See also Code Civ. Proc. §1991.2 ["The provisions of Section 1991 do not apply to any act or omission occurring in a deposition taken pursuant to Title 4 (commencing with Section 2016.010). The provisions of Chapter 7 (commencing with Section 2023.010) of Title 4 are exclusively applicable."] Regardless, the the State Bar is applying terminating "Discovery Sanctions" to the

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[22] RULE 214. RULES OF EVIDENCE
Except as otherwise provided in rules governing specific types of proceedings or hearings, and subject to the provisions of the State Bar Act and relevant decisions of the Supreme Court and the State Bar Court. the Evidence Code, as applied in civil cases, shall be applicable in State Bar Court proceedings. The procedure for producing evidence in civil cases in courts of record shall apply except as otherwise provided by these rules. However, no error in admitting or excluding evidence shall invalidate a finding of fact. decision or determination, unless the error resulted in a denial of a fair hearing.

disobedience of subpoenas, which violates the constitutional - due process rights of State Bar members and respondents, including Kay. Code of Civil Procedure §1991 clearly states that the only course the State Bar Court can take is to refer the "alleged contempt" out to the Superior Court. (See §§6049, 6050 and 6051.) .

53. The refusal to honor a subpoena is an alleged contempt, which must be adjudicated by an article VI court. (See *Jacobs v. Superior Court, supra*, 20 Cal.3d at 196-198.) Contempt is any act, in or out of court, "which tends to impede, embarrass or obstruct the court in the discharge of its duties." (*In re Shortridge* (1893) 99 Cal. 526, 532.) Particular acts constituting contempt are enumerated by statute. (Code of Civil Procedure §1209(a)(9) and Code of Civil Procedure §1991 – witness' refusal to obey subpoena or to answer questions.) A person who refuses to perform an act he or she has been ordered to perform may be imprisoned to *coerce* them until he or she performs it. (Code Civil Procedure §1219; *In re Farr* (1974) 36 Cal.App.3d 577, 583 [newspaper reporter jailed for refusing to divulge sources].) The order of commitment must specify the reason for the commitment; and if it is for failure to answer a question, **must state the question.** (Code of Civil Procedure §1994.) If the contemnor still refuses to comply, the court must hold a hearing to determine whether further imprisonment would serve its *coercive purpose* or instead be "penal" in nature. (*In re Farr, supra*, 36 Cal.App.3d at 584.) Thus, no court, let alone the State Bar Court, has the power to enter terminating sanctions for the refusal of a party witness to testify at deposition or trial. (See *In re Baroldi* (1987) 189 Cal.App.3d 101), in which the court found a contemner was denied due process at a contempt hearing because the procedures outlined in Code of Civil Procedure §1211 had not been followed. As a result of this infirmity, the court nullified the judgment and stated it could not remand a contempt cause "in which the order has been declared void and annulled to the superior court...." (*Id.* at p. 111.)

54. The issue in all direct contempt matters is "jurisdiction," which, pursuant to §§6049, 6050 and 6051; is to be determined by an article VI Superior Court. A valid contempt order consists of three elements: a recitation of the facts constituting the

contempt, the fact the person was adjudged to be in contempt, and a statement of the punishment. (Code of Civil Procedure §1211; *In re Buckley* (1973) 10 Cal.3d 237, 247.) Until such a determination has been made by an article VI Superior Court, State Bar members and respondents, including Kay, are entitled to **preserve** their rights and privileges, pursuant to §§6068(i), 6079.4 and 6085(e). Until the State Bar Court's orders have been tested and determined valid by a proper article VI Superior Court to be (legal) enforceable, the State Bar has no right to request and the State Bar Court has no jurisdictional authority to impose any punishment or discipline, including entry of terminating sanctions under the Discovery Act to strike answers and enter defaults , as it has done and will continue to do to members and respondents, including Kay.

55. In *Summerville v. Kelliher* (1904) 144 Cal.155, 160, the Court held:

> "The motion to strike out the answer to the complaint was based on the refusal of the defendant Kelliher to attend and give his deposition in the cause. The court did not act on the motion, and the point must be considered in the same light as if the motion had been regularly denied. The motion was not well taken. **The law authorizing the court to strike out the answer of a party for a refusal to attend when required and give his deposition (Code Civ. Proc., sec. 1991) is unconstitutional, as tending unduly to restrict the right to defend an action**. (*Foley v. Foley*, 120 Cal. 40[23]; *Hovey v. Elliott*, 167 U. S. 409.)" (Emphasis.)

As stated in *O'Neill v. Day* (1907) 152 Cal. 357, 362-363:

> ". . . the situation of a plaintiff and of a defendant are vitally different, so far as concerns the operation of section 1991, Code Civ. Proc. Plaintiff is always a voluntary actor before a court. A defendant is always under compulsion. The plaintiff is always seeking affirmative relief at the hands of the court. **The defendant is merely contesting plaintiff's right to such relief. While, therefore, it is improper, under such circumstances, to deprive a defendant of the right to make his showing as to the matter urged against him, and, by striking out his answer, to compel him to submit to a judgment without a hearing upon the merits, the case of a plaintiff is far different**. He is seeking the court's aid, and it is manifestly just and proper that, in invoking that aid, he should submit himself to all legitimate orders and processes. And certainly no plaintiff can, with right or reason, ask the aid and assistance of a court in hearing his demands, while he stands in an attitude of contempt to its legal orders and processes. Section 1991 of the Code of Civil Procedure declares as to such a plaintiff that his contumeliousness may be punished as a contempt and his complaint may be stricken out. By analysis, this section manifestly requires that before a plaintiff is punished he must be adjudged guilty of contempt. To such a judgment for a contempt, committed out of the immediate presence of the court, a citation and

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[23] *Foley* was overruled by the Supreme Court on another ground in *Carney v. Simmonds* (1957) 49 Cal.2d 84, 315 P.2d 305.

> showing is necessary. The court, having found the contempt, must punish the plaintiff for it, and in a proper case that punishment may take the form of a rule striking out his complaint. A certain discretion is vested in the court in this regard, but it is not a discretion which would permit the court in one case and under a given state of facts to strike out the complaint, and in another case and under an identical state of facts to refuse to strike it out. **If the plaintiff upon being adjudged guilty of contempt should express his willingness to obey further orders of the court, and to answer the questions propounded to him, clearly whatever other punishment might be awarded against him for his contempt that of striking out his complaint would be altogether too severe.** But, upon the other hand, if the plaintiff remain obdurate and contumacious, it would not only be the right, but as well the duty, of the court, to refuse to proceed with his litigation further, and to evidence its refusal by ordering the pleading stricken from the files. Such, we take it, is the plain meaning of section 1991." (Emphasis.)

Thus, the Supreme Court, in (*Summerville*-**1904**), held that it was unconstitutional to strike the answer of a defendant (respondent) **not** appearing, pursuant to a deposition subpoena, and/or refusing to testify at deposition and then in (*O'Neill*-**1907**), held a contempt proceeding must be held before striking the complaint of a plaintiff, appearing, pursuant to a deposition subpoena, and refusing to testify. The Legislature then amended Code of Civil Procedure §1991 in conformance with these holdings to declare the same rights for defendants and plaintiffs, which states in relevant part:

> "The witness **shall not be punished for any refusal to be sworn or to answer a question** or to subscribe an affidavit or deposition, unless, after a hearing upon notice, the court orders the witness to be sworn, or to so answer or subscribe and then only for disobedience to the order." (Emphasis.)

See also *Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 713:

> Although lesser civil sanctions may be imposed upon a defendant who asserts the Fifth Amendment privilege, **the overwhelming majority of cases hold that the striking of the defendant's answer and the resultant default procedure are too harsh a sanction for exercising such an important constitutional right.** (Citations omitted)" (Emphasis added.)

56. These claims for declaratory and injunctive relief and damages regarding the denial of constitutional - due process rights by the State Bar of members and respondents and Kay in the impending proceeding are at-issue and ripe under *Canatella v. State Bar of California, supra*, 304 Fed.3d at 855:

> "To establish 'a dispute susceptible to resolution by a federal court,' plaintiffs must allege that they have been 'threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible.' " Culinary Workers Union, Local 226 v. Del Papa, 200 F.3d 614, 617 (9th Cir.1999) (quoting Babbitt, 442 U.S. at 298-99, 99 S.Ct. 2301). While Canatella is not currently involved in

disciplinary proceedings, it cannot be said that Canatella's fear of facing future disciplinary proceedings is "imaginative and wholly speculative." Babbitt 442 U.S. at 289, 99 S.Ct. 2301. Additionally, Canatella alleges harm not only in the form of potential disciplinary measures under the challenged statutes, but in the ongoing harm to the expressive rights of California attorneys to the extent they refrain from what he believes to be constitutionally protected activity. We also believe that Canatella's claims do not arise in a factual vacuum and are sufficiently framed to render them fit for judicial decision.

We also conclude Canatella and others in his position will be harmed absent a consideration of his claims. We do not believe the challenge should be considered ripe only upon the initiation of disciplinary proceedings. If, instead, we were to conclude that Canatella's claims are ripe only when based only on concluded disciplinary proceedings, Canatella would arguably be barred on a theory of mootness, or on the basis of Rooker-Feldman. "Ripeness is particularly a question of timing," Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil & Gas Conservation, 792 F.2d 782, 788 (9th Cir.1986), and there is no better time to entertain Canatella's claims than now."

V. CAUSES OF ACTION

CLASS CLAIMS

FIRST CAUSE OF ACTION - for Declaratory Relief

against all State Bar defendants

57. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

58. Kay, as an individual and as a class representative for other persons similarly situated, brings this claim for declaratory relief. There are predominant questions of law or fact between all similarly situated plaintiffs. Kay, as class representative, has claims typical of the class and will adequately represent the entire class equally as no money damages are sought in this action for the class claim for declaratory relief. As a result, the requirements of a class action are met for numerosity, commonality, typicality, and adequacy of representation of the entire class by Kay as the class representative. There is an actual controversy between State Bar members and respondents, including Kay, and the State Bar defendants and each of them. The State Bar members and respondents, including Kay, seek a declaration of their rights to be free of the unconstitutional, unlawful, illegal, void and *ultra vires* acts by defendants, and each of them, including a declaration of their rights to be afforded under Code of Civil Procedure §382; *Capitol*

People First v. Department of Developmental Services, supra, 155 Cal.App.4th at 690; *Canatella v. State Bar of California, supra*, 304 Fed.3d 843; Code of Civil Procedure §1060, 42 USC § 1983, Civil Code §52.1(b), State Bar Act, State Bar Rules of Procedure, California Constitution and United States Constitution.

59. The State Bar members and respondents, including Kay, request the Court to consider, determine and declare, not limited to but including, the following to be in violation of the constitutions of the United States and California and the State Bar Act:

- charging and finding non-existent common law crime of "obstruction of justice";
- charging and finding criminal misconduct without specifying any Penal Code or analogous statute or ordinance violation;
- use of threats, intimidation and coercion to compel respondents to waive constitutional rights and privileges;
- use of threats, intimidation and coercion to compel respondents to admit to fabricated charges and findings;
- exercise of "Discovery Sanctions" to compel compliance with subpoenas;
- exercise of "Discovery Sanctions" to strike answers;
- exercise of "Discovery Sanctions" to enter defaults;
- exercise of contempt powers without jurisdiction[24];
- denial of 5th Amendment right not to be compelled as a witness;
- denial of 6th Amendment right to a jury trial in criminal matters;
- SBRP Rule 5.104 Evidence;
- SBRP 5.104(C) Relevant and Reliable Evidence;
- SBRP 5.104(B) Rights of Parties:

  (6) if the member does not testify in his or her own behalf, he or she may be called and examined as if under cross-examination.

The State Bar is seeking to commence another State Bar proceeding, similar to the prior

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[24] State Bar Court lacks contempt or sanction power (*Matter of Lapin* (Rev.Dept. 1993) 2 Cal. State Bar Ct.Rptr. 279, 295).

proceeding, in which it will engage in a pattern, practice, policy, tradition and/or custom of depriving members and respondents, including Kay, their constitutional - due process rights and privileges in violation of law and without undue and unreasonable government interference to be afforded under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and in violation of 42 USC §1983.

60. At all relevant times herein, there existed within the State Bar of California as promulgated by the Board of Governors of the State Bar, a pattern, policy, practice, tradition, custom, and usage of conduct, without jurisdiction of depriving members and respondents, including Kay, of their constitutional - due process rights and privileges, in violation of law and without undue and unreasonable government interference to be afforded under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

61. The acts set forth herein constitute a policy, practice, or custom of ordering, ignoring, encouraging, causing, tolerating, sanctioning, and/or acquiescing in the violation by State Bar officials of the constitutional - due process rights and privileges of members and respondents, including Kay, in violation of law and without undue and unreasonable government interference to be afforded under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

62. The acts and failures to act as alleged herein also result from a custom, practice or policy of inadequate training and supervision in a deliberate indifference to the constitutional - due process rights and privileges of respondents, including Kay, in violation of law and without undue and unreasonable government interference to be afforded under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

63. The Court is requested to consider, determine and declare whether in perpetrating the above described acts and omissions, defendants are threatening, intimidating and coercing members and respondents, including Kay, to waive their constitutional - due process rights by bringing disciplinary actions, including their 5th and 6th Amendment

rights, in violation of 42 USC §1983 and Civil Code §52.1(b).

SECOND CAUSE OF ACTION - for Injunctive Relief

against State Bar defendants

64. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

65. Kay, as an individual and as a class representative for other persons similarly situated brings this claim for injunctive relief. There are predominant questions of law or fact between all similarly situated plaintiffs. Kay, as class representative, has claims typical of the class and will adequately represent the entire class equally as no money damages are sought in this action for the class claim for injunctive relief. As a result, the requirements of a class action are met for numerosity, commonality, typicality, and adequacy of representation of the entire class by Kay as the class representative. There is an actual controversy between State Bar members and respondents, including Kay, and the State Bar defendants and each of them. The State Bar members and respondents, including Kay, request the Court to enjoin the State Bar from the following violations of the constitutions of the United States and California and the State Bar Act:

- charging and finding non-existent common law crime "obstruction of justice";
- charging and finding criminal misconduct without specifying any Penal Code or analogous statute or ordinance violation;
- use of threats, intimidation and coercion to compel respondents to waive constitutional rights and privileges;
- use of threats, intimidation and coercion to compel respondents to admit to fabricated charges and findings;
- exercise of "Discovery Sanctions" to compel compliance with subpoenas;
- exercise of "Discovery Sanctions" to strike answers;
- exercise of "Discovery Sanctions" to enter defaults;

- exercise of contempt powers without jurisdiction[25];
- denial of 5th Amendment right not to be compelled as a witness:
- denial of 6th Amendment right to a jury trial in criminal matters;
- exercise of SBRP Rule 5.104 Evidence;
- exercise of SBRP 5.104(C) Relevant and Reliable Evidence;
- exercise of SBRP 5.104(B) Rights of Parties:

(6) if the member does not testify in his or her own behalf, he or she may be called and examined as if under cross-examination.

66. For the foregoing reasons, Kay requests this Court to enjoin the State Bar from filing and/or pursuing the impending disciplinary action, which will be brought with the intent to violate Kay's constitutional - due process rights and/or demand that he waive them.

67. As a result of the conduct of defendants and each of them, State Bar members and respondents, including Kay, have and will continue to be injured, and in the absence of injunctive relief, will be irreparably harmed. The State Bar members and respondents, including Kay, have no adequate remedy at law. Therefore, they seek injunctive relief under the laws of equity to remedy their injuries and prevent any future injuries, including rights afforded under Code of Civil Procedure §382; *Capitol People First v. Department of Developmental Services, supra*, 155 Cal.App.4th at 690; *Canatella v. State Bar of California, supra,* 304 Fed.3d 843. Code of Civil Procedure §§1065, 1068 and 1102 and Civil Code 52.1(b).

THIRD CAUSE OF ACTION - STATE BAR ACT - §6001

against all State Bar defendants

68. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

69. Kay, as an individual and as a class representative for other persons similarly

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[25] State Bar Court lacks contempt or sanction power (*Matter of Lapin* (Rev.Dept. 1993) 2 Cal. State Bar Ct.Rptr. 279, 295).

situated brings this claim for declaratory relief There are predominant questions of law or fact between all similarly situated plaintiffs. Kay, as class representative, has claims typical of the class and will adequately represent the entire class equally as no money damages are sought in this action for the class claim for declaratory and injunctive relief. As a result, the requirements of a class action are met for numerosity, commonality, typicality, and adequacy of representation of the entire class by Kay as the class representative. There is an actual controversy between State Bar members and respondents, including Kay, and the State Bar defendants and each of them. In perpetrating the above-described acts and failures to act, the State Bar defendants and each of them engaged and will continue to engage in a pattern, practice, policy, tradition and/or custom of depriving members and respondents, including Kay, of their rights under the State Bar Act. The Board of Governors enacted SBRP 5.104(C) Relevant and Reliable Evidence, which is contrary to law and in violation of the constitutions of the United States and California and the State Bar Act - §6001.

70. State Bar Act - §6001 states:

> No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies, or classes thereof, including, but not by way of limitation, the provisions contained in Division 3 (commencing with **Section 11000), Division 4** (commencing with Section 16100), and Part 1 (commencing with Section 18000) and Part 2 (commencing with Section 18500) of Division 5, of Title 2 of the **Government Code, shall be applicable to the State Bar, unless the Legislature expressly so declares.** (Emphasis.)

However, in violation of section 6001, the State Bar proposed revisions to the Rules of Procedure (see RJN, Ex. 4, Colin Wong memo, Proposed Revisions to the Rules of Procedure, pgs. 2-3):

> 3. Modify the Evidence Standard
> With some exceptions, the Evidence Code is applicable in discipline proceedings. In order to avoid excessive evidentiary disputes, we are proposing to streamline the process by adopting the standard in the **Administrative Procedure Act.** which allows for the admissibility of only relevant and reliable evidence.

In violation of section 6001, the State Bar adopted the Administrative Procedures Act - Government Code§§1140-11529 in new SBRP 5.104(C):

> Relevant and Reliable Evidence. The hearing need not be conducted according to

> technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

SBRP 5.104(C) replaces former SBRP 214[26] requiring the State Bar to adhere to the Evidence Code in disciplinary proceedings to ensure constitutional - due process.

71. In perpetrating the above-described acts and failures to act, the State Bar defendants and each of them have engaged, continue to engage and/or will engage in a series of violations, which caused and/or will cause direct and irreparable harm to members and respondents, including Kay. This harm includes the State Bar - Board of Governors having established illegal (*ultra vires*) new standards [SBRP] through the adoption of the Administrative Procedures Act - Government Code §§11400-11529 to adjudicate culpability in violation of the State Bar Act - §6001. The Board of Governors is not the Legislature and has no power to grant or deny statutory privileges enacted by the Legislature. Thus, the State Bar is not a legislative body and cannot be governed by legislative procedures. The Court is requested to declare the State Bar in violation §6001 enjoin the State Bar's violation of §6001, not limited to but including its adoption of the Administrative Procedures Act - Government Code §§11400-11529 to adjudicate culpability in violation of the State Bar Act - §6001.

CLASS AND INDIVIDUAL CLAIMS

FOURTH CAUSE OF ACTION - CIVIL CODE §52.1(b)

against all State Bar defendants

72. The allegations set forth in the foregoing paragraphs of this Complaint are

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[26] RULE 214. RULES OF EVIDENCE
Except as otherwise provided in rules governing specific types of proceedings or hearings, and subject to the provisions of the State Bar Act and relevant decisions of the Supreme Court and the State Bar Court, the Evidence Code, as applied in civil cases, shall be applicable in State Bar Court proceedings. The procedure for producing evidence in civil cases in courts of record shall apply except as otherwise provided by these rules. However, no error in admitting or excluding evidence shall invalidate a finding of fact, decision or determination, unless the error resulted in a denial of a fair hearing.

realleged and incorporated by reference as if fully set forth herein.

73. Kay, as an individual and as a class representative for other persons similarly situated brings this claim for declaratory relief. There are predominant questions of law or fact between all similarly situated plaintiffs. Kay, as class representative, has claims typical of the class and will adequately represent the entire class equally as no money damages are sought in this action for the class claim for declaratory and injunctive relief. As a result, the requirements of a class action are met for numerosity, commonality, typicality, and adequacy of representation of the entire class by Kay as the class representative. There is an actual controversy between State Bar members and respondents, including Kay, and the State Bar defendants and each of them. In perpetrating the above-described acts and failures to act, the State Bar defendants and each of them engaged and will continue to engage in a pattern, practice, policy, tradition and/or custom of depriving members and respondents, including Kay, of their rights under the State Bar Act. In perpetrating the above-described acts and failures to act, the State Bar defendants and each of them, have engaged, continue to engage and/or will engage in a series of violations and wrongful acts to threaten, intimidate and coerce members and respondents, including Kay, to forgo and give up the "exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state," in violation of Civil Code §52.1(b), which caused and/or will cause direct and irreparable harm to members and respondents, including, Kay.

74. The State Bar members and respondents, including Kay, seek declaratory relief under Civil Code §52.1(b) regarding their constitutional - due process rights and privileges to be afforded in State Bar proceedings.

75. The State Bar members and respondents, including Kay, request the Court to enjoin, under Civil Code §52.1(b), the State Bar from the violations of the constitutions of the United States and California and the State Bar Act.

76. Kay seeks injunctive relief under Civil Code §52.1(b) to prevent the State Bar

from commencing any future proceeding against him to prevent the further denial of his constitutional - due rights and privileges.

77. As a direct and foreseeable consequence of these violations, Kay has suffered economic loss, physical harm, emotional trauma, and irreparable harm to his reputation and other general and special damages.

FIFTH CAUSE OF ACTION - 42 USC § 1983 (PROCEDURAL DUE PROCESS)

against individually named State Bar defendants

78. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

79. In perpetrating the above described acts and omissions, defendant State Bar was, at all relevant times herein, a governmental agency of the State of California, and individually named defendants Armendariz, Towery, Steedman and Blumenthal[27], were, at all relevant times herein, its agents/employees. Thus, defendants' above-described acts and omissions constitute cognizable state action under color of state law and are "persons," as that term is used in 42 USC § 1983.[28]

80. In perpetrating the above-described acts and failures to act, the individually named defendants, and each of them, without jurisdiction, engaged in a pattern, practice, policy, tradition and/or custom of depriving and/or seeking to deprive members and respondents, including Kay of their constitutional - due process rights and privilege, in violation of law and without undue and unreasonable government interference to be afforded under the

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[27] Judge Armendariz sued in her individual capacity is not subject to immunity for her actions without jurisdiction. (See *Stump v. Sparkman*, 435 U.S. 349, 355-357.) The prosecutors sued in their individual capacity are subject to "qualified" immunity, which does not apply in this case for actions taken during the investigation. (See *Buckley v. Fitzimmons*, 509 U.S. 259, 278 (1993).)

[28] The defendants are sued in their official capacity regarding the claims for declaratory and injunctive relief and individual capacity for damages under 42 USC §1983. The Eleventh Amendment bars suit against a state when the state is the named party, but also when the state is the party in fact to an action against a named state official. (*Scheuer v Rhodes*, 416 US 232, 23-238.) However, when an official acts under state law in violation of federal rights, the official acts as an individual and is personally liable for the consequences of his or her conduct. (*Id.*)

Fifth and Fourteenth Amendments to the United States Constitution. Because rights under the federal Constitution are federally protected, defendants also violated and/or are seeking to violate Kay's rights under 42 USC § 1983.

81. At all relevant times herein, there existed within the State Bar of California as promulgated by the Board of Governors, a pattern, policy, practice, tradition, custom, and usage of conduct of depriving members and respondents, including Kay, of their constitutional - due process rights and privileges in violation of law and without undue and unreasonable government interference to be afforded under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, which resulted in deliberate indifference to Kay's procedural due process rights.

82. The acts set forth herein constitute a policy, practice, or custom of ordering, ignoring, encouraging, causing, tolerating, sanctioning, and/or acquiescing in the violation by State Bar officials of the constitutional - due process rights and privileges of members and respondents, including Kay.

83. The acts and failures to act as alleged herein also result from a custom, practice or policy of inadequate training and supervision in a deliberate indifference to their right to adequate notice and a fair trial, and the injuries suffered by members and respondents, including Kay, as alleged herein were caused by such inadequate training and supervision. Defendants, and each of them, exhibited and/or are seeking to engage in deliberate indifference to the violation of members and respondents, including Kay, of their constitutional - due process rights and privileges. The acts and failures to act as alleged herein were done and/or will be done pursuant to policies and practices instituted by these defendants pursuant to their authority as policymakers for the State Bar.

84. Unless and until defendants' unlawful policies and practices as alleged herein are enjoined and restrained by order of this Court, defendants will continue to cause great and irreparable injury to State Bar members and respondents, including Kay. As a direct and foreseeable consequence of these deprivations, Kay has suffered and/or will suffer economic loss, physical harm, emotional trauma, and irreparable harm to his reputation.

SIXTH CAUSE OF ACTION - 42 USC § 1983 (SUBSTANTIVE DUE PROCESS)

against individually named State Bar defendants

85. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

86. In perpetrating the above-described acts and failures to act, the individually named defendants, and each of them, during the investigation of State Bar matters, have engaged and will continue to engage in a pattern, practice, policy, tradition and/or custom of depriving members and respondents, including Kay, of their constitutional - due process rights and privileges in violation of law and due process and without undue and unreasonable government interference to be afforded under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Because rights under the federal Constitution are federally protected, defendants also violated Kay's rights under 42 USC § 1983.

87. At all relevant times herein, there existed within the State Bar, a pattern, policy, practice, tradition, custom, and usage of conduct of depriving members and respondents, including Kay, their constitutional - due process rights and privileges, in violation of law and without undue and unreasonable government interference under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

88. The acts set forth herein constitute a policy, practice, or custom of ordering, ignoring, encouraging, causing, tolerating, sanctioning, and/or acquiescing in the violation by State Bar personnel of the constitutional - due process rights and privileges of members and respondents, including Kay, in violation of law and without undue and unreasonable government interference under the Fifth, Sixth and Fourteenth Amendments.

89. The acts and failures to act as alleged herein also result from a custom, practice or policy of inadequate training and supervision in a deliberate indifference to the rights of attorneys licensed to practice law in the State of California to practice law without undue

and unreasonable government interference, and the injuries suffered by members and respondents, including Kay, as alleged herein were caused by such inadequate training. In perpetrating the above-described acts and failures to act, the defendants, and each of them, also engaged in a pattern, practice, policy, tradition and/or custom of depriving members and respondents, including Kay, their constitutional - due process rights and privileges, in violation of law and without undue and unreasonable government interference under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Because rights under the federal Constitution are federally protected, defendants also violated members and respondents, including Kay, their rights under 42 USC § 1983.

91. Unless and until defendants' unlawful policies and practices as alleged herein are enjoined and restrained by order of this Court, defendants will continue to cause great and irreparable injury to State Bar members and respondents, including Kay. As a direct and foreseeable consequence of these deprivations, Kay has suffered and/or will suffer economic loss, physical harm, emotional trauma, and irreparable harm to his reputation.

SEVENTH CAUSE OF ACTION - 42 USC § 1983 (EQUAL PROTECTION)

against individually named State Bar defendants

92. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

93. In perpetrating the above-described acts and failures to act, the individually named defendants, and each of them, during the investigation of State Bar matters, have engaged and will continue to engage in a pattern, practice, policy, tradition and/or custom of depriving members and respondents, including Kay, of their constitutional - due process rights and privileges in violation of law and due process and without undue and unreasonable government interference to be afforded under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Because rights under the federal Constitution are federally protected, defendants also violated members and respondents, including Kay, their under 42 USC § 1983.

94. At all relevant times herein, there existed within the State Bar, a pattern, policy, practice, tradition, custom, and usage of conduct of depriving members and respondents, including Kay, of their constitutional - due process rights and privileges, in violation of law and without undue and unreasonable government interference under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

95. The acts set forth herein constitute a policy, practice, or custom of ordering, ignoring, encouraging, causing, tolerating, sanctioning, and/or acquiescing in the violation by State Bar personnel of the constitutional - due process rights and privileges of members and respondents, including Kay, in violation of law and without undue and unreasonable government interference under the Fifth, Sixth and Fourteenth Amendments.

96. The acts and failures to act as alleged herein also result from a custom, practice or policy of inadequate training and supervision in a deliberate indifference to the rights of attorneys licensed to practice law in the State of California to practice law without undue and unreasonable government interference, and the injuries suffered by members and respondents, including Kay, as alleged herein were caused by such inadequate training. In perpetrating the above-described acts and failures to act, the defendants, and each of them, also engaged in a pattern, practice, policy, tradition and/or custom of depriving members and respondents, including Kay, of their constitutional - due process rights and privileges, in violation of law and without undue and unreasonable government interference under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Because rights under the federal Constitution are federally protected, defendants also violated members and respondents, including Kay, their rights under 42 USC § 1983.

97. Unless and until defendants' unlawful policies and practices as alleged herein are enjoined and restrained by order of this Court, defendants will continue to cause great and irreparable injury to members and respondents, including Kay. As a direct and foreseeable consequence of these deprivations, Kay has suffered and/or will suffer

economic loss, physical harm, emotional trauma, and irreparable harm to their reputation.

EIGHTH CAUSE OF THE ACTION - 42 U.S.C. §1983 (FREE SPEECH)

against individually named State Bar defendants

98. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

99. In perpetrating the above-described acts and failures to act, the defendants, and each of them, during the investigation of State Bar matters, have engaged and will continue to engage in a pattern, practice, policy, tradition and/or custom of restraining and enacting impermissible prior restraints on members and respondents, including Kay, free speech on matters of public concern in violation of the First Amendment to the United States Constitution and the California Constitution, Art. I, Sec. 2(a). Because rights under the federal and state Constitutions are federally protected, defendants also violated members and respondents, including Kay, their rights under 42 USC § 1983.

100. At all relevant times herein, there existed within the State Bar, a pattern, policy, practice, tradition, custom, and usage of conduct of restraining the free speech of and enacting impermissible prior restraints on attorneys practicing law in California on matters of public concern, which resulted in a deliberate indifference to members and respondents, including Kay, their rights to free speech.

101. The acts set forth herein constitute a policy, practice, or custom of ordering, ignoring, encouraging, causing, tolerating, sanctioning, and/or acquiescing in the violation by State Bar personnel of the constitutional rights to free speech of attorneys practicing law in California on matters of public concern.

102. The acts and failures to act as alleged herein also result from a custom, practice or policy of inadequate training and supervision in a deliberate indifference to the rights of attorneys practicing law in California who speak out on matters of public concern, and the injuries suffered by members and respondents, including Kay, were caused by such inadequate training. Defendants, and each of them, exhibited deliberate indifference to the violation of members and respondents, including Kay, their protected speech rights by

failing to properly investigate or provide protection from unlawful conduct. The acts and failures to act as alleged herein were done pursuant to policies and practices instituted by these defendants pursuant to their authority as policymakers for the State Bar.

103. Unless and until defendants' unlawful policies and practices as alleged herein are enjoined and restrained by order of this Court, defendants will continue to cause great and irreparable injury to members and respondents, including Kay. As a direct and foreseeable consequence of these deprivations, Kay has suffered and/or will suffer economic loss, physical harm, emotional trauma, and irreparable harm to their reputation.

INDIVIDUAL CLAIMS

NINTH CAUSE OF ACTION - PENAL CODE §182

against Wasserman and Ralphs Grocery Company

104. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

105. Defendants Wasserman and Ralphs Grocery Company, and each of them, acting in concert, conspired[29] to falsely report the record in the underlying *Gober* trial and appeals to *fabricate* remands and new trial orders based on attorney misconduct. This conspiracy to falsely report and complain involve criminal acts. In perpetrating the above-described acts and failures to act, Wasserman and Ralphs Grocery Company violated Penal Code §§182(a) ["If two or more persons conspire:"]; (1)["To commit any crime"]; (3)["Falsely to move or maintain any suit, action, or proceeding"]; (4)["To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses . . ."] and (5)["To commit any act . . . to pervert or obstruct justice, or the due administration of the laws."][30].

106. The defendants and each of their actions caused direct and irreparable harm to Kay's relationships with his clients, existing, pending and future cases and his law

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[29] The requirements to file a petition under Code Civ. Proc. §1714.10 are not a bar to the claim. (See *Panoutsopoulos v. Chambliss*, 157 Cal.App.4th 297, 305 (2007).)

[30] It is a misdemeanor and/or felony to violate these sections of the Penal Code.

practice. As a further consequence of these deprivations, Kay was required to retain counsel to represent him in the State Bar proceeding pursued against him and incurred expenses associated with defending against the unlawful State Bar proceeding initiated and sustained by the defendants and each of them.

TENTH CAUSE OF ACTION - STATE BAR ACT - §6086.1(b)

against State Bar defendants, Wasserman and Ralphs Grocery Company

107. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

108. The State Bar defendants, Wasserman and Ralphs Grocery Company and each of them, acting in concert, violated the State Bar Act - §6086.1(b), in which the State Bar provided confidential and privileged information during the investigation to the losing defendants, their counsel, the courts and judges in the *Gober* and *Marcisz* cases.

109. In perpetrating the above-described acts and failures to act, defendants and each of them engaged in a series of violations and wrongful acts, which caused direct and irreparable harm to Kay's relationships with his clients, existing, pending and future cases and his law practice; all of which resulted in interference with Kay's prospective economic advantage. As a direct and foreseeable consequence of these violations, Kay has suffered economic loss, physical harm, emotional trauma, damage to his law practice, and irreparable harm to his reputation.

PUNITIVE DAMAGES

110. Defendants' actions alleged herein in the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action were and/or will be carried out with a conscious disregard of the plaintiff Kay's rights and with the intent to vex, injure or annoy; such as to constitute oppression, fraud or malice under Civil Code §3294; entitling Kay to exemplary or punitive damages.

WHEREFORE, Kay and all similarly situated plaintiffs pray for such relief as follows:

(1) Declaratory and injunctive relief as stated herein;

(2) For general and special damages according to proof;

(3) For punitive or exemplary damages;

(4) For reasonable attorneys' fees and costs of suit herein; and

(5) For each other such and further relief as the Court may deem proper.

Dated: April __, 2011 May 3, 2011

By: May 3, 2011
Patricia J. Barry

By:
Philip E. Kay

VERIFICATION

1. I, am a plaintiff in this action.

2. I have read the foregoing Complaint. I make this declaration to verify the contents thereof; the factual allegations of which are true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California. that the foregoing is true and correct. Executed on the 3 day of May 2011 at San Francisco, California.

Philip E. Kay

Prepared by the Court

SUPERIOR COURT OF CALIFORNIA

County Of San Francisco

Department No. 301

PHILIP E. KAY,
Plaintiff,

vs.

THE STATE BAR OF CALIFORNIA, et al,
Defendants.

Case No.: CGC-11-510717

ORDER SUSTAINING THE STATE BAR DEFENDANTS' DEMURRER WITHOUT LEAVE TO AMEND AS TO FIRST, SECOND, THIRD, FOURTH AND TENTH CAUSES OF ACTION AND SUSTAINING THE STATE BAR DEFENDANTS' DEMURRER AS TO THE FIFTH, SIXTH, SEVENTH AND EIGHTH CAUSES OF ACTION ON GROUNDS OF ANOTHER ACTION PENDING AS TO THOSE CLAIMS

On May 31, 2011 defendants The State Bar of California (State Bar), The Board of Governors of the State Bar of California, The State Bar Court, Office of the Chief Trial Counsel, Lucy Armendariz, Scott J. Drexel, James E. Towery, Jeff Dal Cerro, Donald Steedman and Allen Blumenthal (collectively the "State Bar Defendants") filed a demurrer to all causes of action alleged against them in the complaint filed by plaintiff Philip E. Kay (Kay). A hearing was held

on the demurrer on June 27, 2011. At that hearing Kay represented himself and Michael Von Lowenfeldt appeared on behalf of the State Bar Defendants. At the end of the hearing I stated that I was sustaining the demurrer without leave to amend as to all the injunctive relief sought by Kay and taking the demurrer as to all other portions of the complaint under submission.

Kay's complaint alleges ten causes of action. All but the ninth cause of action are alleged against the State Bar. Each of the nine causes of action alleged against the State Bar Defendants is discussed below.

This Court Lacks Jurisdiction to Order the Injunctive and Declaratory Relief Sought in the First and Second Causes of Action and In All of the Other Causes of Action Alleged Against the State Bar Defendants to the Extent those Causes of Action Seek Injunctive and/or Declaratory Relief

Kay's first cause of action seeks a declaration that many alleged practices of the State Bar in its handling of attorney disciplinary proceedings, including a few of the State Bar's rules of procedure, violate specified federal and California constitutional and statutory provisions. Kay's second cause of action seeks injunctive relief restraining the State Bar from pursuing further disciplinary proceedings against him regarding an order of suspension and probation issued by the California Supreme Court on July 14, 2010. In addition to the first and second causes of action which are labeled as claims for declaratory and injunctive relief, Several of the other causes of action (e.g. the third and fourth) alleged by Kay also seek a declaration that certain conduct of the State Bar Defendants is unlawful and/or an order restraining the Sate Bar from engaging in certain conduct as to Kay in future disciplinary proceedings. Because this court lacks jurisdiction to grant either the declaratory or injunctive relief sought by Kay, the demurrer as to the first and second causes of action are sustained without leave to amend, as is the demurrer as

to all other causes of action to the extent those causes of action seek declaratory and/or injunctive relief against the State Bar Defendants.

Numerous decisions of the California Supreme Court hold that attorney discipline issues are exclusively within the jurisdiction of the California Supreme Court and the Sate Bar, acting as that court's "administrative arm." (*See, e.g., Jacobs v. State Bar* (1977) 20 Cal. 3d 191, 198). From this simple rule, it naturally follows that this court lacks jurisdiction to issue the declaratory and injunctive relief sought by Kay, and I so hold.

Kay contends, however, that the Ninth Circuit decision in *Canatella v. State Bar* (9th Cir. 2002) 304 F.3d 843 holds that under 42 USC 1983 this court has jurisdiction to restrain an imminent but not yet filed State Bar disciplinary proceeding to prevent the violation by the State Bar of the federal rights of the party against whom the disciplinary proceeding would be brought. While entitled to considerable weight, Ninth Circuit decisions are not binding on this court. No published decision of a California appellate court has cited or discussed *Canatella* for the proposition advocated by Kay. To the extent that *Canatella* can be read to support the proposition that Kay advocates, I decline to follow it because I think that such a proposition is irreconcilable with the repeated holdings of the California Supreme Court, which are binding on this court, that the exclusive jurisdiction regarding attorney discipline lies with that Court. Because *Canatella* dealt with the issue of whether a federal court, not a state court, had the jurisdiction to restrain a not yet filed State Bar proceeding, the frequently cited maxim that a decision is not authority for a proposition which it does not address is also applicable here and thus *Canatella* can be reconciled with binding California law by viewing the former as speaking soley to federal court jurisdiction.

A related but distinct reason for sustaining the demurrer to Kay's requests for declaratory relief is that all or nearly all of the State Bar practices that Kay seeks to be declared unlawful

were among the grounds that Kay sought and was denied review by the California Supreme Court from the State Bar decision recommending discipline against him. Though the California Supreme Court denial of Kay's petition for review was a summary denial, that denial is a decision on the merits for which res judicata attaches. (*In re Rose* (2000) 22 Cal. 4th 430, 445 (approving *Geibel v. State Bar* (1939) 14 Cal. 2d 144, 146-49 on this point)). In practical effect, then, Kay's first cause of action seeks to have this court reach a different decision than the California Supreme Court did in denying Kay's petition for review. Kay's contention that the order of suspension is void and thus this court has the authority to vacate or rule contrary to the California Supreme Court lacks merit. Kay was afforded the opportunity to and did challenge the State Bar Court's default decision in his petition for review to the California Supreme Court. This court lacks the power to disturb the California Supreme Court's denial of Kay's petition for review and order of suspension under the most basic concept that an inferior tribunal must heed and may not disturb the rulings of a superior tribunal.

Kay's Third Cause of Action For Violation of Bus. & Prof. Code 6001 Does Not Allege A Cognizable Claim

Kay's third cause of action alleges that the State Bar Defendants violated Bus. & Prof. Code 6001. However, nothing in the language of that statute or, as far as I am able to discern its legislative history, states or suggests that there is a private cause of action for violation of that statute and thus the demurrer to Kay's third cause of action is sustained without leave to amend.

Unless a statute or its legislative history evinces an intent to permit a private cause of action for its violation, there is no private cause of action. (*Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal. 4th 592, 596-97). A review of section 6001 and the authorities cited in the annotation to that section in *West's Annotated California Codes* does not reveal a single published decision or any other authority that states or suggests that a private right of action is

available for violation of section 6001. Nor has Kay cited any such authority. While I do not purport to have reviewed all of the legislative history of section 6001 going back to its initial enactment in 1939, the materials I did review persuade me that it is extremely unlikely that the Legislature intended that a violation of this section be redressed through a private cause of action.

The Fourth and Tenth Causes of Action are Barred By Civil Code 47(b) and Government Code 818.4, 821.2 and 821.6

Kay's fourth cause of action alleges that he is entitled to declaratory and injunctive relief and damages against the State Bar Defendants per Civil Code 52.1(b) for the State Bar Defendants' interference or attempted interference with Kay's federal and California rights by threats, intimidation and/or coercion. As stated or suggested in his complaint and clearly articulated by Kay at the June 27 hearing, the bases for Kay's fourth cause of action are: 1) the statements by the State Bar and its employee(s) that unless Kay apologized to Judge Anello, they would pursue disciplinary proceedings against Kay and 2) State Bar Judge Lucy Armendariz's statements that she would, as she later did, enter a default against Kay unless he testified.

Kay's tenth cause of action alleges that the State Bar Defendants violated Bus. & Prof. Code 6086.1(b) by providing confidential and privileged information during the State Bar's investigation of Kay to persons who should not have received that information.

Assuming without deciding that the factual allegations forming the basis of the fourth cause of action constitute "threats, intimidation, or coercion" within the meaning of those terms as used in Civil Code 52.1(a) and that there is a private cause of action for violation of Bus. & Prof. Code 6086.1(b) (*see Mack v. State Bar* (2001) 92 Cal. App. 4th 957 (apparently assuming but not deciding that a disciplined attorney may state a claim against the State Bar for impermissible dissemination of information about the attorney)), both the fourth and tenth causes

of action are barred by the privileges and immunities set forth in Civil Code 47(b) and Government Code 818.4, 821.2 and 821.6. This result is compelled by *Rosenthal v. Vogt* (1991) 229 Cal. App. 3d 69, 74-75 where the appellate court affirmed a trial court's sustaining of a demurrer without leave to amend by the State Bar and several of its employees to California law claims alleged by a disciplined attorney that the State Bar and its employees disseminated information that they should not have and otherwise acted unlawfully in the course of the disciplinary proceedings. The holding in *Rosenthal* that the California law claims alleged by the disciplined attorney were barred by Civil Code 47(b) and Government Code 818.4, 821.2 and 821.6 is on all fours with this case and requires that the State Bar Defendants' demurrer to Kay's fourth and tenth causes of action be sustained without leave to amend.

The Demurrer to the Fifth, Sixth, Seventh and Eighth Causes of Action are Sustained on the Grounds that these Claims Are Part of the Pending Prior Filed Lawsuit Brought by Kay Against the State Bar Defendants

The fifth, sixth, seventh and eighth causes of action are all based on 42 USC 1983 and allege that the State Bar Defendants violated Kay's federally protected rights of procedural due process (fifth cause of action), substantive due process (sixth cause of action), equal protection (seventh cause of action) and free speech (eighth cause of action). Apart from any declaratory or injunctive relief that may be sought as part of these claims, and for which I have already stated this court lacks the jurisdiction to grant, the fifth, sixth, seventh and eighth causes of action are based entirely on allegations that the State Bar Defendants' conduct leading up to State Bar Judge Armendariz's decision recommending discipline violated Kay's federally protected rights. That is precisely what is alleged in Kay's three causes of action – the third (procedural due process), fourth (free speech) and fifth (substantive due process) – invoking 42 USC 1983 in his second amended complaint in CGC-10-502372, a previously filed and still pending lawsuit in the

San Francisco Superior Court against the State Bar and most of the other entities and persons who have been collectively referred to as State Bar Defendants in this order. Because of the pendency of CGC-10-502372, the State Bar Defendants' demurrer on grounds of "another action pending" is sustained. Sustaining the demurrer to the fifth, sixth, seventh and eighth causes of action triggers the legal doctrine of abatement, which as applied here means that no further proceedings may be had as to these claims unless and until there is a final disposition on Kay's third, fourth and fifth causes of action in CGC-10-502372.

A comparison of the third, fourth and fifth causes of action in the second amended compliant in CGC-10-502372 with the fifth, sixth, seventh and eighth causes of action in Kay's complaint filed in this case discloses two differences. The first difference is that in the prior filed action Kay did not sue the State Bar Court, James E. Towery or Donald Steedman, all of whom are named as defendants in this action. However, the absence of those defendants from the prior cases does not alter the fact that in both cases Kay is suing the State Bar and a host of related entities and employees of the State Bar for alleged misconduct committed in Kay's prior disciplinary proceedings. The addition of one State Bar entity and two individual defendants to this action does not change the fact that, for all practical and legal purposes, the claims in the two actions are the same and Kay should not be permitted to proceed with the same claims in two different actions simultaneously.

The second difference is that in this case, but not in the prior filed action, Kay labeled one of his section 1983 claims as based on equal protection. Apart from the fact that nowhere in Kay's complaint does he allege how federal equal protection principles have been implicated in any of the misconduct he attributes to the State Bar Defendants, the alleged violation of Kay's federal equal protection rights is based on the identical set of facts that Kay bases his allegations that his federal procedural and substantive due process and free speech rights were violated.

Thus, the alleged core facts that form the basis for Kay's third, fourth and fifth causes of action in his second amended complaint in CGC-10-502372 are the same as the alleged core facts that form the basis for Kay's fifth, sixth, seventh and eighth causes of action in his complaint filed in this case. Accordingly, notwithstanding the two differences noted between the near-identical claims in the prior filed action and in this action, the State Bar Defendants' demurrer based on CCP 430.10(c) ("There is another action pending between the same parties on the same cause of action") is sustained and the fifth, sixth, seventh and eighth causes of action abated.

Conclusion

For the reasons set forth above, the State Bar Defendants' demurrer to the first, second, third, fourth and tenth causes of action alleged against them in Kay's complaint is sustained without leave to amend and the State Bar Defendants' demurrer to the fifth, sixth, seventh and eighth causes of action is sustained on the grounds of another action pending and thus those claims are abated unless and until there has been a disposition of the third, fourth and fifth causes of action in Kay's second amended complaint in CGC-10-502372.

IT IS SO ORDERED.

Dated: AUGUST 4, 2011

Harold E. Kahn
Judge of the Superior Court

Superior Court of California
County of San Francisco

PHILIP E. KAY,
Plaintiff(s)

vs.

THE STATE BAR OF CALIFORNIA. ET. AL.,,
Defendant(s)

Case Number: 510717

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, CYNTHIA HERBERT, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On August 5, 2011 I served the attached Order Sustaining the State Bar Defendants Demurrer by placing a copy thereof in a sealed envelope, addressed as follows:

Atty.Philipe E. Kay
736 43rd Avenue
San Francisco, CA 94121

Atty. Danielle A. Lee
State Bar of California
180 Howard Street
San Francisco, CA 94105

Atty. Michael Von Loewenfeldt
KERR & WAGSTAFFE LLP
100 Spear Street, 18th Floor
San Francisco, CA 94105

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: August 5, 2011

MICHAEL YUEN, Clerk

By: C Herbert
CYNTHIA HERBERT
DEPUTY CLERK

SUM-100

SUMMONS
(CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):
State Bar of California, The Board of Govenors of the State Bar of California, The State Bar Court, Lucy Armendariz, (see att.)

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):
ROBIN A. KAY, LARRY J. PELUSO, CHRISTOPHER ENOS, PHILIP E. KAY

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (*www.lawhelpcalifornia.org*), the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of $10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.

¡AVISO! *Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.*

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de $10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es): San Francisco Superior Court
400 McAllister St., San Francisco, Ca. 94102

CASE NUMBER:
(Número del Caso): CGC-11-514255

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Philip E. Kay, 736 43rd Ave., San Francisco, Ca. 94121, 415/387-6622

DATE: *(Fecha)* SEP 14 2011 CLERK OF THE COURT Clerk, by *(Secretario)* D. STEPPE, Deputy *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons *(form POS-010).)*
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, *(POS-010)).*

(SEAL) SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN FRANCISCO EUREKA

NOTICE TO THE PERSON SERVED: You are served
1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of *(specify):*
3. ☐ on behalf of *(specify):*
   under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
   ☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
   ☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
   ☐ other *(specify):*
4. ☐ by personal delivery on *(date):*

SHORT TITLE: Kay v State Bar, ET AL.	CASE NUMBER:

INSTRUCTIONS FOR USE

- This form may be used as an attachment to any summons if space does not permit the listing of all parties on the summons.
- If this attachment is used, insert the following statement in the plaintiff or defendant box on the summons: "Additional Parties Attachment form is attached."

List additional parties *(Check only one box. Use a separate page for each type of party.)*:

☐ Plaintiff ☑ Defendant ☐ Cross-Complainant ☐ Cross-Defendant

SUPREME COURT OF CALIFORNIA, OFFICE OF CHIEF TRIAL COUNSEL, JAMES TOWERY, DONALD STEEDMAN, ALLEN BLUMENTHAL, SCOTT J. DREXEL, JEFF DAL CERRO, MICHAEL ANELLO, JOAN WEBER, JOHN MEYER, HELENE WASSERMAN, RALPHS GROCERY COMPANY, THE CALIFORNIA ATTORNEY GENERAL, KAMALA HARRIS, HARRY T. GOWER, III and DOES 1-150,

Form Adopted for Mandatory Use
Judicial Council of California
SUM-200(A) [Rev. January 1, 2007]

ADDITIONAL PARTIES ATTACHMENT
Attachment to Summons

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Philip E. Kay, SB#99830
736 43rd Ave., San Francisco, Ca. 94121
TELEPHONE NO.: 415/387-6622 FAX NO.:
ATTORNEY FOR (Name):

FOR COURT USE ONLY

FILED
Superior Court of California
County of San Francisco
SEP 14 2011
CLERK OF THE COURT
BY: Deputy Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco
STREET ADDRESS: 400 McAllister Street
MAILING ADDRESS: same
CITY AND ZIP CODE: San Francisco, Ca. 94102
BRANCH NAME: Civil

CASE NAME:
KAY V. STATE BAR, ET AL.

CASE NUMBER: CGC-11-514255

JUDGE:
DEPT:

CIVIL CASE COVER SHEET

[✓] **Unlimited** (Amount demanded exceeds $25,000) [ ] **Limited** (Amount demanded is $25,000 or less)

Complex Case Designation

[ ] **Counter** [ ] **Joinder**

Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

Items 1–6 below must be completed (see instructions on page 2).

1. Check **one** box below for the case type that best describes this case:

Auto Tort
- [ ] Auto (22)
- [ ] Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
- [ ] Asbestos (04)
- [ ] Product liability (24)
- [ ] Medical malpractice (45)
- [ ] Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort
- [ ] Business tort/unfair business practice (07)
- [ ] Civil rights (08)
- [ ] Defamation (13)
- [ ] Fraud (16)
- [ ] Intellectual property (19)
- [ ] Professional negligence (25)
- [ ] Other non-PI/PD/WD tort (35)

Employment
- [ ] Wrongful termination (36)
- [ ] Other employment (15)

Contract
- [ ] Breach of contract/warranty (06)
- [ ] Rule 3.740 collections (09)
- [ ] Other collections (09)
- [ ] Insurance coverage (18)
- [ ] Other contract (37)

Real Property
- [ ] Eminent domain/Inverse condemnation (14)
- [ ] Wrongful eviction (33)
- [ ] Other real property (26)

Unlawful Detainer
- [ ] Commercial (31)
- [ ] Residential (32)
- [ ] Drugs (38)

Judicial Review
- [ ] Asset forfeiture (05)
- [ ] Petition re: arbitration award (11)
- [ ] Writ of mandate (02)
- [ ] Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400–3.403)
- [ ] Antitrust/Trade regulation (03)
- [ ] Construction defect (10)
- [ ] Mass tort (40)
- [ ] Securities litigation (28)
- [ ] Environmental/Toxic tort (30)
- [ ] Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment
- [ ] Enforcement of judgment (20)

Miscellaneous Civil Complaint
- [ ] RICO (27)
- [✓] Other complaint *(not specified above)* (42)

Miscellaneous Civil Petition
- [ ] Partnership and corporate governance (21)
- [ ] Other petition *(not specified above)* (43)

2. This case [✓] is [ ] is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
   a. [ ] Large number of separately represented parties
   b. [✓] Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
   c. [✓] Substantial amount of documentary evidence
   d. [✓] Large number of witnesses
   e. [✓] Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
   f. [ ] Substantial postjudgment judicial supervision
3. Remedies sought *(check all that apply)*: a. [✓] monetary b. [✓] nonmonetary; declaratory or injunctive relief c. [✓] punitive
4. Number of causes of action *(specify)*:
5. This case [ ] is [✓] is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. *(You may use form CM-015.)*

Date: September 14, 2011
Philip E. Kay
(TYPE OR PRINT NAME)

P E Kay
(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE
- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on **all** other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Form Adopted for Mandatory Use
Judicial Council of California
CM-010 [Rev. July 1, 2007]

CIVIL CASE COVER SHEET

Cal. Rules of Court, rules 2.30, 3.220, 3.400–3.403, 3.740;
Cal. Standards of Judicial Administration, std. 3.10
www.courtinfo.ca.gov

Philip E. Kay [SB#99830]
736 43rd Avenue
San Francisco, California 94121
(415)387-6622
(415)387-6722 (fax)

on behalf of the Plaintiffs and *in pro* per

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

ROBIN A. KAY, LARRY J. PELUSO, CHRISTOPHER ENOS, PHILIP E. KAY,

Plaintiffs,

vs.

STATE BAR OF CALIFORNIA, THE BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA, THE STATE BAR COURT, LUCY ARMENDARIZ, SUPREME COURT OF CALIFORNIA, OFFICE OF CHIEF TRIAL COUNSEL, JAMES TOWERY, DONALD STEEDMAN, ALLEN BLUMENTHAL, SCOTT J. DREXEL, JEFF DAL CERRO, MICHAEL ANELLO, JOAN WEBER, JOHN MEYER, HELENE WASSERMAN, RALPHS GROCERY COMPANY, THE CALIFORNIA ATTORNEY GENERAL, KAMALA HARRIS, HARRY T. GOWER, III and DOES 1 - 150,

Defendants.

CGC-11-514255

Case No.

VERIFIED
COMPLAINT FOR DAMAGES

INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE AND EMPLOYMENT RELATIONSHIP, VIOLATION OF CIVIL CODE §52.1(b), VIOLATION OF PENAL CODE §518, FAILURE TO DISCHARGE MANDATORY DUTY [GOVERNMENT CODE §815.6], CIVIL CONSPIRACY

I. INTRODUCTION

1. Plaintiffs are Robin A. Kay, Larry J. Peluso, Christopher Enos and Philip E. Kay (Kay). This Complaint is brought for damages caused by defendants' interference with their economic advantage and employment relationship, coercion, extortion and failure to discharge mandatory duty.

2. Kay is an attorney. Plaintiffs worked in Kay's law office. Robin A. Kay worked as a paralegal. Larry J. Peluso worked as the office manager. Christopher Enos worked as a paralegal.

3. Based on criminal false reports, complaints, fabricated evidence and denial of constitutional - due process rights and privileges, including the right not to be compelled as a witness against himself under the 5th Amendment, Kay was found culpable by an illegal void default in the first State Bar proceeding. The State Bar found Kay culpable of completely *fabricated* misconduct, including "obstruction of justice," (contempt) resulting in the denial of fair trials to private party defendants, contrary to the final decisions and judgments in the underlying article VI court cases of *Gober v. Ralphs Grocery Company* and *Marcisz v. UltraStar Cinemas*. Kay was subjected to threats, intimidation, coercion and extortion to waive his constitutional - due process rights and privileges, including his rights under the 5th and 6th Amendments. Kay was then punished for asserting his constitutional - due process rights in violation of the State Bar Act[1] - Business & Professions Code §§6068(i), 6079.5 & 6085(e). The State Bar is now threatening, intimidating, coercing and extorting Kay to admit to the fabricated [criminal] findings in the Decision by instituting a new [second] disciplinary proceeding based on his failure to comply with the terms of the void Order of Suspension (Order). Moreover, the State Bar knows the Order is void and unenforceable, which is why it has never sought to enforce the Order, pursuant to §§6084, 6086.10, California Rules of Court (CRC) 9.16(b) and/or 9.20(d) in the Superior Court. Prior to the filing of the second

[1] Section references are to the State Bar Act - Business & Professions Code §§6000, *et seq.*

disciplinary proceeding, during the investigation, the State Bar fabricated, altered and withheld evidence regarding the article VI court trials in the *Gober* and *Marcisz* cases, as it did in the first State Bar proceeding in violation of Penal Code §§166(a)(7) & 182. For Kay to comply with the void Order, he would be required to waive his 5th and 6th Amendment rights, and commit perjury by admitting to the fabricated findings in the Decision, including but not limited to the crime of "obstruction of justice" and pay a criminal fine, without ever being charged or convicted with any Penal Code violation and having received no constitutional - due process in the State Bar. [Plaintiffs served timely notice of there claims, pursuant to Government Code §§900, *et seq.*]

II. JURISDICTION AND VENUE

4. This Court has jurisdiction to consider these claims for damages. (See e.g., *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148.)

5. Venue is proper in this Court because the harm was caused to the Plaintiffs in this County and the State Bar maintains corporate headquarters in this County.

III. PARTIES

6. Plaintiffs were, and at all times mentioned herein, citizens and residents of the State of California.

7. The State Bar of California is a public corporation in the judicial branch of the State of California, incorporated under the laws of the State of California, with its principal place of business in the State of California. The State Bar acts through the Board of Governors of the State Bar of California. The Board of Governors makes rules, regulates and operates the State Bar, which is **not** empowered to reverse the final decisions and judgments of the article VI courts, as it has done here. [These defendants are referred to as the "State Bar."]

8. The State Bar Court is the hearing and review department acting of the State Bar, which acts as an administrative arm of the California Supreme Court to hear and decide attorney disciplinary and regulatory proceedings and to make recommendations to the Supreme Court regarding those matters. Lucy Armendariz is a hearing department officer

in the State Bar Court. Armendariz, without jurisdiction and immunity issued and entered the **void** default resulting in Kay's suspension. [These defendants are referred to as the "State Bar."]

9. Scott J. Drexel is the former Chief Trial Counsel of the Office of the Chief Trial Counsel, the office within the State Bar, which is the prosecutorial arm of the State Bar in attorney discipline and regulatory matters. James Towery is a former Chief Trial Counsel. The Office of the Chief Trial Counsel functions under the direction of the Chief Trial Counsel. Defendants Jeff Dal Cerro, Donald Steedman and Allen Blumenthal are Deputy Trial Counsel of the Office of Chief Trial Counsel. [These defendants are referred to as the "State Bar."]

10. Michael Anello is a disqualified judge, formerly with the Superior Court of San Diego County. Joan Weber is a disqualified judge from the Superior Court of San Diego County. John Meyer is a disqualified judge from the Superior Court of San Diego. When disqualified judges Anello, Weber and Meyer falsely reported and complained about Kay to the State Bar, as alleged herein, they did so without jurisdiction, privately not in a judicial capacity and/or administratively and thus, without immunity.

11. Helene Wasserman is an attorney licensed to practice in California, who represented defendant Ralphs Grocery Company in the *Gober* case and a resident of California. Wasserman, at the time of her actions alleged and mentioned herein, was acting within the course and scope of her agency, employment and authority for Ralphs Grocery Company.

12. The California Attorney General is the State Attorney General of California. The Attorney General's duty is to ensure that "the laws of the state are uniformly and adequately enforced" (California Constitution, Article V, Section 13.) The Attorney General carries out the responsibilities of the office through the California Department of Justice. Kamala Harris is the Attorney General. Harry T. Gower, III is a Deputy Attorney General. [These defendants are referred to as the "Attorney General."]

13. The true names and capacities of Defendants named herein as Does 1 through 150,

inclusive, whether individual, corporate, associate, or otherwise, are unknown to Plaintiffs, who therefore sues such defendants by such fictitious names. Plaintiffs will amend this Complaint to show true names and capacities when they have been determined.

IV. ALLEGATIONS COMMON TO ALL CLAIMS

14. The State Bar defendants, without immunity, used false information and evidence and falsely claimed there existed evidence of non-existent orders and misconduct during the investigations of Kay prior to the filing of first and second disciplinary proceedings. The false information was provided by disqualified judges Anello, Weber, Meyer, Wasserman and Ralphs. Moreover, during the investigations, the State Bar fabricated evidence and ignored and withheld exculpatory evidence establishing no grounds for filing any charges and/or the dismissal of all charges. From the outset of its investigations, the State Bar knew this matter did not involve a reportable action (§6086.7), because no valid orders exist or were ever presented to the State Bar establishing the existence of a reportable action. Moreover, the State Bar knew disqualified judges Anello, Weber and Meyer lied in their reports and complaints that Kay engaged in sanctionable and contemptuous misconduct and that Anello, Weber and Meyer granted new trials based on Kay's misconduct, which if true, would have resulted in a reportable action.

15. The State Bar has **admitted** this matter did not involve a reportable action and that it lacked grounds to open an investigation. Chief Trial Counsel Towery has recently publicly stated that absent a ruling (reversal) where attorney misconduct "made a difference in the trial," the State Bar has **no jurisdiction** to investigate or charge prosecutors for misconduct.

> "Towery's office is analyzing approximately 130 cases the innocence project said were reversed because of prosecutorial misconduct. The office will not look at the matters identified by the report as harmless (not resulting in a reversal) because of the bar's "clear and convincing" burden of proof. Towery suspects that bar prosecutors did not know about many of the reversals, either because the case was not reported, as required, or did not meet the criteria for notifying the bar. To improve the requisite reporting, his office sent 1,900 letters to judges and is

stepping up contacts with district attorneys' offices to educate them about reporting requirements."
(See Request for Judicial Notice (RJN), Ex. 1, California Bar Journal, February 2011.)

See also, RJN, Ex. 2, February 22, 2011 Agenda Item from James Towery, Chief Trial Counsel, specifying that under the State Bar Rules of Procedure, the State Bar is required to specify in the notice of disciplinary charges and "cite the statutes, rules or **Court orders** that the member allegedly violated or that warrant the proposed action." (Emphasis.) This same standard applies to Kay's prior State Bar proceeding, in which no such order or ruling exists. Moreover, in response to Kay's complaints against defense counsel [Wasserman] in the very same underlying cases, the State Bar refused to open an investigation – citing the very defenses raised by Kay – not a reportable action and statute of limitations. (See RJN, Ex. 3, State Bar Erin Joyce letter, which states in part):

> " . . . it is clear that the trial court in both cases did not make any finding that any of the attorneys intentionally violated the courts' in limine orders warranting censure by the court or discipline by the State Bar. The trial courts did not make any findings against any of the attorneys sufficient to warrant a State Bar investigation. **The trial Courts are in the best position to determine if an attorney has committed a violation of Business & Professions Code section 6103, or if an attorney has provided false testimony in violation of Business & Professions Code section 6068(d).** There appears to be no basis for the State Bar to investigate your allegations absent such findings by the Courts in question. As for your complaint against Mr. Chambers, it is barred by the statute of limitations. . ." (Emphasis.)

16. Without any such valid orders and referral from the underlying article VI courts, the State Bar had no jurisdiction to open the investigations, investigate, charge and/or review the underlying trial records for misconduct and/or find misconduct in the State Bar proceeding. Because there was no reportable action, no party or member of the public was harmed and the State Bar was acting without standing and in the absence of all jurisdiction. Moreover, fabricating charges of non-existent orders and evidence of misconduct results in the false reporting of the underlying article VI court record by the State Bar. This false reporting and complaining about the article VI court record is a crime in violation of Penal Code §166(a)(7). Conspiring to pursue a malicious prosecution is a crime in violation of Penal Code §182. Falsely reporting and

complaining to the State Bar is a crime in violation of §6043.5.

17. The State Bar prosecutors demanded that Kay admit to their made up [fabricated] misconduct as an "apology" to Judge Anello for having him disqualified "in the interests of justice," as ordered by the Court of Appeal[2] to avoid any discipline.

See RJN, Ex. 11, memo of OCTC prosecutor Alan Konig, pg. 2:

"I (Konig) was more interested in having him (Kay) admit responsibility as that would **serve as an apology to Judge Anello and that I would consider entirely stayed suspension if that occurred.**" (Emphasis.)

Moreover, such an admission could be used by the losing defendants, their counsel [Wasserman], the courts and judges in the *Gober* and *Marcisz* cases to reverse the lawful and final judgments Kay obtained on behalf of his clients and/or have him disbarred or suspended to disqualify him from trying and retrying the cases and take away or deny his attorneys' fees, pursuant to writs of *coram vobis* and/or *coram nobis*. During the State Bar trial, Kay properly objected to providing answers and testimony in response to a succession of questions seeking privileged and confidential client and work product information and based on the 5th Amendment. In response, hearing officer Armendariz found Kay in contempt[3] and entered an illegal and void default in the State Bar proceeding, without jurisdiction and then subsequently *sua sponte* struck his Answer a month later.

18. The State Bar is now threatening, intimidating, coercing and extorting Kay to admit to the fabricated [criminal] findings in the Decision by instituting a second disciplinary proceeding based on his failure to comply with the terms of the void Order. Prior to the filing of the second NDC, during the investigation, the State Bar fabricated,

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[2] The motion to disqualify Judge Anello in the Court of Appeal was drafted and filed by the *Gober* appellate counsel Charles Bird of Luce Forward, for which Kay was charged and found vicariously culpable. (See 7 Witkin *Procedure* (4th ed.) *Trial* §187, p.215, citing *Cantillon v. Superior Court, supra*, 150 Cal.App.2d at190 [no vicarious culpability for the contempt of other attorneys].)

[3] State Bar Court lacks contempt or sanction power (*Matter of Lapin* (Rev.Dept. 1993) 2 Cal. State Bar Ct.Rptr. 279, 293, 295, fn 11.

altered and withheld evidence regarding the article VI court trials in the *Gober* and *Marcisz* cases and the first State Bar proceeding in violation of Penal Code §§166(a)(7) & 182. For Kay to comply with the void Order, he would be required to waive his 5th Amendment rights, and commit perjury by admitting to the fabricated findings in the Decision, including but not limited to the non-existent crime of "obstruction of justice" and pay a criminal fine, without ever being charged or convicted with any Penal Code violation and having received no constitutional - due process in the State Bar. All of these acts were *ultra vires* and void and done with the intent to threaten, intimidate, coerce and extort Kay into waiving his constitutional - due process rights and privileges in violation of Civil Code §52.1(b) and Penal Code §518.

19. Hearing officer Armendariz, without jurisdiction *sua sponte* held Kay in contempt for asserting the attorney-client and work privileges and 5th Amendment. (See *Matter of Lapin* (Rev.Dept. 1993) 2 Cal. State Bar Ct.Rptr. 279, 293[4], 295, fn11.) Armendariz then entered the void default with the Answer on file and Kay having appeared for trial and testified, which no court in California can do, let alone an administrative court. (See *e.g., Wilson v. Goldman* (1969) 274 Cal.App.2d 573, 576-578 [where answer filed, default order based on failure to appear at trial is "**void on its face**" and thus subject to direct or collateral attack at any time]; see also, *Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 864.) Based on the default, the State Bar suspended Kay's law license and placed him on probation, which the California Supreme Court affirmed through a summary denial of Kay's Petition for Review, which cannot decide the "cause" of contempt. (See *In re Mazoros*, 76 Cal.App.3d 50, 52-53 (1977)):

> Once an order to show cause or alternative writ issues, however, the matter

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[4] "Except as otherwise stipulated or as authorized by section 1987(b) of the Code of Civil Procedure, attendance of the deponent ... shall be compelled by subpoena." Business and Professions Code section 6050 provides that any person subpoenaed who refuses to appear or testify is in **contempt** and **Business and Professions Code section 6051 provides the mechanism for punishment of disobedient subpoenaed witnesses**. (Emphasis.)

becomes a "cause," pursuant to the California Constitution (art. VI, s 14[5]) and requires a written opinion.

The State Bar is now threatening, intimidating, coercing and extorting Kay by filing a second disciplinary proceeding to enforce the void Order, which requires Kay to admit to the false and fabricated charges and findings or face felony criminal charges, pursuant to §6126.

20. The complainant disqualified judge Anello falsely [criminally] reported and complained to the State Bar that he granted a new trial based on attorney misconduct by Kay and his co-counsel John Dalton, pursuant to Code Civ. Proc. §657(1).

> "As required by applicable provisions of the Business & Professions Code, I reported the above-referenced attorneys to your office back in October of 2002 (after granting a motion for new trial based upon attorney misconduct)."

Disqualified judge Weber provided false reports and complaints to the State Bar regarding the *Gober* case. Disqualified judge Meyer provided false reports and complaints to the State Bar regarding the Marcisz case, in which the Court of Appeal held:

> "In its motion UltraStar argued, among other things, that the misconduct of Plaintiffs' counsel necessitated a new trial, but the trial Court [Judge Meyer] rejected this argument by not granting a new trial on this ground and it noted at oral argument that this, and the other grounds argued by UltraStar as a basis for a new trial, **were not meritorious.**
>
> (See RJN, Ex. 12, *Marcisz* opinion, pg. 10.)

Thus, as referenced by the Court of Appeal, Judge Meyer expressly rejected the claims of attorney misconduct by UltraStar:

> Counsel for UltraStar:
>
> ". . . this court has not ruled on or has not based its ruling for new trial specifically only on attorney misconduct .. . MTEG while it agrees strongly with the court's

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[5] Section 14 - states in relevant part: "**Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.**" (Emphasis.)

conclusions regarding the excessiveness of damages, also would urge that the other alternative basis for new trial contained in its motion are meritorious."

Judge Meyer:

"I've thought about that, and I respectfully disagree."

(See Ex. 13, *Marcisz* RT p. 7180 lns. 14-24.)

Judge Meyer's statements on the record in the *Marcisz* case establish that his State Bar reports and complaints are false. The State Bar defendants, having read the published opinion in *Gober v. Ralphs Grocery Company* (2006) 137 Cal.App.4th 204 and *Marcisz* opinion, knew that Anello, Weber and Meyer had falsely reported and complained. Regardless, it charged and found Kay culpable of these knowingly false charges.

21. Disqualified judge Anello conspired with disqualified judges Weber and Meyer, attorney Wasserman and her client Ralphs Grocery Company to falsely report and complain to the State Bar. These disqualified judges engaged in secret *ex parte* communications to carry out this criminal conspiracy (Penal Code §182), which is judicial misconduct. See *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1315-1316 (citing *Gubler v. Commission on Judicial Performance* (1984) 37 Cal.3d 27, 54-55 [communications by disqualified judge with replacement judge constituted "willful misconduct"]; *Gubler* was disapproved on another point in *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294.)

22. To gain a litigation advantage in the *Gober* case, attorney Wasserman conspired with her client Ralphs Grocery Company to falsely report and complain to the State Bar that a new trial was granted based on Kay's misconduct. However, the State Bar defendants, having read the published opinion in *Gober v. Ralphs Grocery Company, supra,* 137 Cal.App.4th 204, knew that Wasserman had falsely reported and complained. Regardless, it charged and found Kay culpable of these knowingly false charges.

23. Falsely complaining to the State Bar is a misdemeanor. (§6043(a).) Falsely reporting court proceedings is a misdemeanor. (Penal Code §166(a)(7).) Conspiring to file a malicious prosecution is a felony and/or misdemeanor. (Penal Code §182.) In

addition to be being a crime, a false complaint fits the legal definition of a fraud on the court. (See *Aoude v. Mobile Oil Corporation* (1989) 892 Fed.2d 1115, 1118.)

24. These illegal actions by the State Bar defendants, disqualified judges Anello, Weber, Meyer, Wasserman, Ralphs and each of them, denied Kay's constitutional - due process rights and privileges, including his 5th Amendment rights; Calif. Const., Art. I, Sec. 15, Calif. Const., Art. III, Sec. 3.5; §§6050, 6051, 6068(i), 6079.4, 6085, 6088; Code Civ. Proc. §1991; former State Bar Rules Procedure (SBRP) 152(b) and 187; current SBRP 5.70; 42 U.S.C. §1983; Civil Code §52.1(b) and Penal Code 518. (See *Alvarez v. Sanchez*, 158 Cal.App.3d 709, 712-713 (1984) ["Appellants' principal contention on appeal is that the trial court committed prejudicial error by striking a portion of the answer and allowing the case to proceed as a default matter because the appellants invoked their Fifth Amendment rights at trial. We agree with appellants that such ruling denied them their day in court and requires reversal."] *Id.* at 712.)

25. In perpetrating the above-described acts and failures to act, the above-named defendants and each of them engaged in a series of violations and wrongful acts to threaten, intimidate, coerce and extort Kay to forgo and give up the "exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state," in violation of law, which caused direct and irreparable harm to Kay's relationships with his employees [Plaintiffs], clients, existing, pending and future cases and his law practice; without standing and in the absence of all jurisdiction and/or administratively and/or privately and in non-judicial capacity and thus, without immunity.

26. At the State Bar trial, the State Bar prosecutors repeatedly procured knowingly false testimony from disqualified judges Anello, Weber and Meyer, who lied about their actual rulings in the *Gober* and *Marcisz* cases; thereby, substituting perjured[6] hearsay testimony for their written orders, which determined no misconduct. On December 15,

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[6] See Penal Code §§118 & 127.

2009, State Bar hearing officer Armendariz issued a 48-page Decision, citing to the perjured procured testimony of these disqualified judges, as the primary basis for discipline, which found contrary to the final rulings and judgments in those case that Kay obstructed justice - depriving the *Gober* and *Marcisz* defendants of a fair trial[7] based on the very same record reviewed by the trial and appellate courts, which rejected these findings. The Decision [based on a *ultra vires* - **void** default], was filed on February 17, 2010, as the recommendation to the Supreme Court, which denied review on July 14, 2010. Kay's suspension became effective on August 13, 2010 and he now faces a second State Bar proceeding, which is seeking his disbarment.

27. Plaintiffs provided substantial and sufficient information and evidence to the California Attorney General, Supreme Court, Court of Appeal and Superior Court[8] establishing the criminal malfeasance of the State Bar defendants, disqualified judges Anello, Weber, Meyer, Wasserman and Ralphs; all of whom conspired and falsely complained against attorney Kay to the State Bar of California in violation of Penal Code §§182 & 166(a)(7) and §6043.5 and suborned and committed perjury in violation of Penal Code §§118 & 127. The California Attorney General is required to investigate, report and/or prosecute disqualified judges Anello, Weber, Meyer Wasserman and Ralphs for their criminal malfeasance. However, they knowingly refused and failed to do so. Had they carried out their duties as public officials, Plaintiffs would not have been harmed. However, as a result of their deliberate indifference and failure to discharge their duties to investigate, report and/or prosecute the criminal malfeasance of the State Bar defendants,

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[7] The State Bar admitted in its opposition to Kay's Petition for Writ of Review to the Supreme Court that this finding is contrary to the record in *Gober* and *Marcisz*.

[8] "Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, the judge shall take or initiate appropriate corrective action, which may include reporting the violation to the appropriate authority." (Judicial Canon 3D(1).)

"Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action." (Judicial Canon 3D(2).)

disqualified judges Anello, Weber, Meyer, Wasserman and Ralphs; Plaintiffs have suffered irreparable harm to their economic advantage and relationship arising from their employment and work in the law office of attorney Kay based on the illegal suspension of his law license and pending disbarment, without immunity in violation of Government Code §815.6.

28. The criminal acts of the State Bar defendants, disqualified judges Anello, Weber, Meyer, Wasserman and Ralphs have been **admitted** to by these malefactors. Their acts are not immune from criminal prosecution. Moreover, these unauthorized and/or administrative acts are not immune from civil prosecution. (See *Clinton v. Jones*, 520 U.S. 681, 694-695, 117 S.Ct. 1636 (1997); see also *Wolfe v. Strankman*, 392 Fed.3d 358, 366 (9th Cir. 2004):

> Section 1983 only contemplates judicial immunity from suit for injunctive relief for acts taken in a judicial capacity. The statute provides that "injunctive relief shall not be granted" in an action brought against "a judicial officer for an act or omission taken in such officer's judicial capacity ... unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983 (emphasis added). See also Sup.Ct. of Va. v. Consumers Union of the United States, Inc., 446 U.S. 719, 736, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980) ("We need not decide whether judicial immunity would bar prospective relief, for we believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities."). **Since Wolfe also sued Chief Justice George in his administrative capacity as Chair of the Judicial Council, we conclude that dismissal is not warranted on the basis of judicial immunity.** (Emphasis.)

Malefactor Anello

29. The State Bar defendants and Attorney General defendants were aware that disqualified judge Anello falsely reported and complained to the State Bar that he granted a new trial based on attorney misconduct by Kay and co-counsel John Dalton, pursuant to Code Civ. Proc. §657(1).

> "As required by applicable provisions of the Business & Professions Code, I reported the above-referenced attorneys to your office back in October of 2002 (after granting a motion for new trial based upon attorney misconduct)."

(See RJN, Ex. 4, disqualified judge Anello's June 5, 2007 letter to the State Bar.) No such order exists. Rather, disqualified judge Anello granted a conditional new trial (a remittitur as to punitive damages only), which was based solely on the ground of excessive damages (§657(5)), and denied on all other grounds, including §657(1) –

attorney misconduct. Disqualified judge Anello's false complaint violated Penal Code §166(a)(7) (misdemeanor), to Business & Professions Code §6043.5(a) (misdemeanor) and Penal Code §182(a)(1), (3), (4)&(5) (felony and/or misdemeanor). In addition to being a crime, disqualified judge Anello's false complaint fits the legal definition of a fraud on the court. (See *Aoude v. Mobile Oil Corporation* (1989) 892 Fed.2d 1115, 1118.)

30. Disqualified judge Anello now sits as a U.S. District Court Judge. In his U.S. Senate Questionnaire, pgs. 9-10, he admits (under oath) he did not grant a new trial based on attorney misconduct:

> "(2) Gober v. Ralphs Grocery Company (2006) 137 Ca1.App.4th 204. (Plaintiffs sued defendant for failing to take reasonable steps to. prevent a supervisor from sexually harassing them: After the jury awarded Plaintiffs both compensatory and punitive damages, the trial court denied defendant's motion for judgment notwithstanding the verdict but **conditionally granted defendants motion for new trial on the ground that the punitive damages were excessive**. On appeal the appellate court reversed the order denying defendant's motion for JNOV, and remanded to the trial court with directions that the punitive damages be further reduced.)" (Emphasis.)

(See RJN, Ex. 5, Judge Anello's U.S. Senate Questionnaire.) Thus, disqualified judge Anello admits in his Questionnaire that he granted a conditional new trial (a remittitur as to punitive damages only), which was based solely on the ground of excessive damages (Code Civ. Proc. §657(5)), and denied on all other grounds, including §657(1) – attorney misconduct. (See *Gober v. Ralphs Grocery Company, supra,* 137 Cal.App.4th 204, which sets forth the procedural history for the case, further confirming disqualified judge Anello's false complaint to the State Bar.)

Malefactor Weber

31. The State Bar defendants and Attorney General defendants were aware that Judge Weber was disqualified in the *Gober* case prior to Judge Anello. Following her disqualification, disqualified judge Weber engaged in admitted judicial misconduct[9]

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[9] See *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1315-1316 (citing *Gubler v. Commission on Judicial Performance* (1984) 37 Cal.3d 27, 54-55 [communications by disqualified judge with replacement judge constituted "willful misconduct"]; *Gubler* was Kay, Peluso, Enos v. State Bar

involving ongoing *ex parte* communications regarding Kay, co-counsel John Dalton and the *Gober* case with Judge Anello and other judges, as set forth in State Bar investigator Robert A. Feher's memo and disqualified judge Anello's subsequent communications with the State Bar discussed below. (See RJN, Ex. 6, State Bar investigator Robert Feher memo.) In the Feher memo, Weber, acting in a private and non-judicial capacity and/or administratively, falsely reported and complained to the State Bar about Kay and Dalton. However, at the State Bar trial, she was forced to admit during cross-examination that there were **no grounds to discipline either Kay or Dalton**, as she testified to the following:

> Q. And if a lawyer is violating your lawful court orders, in order to maintain order and decorum in your courtroom, you would have to issue contempt citations to correct those abuses; right?
>
> A. In the abstract, yes.
>
> Q. And in the abstract, you would also have to issue sanctions to get that order under control; correct?
>
> A. Depending on the circumstances, yes.
>
> Q. You never issued any sanctions against Mr. Dalton or me, did you?
>
> A. No.
>
> Q. And you would also have to make sure that the defendant was getting a fair trial in the face of this misconduct that you have testified to; correct?
>
> A. Defendant and plaintiffs, yes.
>
> Q. You made no finding that defendant Ralphs was denied a fair trial based on attorney misconduct; correct?
>
> A. I think when we looked at it, I ruled that it was a very close call, but that I was not going to grant a new trial on that basis.

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disapproved on another point in *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294.)

Q. On a preponderance standard[10]; right?

A. Right.

(See RJN, Ex. 7, State Bar trial transcript excerpts of disqualified judge Weber, pgs. 212-213.)

32. The State Bar defendants and Attorney General defendants were aware that Judge Weber granted a conditional new trial (a remittitur as to punitive damages only), which was based solely on the ground of juror misconduct (§657(1)) and denied on all other grounds, including attorney misconduct. (See *Gober v. Ralphs Grocery Company, supra,* 137 Cal.App.4th 204.) The failure of disqualified judges Anello and Weber to issue any orders that Kay or Dalton's conduct resulted in a reversal of the trial denies the State Bar jurisdiction in this matter. State Bar Chief Trial Counsel James Towery has recently publicly stated (admitted) that absent a ruling (reversal) where attorney misconduct "made a difference in the trial," the State Bar has **no jurisdiction** to investigate or charge prosecutors for misconduct. (See RJN, Ex. 1.)

33. This same standard applies to Kay's State Bar case, in which no such order or ruling exists. (See *Lady v. Worthingham, supra,* 61 Cal.App.2d at 782.) Rather, the State Bar *fabricated* the existence of such an order or ruling on which to base the filing of the fabricated charges against Kay. Moreover, in the February 22, 2011 State Bar Agenda Item from Chief Trial Counsel James Towery specifies that under the State Bar Rules of Procedure, the State Bar is required to specify in the notice of disciplinary charges and "cite the statutes, rules or **Court orders** that the member allegedly violated or that warrant the proposed action." (Emphasis.) (See RJN, Ex. 2.) Here, no such orders exist; rather, there are only the criminal false reports and complaints of disqualified judges Anello and Weber, to which they have admitted.

Malefactor Meyer

34. The State Bar defendants and Attorney General defendants were aware that

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[10] The State Bar is required to establish misconduct by a "clear and convincing" standard of proof. Kay, Peluso, Enos v. State Bar

disqualified judge Meyer falsely complained and reported that Kay engaged in misconduct. In affirming the trial court's denial of defendant UltraStar's Motion for New Trial based on attorney misconduct in the *Marcisz* case, the Court of Appeal held:

> "In its motion UltraStar argued, among other things, that the misconduct of Plaintiffs' counsel necessitated a new trial, but the trial Court [Judge Meyer] rejected this argument by not granting a new trial on this ground and it noted at oral argument that this, and the other grounds argued by UltraStar as a basis for a new trial, **were not meritorious.**
>
> (See RJN, Ex. 12, *Marcisz* decision, pg. 10.)

Thus, as referenced by the Court of Appeal, Judge Meyer expressly rejected the claims of attorney misconduct by UltraStar:

> Counsel for UltraStar:
>
> ". . . this court has not ruled on or has not based its ruling for new trial specifically only on attorney misconduct .. . MTEG while it agrees strongly with the court's conclusions regarding the excessiveness of damages, also would urge that the other alternative basis for new trial contained in its motion are meritorious."
>
> Judge Meyer:
>
> "I've thought about that, and I respectfully disagree."
>
> (See Ex. 13, *Marcisz* RT p. 7180 lns. 14-24.)

Judge Meyer's statements on the record in the *Marcisz* case establish that his State Bar reports and complaints are false.

35. When disqualified judges Anello, Weber and Meyer made their criminal false reports and complaints to the State Bar, they were no longer judges in the *Gober* case, having been disqualified; thus, they acted in a private and non-judicial capacity and/or administratively and thus, without any immunity. Moreover, they are not immune from criminal prosecution whatsoever. In addition, disqualified judges Anello, Weber and Meyer's *ex parte* communications regarding Kay, Dalton and the *Gober* and *Marcisz* cases with one another and other judges were carried out while they were no longer

judges, having been disqualified. Thus, these *ex parte* communications are not subject to immunity, because disqualified judges Anello, Weber and Meyer were acting privately and not in a judicial capacity and/or administratively. As discussed, the administrative acts of judges are not immune from prosecution. (See *Clinton v. Jones, supra*, 520 U.S. at 694-695.)

36. Disqualified judge Weber **admitted**, that following her disqualification, she discussed Kay, Dalton and the *Gober* case with disqualified judge Anello under the auspice of her "administrative position," as Presiding Judge, which is not subject to immunity. (*Id.*) Disqualified judge Anello **admitted**, that following his disqualification, he discussed Kay, Dalton and the *Gober* case with other judicial officers, which could only have been authorized, if at all, in an "administrative" capacity and not subject to immunity. (*Id.*) (See RJN, Ex. 8, disqualified judge Anello's fax to the State Bar regarding his refusal to provide documents, pursuant to subpoena, while requesting legal advice from the State Bar.) ["Subject to your advice to the contrary, my communications with other judges don't appear to be relevant, so I don't intend to bring anything with regard to those requests."] Judge Meyer **admitted** that he engaged in *ex parte* communications regarding these matters with disqualified judges Anello and Weber. These disqualified and dishonest judges do not get to cover up their misdeeds by saying they are administrative actions, because such actions are not covered by <u>any</u> immunity.

Malefactors Wasserman and Ralphs

37. The State Bar defendants were aware that Wasserman and Ralphs conspired to falsely report, complain and fabricate evidence regarding the record in the *Gober* trials and appeals to gain a litigation advantage. See RJN, Ex. 9, State Bar internal memos, which establish the following:

- State Bar prosecutor Alan Konig states that unless one talks to losing counsel [Wasserman] and the disqualified judges [Anello and Weber], **there is nothing in the record that would indicate misconduct**. Thus, Konig's rant about Kay's misconduct is **not** based on his review of the record; rather, it derives from Anello,

Weber, Wasserman and Ralphs' false reports and complaints to the State Bar and evidence a conspiracy.

- State Bar prosecutor Alan Blumenthal states Wasserman informs him the *Gober* trials were remanded based on Kay's attorney misconduct.
- The manufacturing and fabricating of non-existent orders, which falsely proclaim that Kay is not allowed to mention customer complaints in the *Gober* case. There are no such orders, nor did defendant Ralphs ever submit an *in limine* order or instruction mentioning customer complaints. (See RJN, Ex. 10, Exhibit 4 from the State Bar proceedings, which are all the orders entered from the first *Gober* trial.) Moreover, the published and unpublished *Gober* decisions base the findings of punitive liability on customer complaints admitted by the trial court into evidence.
- The manufacturing and fabricating of a non-existent restraining order for counsel to "remain 10 feet apart," which Wasserman stated to Konig exists.
- Phone messages that memorialize that Wasserman gave this type of manufactured and fabricated evidence and information to Konig and Blumenthal and that she produced such "orders and documents."

38. The State Bar defendants were aware that the published *Gober* decision states the new trial was granted on the grounds of excessive damages ONLY. There *was no order or finding of attorney misconduct.* (*See Gober v. Ralphs Grocery Company, supra*, 137 Cal.App.4th at 209.) Wasserman told these lies [false reports and complaints] regarding the *Gober* case, while supplying the false, fabricated and altered evidence to the State Bar for several years during the *Gober* appeal and before the State Bar filed the charges, which were based on her false and fabricated accusations and evidence. This was done to have Kay suspended or disbarred before the potential third trial in *Gober*.

39. In perpetrating the above-described acts and failures to act, the State Bar defendants, disqualified judges Anello, Weber, Meyer, Wasserman and Ralphs engaged in a series of violations and wrongful acts to extort Kay to forgo and give up the "exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of

rights secured by the Constitution or laws of this state," in violation of Penal Code §518, which caused direct and irreparable harm to relationships with his clients, existing, pending and future cases and his law practice; without standing and in the absence of all jurisdiction and/or administratively and/or privately and in non-judicial capacity and thus, without immunity.

V. CAUSES OF ACTION

FIRST CAUSE OF ACTION [Interference with Prospective Economic Advantage and Employment Relationship] against the State Bar defendants, Anello, Weber, Meyer, Wasserman and Ralphs

40. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein. While defendants' wrongful acts were being carried out, Plaintiffs Robin A. Kay, Larry J. Peluso, Christopher Enos and Kay were all employed in Kay's law office.

41. The defendants and each of them, acting in concert, falsely reported and/or complained about the article VI court record in the underlying *Gober* and *Marcisz* trials and appeals to *fabricate* evidence, false charges and findings that orders exist in the trial court and appellate record that Kay engaged in "obstruction of justice" (contempt), resulting in the denial of fair trials to the defendants in these cases. However, no such orders or evidence of misconduct exists, as established by the final decisions and judgments in the article VI courts. The State Bar has no jurisdiction to review and/or reverse these final decisions and judgments.

42. Kay was never found to have violated any orders in the article VI court cases; nor was he the subject on an order of contempt, sanctions or new trial based on misconduct, establishing jurisdiction in the State Bar to commence an investigation, as admitted by Chief Trial Counsel Towery. (§6086.7.) The State Bar is *estopped* by these final judgments and decisions, based on the doctrine of *res judicata*, which gives stability to judgments and decisions after the parties have had a fair opportunity to litigate their claims and defenses. (See e.g., *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14

Cal.2d 47, 51; *Johnson v. Loma Linda* (2000) 24 Cal.4th 61, 77.) The California Supreme Court has no authority to reclaim jurisdiction through its administrative arm (State Bar) in the very same matters, in which it relinquished jurisdiction (having denied review) based on the exact same record. (*Lady v. Worthingham*, 61 Cal.App.2d 780, 782 (1943) [State Bar has no authority (jurisdiction) to contravene final judicial findings and ruling of article VI courts].)[11] (*In re Kittrell* (2000) 4 Cal. State Bar Ct. Rptr. 195, p.7 [". . .we conclude that principles of collateral estoppel can properly be applied in this (State Bar) proceeding. . ."]

43. In perpetrating the above-described acts and failures to act, the defendants and each them, acting in concert, engaged in a series of wrongful acts, without immunity and/or jurisdiction, resulting in violations of criminal and civil law, which caused direct and irreparable harm to Kay's relationships with his employees [Plaintiffs] clients, existing, pending and future cases and his law practice; all of which resulted in interference with Plaintiffs' economic advantage and employment relationship arising from their employment in Kay's law office.

44. Defendants' wrongful acts were carried out with knowledge and intent to cause irreparable harm to Kay's law practice and with the knowledge that Plaintiffs, as employees in Kay's law office, would be harmed by their wrongful acts. As a direct and foreseeable consequence of these wrongful acts by defendants, and each them, acting in concert, Plaintiffs and each of them, have suffered economic loss, physical harm and emotional trauma; resulting from the irreparable harm caused by defendants to Kay's law practice. Defendants' actions were carried out with a conscious disregard of Plaintiffs' rights and with the intent to vex, injure or annoy Plaintiffs; such as to constitute oppression, fraud or malice under California Civil Code §3294; entitling Plaintiffs to

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[11] "[I]t is utterly immaterial what conclusion the State Bar, or any investigating committee thereof, may have reached relative to a judgment of this court or of the Supreme Court. The decisions and judgments of the District Court of Appeal and the Supreme Court are not subject to review by the State Bar or a committee thereof." (*Id.*)

exemplary or punitive damages.

SECOND CAUSE OF ACTION [Violation of Civil Code §52.1(b)] against the State Bar defendants, Anello, Weber, Meyer, Wasserman and Ralphs

45. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

46. The defendants and each of them, acting in concert, conspired to falsely report, complain and testify about the record in the underlying *Gober* and *Marcisz* trials and appeals to *fabricate* the false charges and findings that orders exist in the trial court and appellate record of findings of contempt and reversals of the underlying *Gober* and *Marcisz* trials, of which none exist. This conspiracy to falsely report, complain and testify regarding article VI court records amounts to criminal acts.

47. In perpetrating the above-described acts and failures to act, the State Bar defendants, disqualified judges Anello, Weber, Meyer, Wasserman and Ralphs engaged in a series of violations and wrongful acts to coerce and extort Kay to forgo and give up the "exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state," in violation of Civil Code §52.1(b), which caused direct and irreparable harm to relationships with his employees [Plaintiffs] clients, existing, pending and future cases and his law practice; without standing and in the absence of all jurisdiction and/or administratively and/or privately and in non-judicial capacity and thus, without immunity.

48. As a direct and foreseeable consequence of these violations, Plaintiffs and each of them, have suffered economic loss, physical harm, emotional trauma, damage to Kay's law practice, and irreparable harm to his reputation and other general and special damages. As a further consequence of these deprivations, Kay was required to retain counsel to represent him in the State Bar proceeding pursued against him and incurred expenses associated with defending against the unlawful State Bar proceeding initiated and sustained by the defendants and each of them. Defendants' actions were carried out with a conscious disregard of Plaintiffs' rights and with the intent to vex, injure or annoy

them; such as to constitute oppression, fraud or malice under California Civil Code §3294; entitling Plaintiffs to exemplary or punitive damages.

THIRD CAUSE OF ACTION [Violation of Penal Code §518] against the State Bar defendants, Anello, Weber, Meyer, Wasserman and Ralphs

49. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

50. The defendants and each of them, acting in concert, conspired to falsely report, complain and testify regarding the record in the underlying *Gober* and *Marcisz* trials and appeals to *fabricate* the false charges and findings that orders exist in the trial court and appellate record of findings of contempt and reversals of the underlying *Gober* and *Marcisz* trials, of which none exist. This conspiracy to falsely report, complain and testify regarding article VI court records amounts to criminal acts.

51. In perpetrating the above-described acts and failures to act, the State Bar defendants, disqualified judges Anello, Weber, Meyer, Wasserman and Ralphs engaged in a series of violations and wrongful acts to extort Kay to forgo and give up the "exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state," his in violation of Penal Code §518), which caused direct and irreparable harm to relationships with his employees [Plaintiffs] clients, existing, pending and future cases and his law practice; without standing and in the absence of all jurisdiction and/or administratively and/or privately and in non-judicial capacity and thus, without immunity.

52. As a direct and foreseeable consequence of these violations, Plaintiffs and each of them, have suffered economic loss, physical harm, emotional trauma, damage to Kay's law practice, and irreparable harm to his reputation and other general and special damages. As a further consequence of these deprivations, Kay was required to retain counsel to represent him in the State Bar proceeding pursued against him and incurred expenses associated with defending against the unlawful State Bar proceeding initiated and sustained by the defendants and each of them. Defendants' actions were carried out

with a conscious disregard of Plaintiffs' rights and with the intent to vex, injure or annoy them; such as to constitute oppression, fraud or malice under California Civil Code §3294; entitling Plaintiffs to exemplary or punitive damages.

FOURTH CAUSE OF ACTION [Violation of Government Code §815.6] against the California Attorney General, Harris and Gower

53. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

54. The California Constitution article V, sec. 13[12] states in relevant part:

> ". . . the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney."

See *People v. Brophy*, 49 Cal.App.2d 15 (1942):

> "The Attorney General shall be the chief law officer of the State and it shall be his duty to see that the laws of the State of California are uniformly and adequately enforced in every county of the State." Manifestly, enforcement of the laws contemplates enforcement according to law, the procedure for which is definitely established. There is nothing in section 21 of article V which authorizes the Attorney General to depart from that procedure.

The Office of Attorney General website, "About the Office of the Attorney General," states:

> **The Attorney General represents the people of California in civil and criminal matters before trial courts**, appellate courts and the supreme courts of California and the United States. **The Attorney General also serves as legal counsel to state officers** and, with few exceptions, to state agencies, boards and commissions. Exceptions to the centralized legal work done on behalf of the state are listed in Section 11041 of the Government Code.
> * * * * *
> It is our duty to serve our state and work honorably every day to fulfill California's promise. The Attorney General and our Department's employees provide leadership, information and education in partnership with state and local

[12] Formerly article V, sec. 21

governments and the people of California to:

* **Enforce and apply all our laws fairly and impartially.**
* Ensure justice, safety, and liberty for everyone.
* Encourage economic prosperity, equal opportunity and tolerance.
* Safeguard California's human, natural, and financial resources for this and future generations. (Emphasis.)

The interests of the "people of California" include enforcement of state criminal statutes violated by the State Bar defendants, disqualified judges Anello, Weber, Meyer, Wasserman and Ralphs. However, the Attorney General failed to discharge its mandatory duties, as alleged herein in violation of Government Code §815.6.

55. As a direct and foreseeable consequence of these violations, Plaintiffs and each of them, have suffered economic loss, physical harm, emotional trauma, damage to Kay's law practice, and irreparable harm to his reputation and other general and special damages. As a further consequence of these deprivations, Kay was required to retain counsel to represent him in the State Bar proceeding pursued against him and incurred expenses associated with defending against the unlawful State Bar proceeding initiated and sustained by the defendants and each of them. Defendants' actions were carried out with a conscious disregard of Plaintiffs' rights and with the intent to vex, injure or annoy them; such as to constitute oppression, fraud or malice under California Civil Code §3294; entitling Plaintiffs to exemplary or punitive damages.

FIFTH CAUSE OF ACTION [Civil Conspiracy] against all defendants

56. The allegations set forth in the foregoing paragraphs of this Complaint are realleged and incorporated by reference as if fully set forth herein.

57. The State Bar defendants, disqualified judges Anello, Weber, Meyer, Wasserman, Ralphs and Attorney General defendants, acting in concert, and each of them, conspired to falsely report, complain, fabricate, alter and withhold evidence, obtain privileged information, overturn the lawfully obtained verdicts and final judgments in the *Gober* and/or *Marcisz* cases and have Kay suspended and/or disbarred to prevent him from retrying said cases, in violation of Penal Code §§166(a)(7) &182, §§6043.5 & 6086.1(b), Kay's constitutional - due process rights, pursuant to 42 U.S.C. § 1983, and in violation

of Kay's procedural due process, substantive due process, equal protection and free speech rights and privileges, pursuant to the First, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

58. In perpetrating the above-described acts and failures to act, the State Bar defendants, disqualified judges Anello, Weber, Meyer, Wasserman, Ralphs and Attorney General defendants, acting in concert and each of them, conspired, without jurisdiction, and engaged in a pattern, practice, policy, tradition and/or custom of depriving and/or seeking to deprive Kay his constitutional - due process rights and privileges, in violation of law and without undue and unreasonable government interference to be afforded under the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and in violation of Kay's procedural due process, substantive due process, equal protection and free speech rights and privileges.

59. In perpetrating the above-described acts and failures to act, the defendants, and of them, engaged in a series of violations and wrongful acts, which caused direct and irreparable harm to Kay's relationships with his employees [Plaintiffs] clients, existing, pending and future cases and his law practice; all of which resulted in interference with Plaintiffs' prospective economic advantage. As a direct and foreseeable consequence of these violations, Plaintiffs have suffered economic loss, physical harm, emotional trauma, damage to his law practice, and irreparable harm to his reputation. As a further consequence of these deprivations, Kay was required to retain counsel to represent him in the State Bar proceeding pursued against him and incurred expenses associated with defending against the unlawful State Bar proceedings initiated and sustained by the defendants and each of them. Defendants' actions were carried out with a conscious disregard of Plaintiffs' rights and with the intent to vex, injure or annoy them; such as to constitute oppression, fraud or malice under California Civil Code §3294; entitling Plaintiffs to exemplary or punitive damages.

PUNITIVE DAMAGES

60. Defendants' actions alleged herein in the First, Second, Third, Fourth and Fifth

Causes of Action were and/or will be carried out with a conscious disregard of the Plaintiffs' rights and with the intent to vex, injure or annoy; such as to constitute oppression, fraud or malice under Civil Code §3294; entitling Plaintiffs to exemplary or punitive damages.

WHEREFORE, Plaintiffs pray for relief against defendants and of each of them, as alleged herein, as follows:

(1) For general and special damages stated herein and according to proof;

(2) For punitive or exemplary damages as stated herein and according to proof;

(3) For reasonable attorney's fees and costs of suit stated and incurred herein;

(4) For each other such and further relief as the Court may deem proper.

Dated: September 14, 2011

By: _____

Philip E. Kay

VERIFICATION

1. I, am a plaintiff in this action.

2. I have read the foregoing Complaint. I make this declaration to verify the contents thereof; the factual allegations of which are true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on the 14th day of September 2011 at San Francisco, California.

_____

Philip E. Kay

REQUEST FOR JUDICIAL NOTICE

Plaintiff Philip E. Kay (Kay) hereby presents these Exhibits to and requests and moves for judicial notice in conjunction with this Verified Complaint. Kay presents these Exhibits and makes this request because proper resolution of the issues in this Verified Complaint cannot be had without consideration of these Exhibits, which is the subject of this Complaint. A number of the requests should be granted because it is a matter of the authenticity of the records in the State Bar proceeding and secondary published authority. Kay further requests this Court to take judicial notice pursuant to Rules 8.520(g) & 8.252(a) of the California Rules of Court and Evidence Code §§451, 452 & 459.

The following true and correct copies are attached as Exhibits and for which judicial notice is requested:

Ex. 1, California Bar Journal, February 2011;

Ex. 2, February 22, 2011 Agenda Item from James Towery, Chief Trial Counsel;

Ex. 3, State Bar Erin Joyce letter;

Ex. 4, disqualified judge Anello's June 5, 2007 letter to the State Bar;

Ex. 5, Judge Anello's U.S. Senate Questionnaire;

Ex. 6, State Bar investigator Robert Feher memo;

Ex. 7, State Bar trial transcript excerpts of disqualified judge Weber, pgs. 212-213;

Ex. 8, disqualified judge Anello's fax to the State Bar regarding his refusal to provide documents, pursuant to subpoena, while requesting legal advice from the State Bar;

Ex. 9, State Bar internal memos re Wasserman;

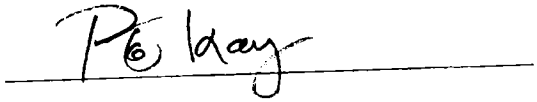
Ex. 10, Exhibit 4 from the State Bar proceedings, which are all the orders entered from the first *Gober* trial;

Ex. 11, memo of OCTC prosecutor Alan Konig;

Ex. 12, *Marcisz* decision;

Ex. 13, *Marcisz* RT p. 7180, lns. 14-24.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed in San Francisco, California on 14 September 2011.



Philip E. Kay

No let-up in loan modification complaints

By Nancy McCarthy
Staff Writer

James Towery reflects on his first six months as Chief Trial Counsel
Photo, Darryl Bush

Despite extensive efforts over the past two years to rein in improper loan modification activities by some lawyers, including legislation and aggressive prosecution by the State Bar and the attorney general, complaints from clients continue unabated. Chief Trial Counsel James Towery, who took over as the bar's head prosecutor in August, said one-third of his office workload is devoted to loan modification complaints; 1,500 investigations of 400 attorneys currently are active. Twenty have either resigned or been disbarred.

"We've made tremendous strides but we haven't stemmed the tide," Towery said. "The foreclosure crisis is so significant in California, and regrettably it has been an opportunity for a small number of attorneys to take advantage of people and try to get rich quick."

The foreclosure complaints are largely responsible for a 50 percent or more increase in the discipline unit's work between 2008-2010, he said. Historically the office handles about 1,500 investigations at a time. That number rose to 2,500 in 2009, to 3,500 last year and currently stands at 3,200. "It's been challenging for everyone," Towery said. "It's like being in a district attorney's office in the midst of a crime wave."

Despite the larger number of complaints and a steady number of calls — 6,500 per month — to the department's intake number, Towery said the discipline unit has made impressive inroads to its backlog numbers. The investigative backlog — cases older than six months — dropped from 911 in July 2010 to the current 390. The number of cases in which the investigation is complete but notices have not been drafted declined from 1,400 a year ago to 1,163 last month. And between 2007 and 2010, the number of cases resolved through warning letters, stipulations, closure or filing of charges doubled from 902 to 1987.

In other words, Towery said, his office's productivity increased by 75 percent between 2009 and 2010.

Towery took the top disciplinary job after 33 years in private practice, where he specialized in civil litigation with a focus on professional liability. He served as State Bar president in 1995-96 after a

year as chair of the board of governors discipline committee, overseeing implementation of recommendations to improve the efficiency of the discipline system. His long interest in legal ethics issues led to the new job, which he described as the "best discipline job" in the country.

The large number of lawyers committing misconduct while handling foreclosure matters led to passage in October 2009 of SB 94, which prohibits attorneys from taking advance fees for work on loan modifications. Although the statute was expected to curb abuses, many lawyers have either ignored the new law or tried to find ways to get around it, Towery said. "There is an irresistible impulse for a small group to take advantage of the plight of people in crisis," he said. Most of the misconduct involves charging clients small sums, offering promises of loan modifications and then doing little or no work. Some California lawyers also operate in other states where they are not licensed.

The discipline office is now receiving complaints from homeowners who may have hired a lawyer prior to the passage of SB 94 but are just now losing their homes. The investigations are complex, often involving multiple clients, many of them non-English speaking, and often involving subpoenas of bank records. "Twenty is not going to be the final number" who lose their law license, Towery said.

The discipline office also is receiving complaints about a somewhat newer scam: debt consolidation. Clients facing large debt pay their lawyer a certain amount of money every month believing the lawyer will pay down the debt. In fact, however, the lawyer simply takes the money.

In addition to the ongoing loan modification complaints, Towery said the discipline office is focusing on three other areas: major misappropriation by lawyers of client funds; responding to the report of the Northern California Innocence Project (NCIP) that found what it said was widespread failure to pursue prosecutorial misconduct; and creating initiatives to divert low-level misconduct.

• The bar is trying to identify lawyers who take client funds early and fast-track their cases. Towery estimated between 30 and 40 lawyers meet the initial criteria of stealing at least $25,000 from clients, and his office also will investigate lawyers who take less but have a prior history of misappropriation. Small teams of lawyers and investigators are working on major misappropriation cases in both Los Angeles and San Francisco and will act quickly to go to court to restrict a lawyer's license if he or she poses a "substantial threat of harm" to the public.

Towery described major misappropriation matters as a "classic case" of a small number of lawyers causing a disproportionate number of problems. While the vast majority of lawyers are fundamentally honest, he said, "a tiny percentage has crossed that boundary line" and dipped into

their client trust accounts. Towery said 42 percent of the claims paid by the Client Security Fund to victims of lawyer dishonesty are the result of major misappropriation and ratcheting up prosecution of these offenders will enhance public protection.

• Towery's office is analyzing approximately 130 cases the innocence project said were reversed because of prosecutorial misconduct. The office will not look at the matters identified by the report as harmless (not resulting in a reversal) because of the bar's "clear and convincing" burden of proof. Towery suspects that bar prosecutors did not know about many of the reversals, either because the case was not reported, as required, or did not meet the criteria for notifying the bar. To improve the requisite reporting, his office sent 1,900 letters to judges and is stepping up contacts with district attorneys' offices to educate them about reporting requirements.

Towery said the bar is not looking at misconduct that occurred more than 10 years ago. Some of the more recent cases involved prosecutors who have died or were not licensed in California, some are now judges and others are misidentified. None of those can be prosecuted. A small number will meet the bar's criteria for prosecution, he said. "Our approach is very simple — we treat prosecutors in an even-handed fashion."

• Towery is creating an alternative diversion program for low-level misconduct matters, such as first-time DUIs. Lawyers with no previous record but minor complaints may receive a warning letter or have charges dismissed. "We hope it'll be a learning experience for them," Towery said.

The Alternative Discipline Program, created for lawyers with mental health or substance abuse problems, "is problematic and we continue to closely examine it," Towery said. His office will adhere to an informal three-strikes rule, and lawyers who return to the discipline system "will no longer get the benefit of the doubt. The folks with prior records are going to be our focus."

AGENDA ITEM

March 2011

DATE: February 22, 2011

TO: Members, Regulation, Admissions and Discipline Oversight

FROM: James Towery, Chief Trial Counsel

SUBJECT: Description of Major Misappropriations Prosecution Team and Related Initiatives; Posting of Consumer Alert of Major Misappropriation Charges on Member's Profile Page--Request for Public Comment

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EXECUTIVE SUMMARY

Lawyer misappropriation of client funds poses a vexing problem where a relatively small number of lawyers cause a disproportionate amount of harm to clients and the public. To improve the efficiency and speed with which the Office of the Chief Trial Counsel prosecutes this relatively small number of serious offenders, we have formed a new vertical prosecutorial team to fast track and aggressively prosecute major misappropriation cases.

The goals of the Major Misappropriation Team involve early identification of lawyers who have stolen $25,000 or more from clients; expediting the investigation of these cases; and accelerating prosecution by filing a notice of disciplinary charges and/or other interim remedies, such as pursuing Section 6007(c) involuntary inactive enrollment "threat of harm" petitions. We believe that such aggressive measures are necessary to swiftly remove these lawyers from practice to avoid further harm to other clients and the public.

A particularly challenging aspect of major misappropriation cases is adequately ensuring the protection of unsuspecting current or prospective clients from the risk of continuing harm when a lawyer remains on active status after a major misappropriation charge is filed and remains pending in the State Bar Court. Currently, the State Bar posts on its website's member profile page a filed notice of disciplinary charges and any response to the notice, until such time as an order or decision is filed resolving the disciplinary matter. The website does not currently post a petition filed under Business & Professions Code section 6007(c) to enroll an attorney involuntarily on inactive status based on "threat of harm" to clients or the public.

We believe that in order to sufficiently warn and prevent future harm to clients and the public about lawyers charged with major misappropriation of client funds, the Bar's website policy should be extended to post a Consumer Alert displayed prominently on the member's profile page. The Consumer Alert and informational text, coupled with a disclaimer, would be posted upon filing either a notice of disciplinary charges or a petition under Business & Professions Code section 6007(c) in the State Bar Court, when either includes a charge of misappropriation of client funds in the amount of $25,000 or more, whether as a single charge or aggregate of charges.

We are seeking your Committee's authorization to release for public comment, for a period of 45 days, the proposed policy regarding posting a Consumer Alert on a member's State Bar website profile page. The policy also provides for posting a filed petition under section 6007(c), which relies on a major misappropriation of client funds, and any response, as set forth in Attachment A.
For any questions about this agenda item, please contact Jill Sperber, Special Assistant to the Chief Trial Counsel, at jill.sperber@calbar.ca.gov or (415) 538-2023.

BACKGROUND

1. Description of New Major Misappropriations Prosecution Team and Related Initiatives

Recognizing that the few lawyers who steal from their clients cause a disproportionate amount of harm to clients, the public, and maintenance of the highest standards of the legal profession, the Office of the Chief Trial Counsel (OCTC) formed a new vertical team to improve our prosecution of these serious offenders. Effective February 1, 2011, OCTC created the Major Misappropriations Team to give the highest priority to a swift and aggressive prosecution of these relatively few attorneys who misappropriate substantial sums from their clients. Underscoring the disproportionate amount of harm these lawyers cause, in 2009 for example, 59% of the total $3.5 million in claims paid by the Client Security Fund to clients-a sum of $2,037,121- involved reimbursement due to lawyer misappropriation, by far the largest dollar amount paid in any single category of Fund claims.

Goals and Definition of Major Misappropriation. The goals of the Team involve the early identification of attorneys suspected of major misappropriation, aggressive investigation, and accelerated filing of either a Notice of Disciplinary Charges or, where appropriate, expedited inactive enrollment petitions under Business & Professions Code section 6007(c).The Major Misappropriations Team will be responsible for all cases where the attorney has willfully misappropriated $25,000 or more in client funds, either from a single client or from multiple clients in that aggregate amount. As of February 15, 2011, the Team identified 113 pending investigations of misappropriation charges

involving approximately 50 lawyers which meet the dollar threshold criteria for major misappropriation fast- track prosecution.

Composition of Team. The initial staffing plan is to have three lawyers and two investigators full time in Los Angeles, and one attorney and one investigator part time in San Francisco. Supervising Trial Counsel Joseph Carlucci from the Los Angeles office is in charge of the Team, which is part of a Trial Unit under the management of Assistant Chief Trial Counsel Alan Gordon.

Expedited Process for Investigation and Prosecution. Major misappropriation cases will be fast-tracked as soon as OCTC's Intake Unit receives a complaint that appears to meet the threshold requirements of a major misappropriation. The Team's leader will promptly evaluate the complaint to determine if it is appropriate for handling by the Major Misappropriation Team. If the complaint meets the established criteria for major misappropriation prosecution, the complaint will be assigned to a Team investigator and prosecuting attorney for vertical investigation and prosecution. We anticipate improving our prosecutorial efficiency in such matters because the same prosecutor who oversees the investigation will also handle the case through Notice filing and trial, including any appeal.

Whenever possible, the Team will aggressively investigate and attempt to quickly resolve major misappropriation cases, if possible, short of filing disciplinary charges. For example, rather than initially prepare and serve a subpoena duces tecum for the lawyer's bank records, which can be time consuming, the investigator may elect to first initiate a meeting with the lawyer at his or her law office to examine the lawyer's financial records required by rule 4-100(C), Rules of Professional Conduct.

In our experience, given the limited defenses available in most misappropriation matters, in person meetings held early in the investigation stage also conserve prosecutorial efforts and valuable resources: we may be able to reach an appropriate stipulation or other resolution, including a stipulation to disbarment, without filing formal proceedings.[1]

Interim Remedies to Protect the Public. To ensure protection of the public by removing a lawyer suspected of major misappropriation from active practice as quickly as possible, the Major Misappropriation Team will, where appropriate, seek statutory interim remedies, including involuntary inactive enrollment pursuant to Business and Professions Code section 6007(c). Section 6007(c) provides a procedure for the State Bar to petition the State Bar Court to involuntarily enroll the lawyer inactive, pending the filing and resolution of disciplinary charges, where the lawyer poses a substantial threat of harm to clients and the public.

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[1] A lawyer's failure to preserve client funds in a client trust account is a strict liability offense under Rule of Professional Conduct 4-100(A). Where there is reasonable cause to believe that a lawyer took client funds, whether intentionally or acting with gross negligence, the State Bar will also charge the commission of an act of moral turpitude. (Bus. & Prof. Code §6106.)

Referrals to Law Enforcement. Another important component of the Team's mission is to refer lawyers who have committed theft of client funds to law enforcement for criminal prosecution. To this end, the Team has already established direct contacts within many district attorneys' offices and police agencies. The Team will assist law enforcement by providing comprehensive evidentiary documents and internal summaries of suspected misconduct.

2. Proposal to Post a Consumer Alert for Lawyers Charged with a Major Misappropriation of Client Funds

To complement the Major Misappropriation Team's aggressive prosecution of lawyers involved in a major misappropriation of client funds and adequately protect clients and the public from the risk of further harm from lawyers who remain on active status pending prosecution of a major misappropriation charge or charges, we propose here a new initiative: posting a Consumer Alert online on the member's State Bar website profile page when a charge of misappropriation is filed in the State Bar Court. This Consumer Alert, coupled by a disclaimer about filed charges, would be posted upon the filing of a major misappropriation charge in a notice of disciplinary charges or section 6007(c) petition requesting the lawyer's involuntary inactive enrollment.

ISSUE

Whether the Board Committee on Regulation, Admissions & Discipline should authorize release, for a 45 day period, for public comment the attached proposed policy set forth in Attachment A. The policy contains two parts. First, the State Bar would post on a member's State Bar website profile page a prominent Consumer Alert to warn clients and the public of charge(s) filed against the member involving a misappropriation of $25,000 or more of client funds. The second part of the policy authorizes posting a involuntary inactive enrollment petition filed under Business & Professions Code section 6007(c) when a basis for the application is a misappropriation of $25,000 or more of client funds and any response until a decision or order issues from the State Bar Court.

DISCUSSION

By statute, hearings and records of original disciplinary proceedings, including filing for involuntary inactive enrollment under Section 6007(c), are public following the filing of a Notice of Disciplinary Charges. (Bus. & Prof. Code §§6086(a)(1), 6086.1(a)(2)(A), 6086.1(b); rule 5.9, Rules Proc. of State Bar.) Until fairly recently, the State Bar did not post the notice of disciplinary charges online.[2] In mid- 2008, the Board of Governors approved a new policy authorizing the State Bar to post a filed notice of disciplinary charges and any reply on a member's profile page on the Bar's website under a section entitled, "Disciplinary and Related Actions."

[2] In or about July 2005, the State Bar began posting disciplinary decisions and orders on stipulated dispositions on the member's profile page on the State Bar's website.

Upon approval of this policy, the Board recognized that posting this information helps to fulfill the State Bar's duty to protect the public, which includes informing the public about the work of the State Bar, the right of all persons to make complaints against attorneys, and the nature and procedures of the discipline system protection. A true and correct copy of the filed Notice is now posted as a PDF on the member's profile page on the State Bar website. This is the only way for a member of the public to review disciplinary charges pending against a lawyer on the Bar's website.

In contrast, a petition filed by the State Bar under Business & Professions Code section 6007(c) to enroll an attorney involuntarily on inactive status based on "threat of harm" to clients or the public, although such proceedings are public, is not currently authorized for posting on the Bar's website.

We acknowledge that the posted notice of disciplinary charges, once opened and read, discloses any misappropriation charge filed against a lawyer.[3] However, we believe that stronger public protection measures are warranted to protect current or prospective clients from additional harm by posting a prominent Consumer Alert of a member's pending charge involving a major misappropriation of client funds on his or her State Bar member profile page.

The proposed Consumer Alert would contain the following message:

> **CONSUMER ALERT The State Bar of California has filed disciplinary charges against this attorney alleging that the attorney engaged in a major misappropriation of client funds. In order to read the Notice of Disciplinary Charges filed by the State Bar against this attorney, click here. To learn more about the general nature of the disciplinary offense of misappropriation of client funds by an attorney, click here.**

To ensure fair treatment of accused members, a disclaimer would follow any Consumer Alert explaining that filed charges are only allegations and the member is presumed to be innocent until the charges have been proven. The proposed disclaimer language would read as follows:

> **DISCLAIMER: Any Notice of Disciplinary Charges filed by the State Bar contains only allegations of professional misconduct. The attorney is presumed to be innocent of any misconduct warranting discipline until the charges have been proven.**

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[3] Rule 5.41(B), Rules of Proc. of the State Bar, requires a notice of disciplinary charges to, *inter alia*: "(1) cite the statutes, rules, or Court orders that the member allegedly violated or that warrant the proposed action; (2) contain a statement of facts comprising the violations in sufficient detail to permit the preparation of a defense; [and] (3) relate the stated facts to the statutes, rules or Court orders that the member allegedly violated or that warrant the proposed action...."

To see a mock-up of the proposed Consumer Alert and Disclaimer on a member's profile page, see Attachment B referring to John Doe #999999. As with the policy on removing a filed notice and any response, the Consumer Alert and Disclaimer would similarly be removed upon the filing of a State Bar Court decision or order.

For the reasons stated above, a Consumer Alert and accompanying disclaimer should also be posted online upon the filing of a petition seeking the member's involuntary inactive enrollment under Business & Professions Code section 6007(c) [threat of public harm] when the petition includes, as a basis for application, a major misappropriation of client funds.[4] The Consumer Alert and Disclaimer would be removed upon the filing of a State Bar Court decision or order.

Finally, to be consistent with the State Bar's policy on filed notices of disciplinary charges and to adequately protect the public, we believe that the Board should also approve online posting of a filed section 6007(c) petition involving an allegation of a major misappropriation of client funds and any reply until the State Bar Court files a decision or order.

We believe that the proposed policy, confined to the filing of either a notice of disciplinary charges or a section 6007(c) involving a major misappropriation of client funds, satisfies due process considerations of the respondent about whom a Consumer Alert is made. Two separate disclaimers will appear on the member's profile page. Both the current disclaimer in the section entitled "Disciplinary and Related Actions" and the proposed disclaimer for posting a Consumer Alert caution that pending charges should not be considered as evidence of culpability until the charges are proven. In addition, a notice of disciplinary charges requires "reasonable cause" to believe that a member has committed a violation of the State Bar Act or Rules of Professional Conduct and a "fair, adequate and reasonable opportunity" for the member to deny or explain the matters which are the subject to the notice." (Rule 2604, Rules Proc. of State Bar.)

Similarly, a petition under section 6007(c) must include, in addition to sufficient proof of the presence and continued risk of substantial client or public harm, a verified application which includes facts supported by declarations, transcripts or requests for judicial notice, alleges disciplinary violations, and relates the facts with particularity to support the rule, order or statutory violations. (Rule 5.226, Rules of Proc.) Any order finding that the lawyer's conduct poses a substantial threat of harm to clients or the public warranting interim suspension must be based on a finding that "there is a reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter." (Bus. & Prof. Code §6007(c)(2)(C).)

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[4] To proceed under Business & Professions Code section 6007(c), rule 5.226, Rules of Proc., requires a verified application which must identify any investigation matters or pending disciplinary proceedings relied on by case number and complaining witness name (if any). "Otherwise, the application itself must cite the statutes, rules or court orders allegedly violated, or that warrant involuntary inactive enrollment. It must also state the particular acts or omissions that constitute the alleged violation or violations, or that form the basis for warranting involuntary inactive enrollment."

FISCAL / PERSONNEL IMPACT:

Some personnel impact is involved, to the extent that staff will be required to identify whether a notice of disciplinary charges or a section 6007(c) petition involves a major misappropriation of client funds, post, and eventually remove the consumer alert and disclaimer upon the filing of a decision or order resolving the proceedings. Where a filed section 6007(c) petition relies upon a charge of major misappropriation of client funds, staff would also be required to identify such petitions, post them, and eventually remove the petition and any response upon the filing of a decision or order resolving the proceedings.

RULE AMENDMENTS:

Not applicable.

BOARD BOOK IMPACT:

Not applicable.

RECOMMENDATION

The Office of the Chief Trial Counsel recommends that the Board Committee on Regulation, Admissions & Discipline release the proposed policy authorizing the posting of a consumer alert online when a member is charged, by notice of disciplinary charges or section 6007(c) petition, with major misappropriation of client funds, as set forth as Attachment A, for a 45-day public comment period.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should this Board Committee agree with the above recommendation, the following resolution would be appropriate:

> **RESOLVED**, that the Board Committee on Regulation, Admissions & Discipline hereby authorizes the release of the proposed policy attached as Attachment A regarding 1) the online posting of a Consumer Alert and disclaimer on the member's State Bar profile page when a major misappropriation of client funds charge is filed in a notice of disciplinary charges or relied on in a section Business & Professions Code section 6007(c) petition, until the State Bar Court files a decision or order; and 2) the online posting of a Business & Professions Code section 6007(c) petition which relies on major misappropriation of client funds, and any response, until the State Bar Court files a decision or order; and it is

FURTHER RESOLVED, that the release of the attached policy statement set forth in Attachment A for public comment does not constitute, and shall not be considered, as approval of the Board of Governors of the State Bar of the matters published.

THE STATE BAR
OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
INTAKE
Scott J. Drexel, Chief Trial Counsel

1149 SOUTH HILL STREET, LOS ANGELES, CALIFORNIA 90015-2299

TELEPHONE: (213) 765-1000
FAX: (213) 765-1168
http://www.calbar.ca.gov

February 26, 2009

Philip Edward Kay
736 43rd Ave.
San Francisco, CA 94121

RE: Inquiry Number: 08-21769
Respondents: Bonnie Allycee Glatzer, Helene Joy Wasserman, John Bruce Golper, Edward Dewey Chapin, Jill Marie Sullivan, Linda Jean Sinclair, Mary Alice Lehman and Arthur Charles Chambers

Dear Mr. Kay:

Your complaint against attorneys Ms. Glatzer, Ms. Wasserman, Mr. Golper, Mr. Chapin, Ms. Sullivan, Ms. Sinclair, Ms. Lehman and Mr. Chambers, received on July 21, 2008, has been reviewed to determine whether any of these attorneys violated the State Bar Act or the Rules of Professional Conduct and whether there is a basis to investigate any of these attorneys for alleged misconduct.

After careful review and after taking into consideration all relevant factors, the State Bar has concluded that the matter does not warrant action. In your complaint, you alleged that seven of the eight attorneys, who served at various times as defense counsel in *Gober v. Ralphs Grocery Company* ((2006) 137 Cal. App. 4th 204) and *Marcicz v. Ultrastar* ((2008) *Cal App. Unpub. LEXIS 4455)* engaged in misconduct by violating the trial courts' *in limine* orders. Among the additional allegations you made, you claimed (1) Ms. Wasserman committed perjury in two declarations filed with the court in the *Gober* action; (2) Mr. Golper, Mr. Chapin, Ms. Houlahan, and Ms. Sinclair asserted an improper defense, introduced an improper exhibit and elicited improper character evidence at trial; and (3) Ms. Lehman made false statements to the court in the petition for review she filed concerning your alleged misconduct. You also accused Mr. Chambers of violating your client's confidentiality and the attorney-client privilege in 1993.

We requested that you provide the specfic *in limine* motions you claimed that attorneys violated in our letter of September 26, 2008. While you sent the State Bar a CDR containing many transcripts and what you described as "illegally obtained" OSC's, you failed to provide, or even identify, any particular *in limine* orders you claim the attorneys violated. Moreover, in reviewing the transcripts and information you did provide, it is clear that the trial courts in both cases did not make any finding that any of the attorneys intentionally violated the courts' *in limine* orders warranting censure by the court or discipline by the State Bar. The trial courts did not make any findings against any of the attorneys sufficient to warrant a State Bar Investigation.

The trial courts are in the best position to determine if an attorney has committed a violation of Business and Professions Code section 6103, or if an attorney has provided false testimony in violation of

Business and Professions Code section 6068(d). There appears to be no basis for the State Bar to investigate your allegations absent such findings by the courts in question.

As for you complaint against Mr. Chambers, it is barred by the statute of limitations and is duplicative of your complaint made back in 2003, Inquiry No. 03-5201, which was closed.

We are closing our file at this time.

If you do not agree with the decision to close your complaint, you may request a review, **in writing,** within **three (3) months** of the date of this letter. Telephonic requests cannot be accepted. Include with your request any additional or new evidence and **copies** of documents which you believe should be considered. You may make your request to: Audit and Review, Office of the Chief Trial Counsel, State Bar of California, 1149 South Hill Street, Los Angeles, California 90015.

Very truly yours,

Erin McKeown Joyce
Deputy Trial Counsel

Judge
Michael M. Anello

North County Regional Center
325 South Melrose Drive
Vista, California 92083-6627

June 5, 2007

Scott J. Drexel, Esq.
Chief Trial Counsel
Office of the Chief Trial Counsel
The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: State Bar Case Nos. 02-O-15326 and 02-O-15327
Philip Kay and John Dalton

Dear Mr. Drexel:

Thank you for your recent letter to all California judges providing information about your office, and inviting questions or comments about attorney discipline matters.

As required by applicable provisions of the Business & Professions Code, I reported the above-referenced attorneys to your office back in October of 2002 (after granting a motion for new trial based upon attorney misconduct). Enclosed for reference is a copy of your predecessor's letter of November 1, 2002, acknowledging receipt of that complaint. It has now been almost five years, and to my knowledge no formal action has yet been taken. It would be most appreciated if you could check into this matter and advise me at your convenience as to its status.

Thank you for your attention to this matter.

Sincerely,

Michael M. Anello

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: Full name (include any former names used).

   Michael Monroe Anello

2. **Position**: State the position for which you have been nominated.

   United States District Judge for the Southern District of California

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office: San Diego Superior Court
   330 West Broadway
   San Diego, CA 92101

   Residence: La Jolla, CA

4. **Birthplace**: State year and place of birth.

   1943; Miami, Florida

5. **Marital Status**: (include name of spouse, and names of spouse pre-marriage, if different). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.

   I am married to Pamela P. Anello (formerly Pamela Wray Plummer). She has not worked outside the home during the marriage. We have no dependent children.

6. **Education**: List in reverse chronological order, listing most recent first, each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   January to May 1982, University of San Diego Law School, Master of Law in Taxation Program, no degree received.

   1965 to 1968, Georgetown University Law Center; J.D., June 1968

   1961 to 1965, Bowdoin College; B.A., June 1965

7. **Employment Record**: List in reverse chronological order, listing most recent first, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

1998 – present
San Diego Superior Court
Superior Court Judge

1973 – 1998
Wingert, Grebing, Anello & Brubaker
Partner in the law firm now known as Wingert, Grebing, Brubaker & Goodwin LLP

1972 – 1973
San Diego City Attorney's Office
Deputy City Attorney (Prosecutor)

1968 – 1972
U. S. Marine Corps
Captain

1966 – 1968 (Jan–May 1966, Oct 1966-May 1967, Oct-Nov 1968)
Library of Congress
Security Guard

June-August 1966, and June-August1967.
Pierson, Ball & Dowd
Law Clerk

8. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received.

I served on active duty in the U.S. Marine Corps from November 25, 1968, to February 1, 1972, when I was honorably released from active duty as a Captain. While on active duty, I served a full tour in Vietnam from September 1969 to September 1970. After being released from active duty, I joined the U. S. Marine Corps Reserve, and ultimately retired as a Lt. Col. (USMCR) in 1990.

9. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Dean's List (all four years) and James Bowdoin Scholar Award (two years) at Bowdoin College

East Coast Regional Candidate from Bowdoin College in the 1965 Rhodes Scholarship competition (not successful)

Class Marshall for the 1965 graduating class at Bowdoin College (elected by vote of the Senior Class)

cum laude graduate of Bowdoin College

selection for law review (Georgetown Law Journal)

Military awards and honors include: National Defense Service Medal; Vietnam Service Medal; Vietnam Campaign Medal; various unit citations; and a special Certificate of Commendation from the Commanding General, Marine Corps Base, Camp Pendleton, CA, citing me meritoriously for monitoring and supervising trial of approximately 1000 general and special courts-martial as Chief Trial Counsel (Chief Prosecutor), and presiding over approximately 60 special courts-martial as Military Judge.

10. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

San Diego County Barrister's Club - I served as a Director of the Barrister's Club in 1976 and 1977, as its Treasurer in 1976, and as its President in 1977.

San Diego County Bar Association - I served as a Director of the Association from 1982 to 1984, and as Vice-President of the Association in 1984. I served as a County Bar Association Delegate to the annual California State Bar Convention for approximately 10 years (approx. 1975-1985).

San Diego Defense Lawyers Association - I served as a Director of SDDL in 1991 and 1992.

Enright Chapter of the American Inns of Court - I am a Master in the Enright Chapter of the American Inns of Court (presently on sabbatical), and served as the Program Chair in 1993-1994.

Association of Southern California Defense Counsel (former member)

San Diego Inn of Court - I am a former member and Work Shop Instructor of the San Diego Inn of Court.

San Diego County Bar Association Committees and Sections - I was formerly a member of, and active in, several bar association committees and study sections, including the Real Property, Appellate, Insurance, Probate, and Litigation Committees/Sections.

San Diego Superior Court Executive Committee - I am presently serving in my fourth annual term on the San Diego Superior Court Executive Committee (elected by the 128 Judges of the court). I also currently serve on the Technology and Civil Policy Committees of the San Diego Superior Court.

11. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

District of Columbia Bar - Feb. 16, 1969,

California State Bar - June 2, 1972.

I allowed the DC bar membership to lapse when I moved to California. I remained continuously licensed in California until I was appointed to the San Diego Superior Court in June 1998 at which time I became an "inactive" member. Under the Constitution of California, a person serving as a judge of a court of record is not considered to be a member of the State Bar while in office. See California Constitution Article 6, § 9.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States District Court for the District of Columbia, Feb. 16, 1968
United States Court of Military Appeals, Oct. 7, 1971
Supreme Court of the State of California, June 2, 1972
United States District Court for the Southern District of California, May 31, 1974
United States Court of Appeals for the Ninth Circuit, June 9, 1986
Supreme Court of the United States, June 23, 1986

12. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11 to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Greater San Diego County Arthritis Foundation; member of the Board of Directors (in the approx. mid-1980's timeframe)

Muirlands Junior High School Foundation; founding member of the Board of Directors (in the approx. late 1980's timeframe)

La Jolla High School Foundation; I served on the Board of Directors in the approx. early 1990's timeframe.

La Jolla Beach and Tennis Club

Youth Sports. I served in several positions in youth sports organizations in the 1980's and 1990's, including coaching several youth baseball and soccer teams in the La Jolla Youth Recreation League, serving as a Division Director of La Jolla Youth's Soccer League, and sponsoring several teams in the Mira Mesa-Scripps Ranch and Kearney "Pop" Warner Football Leagues.

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Please indicate whether any of these organizations listed in response to 12a above currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

To my knowledge, none of the organizations in which I have served, or to which I have belonged, have ever discriminated on the basis of race, sex, or religion.

13. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Please supply four (4) copies of all published material to the Committee.

None

b. Please supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, please give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

None

c. Please supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None

d. Please supply four (4) copies, transcripts or tape recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Please include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke.

None

e. Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I was the subject of articles published in the following:

Los Angeles Daily Journal, March 17, 1999
"Update" published by the San Diego Defense Lawyers, Spring 1999
North County Lawyer Magazine, August 2000

14. **Judicial Office**: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I currently serve as a Superior Court Judge on the San Diego Superior Court, having been appointed to that position by former California Governor Pete Wilson on June 24, 1998. The Superior Court is a state court of general jurisdiction hearing all levels and types of criminal and civil matters. Judges are elected every six years. My current term expires January 16, 2013.

In or about 1971 and 1972, while serving on active duty in the U.S. Marine Corps, I served as a Special Courts-Martial Military Judge at Marine Corps Base, Camp Pendleton, CA, where I presided over approximately 60 special court-martial trials (all criminal cases, involving prosecutions under the Uniform Code of Military Justice).

15. **Citations**: If you are or have been a judge, please provide:

a. citations for all opinions you have written (including concurrences and dissents);

As a state trial court judge, I have not written any citable appellate decisions. I have, however, authored many (approx. 75 to 100) "Tentative Decisions" or "Statements of Decision" following non-jury trials.

b. a list of cases in which certiorari has been requested or granted;

None

c. a short summary of and citations for all appellate opinions or orders where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

As a state court trial judge, I have been reversed in nine appellate decisions, two published and seven unpublished.

The two published decisions (with summaries) are:

(1) *Carlsbad Aquafarm, Inc. v. Department of Health Services* (2000) 84 Cal.App. 4th 809. (Plaintiff corporation grew and harvested mussels for commercial sale at its facilities in Carlsbad, California. Plaintiff alleged that defendant Department of Health Services violated its due process rights by refusing to provide a hearing before removing plaintiff from a list of approved interstate shellfish sellers. The jury agreed and awarded plaintiff monetary damages of $290,000. Defendant appealed, contending plaintiff was not entitled to recover money damages based upon a constitutional due process violation. The court of appeal reversed the judgment, finding that plaintiff was not entitled to recover monetary damages for a constitutional due process violation.)

(2) *Morris v. Employers Reinsurance Corporation* (2000) 84 Cal.App.4th 1026. (In an insurance coverage dispute, plaintiff, as an assignee of certain rights under a real estate broker's professional liability policy, sued defendant insurer for breach of contract for failure to defend and indemnify its assignor in an underlying lawsuit. The trial court granted summary judgment to defendant insurer, concluding that there was no coverage based upon a policy exclusion for claims relating to property owned by the broker. The appellate court reversed, finding that the subject exclusion was ambiguous, and that the ambiguity should be construed against the insurer and in favor of coverage.)

The seven unpublished decisions (with summaries) are:

(1) *Noble v. Aldred*, DO42196, issued June 7, 2004. (Plaintiff was injured while dancing in a "mosh pit" during a "punk rock" concert at defendant's bar. Plaintiff claimed that defendant was negligent in managing the concert, and that its negligence was a cause of plaintiff's injury. The jury rendered its verdict in favor of defendant. Plaintiff claimed on appeal that the trial court had erred in excluding an audio recording from evidence, and that it had improperly rushed the jury to its verdict. The appellate court agreed, and reversed the judgment and ordered a new trial.)

(2) *Moore v. San Diego Cemetery Ass'n*, DO42196, issued June 25, 2004. (Plaintiff sued defendant for negligence and breach of contract in connection with a written contract for funeral arrangements. The contract contained an arbitration provision, and defendant moved to compel arbitration pursuant thereto. Based upon affidavits from plaintiff and her husband that defendant's representative agreed the arbitration provision would not be binding on them, the trial court denied the motion to compel arbitration. Defendant contended on appeal that the contract was not ambiguous and that extrinsic evidence (i.e., the Moore's affidavits) should not have been admitted to vary or alter its terms. The appellate court agreed that the Moore's affidavits should not have been admitted, and reversed and remanded for further proceedings.)

(3) *Morris v. Employers Reinsurance Corporation*, DO40993, issued Jan. 5, 2004. (In an insurance coverage dispute, plaintiff, as an assignee of certain rights under a real estate broker's professional liability insurance policy, sued defendant insurer for failing to defend and indemnify the assignor in an underlying lawsuit. After a non-jury trial, the trial court entered judgment in favor of defendant insurer on the ground that even though there may have been an initial breach of duty under the subject policy, plaintiff could not establish an entitlement to any compensatory damages. Plaintiff contended on appeal that the trial court failed to give appropriate value to the settlement in the underlying lawsuit. The appellate court agreed and reversed and remanded for further proceedings.)

(4) *Kuebler v. McCambridge*, DO35812, issued May 3, 2001. (Plaintiff sued defendant for declaratory relief regarding the proper interpretation of the Mobilehome Residency Law and the City of Escondido's rent control ordinance in connection with plaintiff's sale of his mobilehome. Defendant then filed a cross-complaint against plaintiff seeking punitive damages for alleged violations of the Mobilehome Residency Law. Both the complaint and the cross-complaint were ultimately dismissed, and plaintiff then moved for an award of attorneys fees contending he was the "prevailing party." The trial court awarded attorneys fees to plaintiff, and defendant appealed contending that plaintiff was not the "prevailing party." The appellate court agreed, and reversed the attorney fee award.)

(5) *Garces v. Cannon Pacific Services*, DO44540, issued Oct. 5, 2005. (Plaintiffs sued defendant for violation of overtime laws, contending they were

common law "employees" and not "independent contractors." After a non-jury trial, the trial court entered judgment in favor of defendant. Plaintiffs appealed, contending that the evidence presented led to a reasonable inference that they were employees, and not independent contractors. The appellate court agreed, and reversed and remanded for further proceedings.)

(6) *Citizens for Better Rancho Santa Fe Schools v. Rancho Santa Fe School District Board of Trustees*, DO47210, issued April 20, 2006. (Plaintiff sued defendant to enjoin it from proceeding with plans to develop and construct a new school within the covenant area of Rancho Santa Fe. Defendant demurred to the complaint, contending that plaintiff could not establish the necessary predicate of waste of public funds or illegal expenditures of public money. The trial court sustained the demurrer without leave to amend, and dismissed the complaint. Plaintiff appealed, contending it had adequately stated a cognizable claim. The appellate court agreed, and reversed the judgment of dismissal.)

(7) *Pender v. Waldenmayer*, DO44781, issued August 2, 2005. (Plaintiff sued defendant developers for alleged breach of an agreement to make certain improvements on a private road which abutted her residence. During the non-jury trial, at the conclusion of plaintiff's case in chief, the trial court granted defendants' non-suit motion and entered judgment for defendants. Plaintiff appealed, contending she had presented sufficient evidence to make a prima facie showing of the elements of her claim, and that the non-suit motion should not have been granted. The appellate court agreed, and reversed the non-suit and remanded the case for trial.)

I have been affirmed in part, and reversed in part, in eight appellate decisions, two partially published, and six unpublished.

The two partially published decisions (with summaries) are:

(1) *Hogar v. Community Development Commission of the City of Escondido* (2003) 110 Cal.App.4th 1288. (Plaintiff sued defendant claiming the city was not paying sufficient funds into the low-income housing fund as required under the Community Development Law. After a non-jury trial, the trial court applied the "delayed discovery" rule and ordered reimbursement by the city of amounts that should have been paid into the fund from the date it was established until the date of trial. Defendant appealed, contending the "delayed discovery" rule was not applicable, and that reimbursement should be ordered only for amounts that accrued within the three-year limitations period under the applicable statute of limitations. The appellate court agreed, holding that under the unique facts of this case the "delayed discovery" rule was not available, and reversed the judgment in part and remanded for determination of how much reimbursement was required.)

(2) *Gober v. Ralphs Grocery Company* (2006) 137 Cal.App.4th 204. (Plaintiffs sued defendant for failing to take reasonable steps to prevent a

supervisor from sexually harassing them. After a jury awarded Plaintiffs both compensatory and punitive damages, the trial court denied defendant's motion for judgment notwithstanding the verdict, but conditionally granted defendants motion for new trial on the ground that the punitive damages were excessive. On appeal, the appellate court reversed the order denying defendant's motion for JNOV, and remanded to the trial court with directions that the punitive damages be further reduced.)

The six unpublished decisions (with summaries) are:

(1) *Pinho v. Lobo*, DO42669, issued June 4, 2004. (In a third party lawsuit against Pinho and others, Pinho cross-complained against Lobo for defamation, interference with business relations, and conversion. Lobo moved to strike the cross-complaint under California's anti-SLAPP statute (CCP § 425.16), which allows for early dismissal of an action determined to be a strategic lawsuit against public participation. The trial court denied the motion, and Lobo appealed, contending that the anti-SLAPP statute did apply. The appellate court agreed that it applied to certain of her claims, and affirmed in part, and reversed in part, and remanded for further proceedings.)

(2) *Brumfield v. Richardson*, DO36348, issued Feb. 19, 2002. (Plaintiffs sued defendant veterinarian for alleged veterinary malpractice in treating their horse. During the jury trial, the court dismissed plaintiffs' claims for fraud and breach of contract, but allowed the veterinary malpractice claims to go to the jury. The jury rendered its verdict in favor of the defendant. The plaintiffs appealed, contending that it was error for the trial court to dismiss their fraud and breach of contract claims. The appellate court agreed that there was some evidence of alleged fraud (i.e., alleged misrepresentation of veterinarian experience), and that the fraud claim should have been allowed to go to the jury. The appellate court affirmed in part, and reversed in part, and remanded for a new trial on the fraud claim.)

(3) *Moore v. Orthodontic Centers of America, Inc.*, DO35808, issued Jan. 11, 2002. (Plaintiff sued defendant seeking to compel it to agree to his purchase of an OCA affiliated orthodontic practice, and defendant cross-complained against plaintiff alleging breach of contract and fraud. After a jury trial on the cross-complaint, a substantial monetary verdict was rendered in favor of OCA and against Moore. Moore appealed, contending that the underlying contract was unenforceable, and that there was insufficient evidence to support the verdict. The appellate court concluded that certain portions of the contract were unenforceable, but that those provisions could be severed from the subject contract, and that the balance of the agreement could be enforced upon retrial.)

(4) *Argonaut Great Central Insurance Co. v. St. Mar Enterprises*, DO34787, issued June 5, 2001. (This complicated matter involved three appeals from defense verdicts and subsequent denials of post-judgment motions in an insurance subrogation action and a cross-action, both of which arose out of a fire at an

Escondido shopping mall. After considering various claims of error at trial, the appellate court reversed the portion of the judgment in favor of St. Mar on Argonaut's complaint and Zurich's complaint-in-intervention, and affirmed the portion of the judgment in favor of Cole on St. Mar's cross-complaint.)

(5) *Gandy v. Asplundh Tree Expert Co.*, DO43307, issued Oct. 20, 2005. (Plaintiff sued defendant for cutting down and removing trees from its property without its consent. After a jury trial, a verdict was rendered in favor of plaintiff and against defendant in the amount of $475,000. Plaintiff then sought, in post-trial motions, to treble or double the award pursuant to applicable statutes. The court doubled the award, and both parties appealed. Plaintiff contended that treble damages were appropriate, whereas defendant contended that the entire verdict should be overturned due to certain alleged errors at trial. The appellate court agreed that treble damages were appropriate, and reversed that portion of the judgment, but affirmed the judgment in all other respects.)

(6) *Shuster v. Hilton*, DO45249, issued Jan. 18, 2006. (Plaintiff sued defendant for fraud and breach of contract, among other things, arising out of a failed business relationship involving the manufacture and sale of helicopters. The defendant cross-complained against plaintiff for the alleged non-payment of various loans. The complaint was tried to a jury, resulting in a verdict in favor of plaintiff Shuster in the amount of $312,706. The cross-complaint was then tried to the court, sitting without a jury, which resulted in a net recovery to defendant Hilton after all set-offs were applied. Both parties appealed. The appellate court found that the law of set-off was incorrectly applied, and reversed the judgment to that limited extent, but affirmed the judgment in all other respects.)

d. a list of and copies of any of your unpublished opinions that were reversed on appeal or where your judgment was affirmed with significant criticism of your substantive or procedural rulings;

As a state trial judge, I have not issued any appellate opinions, published or unpublished. All appellate opinions reversing, or reversing in part and affirming in part, my trial court decisions are listed and summarized in the answer to Question 15.c above.

e. a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored; and

As a trial court judge, I have not authored any appellate opinions. However, I have authored approximately 75 to 100 written "Tentative Decisions" and "Statements of Decision" following non-jury trials. Those written decisions are filed by case name and number in the court clerk's office or are in storage. In addition, I maintain copies of those written decisions, which can be provided upon request.

f. citations to all cases in which you were a panel member in which you did not issue an opinion.

None

16. **Recusal:** If you are or have been a judge, please provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest, or for any other apparent reason, or in which you recused yourself sua sponte. (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Please identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

Our court does employ a form of "automatic" recusal system pursuant to which each judge provides the court clerk's office with a list of attorneys (e.g., former partners or good friends) and parties (e.g., former clients) whose cases the judge deems it inappropriate to hear due to actual or potential conflicts of interest. That list is incorporated into our court's initial case assignment system, and, if it works properly, no case involving any of those persons or entities is assigned to that judge. Should such a case be assigned to me, or if I subsequently determine that there is a real or apparent conflict of interest, or some other ground to recuse myself, I voluntarily, on my own motion, recuse my self at that point.

In addition, California has a "peremptory" challenge procedure (set forth in Cal. Code of Civ. Proc. § 170.6) which allows, within a specified time frame, each party to exercise one "peremptory" challenge of the judge assigned to the case (exercised by signing and filing a peremptory challenge form which is then automatically granted by the judge) without stating any reason other than that "the party or attorney cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge." Accordingly, many cases are routinely reassigned either without the judge's knowledge or based upon a "peremptory" challenge which is automatically granted, and there is no practical way to compile a list of those cases and parties.

California also has a "for cause" challenge or disqualification procedure (set forth in Cal. Code of Civ. Proc. § 170.3) which permits a party to file a motion requesting disqualification for cause (which "shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification").

The only instance I can recall in which a party filed such a motion to disqualify me was in or about February 2002 in the case of Gober, et. al., v. Ralphs Grocery Company (San Diego Superior Court Case No. N72141). The motion to disqualify in that case was filed long after I had made several pretrial rulings with which the attorney filing the motion (Plaintiffs' counsel) obviously disagreed. Although the stated reason for the disqualification motion was that I was allegedly "biased" or "prejudiced" against that party and/or its attorneys, it was clear that the motion was motivated simply by disagreement with prior rulings, and it was summarily denied as being without legal basis.

17. **Public Office, Political Activities and Affiliations:**

    a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

       None

    b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

       None

18. **Legal Career:** Please answer each part separately.

    a. Describe chronologically your law practice and legal experience after graduation from law school including:

       i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

          I did not serve as a clerk to a judge.

       ii. whether you practiced alone, and if so, the addresses and dates;

          I have not practiced alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

1998 – present
San Diego Superior Court
Central Division (Hall of Justice)
330 W. Broadway
San Diego, CA 92101
Superior Court Judge

1973 – 1998
Wingert, Grebing, Anello & Brubaker
(now known as Wingert, Grebing, Brubaker & Goodwin LLP)
600 W. Broadway, 7th Floor
San Diego, CA 92101
Partner

1972 – 1973
San Diego City Attorney's Office
1200 Third Ave., Suite 1620
San Diego, CA 92101
Deputy City Attorney (Prosecutor)

1968 – 1972; United States Marine Corps

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

Except for a brief time as a prosecutor with the San Diego City Attorney's Office, my entire civilian career as a lawyer (1973 to 1998) was spent in a civil litigation law firm. During my first few years with the firm, I did some criminal defense work, and handled a substantial number of family law and probate matters. Later on, I was involved primarily in civil litigation matters, with an emphasis on real estate, insurance, business and professional liability matters. I also became the firm's appellate specialist, and records from the California Court of Appeal, 4th Appellate District, should confirm that I appeared on more than 50 matters before that court.

ii. your typical clients and the areas, if any, in which you have specialized.

Typical clients were real estate brokers, mortgage brokers, small builders and developers, insurance companies and their insureds, small business

owners, and attorneys and other licensed professionals.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

As an attorney/partner in a civil litigation firm for 25 years, the great majority of my practice was in litigation. Since most of my matters dealt with real estate, business, insurance, professional liability, and appellate work, however, I did not appear in court as frequently as some of my partners who were more involved in personal injury, construction defect, and other matters which seemed to require more frequent trials and court appearances. Although it's difficult to quantify, I would still describe my court appearances as "frequent" rather than "occasional."

i. Indicate the percentage of your practice in:
   1. federal courts: 2%
   2. state courts of record: 98%
   3. other courts.

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 95%
   2. criminal proceedings. 5%

d. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

While in the U.S. Marine Corps, I tried literally hundreds of courts-martial cases, all of which were criminal cases, and approximately one-third of which were jury trials. As a Deputy City Attorney (Prosecutor), I tried approximately 20 misdemeanor criminal trials, approximately half of which were jury trials. While in private practice, I tried approximately 60 to 80 civil cases, approximately 15 of which were jury trials to verdict.

i. What percentage of these trials were:
   1. jury: approximately 33%
   2. non-jury: approximately 67%

e. Describe your practice, if any, before the Supreme Court of the United States. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have never practiced before the Supreme Court of the United States.

19. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    a. the date of representation;

    b. the name of the court and the name of the judge or judges before whom the case was litigated; and

    c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) United Services Automobile Ass'n v. Cavanaugh (San Diego Superior Court Case No. 582128).

This matter resulted in a 6-day court trial before the Hon. J. A. Kilgarif (now deceased) in July 1988. It was a declaratory relief action filed by an insurance company (USAA) seeking a determination that it had no duty to defend or indemnify its insured (Evanna Cavanaugh) in an underlying wrongful death action brought against her by the heirs of a person she had shot and killed.

I represented USAA, and Mrs. Cavanaugh and the decedent's heirs were represented by Glen R. McAllister (now with the San Diego District Attorney's Office, 250 East Main Street, El Cajon, CA, phone 619-441-4239).

The trial was interesting and unusual in that it resembled the trial of a homicide case. To establish that the killing was not an "accident" (and/or an act of self-defense), we attempted to "reconstruct" the incident in the courtroom using a mock-up of the room where the shooting occurred, and a demonstration (using laser beams to show bullet paths) by a renowned criminalist. Sophisticated blood-spatter analysis was also used, along with voice analysis and audio tape enhancement of a portion of the recorded conversation of the victim just before the shooting. A representative of the County Coroner testified as to his autopsy findings (e.g., bullet paths, entry and exit wounds, which shot was likely to have caused death, etc.), and two psychiatrists testified as to the mental state (including intent) of the victim and the shooter.

In a judgment entered on August 25, 1988, the Court found that there was no coverage for the subject claims, and thus no duty to defend or indemnify the insured, because the shooting was intentional (i.e., not an "accident" and not an act of self-defense). The judgment was subsequently appealed (to the California Court of Appeal, 4th Appellate District, Civil No. D009071), and, in an opinion filed January 18, 1991, the judgment was affirmed. A subsequent Petition for Review was denied by the California Supreme Court.

(2) Devin v. United Services Automobile Ass'n (San Diego Superior Court Case No. N38806).

This was an insurance "bad faith" action filed against USAA by its insureds for failing to defend and indemnify them in an underlying lawsuit brought against them by the disgruntled buyer of their home (who alleged misrepresentation and non-disclosure of defects).

I represented USAA, and the plaintiffs were represented by David J. Noonan, Esq., of the firm of Kirby, Noonan, Lance & Hoge LLP (600 West Broadway, Suite 1100, phone 619-231-8666).

On the fourth day of a jury trial, after the plaintiffs rested, the court granted a motion for non-suit on behalf of USAA on the ground that an alleged misrepresentation in the sale of real estate is not an "occurrence" triggering coverage under a liability policy. The judgment was subsequently appealed (Fourth District Court of Appeal No. D011407) and affirmed in a published decision on May 22, 1992, cited at 6 Cal.App.4th 1149 (another firm handled the appeal). A subsequent Petition for Review to the California Supreme Court was denied.

At the time this matter went to trial, there were no California cases directly on point, and the coverage issue was unresolved. There were several similar cases in the pipeline and both the insurance industry and the real estate industry were anxiously awaiting a resolution. Subsequent appellate opinions have followed this case, which is often cited for the proposition that a misrepresentation in a real estate transaction is not an "occurrence" for the purposes of triggering coverage under a liability policy.

(3) Norman v. Fleener (San Diego Superior Court Case No. N32449).

This was a 6-day jury trial before the Hon. Franklin J. Mitchell (now retired) in March 1990. It was a personal injury action filed by a bicycle rider struck from the rear by a motorist on Via de la Valle in Del Mar, CA, near the Del Mar Racetrack.

I represented the Fleener defendants (owners of property abutting the accident scene). Plaintiff was represented by Charles Kavalaris, Esq., of San Jose, CA (according to a recent attorney directory, now located at 1099 N. 4th St., San Jose, CA, phone 408-971-3226). The City of Del Mar was represented by Neal S. Meyers of the firm of Daley & Heft (462 Stevens Ave., Suite 201, Solan Beach, CA 92075, phone 858-755-5666). The motorist (Michael Engle) did not appear, and his default was taken.

The theory of liability asserted against my clients (the Fleeners) was that the alleged negligent maintenance of their property (which abutted the accident site) was a proximate cause of the accident. Specifically, it was alleged that dirt and debris eroded out onto the roadway (across the bike path) causing the plaintiff to have to swerve outside the bike path when she was struck and injured by a passing motorist. The Fleeners denied any

negligence, and presented evidence that the erosion, if it did contribute to the accident, was caused by another landowner.

The jury came back with a defense verdict in favor of the Fleeners and the City of Del Mar. Plaintiff then proved up a default judgment against the motorist. There was no appeal.

(4) Marincovich v. Cattedra (San Diego Superior Court Case No. 626513).

This was a 2-day court trial before the Hon. Jeffrey T. Miller (now sitting on the U.S. District Court for the Southern District of California) in October 1991. It was essentially a very heated boundary dispute between two neighbors. Among other things, the Marincoviches claimed the right to a prescriptive easement across a portion of the Cattedra's property. The Cattedras claimed that certain improvements constructed by the Marincoviches encroached on their property.

I represented the Cattedras. The Marincoviches were represented by Donald Merkin, Esq. (now located at 4747 Morena Blvd., Suite 302, San Diego, CA 92117, phone 858-454-3244).

In a judgment entered January 23, 1992, the court denied the Marincoviches' easement claim, and ordered them to remove certain encroaching improvements and to pay a monetary judgment, plus costs, to the Cattedras.

(5) Hambrick v. Bharadwaja (San Diego Superior Court Case No. 624794).

This was an 8-day jury trial before the Hon. G. Dennis Adams (now retired) in January 1992. It was a personal injury (product liability and premises liability) case resulting from a severe lacerating injury to the plaintiff's arm caused by the shattering of a glass shower door.

I represented the defendant landlord (Bharadwaja and the Mauryan Condominium HOA). Co-defendant Guardian Industries, Inc. (the manufacturer of the glass shower door panel) was represented by Charles H. Dick, Jr., Esq. of the firm of Baker & McKenzie (101 West Broadway, Suite 1200, San Diego, CA 92101, phone 619-235-7790). Plaintiff was represented by David G. Ronquillo, Esq. (3033 Fifth Avenue, Suite 425, San Diego, CA 92103, phone 619-294-7474).

The jury returned a defense verdict in favor of my clients, and awarded money damages against Guardian Industries. There was no appeal.

(6) Simms v. Love (San Diego Superior Court Case No. 627578).

This was a 6-day jury trial before the Hon. J. Richard Haden (now retired) in January and February 1992. It was essentially a misrepresentation, non-disclosure claim brought by the buyer (Sims) against the broker (Love) and the seller (Richardson).

I represented the real estate agent (Chris Love) and her then-broker (Willis M. Allen Co.). Plaintiff was represented by Richard R. Leuthold, Esq. (now at 12625 High Bluff Drive, Suite 303, San Diego, CA, phone 858-792-7070). The seller (Richardson) was not represented, and was ultimately dismissed from the case.

Expert witnesses were called by both sides on the subject of the broker's standard of care with respect to the non-disclosure claim. There was also an allegation that the real estate agent forged signatures on certain documents, and questioned-document examiners were called to testify on that subject.

The jury returned a defense verdict on all claims. There was no appeal.

(7) United Services Automobile Ass'n v. Anderson (San Diego Superior Court Case No. EC003461).

This was a 3-day jury trial before the Hon. James Malkus (now retired) in June 1992. It was essentially a declaratory relief action in which an insurance company (USAA) sought a determination that it had no duty to defend or indemnify its insured (Anderson) in an underlying action brought against him for assault and battery.

I represented United Services Automobile Ass'n. Defendant Anderson was represented by Elliott N. Kanter, Esq. (now at 2445 Fifth Avenue, Suite 350, San Diego, CA 92101, phone 619-2321-1883). The victim of the alleged assault (Teresa Anne Meno) was represented by William O. Dougherty, Esq. (now at 2550 Fifth Avenue, Suite 617, San Diego, CA 92103, phone 619-232-9131).

An usual aspect of this case was the submission to the jury (by a lengthy special verdict form containing 31 questions) of all possible factual issues upon which the ultimate coverage determination might be made. Based upon the jury's answers to those questions, the court had no choice but to find that there was no coverage, and thus no duty to defend or indemnify, and judgment was entered in favor of USAA. There was no appeal.

(8) Royston v. Nelson (San Diego Superior Court Case No. 642267).

This was a 3-day binding arbitration (by stipulation) before the Hon. William Yale (retired) in 1993. It was essentially a misrepresentation/non-disclosure case, brought by the dissatisfied buyer (Royston) of a luxury ocean-view home in La Jolla against the

sellers (Mr. and Mrs. Douglas Allred) and the listing broker (Andrew Nelson and Willis M. Allen Co.)

I represented the broker (Nelson and Willis M. Allen Co.). The plaintiff/buyer (Royston) was represented by Brian L. Forbes, Esq. of the firm now known as DLA Piper US LLP (401 B Street, Suite 1700, San Diego, CA 92101, phone 619-699-3642). The sellers (the Allreds) were represented by Mark Smith, Esq., of the firm of Latham & Watkins LLP (600 West Broadway, Suite 1800, San Diego, CA 92101, phone 619-236-1234).

The primary claim here related to prospective view impairment, and consequent diminution in value, as a result of the plans of the neighbor across the street (to the West) to construct a second-story addition on his house, which would potentially block or eliminate Royston's ocean view. It was alleged that the sellers and the broker knew of the impending construction, and should have disclosed that knowledge to the Roystons when they purchased their house. Royston claimed the loss of his view would diminish the value of his property by $2,000,000, or more, and he sought either damages in that amount or rescission.

Defendants denied any prior knowledge of the neighbor's building plans, and thus denied liability. In order to address the damages claim, however, out of an abundance of caution, we retained experts (computer simulation expert, architect, surveyor, etc.) to create a computer-generated simulation (in glossy, color photo format) to show what the neighbor's project would look like if built, and what the impact would be, if any, on Royston's view. The simulation showed, in a persuasive and virtually undeniable manner, that the view impairment would be minimal.

In exercising his wide discretion as an arbitrator, Judge Yale awarded $25,000 to the plaintiffs, finding that the brokers could have been a little more careful with their due diligence, but agreeing that the damages were minimal. By stipulation, the arbitration was binding, and there was no appeal.

(9) Burroughs v. Heater (San Diego Superior Court Case No. 593572).

This was a malicious prosecution action brought against Henry E. Heater and his law firm (Endeman, Lincoln, Turek & Heater LLP) by former limited partners of a mobile home park who had been sued by Mr. Heater in an underlying action on behalf of tenants of the mobile home park.

I was retained by their insurance carrier (Lawyer's Mutual) to represent Mr. Heater and his law firm. Charles W. Rees, Jr., Esq. (now retired), formerly of the firm of Higgs, Fletcher & Mack LLP (401 West A Street, Suite 2600, San Diego, CA 92101, phone 619-236-1551) was associated in as personal counsel for Mr. Heater. Plaintiffs were represented by Dennis E. Golub, Esq., of the Los Angeles firm of Gustlin, Golub & Bragin (according to a recent attorney directory, the firm of Golub Bragin & Sassoe is

now located at 1990 S. Bundy Drive, #540, Los Angeles, CA 90025, phone 310-979-0321).

In the underlying action (filed in Contra Costa County), the limited partner defendants (plaintiffs in this action) had their demurrer sustained, with leave to amend, on the ground that limited partners ordinarily have no personal liability for clams against a limited partnership. Rather than amend, however, and in return for other concessions, Mr. Heater elected to dismiss the underlying complaint against the limited partners. They then filed the instant action for malicious prosecution.

The primary issue was whether Mr. Heater's clients had a "tenable claim" against the limited partners at the time the underlying action was filed (i.e., was there reasonable or probable cause to sue them). Mr. Heater's investigation revealed that these limited partners had been "bought out" shortly before, and had thus received a return of some portion of their capital investment. His research indicated that limited partners could be sued to recover the amount of any capital distributions made to withdrawing limited partners. Accordingly, Mr. Heater felt that his clients did nave a "tenable claim" and did have "probable cause."

We filed a summary judgment motion on behalf of Mr. Heater and his firm on that basis. The motion was granted, and judgment was subsequently entered, by the Hon. James R. Milliken (now retired) on October 28, 1988. The judgment was subsequently appealed (California Court of Appeal, 4th Appellate District, No. D009014) and the summary judgment was reversed in an unpublished opinion issued on January 25, 1990. The case was then reset for trial, and it ultimately settled for a nominal amount.

(10) Griffin v. Milwaukee Electric Tool Corp. (San Diego Superior Court Case No. 642976).

This was a personal injury/products liability case brought by a construction worker (plumber) who incurred a permanently disabling injury to his right (dominant) arm and elbow while working on a construction site.

I represented the plaintiff (Franklin Griffin). Defendant Milwaukee Electric Tool Corp. was represented by Robert W. Harrison, Esq. (now with the firm of Koeller, Nebeker, Carlson & Haluck, at 225 Broadway, 21st Floor, San Diego, CA 92101, phone 619-233-1600) and by Kris B. Thompson, Esq. (now with the firm of Thompson & Alessio, LLP, at 2550 Fifth Avenue, Suite 600, San Diego, CA 92103, phone 619-233-9100). Defendant J.L. Construction Co., the general contractor, was represented by Scott M. Bonesteel, Esq. (now with the firm of Summers & Shives, APC, at 8755 Aero Drive, Suite 230, San Diego, CA 92123, phone 858-874-1800). Defendant S.R.Bray, dba Temporary Utility Services, was represented by William P. Volk, Esq. (now with the firm of Campbell, Volk & Lauter, a 5040 Shoreham Place, Suite 150, San Diego, CA 92122, phone 858-546-1122).

The injury was caused by the sudden twisting action of a high-powered electric drill (Milwaukee "Hole Hawg" drill) when power to the site was interrupted and then suddenly restored. Experts retained by the plaintiff testified that the drill was unreasonably dangerous, and that the risk of injury could have been reduced or eliminated if the drill had been designed and manufactured with a "slip clutch" (or other torque-limiting safety device) similar to what is provided in other competing brands of electric drills. Defendants' experts disagreed, and contended that the tool was reasonably designed and reasonably safe if used properly.

Defendant Milwaukee Electric Tool Corp. brought a motion for summary judgment just prior to the scheduled trial date, which was granted by the Hon. Lawrence Kapiloff (now retired). We then appealed that judgment (California Court of Appeal, 4th Appellate District, No. D018696), and Judge Kapiloff stayed the action against the remaining defendants pending resolution of that appeal. The summary judgment was reversed on appeal, and the matter was subsequently settled (for a relatively nominal amount) prior to trial.

20. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As a Superior Court Judge for the last 10 years, I have presided over more than 200 trials, including approximately 10 felony criminal jury trials, approximately 60 to 80 civil court trials, and well over 100 civil jury trials. I have also been involved in court administration, having been elected to four terms on the court's Executive Committee, and having served on several standing court committees (including the Technology Committee and the Civil Policy Committee).

In private practice, in addition to my trial work, I also became the appellate specialist in my former law firm, and in that capacity I handled all of our firm's appellate work for approximately fifteen (15) years. I handled approximately 50 or more matters before the Fourth Appellate District of the California Court of Appeal over that time frame.

During my 25 years in private practice, I was active in many bar related activities, including various bar committees and study sections. I served in various leadership positions in the San Diego Barrister's Club (Director and President), the San Diego County Bar Association (Director and Vice-President), the San Diego Defense Lawyers Association (Director), and the Enright Inn of Court (Master and Program Chair).

Before going into private practice, I served in various legal capacities in the U.S. Marine Corps for over three years, including legal assistance officer, defense counsel, trial

counsel, and ultimately Military Judge. At Marine Corps Base, Camp Pendleton, shortly after returning from my tour in Vietnam, I was appointed as Chief Trial Counsel (i.e., Chief Prosecutor), and in that capacity I supervised the trial of approximately 1000 general and special courts-martial. Thereafter, I was appointed as a Special Courts-Martial Military Judge, and in that capacity I presided over approximately 60 special court martial trials.

I have never performed any lobbying activities, whether on a pro bono basis or otherwise, for any individuals or organizations.

21. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, please provide four (4) copies to the committee.

Other than occasionally serving as a Work Shop Instructor for programs put on by the San Diego Inn of Court some years ago while I was in private practice, I have not taught any courses or produced any course syllabi.

22. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

With the exception of my military reserve retirement annuity (currently approx. $1100 per month), and social security benefits for which I will become eligible at age 66, and potential retirement benefits (depending upon when I retire) accrued in connection with my judicial service on the San Diego Superior Court, I have no deferred income arrangements, or any similar entitlement to income payments or other benefits as contemplated by this question.

23. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no plans, commitments, or agreements to pursue outside employment, with or without compensation, during my service with the court, if confirmed.

24. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other

items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached Financial Disclosure Report.

25. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement

26. **Potential Conflicts of Interest**:

a. Identify the parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

Parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest during my initial service in the position to which I have been nominated would include cases involving my former law partners; cases involving any companies based upon my and my spouse's actual or potential financial interest; any case involving the tenants of my rental property, or otherwise arising out the ownership or management of that property; and any cases involving anyone I deem to be a personal friend.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

As a state court judge for approximately ten (10) years, I have been careful to avoid actual or potential conflict-of-interest issues. With regard to the concerns referenced above, my present practice is to: (1) provide a list of all persons and entities as to which there may be a conflict of interest to the person (or case management program) charged with assignments so that no case involving those persons or entities would be assigned to me; and (2) personally review all new cases as they come in to ascertain whether there are any actual or potential conflicts. If I am confirmed as a United States District Judge, in all cases I would be guided by the Code of Conduct for United States Judges and all applicable statutes, policies and procedures.

27. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

As part of the mission of my former Marine Corps military reserve unit, I regularly provided free legal assistance to needy service members at local military bases, particularly including Marine Corps Recruit Depot, San Diego, and Marine Corps Base, Camp Pendleton. As a former member of the San Diego County Bar Association's Volunteer Lawyer Program, I provided legal assistance to indigent individuals as part of the mission of that program. I also provided representation on a pro bono basis to several juveniles in juvenile court as a result of referrals from local schools and family acquaintances. I also handled a few agency adoptions on a pro bono basis, again as a result of referrals from other attorneys and family acquaintances.

In addition, I found opportunities to provide pro bono legal services to deserving individuals and organizations from time to time during my 25 years or so in my law practice. For example, I provided legal services to the Greater San Diego Arthritis Foundation for several years, and as a founding member of the Muirlands Junior High School Foundation I organized the new entity as a non-profit corporation and obtained its tax-exempt status. As another example, although I was not a member of that church, I assisted a new church congregation (Hope United Methodist Church in Rancho Bernardo, CA) in forming its non-profit corporation and obtaining its tax-exempt status.

28. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Please do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

There is a federal judicial selection commission in California (under the direction of Gerald Parsky). Each federal judicial district in California has a bipartisan judicial selection committee composed of 6 members (3 appointed by the administration and 3 appointed collectively by Senators Feinstein and Boxer). I submitted my written application to the local Southern District selection committee, and was personally interviewed by the members of that committee. It is my understanding that the committee then recommended me unanimously for consideration by the President for nomination to the U.S. District Court for the Southern District of California. I was invited to the White House Counsel's Office for an interview on February 20, 2008, at which time I met with staff from the White House Counsel's Office and from the Department of Justice. Since that time, I have had conversations with staff from the Department of Justice regarding nomination paperwork and the process in general. After completion of all the pre-nomination paperwork, my nomination was submitted to the United States Senate on April 30, 2008.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No one involved in the process of selecting me as a judicial nominee discussed with me any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue, or question.

AO 10
Rev. 1/2006

FINANCIAL DISCLOSURE REPORT
NOMINATION FILING

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (last name, first, middle initial)	2. Court or Organization	3. Date of Report
Anello, Michael M	California, Southern District	5/2/2008
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5a. Report Type (check appropriate type)**	**6. Reporting Period**
District Judge - Nominee	[X] Nomination, Date 4/30/2008 [ ] Initial [ ] Annual [ ] Final 5b. [ ] Amended Report	1/1/2007 to 4/15/2008
7. Chambers or Office Address	**8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.**	
San Diego Superior Court 330West Broadway San Diego, CA 92101	Reviewing Officer_____ Date_____	

IMPORTANT NOTES: *The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.*

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of instructions.)*

[X] NONE *(No reportable positions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
1.		
2.		
3.		
4.		
5.		

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of instructions.)*

[X] NONE *(No reportable agreements.)*

	DATE	PARTIES AND TERMS
1.		
2.		
3.		

Name of Person Reporting	Date of Report
Anello, Michael M	5/2/2008

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse: see pp. 17-24 of Instructions.)*

A. Filer's Non-Investment Income

☐ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE	INCOME (yours, not spouse's)
1.	2008	San Diego Superior Court, salary	$ 59,596
2.	2007	San Diego Superior Court, salary	$ 175,218
3.	2006	San Diego Supreior Court, salary	$ 154,320
4.			
5.			

B. Spouse's Non-Investment Income - *If you were married during any portion of the reporting year, complete this section.*
(Dollar amount not required except for honoraria.)

☒ NONE *(No reportable non-investment income.)*

	DATE	SOURCE AND TYPE
1.		
2.		
3.		
4.		
5.		

IV. REIMBURSEMENTS - *transportation, lodging, food, entertainment.*

(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

☐ NONE *(No reportable reimbursements.)*

	SOURCE	DESCRIPTION
1.		EXEMPT
2.		
3.		
4.		
5.		

Name of Person Reporting	Date of Report
Anello, Michael M	5/2/2008

V. GIFTS. *(Includes those of spouse and dependent children. See pp. 28-31 of instructions.)*

☐ NONE *(No reportable gifts.)*

SOURCE	DESCRIPTION	VALUE
1.	EXEMPT	
2.		
3.		
4.		
5.		

VI. LIABILITIES. *(Includes those of spouse and dependent children. See pp. 32-34 of instructions.)*

☐ NONE *(No reportable liabilities.)*

CREDITOR	DESCRIPTION	VALUE CODE
1. USSA Savings Bank	Credit Card	J
2. American Express	Credit Card	J
3. Citibank	Credit Card	J
4. Chase Home Finance	Rental Property Mortgage	N
5. Union Bank of California	Overdraft Credit Line	J

Name of Person Reporting	Date of Report
Antillo, Michael M	5/2/2008

VII. INVESTMENTS and TRUSTS – *Income, value, transactions (includes those of the spouse and dependent children. See pp. 16-17 of filing instructions)*

☐ NONE *(No reportable income, assets, or transactions.)*

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. Income during reporting period (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date Month - Day	D. If not exempt from disclosure (3) Value Code 2 (J-P)	D. If not exempt from disclosure (4) Gain Code 1 (A-H)	D. If not exempt from disclosure (5) Identity of buyer/seller (if private transaction)
1. Rental Property	B	Rent	O	W	Exempt				
2. AT&T Common Stock	A	Dividend	J	T					
3. Chevron Common Stock	A	Dividend	K	T					
4. General Electric Common Stock	A	Dividend	K	T					
5. IDEARC Common Stock	A	Dividend	J	T					
6. PPG Industries Common Stock	B	Dividend	K	T					
7. Verizon Common Stock	A	Dividend	J	T					
8. Alcatel Lucent Common Stock	A	Dividend	J	T					
9.									
10.									
11.									
12.									
13.									
14.									
15.									
16.									
17.									

1. Income Gain Codes: (See Columns B1 and D4)	A =$1,000 or less	B =$1,001 - $2,500	C =$2,501 - $5,000	D =$5,001 - $15,000	E =$15,001 - $50,000
	F =$50,001 - $100,000	G =$100,001 - $1,000,000	H1 =$1,000,001 - $5,000,000	H2 =More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J =$15,000 or less	K =$15,001 - $50,000	L =$50,001 - $100,000	M =$100,001 - $250,000	
	N =$250,001 - $500,000	O =$500,001 - $1,000,000	P1 =$1,000,001 - $5,000,000	P2 =$5,000,001 - $25,000,000	
	P3 =$25,000,001 - $50,000,000	P4 =More than $50,000,000			
3. Value Method Codes (See Column C2)	Q =Appraisal	R =Cost (Real Estate Only)	S =Assessment	T =Cash Market	
	U =Book Value	V =Other	W =Estimated		

Name of Person Reporting	Date of Report
Anello, Michael M	5/2/2008

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS. *(Indicate part of Report.)*

Name of Person Reporting	Date of Report
Ancilo, Michael M	5/2/2008

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature Michael M Ancilo Date May 1, 2008

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		5	000	Notes payable to banks-secured		95	000
U.S. Government securities-add schedule				Notes payable to banks-unsecured		5	000
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities–add schedule		143	373	Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		21	000
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		628	100
Real estate owned-add schedule	2	200	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		100	000				
Cash value-life insurance							
Other assets itemize:							
				Total liabilities		749	100
				Net Worth	1	699	273
Total Assets	2	448	373	Total liabilities and net worth	2	448	373
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT

NET WORTH SCHEDULES

Listed Securities	
AT&T	$ 2,590
Chevron	34,000
GE	44,400
IDEARC	92
PPG	48,720
Verizon	13,176
Alcatel Lucent	395
Total Listed Securities	$ 143,373
Real Estate Owned	
Personal residence	$ 1,200,000
Rental property	1,000,000
Total Real Estate Owned	$ 2,200,000
Real Estate Mortgages Payable	
Personal residence	$ 344,990
Rental property	283,110
Total Real Estate Mortgages Payable	$ 628,100

c. Have you ever been treated for or had any problem with alcoholism or any related condition associated with consumption of alcoholic beverages or any other form of drug addiction or dependence? If so, give details.

I have never been treated for nor had any problem with alcoholism or any related condition associated with consumption of alcoholic beverages or any other form of drug addiction or dependence.

7. **Disclosure**: Please advise the Committee of any unfavorable information that may affect your nomination.

I'm aware of no unfavorable information that may affect my nomination.

AFFIDAVIT

I, Michael M. Anello, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

5-12-08 (DATE)

Michael Anello (NAME)

CALIFORNIA JURAT WITH AFFIANT STATEMENT

☐ See Attached Document (Notary to cross-out lines 1–6 below)
☐ See Statement Below (Lines 1–5 to be completed only by document signer[s], *not* Notary)

Michael Anello
Signature of Document Signer No. 1

Signature of Document Signer No. 2 (if any)

State of California
County of San Diego

Subscribed and sworn to (or affirmed) before me on this
17th (Date) day of May (Month), 2008 (Year), by
(1) Michael Anello (Name of Signer),
proved to me on the basis of satisfactory evidence
to be the person who appeared before me (.) (,)
(and
(2) _____ (Name of Signer),
proved to me on the basis of satisfactory evidence
to be the person who appeared before me.)

Signature _____ (Signature of Notary Public)

BABAK NAVABI
Commission # 1615802
Notary Public - California
San Diego County
My Comm. Expires Oct 23, 2009

THE STATE BAR OF CALIFORNIA

INTER-OFFICE COMMUNICATION

PRIVILEGED & CONFIDENTIAL

DATE OF CONTACT: June 25, 2003

TO: **FILE**

FROM: Robert A. Feher, Investigator

RESPONDENT'S NAMES: Philip E. Kay & John W. Dalton, FILE NUMBERS: 02-O-15326 & 02-O-15327

INTERVIEW OF: Judge Joan Weber

METHOD OF CONTACT: Telephonic

TIME INTERVIEW BEGAN: TIME INTERVIEW ENDED:

DATE MEMO PREPARED: June 25, 2003

I spoke this morning with Judge Joan Weber.

She stated R-Kay was the most unethical and unprofessional attorney she has seen in both her years of practice and years on the bench. She declared his conduct before her was "appalling," and cited as an example R-Kay's passing out a letter to the jurors after their verdict indicating evidence that had been left out. She advised it made the jurors feel guilty. She will provide a copy of the letter.

She noted R-Kay was flagrant in his disregard of the court's rulings and unprofessional to other attorneys and her staff. She suggested contacting the defense attorneys in the case. She will provide their names.

She indicated the trial before her lasted eight weeks and that it would be extraordinarily burdensome to her, given her duties as supervising judge, to obtain a transcript and provide excerpts.

She advised that R-Dalton was with R-Kay on trial before her and that he engaged in conduct similar to R-Kay's. She noted, however, that R-Dalton was "clearly second in command" and that R-Kay mistreated him as well.

She explained that she spoke regularly with Judge Anello about R-Kay while the matter proceeded before him, but acknowledged she was not in his courtroom during the trial and so did not witness Rs conduct.

She further explained that Judge Anello knew about the letter handed out after her trial and he instructed R-Kay not to do so in his trial.

Her address and telephone number are as follows: 325 South Melrose Dr., Vista, CA 92083, (760) 806-6301.

THE STATE BAR COURT

HEARING DEPARTMENT - SAN FRANCISCO

In the matter of PHILIP EDWARD KAY, No. 99830, Member of the State Bar.	Case Nos. 01-0-01930; 02-0-15326; 03-0-00142; 05-0-3685
In the matter of JOHN WILLIAM DALTON, No. 183685, Member of the State Bar.	

REPORTER'S TRANSCRIPT OF RECORDED PROCEEDINGS

HELD FRIDAY, MAY 1, 2009

BEFORE THE

HONORABLE LUCY ARMENDARIZ, JUDGE THEREOF

ATKINSON-BAKER, INC.
COURT REPORTERS
(800) 288-3376
www.depo.com

REPORTED BY: KRISTINA HOFSTAD, CSR No. 6912, RPR, CRR

FILE NO: A3046FC

Answer if you know.
THE WITNESS: Yes. It would have to be a lawful order.
BY MR. KAY:
Q. And before you issue a contempt citation, you would have to determine in advance of issuing the contempt citation whether or not it was, as you say, a lawful order; right?
A. Yes.
Q. You would not issue a contempt citation and then later determine whether it was a lawful order; correct?
MS. KAGEN: Objection. Relevance.
THE COURT: Overruled.
Answer if you know.
THE WITNESS: Yes.
BY MR. KAY:
Q. That's correct then? It's a correct statement that I made; right?
A. Yes.
Q. Okay. And it would be an abuse of your contempt power if you would issue a contempt citation based on the violation of an order without first determining that the order was lawful; correct?
A. Of course. Sure.
Q. And you made no such findings during the Gober

trial that any lawful order was ever violated by either Mr. Dalton or me; correct?
A. True. I didn't issue a contempt citation.
Q. Nor did you make any such finding at any time that either Mr. Dalton or I ever violated any lawful orders; correct?
MS. KAGEN: Objection. Asked and answered.
THE COURT: Overruled.
THE WITNESS: I think I did find that you violated orders. I think my review of the complaint shows that I said that you violated rulings of the court and you violated the court's admonitions to you. So to me those are court orders.
BY MR. KAY:
Q. Okay. So it's now your testimony that Mr. Dalton and I violated --
A. Not Mr. Dalton. You.
Q. Oh, just me. Okay.
It's now your testimony --
THE COURT: Hold on. Let's hear the question first.
BY MR. KAY:
Q. It's now your testimony that I violated lawful court orders, but you didn't issue any contempt citations; correct?

A. Right.
Q. Okay. And the reason that you failed in issuing any contempt citations was because you were not aware of your duties as a judge to maintain order and decorum in your court?
A. Not at all, sir.
Q. Isn't it true that you are obligated under the Canons of Ethics to maintain order and decorum in your courtroom?
A. Yes.
Q. And if a lawyer is violating your lawful court orders, in order to maintain order and decorum in your courtroom, you would have to issue contempt citations to correct those abuses; right?
A. In the abstract, yes.
Q. And in the abstract, you would also have to issue sanctions to get that order under control; correct?
A. Depending on the circumstances, yes.
Q. You never issued any sanctions against Mr. Dalton or me, did you?
A. No.
Q. And you would also have to make sure that the defendant was getting a fair trial in the face of this misconduct that you have testified to; correct?
A. Defendant and plaintiffs, yes.

Q. You made no finding that defendant Ralphs was denied a fair trial based on attorney misconduct; correct?
A. I think when we looked at it, I ruled that it was a very close call, but that I was not going to grant a new trial on that basis.
Q. On a preponderance standard; right?
A. Right.
Q. Okay. Excuse me.
(Inaudible conversation.)
BY MR. KAY:
Q. By the way, it's not inappropriate to ask a court reporter to mark a transcript, is it?
A. Well, first of all, I have never had a lawyer do that. And it wouldn't have been inappropriate once, but repeatedly it was very rude and very disruptive at the trial proceedings.
Q. Plaintiffs were paying for a separate court reporter to come in and provide realtime transcription during the trial; isn't that correct?
A. I have no idea, sir. That's between you and the court reporter.
Q. Isn't it appropriate for a lawyer who is trying a case and paying for a realtime transcript to have the right to ask a court reporter on occasion to mark the

JUDGE MICHAEL M. ANELLO
940 FRONT STREET
SAN DIEGO, CA 92101
(619) 557-5963
(619) 702-9935 (FAX)

FACSIMILE TRANSMITTAL

DATE: March 6, 2009

TO: Allen Blumenthal, Esq.

FAX: (415) 538-2220

PHONE: (415) 538-2031

RE: Philip E. Kay/State Bar Court Trial

PAGES FAXED (INCLUDING THIS COVER PAGE): 4

MESSAGE FROM MICHAEL ANELLO

Alan:
As discussed today with Jim Hyland (sp?), enclosed is a copy of the subpoena served on me at court yesterday. I expect my communications with the State Bar and your office may be relevant, so I intend to bring copies of those documents with me. Subject to your advice to the contrary, my communications with other judges don't appear to be relevant here, so I don't intend to bring anything with regard to those requests. My concern there is that Mr. Kay is simply trying to drum something up to use in his ongoing complaints to the Commission on Judicial Performance regarding my alleged "judicial misconduct." I hope we'll be able to limit Mr. Kay's evidence and questioning to relevant matters.
Regards,
Mike Anello

NOTICE:

EXHIBIT 1

SUBP-002

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
Philip E. Kay, Esq. 99830. Law Offices of Philip E. Kay 736 43rd Avenue San Fnacisco, CA 94121 TELEPHONE NO.: 415/387-6622 FAX NO.: ATTORNEY FOR (Name):	
NAME OF COURT: THE STATE BAR COURT STREET ADDRESS: 180 Howard Street MAILING ADDRESS: CITY AND ZIP CODE: San Francisco 94105 BRANCH NAME:	
PLAINTIFF/PETITIONER: The State Bar of California DEFENDANT/RESPONDENT: Philip E. Kay et al.	
CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and Production of Documents and Things at Trial or Hearing AND DECLARATION	CASE NUMBER: 01-O-01930 et al.

THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of witness, if known)*:
Honorable Michael Anello, United State District Judge, U.S. District Court, Southern District of California, 940 Front St., San Diego, CA 92101

1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time, and place shown in the box below UNLESS your appearance is excused as indicated in box 3b below or you make an agreement with the person named in item 4 below.

a. Date: Mar.16-27, 2009	Time: 9:30 a.m.	Dept.:	Div.:	Room:
b. Address: The State Bar Court, 180 Howard St., San Francisco, CA 94105				

2. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.

3. YOU ARE *(Item a or b must be checked)*:
   a. [X] Ordered to appear in person and to produce the records described in the declaration on page two or the attached declaration or affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
   b. [ ] Not required to appear in person if you produce (1) the records described in the declaration on page two or the attached declaration or affidavit and (2) a completed declaration of custodian of records in compliance with Evidence Code sections 1560, 1561, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose the original declaration of the custodian with the records. Seal the envelope. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and number; your name; and the date, time, and place from item 1 in the box above. (3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy of your declaration to the attorney or party listed at the top of this form.

4. IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE YOU ARE TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:
   a. Name of subpoenaing party or attorney: Philip E. Kay b. Telephone number: 415/387-6622

5. Witness Fees: You are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you request them at the time of service. You may request them before your scheduled appearance from the person named in item 4.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: 3-2-09

Philip Kay
(TYPE OR PRINT NAME)

(SIGNATURE OF PERSON ISSUING SUBPOENA)

Attorney
(TITLE)

(Declaration in support of subpoena on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-002 [Rev. January 1, 2008]

CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS AT TRIAL OR HEARING AND DECLARATION

Code of Civil Procedure

SUBP-002

PLAINTIFF/PETITIONER: The State Bar of California

CASE NUMBER: 01-O-01930 et al.

DEFENDANT/RESPONDENT: Philip E. Kay et al.

The production of the documents or the other things sought by the subpoena on page one is supported by *(check one)*:
☐ the attached affidavit or declaration ☒ the following declaration:

DECLARATION IN SUPPORT OF CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS AT TRIAL OR HEARING
(Code Civ. Proc., §§ 1985, 1987.5)

1. I, the undersigned, declare I am the ☐ plaintiff ☐ defendant ☐ petitioner ☐ respondent
☒ attorney for *(specify)*: Philip Kay et al. ☐ other *(specify)*:
in the above-entitled action.

2. The witness has possession or control of the following documents or other things and shall produce them at the time and place specified in the *Civil Subpoena for Personal Appearance and Production of Documents and Things at Trial or Hearing* on page one of this form *(specify the exact documents or other things to be produced)*:
All documents and communications between the Hon. Michael Anello and any representatives of the State Bar of California regarding Philip Kay or John Dalton. "Document" mean and refers to that term as it has been interpreted pursuant to California Evidence Code section 250. "Communication" means any oral communication, including telephone communication, letter, email, message, or any other form of writing.
☒ Continued on Attachment 2.

3. Good cause exists for the production of the documents or other things described in paragraph 2 for the following reasons:
The subject documents are directly relevant to the defense of Messrs. Kay and Dalton in this State Bar matter. Moreover, Judge Apello initiated the complaint against Messrs. Kay and Dalton, and so Messrs. Kay and Dalton are entitled to all communications and documents related to communications batween Judge Anello and the State Bar.
☐ Continued on Attachment 3.

4. These documents or other things described in paragraph 2 are material to the issues involved in this case for the following reasons:
Messrs. Kay and Dalton are entitled to the requested communications and documents and believe such communications and documents contain material information that is directly related to this matter.
☐ Continued on Attachment 4.

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

Date: 3.2.09

Philip E. Kay
(TYPE OR PRINT NAME)

(SIGNATURE OF ☒ SUBPOENAING PARTY ☒ ATTORNEY FOR SUBPOENAING PARTY)

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five court days before the date on which you are to appear. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Response* (form MC-410). (Civil Code, § 54.8.)

(Proof of service on page 3)

SUBP-002 (Rev. January 1, 2008)

CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS AT TRIAL OR HEARING AND DECLARATION

Judicial Council Form

ATTACHMENT 2 TO CIVIL SUBPOENA TO THE HON. MICHAEL ANELLO

1. All DOCUMENTS evidencing communications between the Hon. Michael Anello and the Hon. John Einhorn regarding attorneys Philip Kay and John Dalton.

2. All DOCUMENTS evidencing communications between the Hon. Michael Anello and the Hon. John Meyer regarding attorneys Philip Kay and John Dalton.

3. All DOCUMENTS evidencing communications between the Hon. Michael Anello and the Hon. Jacqueline Stern regarding attorneys Philip Kay and John Dalton.

4. All DOCUMENTS evidencing communications between the Hon. Michael Anello and the Hon. Richard Strauss regarding attorneys Philip Kay and John Dalton.

5. All DOCUMENTS evidencing communications between the Hon. Michael Anello and the Hon. Lisa Guy-Shall regarding attorneys Philip Kay and John Dalton.

6. All DOCUMENTS evidencing communications between the Hon. Michael Anello and the Hon. Joan Weber regarding attorneys Philip Kay and John Dalton.

7. All DOCUMENTS evidencing communications between the Hon. Michael Anello and the Hon. Thomas Nugent regarding attorneys Philip Kay and John Dalton.

DalCerro, Jeff

From: DalCerro, Jeff
Sent: Tuesday, November 18, 2003 11:08 AM
To: Konig, Alan
Subject: RE: Kay/Dalton

Alan, I appreciate your concerns, but I've decided to stick with the original decision to have Blumenthal handle this case. Please provide the files to him at your earliest convenience. Thanks, Jeff

-----Original Message-----
From: Konig, Alan
Sent: Monday, November 10, 2003 5:08 PM
To: DalCerro, Jeff
Subject: Kay/Dalton

Jeff,

I in no way send this e-mail with the intent of "arguing" the decision to reassign the Kay/Dalton matter or stating my intent not to comply with the determination. However, I would appreciate an opportunity to address my concerns with the reassignment and request the decision be reconsidered.

The last thing I heard about the Kay/Dalton matter was on October 24, 2003. On October 24, I requested some sort of information about the status of the matter and its future. I received no information in response. I simply received a response that told me to give Judge Anello's phone number to Don. Don then e-mailed me stating he spoke with Judge Anello and indicated to him that the NDC was simply being reviewed and there were no "further impediments to proceeding with the notice once we were comfortable with its content." He further assured Judge Anello that the delay would only be a week or two and that the delay was not the result of any lack of performance on my part.

Don's conversation with Judge Anello is consistent with the October 21, 2003 response I received from you to my e-mail of the same date when I questioned why the NDC was not filed by Barbara when I gave it to her. Your only concern with the matter was "questions about theories plead [sic], as well as the allegations chosen to be alleged." You asked me to do research into the "ALD issue" in Mr. Exelrod's matter. I did that and provided my results on October 23, 2003.

Since the decision not to file was made, I have done further work in the matter including reviewing documents sent by Judge Anello. Today, I received from Ralphs' counsel, as she previously promised, documents that are about 7" thick. Both Judge Anello and Ralphs' counsel were kind enough to send the documents overnight at their own expense.

The documents from Ralphs' counsel will make no sense to anyone who is not familiar with this matter and has not had the conversations with Ralphs' counsel leading to her providing the documents to me. The same may be true for the documents Judge Anello sent. By removing me from this matter, the new DTC will essentially be back at square one and this is not an easy matter in which to ascertain and learn the history. It will take a significant amount of time for someone to adequately familiarize himself with it and I reasonably do not foresee a NDC being filed in that situation for several weeks if not months. If that happens, it will be another setback to Judge Anello who has patiently endured numerous delays already. I cannot believe that Judge Anello realizes this given Don's statements to him and the fact he sent to me documents by overnight mail. I believe he will be greatly dismayed to learn of further delay given how thoroughly and efficiently he has cooperated with my requests for additional information. He is incredibly responsive given his position as a Superior Court judge.

Additionally, I have concerns that on numerous occasions, Judge Anello's motives have been questioned by individuals in this office. Despite my repeated defense of Judge Anello and providing reasonable bases for him not holding contempt hearings, I believe there is still a belief that Judge Anello should have acted differently and that he is simply requiring us to do the work he should have done. Nothing could be further from the truth. I feel badly for Judge Anello if this matter is assigned to someone who will ultimately question his motives as that individual enters the matter with a preconceived bias against the complaining witness. I fear that Kay/Dalton will either be given no discipline at all or something relatively light that will undoubtedly not satisfy Judge Anello. In his complaint to us, Judge Anello closed by stating that Kay should not be allowed to step foot into another courtroom in California. Whether his statement is a little harsh or not, it shows the impact Kay's misconduct had on a member of the judiciary (and the impact was not limited to Judge Anello but also impacted Judge Weber during the first trial). Kay's misconduct makes Maureen Kallins' conduct look like child's play and that's hard to do.

Finally, I do not know the basis for reassigning this matter to another individual for I have never been told what the basis was or if there was something improper or inappropriate I had done in the matter. You earlier mentioned the nature of the charges and I offered to provide significant case law and authority that supports each and every charge. No one has accepted that offer. I continue to make that offer and believe that if the authorities are read or reviewed the case will be a little clearer to understand.

In closing, I request that this matter not be reassigned as I think it not only unfair to me but also to Judge Anello. If the matter is reassigned, I request that I at least be told the reasons for the reassignment and any problems noted in my charging decisions so that I may have an opportunity to respond. If my response provides no reason to change the decision on reassignment, I would request that I at least be allowed to continue to proceed in the matter as co-counsel.

Thanks.

--Alan

Konig, Alan

From: DalCerro, Jeff
Sent: Thursday, October 23, 2003 10:59 AM
To: Konig, Alan
Subject: RE: Philip Kay

Alan, You have lots of work to do. Concentrate on something else for a bit and calm down. The case will proceed and it will do so with the benefit of imput from others that might actually make it an even better job than it would otherwise be. Consider that possibility for a moment and relax.

----Original Message----
From: Konig, Alan
Sent: Thursday, October 23, 2003 8:39 AM
To: DalCerro, Jeff
Subject: RE: Philip Kay

What concerns me the most about the way this has been handled is the manner in which it was covertly done behind my back. Never once did anyone say the matters could not be filed. The last conversation I had with Don was last week when I gave him the last letter from Kay's counsel in which he rejected the final offer made to Dalton. That was on Thursday. I specifically said to Don when I gave him the letter that I had no intention of responding to it. Never on Friday nor Monday did anyone, Don included, say there was a problem with the notices or that they could not be filed. Never once today did anyone speak to me about undermining my instructions to Barbara or even give me the courtesy of letting me know it had been done. The courteous thing to do would have been to tell me to instruct Barbara not to file and serve them. Instead, Barbara was put in an awkward position unnecessarily and the appearance was given that I had done something wrong. This was only compounded when Don blatantly violated my First Amendment right of speech. I'm at a loss how a supervising attorney in an state agency designed to regulate the legal profession doesn't know better than to try and impose a form of "prior restraint" on an employee. The ACLU would have a field day with this.

If Judge Anello is not entitled to know why the NDC hasn't been filed and why he hasn't been able to reclaim his reputation publicly, then I think someone else needs to explain that to him. I'd be more than happy to participate in a conference call with Judge Anello and any member of management who would like to address him. And this is affecting me personally as every time the decision to file (dating back now several months) is delayed or postponed, I lose credibility with Judge Anello. I can only tell Judge Anello so many times that "I didn't really mean it when I said it would be filed by X date." Judge Anello turned to us for help and has been extremely patient and understanding with the delays which are difficult to justify. The longer we continue to delay, the more disgruntled and less committed Judge Anello becomes. But Judge Anello is actually irrelevant. Our obligation is to protect the administration of justice. Judge Anello is not the first judge with whom Kay has been rude, contemptuous, and insulting and he won't be the last. The longer we delay, the greater the risk that the next unsuspecting judge becomes Kay's next target.

I have also lost essentially any position of strength with Kay/Dalton since they have succeeded in intimidating this agency by false allegations, degrading comments, and outright threats (sounds an awful lot like the conduct directed toward Arthur Chambers, [redacted] Ralphs Grocery Company, Ralphs' counsel, Judge Weber, Judge Anello, and anyone else who has dared cross Kay's path). Kay knew exactly what he was doing by involving Don in this matter and his plan succeeded entirely. I have been unable to follow through with a single deadline imposed on him or Dalton in this matter. They must be laughing so hard they are rolling on the floor right now.

And contrary to the misperception that I have no experience with cases of this nature, I just concluded the Murphy matter with two disgruntled judges in Lassen County who held Mr. Murphy in contempt countless times and a federal district court judge who was about to do the same. I also handled the Hansen matter

which is now one of the leading appellate court cases on contempt in California. Additionally, I have done dozens of hours of research in the area and have about 20 cases on point. The insinuation that any of the charges in my NDC are unsupported or improper is not appreciated. I stand by my charges and the supporting authority and welcome the presentation of any contrary authority.

When there is a meeting with Mike, I request that I be permitted to attend also to ensure that the entire set of facts is presented to him instead of someone else's understanding of the facts. Thanks.

-----Original Message-----
From: DalCerro, Jeff
Sent: Tuesday, October 21, 2003 6:54 PM
To: Konig, Alan
Subject: RE: Philip Kay

The copies of the notices I saw in my inbox, along with my understanding of the issues involved, raised several questions about the theories plead, as well as the allegations chosen to be alleged. In a case as sensitive as this one we are going to do the best job we can do, and the timing of how we do that is my decision, not yours. Additionally, since this is a sensitive case, Mike is going to be brought into the loop on this before we file. Blumenthal and Steedman are going to consult and advise as well, and I expect you to listen to their advice, as both of them have experience with cases not dissimilar from this. To the extent that you might feel that you or the case are prejudiced by a short delay, I don't see it. Why don't you spend the next day or two doing the research on the ALD issue you promised Steedman and we'll discuss all of this together. I don't expect the delay is going to be more than a few days. Concerning calling Judge Anello, just so we are clear: I am instructing you not to do so until we talk. You are creating all types of potential pratfalls to him being a successful witness in the proceedings by involving him in your charging decisions, etc. If you chose to do so, you will be doing so over my direction to the contrary.

-----Original Message-----
From: Konig, Alan
Sent: Tuesday, October 21, 2003 3:27 PM
To: Steedman, Donald
Cc: DalCerro, Jeff
Subject: Philip Kay

Barbara has informed me that she was instructed not to file and serve the Kay notices I gave to her this morning and I just heard a message left for me to that effect. The doors to your offices are closed and other people appear to be in there. Is there some reason the notices could not be filed and served this morning?

MEMORANDUM OF TELEPHONE CONVERSATION

TO: File

DATE: 2/22/05

FROM: Allan [illegible]

TIME: 2:30 PM

R: Kay, Pelton

TELEPHONE: 213 237-240

CW:

CASE:

I contacted Helene [illegible] re helper case on Rsk - Pelton. I asked if she had copies of the entire transcripts + docket sheet, she said yes, she could get. She thought the [illegible] [illegible] 1,[illegible] 100,000 pages. I asked for estimate of cost. She said it was something to go through it. She asked it we were going to [illegible] when I said I needed the transcripts for context. I said I could not discuss that but needed it to make decision on case + if it goes to trial. She also said judge denied her request for [illegible]. [illegible] [illegible] [illegible] but granted new trial based on [illegible] conduct. I asked for the order + if she has it + docket sheet. She [illegible] [illegible] + I said the sooner the better.

4838

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 9, 1998	**DEPT.** C	**REPORTER A:** Robin Mach	**CSR#:** 8824
PRESENT: HON. JOAN P. WEBER **JUDGE**		**REPORTER B:**	**CSR#:**
CLERK: Renee Sedgwick		**REPORTER'S ADDRESS:** P.O. BOX 128	
BAILIFF: Chris Mata		SAN DIEGO, CA 92112-4104	

N72142

DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:20 a.m. This being the time set for **MOTIONS IN LIMINE** in the above-entitled cause, Andrew Edenbaum, John Dalton, Philip Kay and Lawrence Organ appear on behalf of the Plaintiffs who are not present. Bonnie Glatzer, Robert Spagat, Brooks Marshall and Karen Mathes appear on behalf of the Defendant, with no representative present. **PRIOR TO TRIAL COMMENCING,** Court convenes. The Court and counsel discuss scheduling and voir dire.

The Court hears argument on the Defense motion for Judgment on the Pleadings. The Court denies the motion.

Plaintiffs' motion in limine, requesting exclusion of evidence of Plaintiffs' medical history and records, is unopposed and granted.

The Court hears argument on the Plaintiffs' motion in limine, requesting exclusion of evidence of Defendant's investigations and remedial action. The Court grants the motion.

The Court hears argument on the Plaintiffs' motion in limine, requesting exclusion of evidence not produced in response to Plaintiffs' discovery requests. The Court grants the motion..

The Court hears argument on the Plaintiffs' motion in limine, requesting exclusion of hearsay testimony of Defendant's investigators or witnesses. The Court orders that all discovery is to be turned over by 5:00 p.m. tomorrow or the evidence may not be used.

The Court hears argument on the Plaintiffs' motion in limine, requesting exclusion of any claim by Defendant that it is not liable for Misiolek's discrimination or harassment on the basis that he is merely a supervisor. The Court denies the motion.

The Court hears argument on the Plaintiffs' motion in limine, requesting exclusion of any claim by Defendant that it is not liable for Misiolek's discrimination or harassment on the basis that Misiolek's acts were outside the scope of his employment. The Court denies the motion.

The Court hears argument on the Plaintiffs' motion in limine, requesting exclusion of any statement or claim by Defendant that Misiolek is not a managing agent. The Court denies the motion

The Court hears argument on the Plaintiffs' motion in limine, requesting exclusion of any reference to what Plaintiffs did not tell Defendant's investigators regarding Misiolek's discrimination or harassment. The Court denies the motion.

Plaintiffs' motion in limine, requesting exclusion of any claim by Defendant that it took effective remedial action, is withdrawn.

Plaintiffs' motion in limine, requesting exclusion of any other litigation involving Plaintiffs, is unopposed and granted.

Plaintiffs' motion in limine, requesting exclusion of any statements by Defendant that Misiolek's superiors are not managing agents, is withdrawn.

Plaintiffs' motion in limine, requesting exclusion of any statements by Defendant regarding defendant's handling of other complaints of sexual harassment, is unopposed and granted.

Plaintiffs' motion in limine, requesting exclusion of any statements of documents relating to Plaintiffs' employment outside Defendant and Plaintiffs' employment personnel records from other employers, is unopposed and granted.

The Court hears argument on the Plaintiffs' motion in limine, requesting exclusion of any statements or documents referencing Plaintiffs pursuing their claims through their union's grievance process. The Court grants the motion.

The Court hears argument on the Plaintiffs' motion in limine, instructing Defendant not to ask Plaintiffs or other lay witnesses whether they considered Misiolek's conduct to be sex discrimination or harassment. The Court grants the motion.

Plaintiffs' motion in limine, instructing Defendant not to refer to Plaintiffs' counsel's involvement in the case of Weeks v. Baker McKenzie, is unopposed and granted.

The Court hears argument on the Plaintiffs' motion in limine, re dismissal of Roger Misiolek from the lawsuit. The motion is granted.

10:32 a.m. Court is in recess.

10:54 a.m. Court reconvenes with all parties present as noted above. The Court hears argument on the Plaintiffs' motion in limine, re Defendant Ralphs should be precluded from introducing witnesses that claim Roger Misiolek did not harass them. The Court grants the motion subject to re-argument at the end of the People's case. 0002

The Court hears argument on the Plaintiffs' motion in limine, re Defendant Ralphs should be precluded from calling witnesses that were not offended by Misiolek's conduct and did not complain. The Court grants the motion subject to re-argument at the end of the People's case.

Plaintiffs' motion in limine, re Defendant should be precluded from asking witnesses their opinion of the "ultimate issue," is withdrawn.

The Court hears argument on the Plaintiffs' motion in limine, to exclude evidence of Paul Gober selling tomatoes to Defendant Ralphs while employed by Ralphs. The Court denies the motion.

The Court hears argument on the Defense motion in limine to preclude Elvia Chandler from testifying at trial. The Court disallows the witness' testimony and finds that the conduct alleged is dissimilar and remote in time.

12:02 p.m. Court is in recess

1:30 p.m. Court reconvenes with all parties present as noted above. The Court hears argument on the Defense motion in limine to preclude Doreen Conroy from testifying at trial. The Court will allow the witness' testimony and finds that the conduct alleged is similar.

The Court hears argument on the Defense motion in limine to preclude Keiko Henderson from testifying at trial. The Court will allow the witness' testimony.

The Court hears argument on the Defense motion in limine to preclude Sheila Peles from testifying at trial. The Court will allow the witness' testimony and finds that it is probative.

The Court hears argument on the Defense motion in limine to preclude Bonnie Bowles from testifying at trial. The Court disallows the witness' testimony and finds that the conduct alleged is not sufficiently similar.

The Court hears argument on the Defense motion in limine to preclude Melissa Carter from testifying at trial. The Court disallows the witness' testimony and finds that the conduct alleged is not sufficiently similar and is not probative.

The Court hears argument on the Defense motion in limine to preclude Lynn Green from testifying at trial. The Court will allow the witness' testimony and finds the conduct alleged is similar, relevant and highly probative.

The Court hears argument on the Defense motion in limine to preclude Carol Fisher from testifying at trial. The Court disallows the witness' testimony and finds that the conduct alleged is not sufficiently similar and is speculative.

The Court hears argument on the Defense motion in limine to preclude Laurie Sanders from testifying at trial. The Court will allow the witness' testimony and finds the conduct alleged is similar and relevant.

The Court hears argument on the Defense motion in limine to preclude Barbara Cedabacha from testifying at trial. The Court disallows the witness' testimony and finds that the conduct alleged is not similar and the prejudice would outweigh any probative value.

The Court hears argument on the Defense motion in limine to preclude Kathleen Young from testifying at trial. The Court allows the testimony but limits it to member complaints.

3:04 p.m. Court is in recess.

3:19 p.m. Court reconvenes with all parties present as noted above. The Defense makes a motion to exclude all pre-Escondido conduct.

The Court hears argument on the Defense motion in limine to preclude Laura Baty from testifying at trial. The Court will allow the witness to testify in a limited area as fully set forth in the reporter's notes.

The Court hears argument on the Defense motion in limine to preclude Juanita Sherrill from testifying at trial. The Court disallows the testimony and finds it to be cumulative and does not find it probative.

The Court hears argument on the Defense motion in limine to exclude evidence of alleged sexual harassment of Leslie Fuller. The Court will allow the witness' testimony and finds the conduct alleged is similar.

The Court hears argument on the Defense motion in limine to preclude Karen Chapman from testifying at trial. The Court disallows the testimony and finds it to be cumulative and does not find it probative.

The Defense motion in limine to exclude evidence of alleged complaints of employees, including Jeannie Jones, against persons other than Misiolek, is unopposed and granted.

The Court hears argument on the Defense motion in limine to exclude Plaintiffs' expert witness Kathleen Krohne's legal opinion that Plaintiffs were sexually harassed. The Court grants the motion.

The Court hears argument on the Defense motion in limine to exclude deposition testimony of Mary Lou Wakefield. The Court grants the motion.

The Defense motion in limine to exclude evidence relating to racial and/or ethnic slurs, harassment, and discrimination is unopposed and granted.

3:59 p.m. The Court and counsel discuss voir dire.

4:35 p.m. Court is adjourned until 10:00 a.m., Friday, April 10, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 10, 1998	**DEPT.** C	**REPORTER A:** Robin Mach	**CSR#:** 8824
PRESENT: **HON.** JOAN P. WEBER **JUDGE**		**REPORTER B:**	**CSR#:**
CLERK: Renee Sedgwick		**REPORTER'S ADDRESS:** P.O. BOX 128	
BAILIFF: Chris Mata		SAN DIEGO, CA 92112-4104	

N72142

DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

10:13 a.m. This being the time previously set for **MOTIONS IN LIMINE** in the above-entitled cause, Andrew Edenbaum, John Dalton, Philip Kay and Lawrence Organ appear on behalf of the Plaintiffs who are not present. Bonnie Glatzer, Robert Spagat and Karen Mathes appear on behalf of the Defendant, with no representative present. **PRIOR TO TRIAL COMMENCING**, court convenes. The Court and counsel discuss voir dire and scheduling.

The Court and counsel discuss a statement of the case.

The Court hears argument on the Defense motions to quash subpoenas. The Court shortens time for the notice of motion to appear. The Court orders the Defense to turn over computer print-outs from Ralphs. The Court orders witness Christine Masters be produced for trial. The Court and counsel further discuss witness testimony.

11:21 a.m. Court is adjourned until 9:00 a.m., Tuesday, April 14, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 14, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: HON. JOAN P. WEBER **JUDGE** **REPORTER B:** **CSR#:**

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:19 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Robert Spagat and Karen Mathes appear on behalf of the Defendant, with Mary Lou Wakefield and Harry Wallock present as representatives of Ralphs. Ron Beaton, legal assistant to Ms. Glatzer is also present. Court convenes. The Court and counsel discuss potential witness testimony and scheduling.

9:26 a.m. Court is in recess.

10:03 a.m. A panel of 50 jurors arrives. Roll is taken and the qualifying oath is administered in the presence of counsel and the parties noted above. **TRIAL COMMENCES**.

10:07 a.m. Court reconvenes with the prospective jurors and all parties present as noted above. The parties are introduced, the Statement of the Case is read, the Court reads preliminary instructions to the prospective jurors and voir dire commences.

11:43 a.m. A reported chambers conference is held with counsel and a prospective juror until 11:48 a.m. whereupon voir dire continues in open court.

12:03 p.m. The prospective jurors are admonished and excused. Court is in recess.

1:33 p.m Court reconvenes with the prospective jurors and all parties present as noted above. Voir dire continues.

1:52 p.m. A reported side-bar conference is held until 1:54 p.m. whereupon voir dire continues.

1:58 p.m. A reported side-bar conference is held until 1:59 p.m. whereupon voir dire continues.

2:44 p.m. A reported side-bar conference is held until 2:47 p.m. whereupon voir dire continues.

2:59 p.m. The following twelve individuals are sworn to try the cause:

1.	Brooke Leblanc	7.	Wanda Gemson
2.	Celia Friedman	8.	Dianne Woodcroft
3.	Edward Trapsi	9.	Patricia Smith
4.	Terry Rolls	10.	Michael White
5.	William Jennings	11.	Emilio Puma
6.	John Boston	12.	Steve Gastelum

Voir dire continues for four alternate jurors.

3:06 p.m. The jury and prospective jurors are excused. The Court and counsel discuss voir dire for alternates.

3:08 p.m. Court is in recess.

3:29 p.m. Court reconvenes with the jury, prospective jurors and all parties present as noted above. Voir dire continues for four alternate jurors.

4:13 p.m. A reported side-bar conference is held until 4:16 p.m. whereupon voir dire continues.

4:19 p.m. The following alternate jurors are sworn:

Donna Eggert	Joseph Mesch
Patricia Perez	Gaveston Brown

The Court preinstructs the jury and admonishes them in full per PC1122.

4:30 p.m. The jury is excused. The Court and counsel discuss scheduling.

4:37 p.m. Court is adjourned until 9:00 a.m., Wednesday, April 15, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 15, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: **HON.** JOAN P. WEBER **JUDGE** **REPORTER B:** Carrie James **CSR#:** 7329

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:15 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, all of whom are present in court. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer and Robert Spagat appear on behalf of the Defendant, with Mary Lou Wakefield and Harry Wallock present as representatives of Ralphs. Court convenes. The Plaintiffs make a motion to exclude witnesses. The Court grants the motion but will allow Ms. Meek to be present in Ms. Wakefield's absence.

9:20 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES**. Mr. Kay presents opening statement on behalf of the Plaintiffs.

10:00 a.m. Karen Mathes is now present also on behalf of the Defense.

10:58 a.m. The jury is excused. Court is in recess.

2:01 p.m. Court reconvenes with the jury and all parties present as noted above. Mr. Kay continues with his opening statement.

2:05 p.m. A reported side-bar conference is held until 2:09 p.m. whereupon Mr. Kay continues with opening statement.

2:35 p.m. A reported side-bar conference is held until 2:37 p.m. whereupon Mr. Kay continues with opening statement.

2:45 p.m. The jury is excused. Court is in recess.

2:59 p.m. Court reconvenes with the jury and all parties present as noted above. Ms. Glatzer presents opening statement on behalf of the Defendant.

3:27 p.m. A reported side-bar conference is held until 3:32 p.m. whereupon Ms. Glazter continues with opening statement.

3:53 p.m. **LYNNE GREEN** is sworn and examined on behalf of the Plaintiffs.

4:26 p.m. The jury is excused. The Court and counsel discuss opening statements and witness testimony.

4:51 p.m. Court is adjourned until 9:15 a.m., Thursday, April 16, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 16, 1998 **DEPT.** C **REPORTER A:** Carrie James **CSR#:** 7329

PRESENT: HON. JOAN P. WEBER **JUDGE** **REPORTER B:** **CSR#:**

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:20 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Mary Lou Wakefield present as a representative of Ralphs. Court convenes outside the presence of the jury.

The Court and counsel discuss the investigation by Sheri Meek. The Court and counsel discuss witness scheduling.

9:38 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES**. **LYNNE GREEN**, previously sworn, resumes the stand for further examination.

10:00 a.m. Ms. Green is excused. **KAREN KEIKO HENDERSON** is sworn and examined on behalf of the Plaintiffs.

10:04 a.m. A reported side-bar conference is held until 10:07 a.m. whereupon examination of the witness continues.

10:40 a.m. The jury is excused. The Court and counsel discuss witness scheduling.

10:48 a.m. Court is in recess.

11:02 a.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues.

11:44 a.m. Ms. Henderson is excused. The jury is excused. The Court and counsel discuss use of depositions for impeachment. The Court and counsel discuss witness scheduling.

11:51 a.m. Court is in recess.

1:31 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel discuss the use of depositions during testimony.

1:55 p.m. The jury is escorted into the courtroom and **DOREEN CONROY** is sworn and examined on behalf of the Plaintiffs.

3:07 p.m. The jury is excused. Court is in recess.

3:21 p.m. Court reconvenes with the jury and all parties present as noted above. Examination of Ms. Conroy continues.

3:53 p.m. Ms. Conroy is excused. **LESLIE FULLER** is sworn and examined on behalf of the Plaintiffs.

4:08 p.m A reported side-bar conference is held until 4:13 p.m whereupon examination of the witness continues.

4:31 p.m. Ms. Fuller is excused. The jury is excused. The Court and counsel discuss witness scheduling.

4:35 p.m Court is adjourned until 9:15 a.m., Monday, April 20, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 20, 1998	**DEPT.** C	**REPORTER A:** Robin Mach	**CSR#:** 8824
PRESENT: HON. JOAN P. WEBER **JUDGE**		**REPORTER B:** Carrie James	**CSR#:** 7329
CLERK: Renee Sedgwick		**REPORTER'S ADDRESS:** P.O. BOX 128	
BAILIFF: Chris Mata		SAN DIEGO, CA 92112-4104	

N72142

DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:20 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Mary Lou Wakefield present as a representative of Ralphs. Court convenes outside the presence of the jury.

The Court and counsel discuss witness testimony. The Court and counsel discuss the video deposition of Roger Misiolek.

9:39 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES.** **KATHLEEN YOUNG** is sworn and examined on behalf of the Plaintiff.

9:53 a.m. A reported side-bar conference is held until 9:56 a.m. whereupon examination of the witness continues.

10:37 a.m. The jury is excused. The Court and counsel discuss an unmarked exhibit. The Court will not allow the exhibit. The Court and counsel discuss witness Lori Sanders.

10:42 a.m. Court is in recess.

10:54 a.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel further discuss Lori Sanders.

10:56 a.m. The jury is escorted into the courtroom and examination of the witness continues.

11:45 a.m. Ms. Young is excused. **LORI SANDERS** is sworn and examined on behalf of the Plaintiff.

11:59 a.m. The jury is excused. The Court admonishes counsel regarding their conduct.

12:01 p.m. Court is in recess.

1:33 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel discuss demonstrative evidence.

1:38 p.m. The jury is escorted into the courtroom and examination of the witness continues.

2:00 p.m. A reported side-bar conference is held until 2:03 p.m. whereupon examination of the witness continues.

2:05 p.m. The testimony of Ms. Sanders is interrupted and **SHEILA PELES** is sworn and examined on behalf of the Plaintiff. The following pre-marked Court's exhibit is identified:

Court's exhibit 204 - Change of Status dated 4/18/94

3:04 p.m. The jury is excused. Court is in recess.

3:17 p.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues. The following pre-marked Court's exhibits are identified:

Court's exhibit 205 - Notice of Unacceptable Conduct dated 6/1/94
Court's exhibit 206 - Notice of Unacceptable Conduct dated 7/2/94
Court's exhibit 207 - Notice of Unacceptable Conduct dated 7/25/94
Court's exhibit 208 - Notice of Unacceptable Conduct dated 9/12/94
Court's exhibit 209 - Notice of Unacceptable Conduct dated 12/4/94
Court's exhibit 210 - Change of Status dated 12/12/94

Court's exhibits 205, 206, 207, 208, 209 and 210 are received into evidence.

3:42 p.m. A reported side-bar conference is held until 3:44 p.m. whereupon examination of the witness continues.

3:50 p.m. Ms. Peles is excused. A reported side-bar conference is held until 3:53 p.m. whereupon **LAURA BATY** is sworn and examined on behalf of the Plaintiff.

3:56 p.m. Ms. Baty is excused. **LORI SANDERS**, previously sworn, resumes the stand for further examination.

4:22 p.m. Ms. Sanders is excused. The jury is excused. The Court and counsel discuss witness scheduling. The Court and counsel discuss video tape deposition of Roger Misiolek. The Court excludes the video tape on the grounds that there was not sufficient notice to use the video. Mr. Kay requests that the Court admonish Mr. Misiolek prior to his testimony. The Court sets parameters for the testimony of Mr. Misiolek.

4:41 p.m Court is adjourned until 9:00 a.m., Tuesday, April 21, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 21, 1998	**DEPT.** C	**REPORTER A:** Robin Mach	**CSR#:** 8824
PRESENT: HON. JOAN P. WEBER JUDGE		**REPORTER B:** Carrie James	**CSR#:** 7329
CLERK: Renee Sedgwick		**REPORTER'S ADDRESS:** P.O. BOX 128	
BAILIFF: Chris Mata		SAN DIEGO, CA 92112-4104	

N72142	DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN, Plaintiffs,	By:	Andrew Edenbaum John Dalton Philip Kay Lawrence Organ
	vs.		
	RALPHS GROCERY COMPANY, Defendant.	By:	Bonnie Glatzer Robert Spagat Brooks Marshall Karen Mathes

9:10 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Mary Lou Wakefield and Harry Wallock present as representatives of Ralphs. Court convenes outside the presence of the jury.

The Court and counsel discuss volume records.

9:15 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES.** **LEON ROGER MISIOLEK** is sworn and examined on behalf of the Plaintiff.

10:07 a.m. A reported side-bar conference is held until 10:18 a.m. whereupon examination of the witness continues.

10:40 a.m. The jury is excused. Court is in recess.

10:55 a.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues. The following Court's exhibits are identified:

Court's exhibit 101 - Ralphs Grocery Company's Sexual Harassment Policy dated 8/29/95
Court's exhibit 104 - DFEH Posting "Harassment or Discrimination in Employment"

11:58 a.m. The jury is excused. **Court's exhibits 101 and 104 are received into evidence.** Court is in recess.

1:33 p.m Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues. The following Court's exhibits are identified:

Court's exhibit 162 - Personnel memo dated May 13, 1996
Court's exhibit 15 - Tina Swann Performance Evaluation dated 9/30/95
Court's exhibit 44 - Terrill Finton Performance Evaluation dated 3/16/96
Court's exhibit 66 - Suzanne Papiro's Performance Evaluation dated 9/2/95
Court's exhibit 32 - Sarah Lang's Performance Evaluation dated 7/28/95
Court's exhibit 54 - Talma "Peggy" Noland's Performance Evaluation dated 3/1/96

Court's exhibit 15 is received into evidence.

3:07 p.m. The jury is excused. The Court and counsel discuss witness scheduling.

3:11 p.m. Court is in recess.

3:26 p.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues.

4:28 p.m. The jury is excused. The Court and counsel discuss scheduling.

4:38 p.m Court is adjourned until 9:15 a.m., Wednesday, April 22, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 22, 1998	**DEPT.** C	**REPORTER A:** Robin Mach	**CSR#:** 8824
PRESENT: **HON.** JOAN P. WEBER **JUDGE**		**REPORTER B:** Carrie James	**CSR#:** 7329
CLERK: Renee Sedgwick		**REPORTER'S ADDRESS:** P.O. BOX 128	
BAILIFF: Chris Mata		SAN DIEGO, CA 92112-4104	

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:29 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Mary Lou Wakefield and Harry Wallock present as representatives of Ralphs. Court convenes outside the presence of the jury. The Court and counsel discuss an additional witness who was not previously disclosed.

9:41 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES. LEON ROGER MISIOLEK,** previously sworn, resumes the stand for further examination. The following pre-marked Court's exhibit is identified:

Court's exhibit 146 - Notes of Kathleen Young dated 10/29/97 & 9/19/97

10:13 a.m. A reported side-bar conference is held until 10:14 a.m. whereupon examination of the witness continues. The following pre-marked Court's exhibit is identified:

Court's exhibit 160 - Store Director, Store Operations Statement of Responsibility
Court's exhibits 160 and 162 are received into evidence.

10:42 a.m. A reported side-bar conference is held until 10:50 a.m. whereupon examination of the witness continues.

10:52 a.m. A reported side-bar conference is held with the witness present until 10:54 a.m. whereupon the jury is excused and court is in recess.

11:07 a.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues.

The following pre-marked Court's exhibit is identified:

Court's exhibit 133 - Ralphs' Notice Prevention of Sexual Harassment Seminar dated 7/1/97

11:47 a.m. The jury is excused. The Court and counsel discuss scheduling. The Court and counsel discuss a prior lawsuit against Ralphs. The Court and counsel further discuss the additional witness not previously disclosed.

12:07 p.m. Court is in recess.

1:21 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel further discuss prior litigation. The Court finds that the 1987 complaint is not relevant and is remote in time. The Court excludes the evidence per Evidence Code section 352.

1:36 p.m. The jury is escorted into the courtroom and examination of the witness continues. The following pre-marked Court's exhibit is identified:

Court's exhibit 115 - Collective Bargaining Agreement dated 10/2/95 - 10/3/99
Court's exhibit 115 is received into evidence.

1:55 p.m. Mr. Misiolek is excused subject to recall. DANIEL G. HUTCHISON is sworn and examined on behalf of the Plaintiffs. The following pre-marked Court's exhibit Is identified:

Court's exhibit 161 - District Manager, Store Operations Statement of Responsibility
Court's exhibit 161 is received into evidence.

2:59 p.m. The jury is excused. Court is in recess.

3:18 p.m. Court reconvenes with the jury and all parties present as noted above except Mary Lou Wakefield. Examination of the witness continues. **Court's exhibit 133 is received into evidence.** The following pre-marked Court's exhibit is identified:

Court's exhibit 164 - Handwritten notes by Dan Hutchison
Court's exhibit 164 is received into evidence.

4:27 p.m. The jury is excused. The Court inquires of the witness.

4:31 p.m. Mr. Hutchison is excused until Tuesday, April 28, 1998. Mr. Kay makes an offer of proof regarding the testimony of a previously undisclosed witness.

4:44 p.m Court is adjourned until 9:00 a.m., Thursday, April 23, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 23, 1998	**DEPT.** C	**REPORTER A:** Robin Mach	**CSR#:** 8824
PRESENT: HON. JOAN P. WEBER **JUDGE**		**REPORTER B:** Carrie James	**CSR#:** 7329
CLERK: Renee Sedgwick		**REPORTER'S ADDRESS:** P.O. BOX 128	
BAILIFF: Chris Mata		SAN DIEGO, CA 92112-4104	

N72142

DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:04 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Sheri Meek and Harry Wallock present as representatives of Ralphs. Court convenes outside the presence of the jury.
Mr. Kay makes a further offer of proof regarding witness Kathy Stahl.

9:15 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES**. **JOHN JACKMAN** is sworn and examined on behalf of the Plaintiffs.

9:40 a.m. A reported side-bar conference is held until 9:42 a.m. whereupon examination of the witness continues.

10:35 a.m. Mr. Jackman is excused. **BRIAN EUGENE FINLEY** is sworn and examined on behalf of the Plaintiffs.

10:47 a.m. The jury is excused. Court is in recess.

1:32 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel discuss a doctor's note regarding Alternate Juror Number Two, Patricia Perez. Counsel stipulate to excuse Ms. Perez from further service on this jury. The note is marked and filed as Jury Note Number One.
The Court and counsel discuss the testimony of Sheri Meek.

1:38 p.m. The jury is escorted into the courtroom and examination of the witness continues.

The following pre-marked Court's exhibit is identified:

Court's exhibit 119 - Redacted Handwritten Investigation Notes by Mary Lou Wakefield

2:49 p.m. Mr. Finley is excused. SHERI MEEK is sworn and examined on behalf of the Plaintiffs.

3:02 p.m. The jury is excused. The Court and counsel discuss an exhibit.

3:10 p.m. Court is in recess.

3:20 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel further discuss the exhibit.

3:22 p.m. Court is at rest pending redaction of the exhibit.

3:29 p.m. The jury is escorted into the courtroom and examination of the witness continues. The following pre-marked Court's exhibit is identified:

Court's exhibit 123 - Sheri Meek's Interview Notes with Kathleen Young dated 10/31/97

3:33 p.m. A reported side-bar conference is held until 3:35 p.m. whereupon examination of the witness continues. The following pre-marked Court's exhibit is identified:

Court's exhibit 124 - Non-Redacted Interview Notes dated 11/20/97

4:28 p.m. The jury is excused. The Court and counsel discuss witness testimony.

4:33 p.m Court is adjourned until 9:30 a.m., Friday, April 24, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 27, 1998	**DEPT.** C	**REPORTER A:** Robin Mach	**CSR#:** 8824
PRESENT: HON. JOAN P. WEBER **JUDGE**		**REPORTER B:** Carrie James	**CSR#:** 7329
CLERK: Renee Sedgwick		**REPORTER'S ADDRESS:** P.O. BOX 128	
BAILIFF: Chris Mata		SAN DIEGO, CA 92112-4104	

N72142

DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:06 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Sheri Meek and Harry Wallock present as representatives of Ralphs. Court convenes outside the presence of the jury, the Court and counsel discuss witness scheduling.

9:08 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES**. **GARY ROBERT RAYMOND** is sworn and examined on behalf of the Plaintiffs.

10:38 a.m. The jury is excused. Court is in recess.

10:54 a.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues.

11:58 a.m. The jury is excused. The Court and counsel discuss proposed testimony.

11:59 a.m. Court is in recess.

1:33 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel discuss objections to testimony.

1:53 p.m. The jury is escorted into the courtroom and examination of the witness continues.

The following pre-marked Court's exhibits are identified and received into evidence:
Court's exhibit 130 - Ralphs Intercompany Communication dated 10/22/97 re: Roger Misiolek
Court's exhibit 131 - Ralphs Intercompany Communication dated 10/22/97 re: Store Visit Recap

3:09 p.m. The jury is excused. Court is in recess.

3:23 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel discuss a jury instruction.

3:25 p.m. The jury is escorted into the courtroom and the Court gives an instruction regarding hypothetical questions.

3:26 p.m. Examination of Mr. Raymond continues.

4:10 p.m. A reported side-bar conference is held until 4:11 p.m. whereupon examination of the witness continues.

4:17 p.m. The jury is excused. The Court and counsel discuss testimony of potential witness Kathy Stahl. The Court finds that the testimony is not similar and not proper pursuant to Evidence Code section 1101. The Court further finds that pursuant to Evidence Code section 352, the testimony is cumulative and that the prejudice to the Defense could not be cured without a continuance of the trial. The testimony will not be permitted.

4:45 p.m. Court is adjourned until 9:00 a.m., Tuesday, April 28, 1998.

COUNTY OF SAN DIEGO SUPERIOR COURT NORTH COUNTY DIVISION STATE OF CALIFORNIA

I certify that this is a correct copy of the original on file with the Clerk, San Diego Superior Court, San Diego, California.
Attest my hand SEP 09 2008
Clerk, by L. Alvarez Deputy (2 pages)

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 29, 1998	**DEPT.** C	**REPORTER A:** Robin Mach	**CSR#:** 8824
PRESENT: **HON.** JOAN P. WEBER **JUDGE**		**REPORTER B:** Carrie James	**CSR#:** 7329
CLERK: Renee Sedgwick		**REPORTER'S ADDRESS:** P.O. BOX 128	
BAILIFF: Chris Mata		SAN DIEGO, CA 92112-4104	

N72142

DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:49 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Mary Lou Wakefield and Harry Wallock present as representatives of Ralphs. The jury is present, court convenes and **TRIAL RESUMES**. **DANIEL HUTCHISON**, previously sworn, resumes the stand for further examination.

10:19 a.m. A reported side-bar conference is held until 10:20 a.m. whereupon examination of the witness continues.

10:26 a.m. Mr. Hutchison is excused subject to recall. **GERALD ALLEN SMITH** is sworn and examined on behalf of the Plaintiffs.

10:53 a.m. The jury is excused. Court is in recess.

11:04 a.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues.

12:00 p.m. The jury is excused. The Court and counsel discuss Juror Number Three, Mr. Trapsi.

12:01 p.m. Court is in recess.

1:33 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. Juror Number Three, Mr. Trapsi, is escorted into the courtroom. The Court inquires of the juror regarding his medical condition

1:39 p.m. Mr. Trapsi exits the courtroom. The Court and counsel discuss excusing the juror.

1:44 p.m. Mr. Trapsi is escorted into the courtroom and excused from further service on this case. At the direction of the Court, the clerk randomly draws Alternate Juror Gaveston Brown to be substituted in as Juror Number Three.

1:45 p.m. The jury is escorted into the courtroom and Mr. Brown is seated as Juror Number Three. Examination of the witness continues.

3:07 p.m. The jury is excused. The Court and counsel discuss responses to requests for production.

3:11 p.m. Court is in recess.

3:27 p.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues.

3:56 p.m. Mr. Smith is excused subject to recall. **MARY LOUISE WAKEFIELD** is sworn and examined on behalf of the Plaintiffs.

4:29 p.m. The jury is excused until 9:00 a.m., Thursday, April 29, 1998. The Court and counsel discuss discovery rulings and evidence.

4:43 p.m. Court is adjourned until 8:45 a.m., Thursday, April 30, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 28, 1998	**DEPT.** C	**REPORTER A:** Robin Mach	**CSR#:** 8824
PRESENT: **HON.** JOAN P. WEBER **JUDGE**		**REPORTER B:** Carrie James	**CSR#:** 7329
CLERK: Renee Sedgwick		**REPORTER'S ADDRESS:** P.O. BOX 128	
BAILIFF: Chris Mata		SAN DIEGO, CA 92112-4104	

N72142	DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN, Plaintiffs,	By:	Andrew Edenbaum John Dalton Philip Kay Lawrence Organ
	vs.		
	RALPHS GROCERY COMPANY, Defendant.	By:	Bonnie Glatzer Robert Spagat Brooks Marshall Karen Mathes

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9:09 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Mary Lou Wakefield and Harry Wallock present as representatives of Ralphs. Court convenes outside the presence of the jury, Mr. Kay makes a motion regarding notice and in limine rulings.

9:53 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES. GARY ROBERT RAYMOND,** previously sworn, resumes the stand for further examination. The following pre-marked Court's exhibit is identified:

Court's exhibit 165 - Enlargement of Store Volume Data for Escondido and Mission Viejo stores

10:48 a.m. The jury is excused. Court is in recess.

11:01 a.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues. **Court's exhibit 119 is received into evidence.**

11:27 a.m. A reported side-bar conference is held until 11:30 a.m. whereupon examination of the witness continues.

11:58 a.m. The jury is excused. Court is in recess.

1:31 p.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues.

2:58 p.m. The jury is excused. The Court and counsel discuss volume records.

3:12 p.m. Court is in recess.

3:20 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel further discuss the volume exhibits.

3:22 p.m. The jury is escorted into the courtroom and examination of the witness continues.

3:30 p.m. Mr. Raymond is excused subject to recall. **RANDALL PAUL KRUSKA** is sworn and examined on behalf of the Plaintiffs.

3:54 p.m. Mr. Kruska is excused. The jury is excused. Court is adjourned until 9:45 a.m., Wednesday, April 29, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: April 30, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: HON. JOAN P. WEBER **JUDGE** **REPORTER B:** Carrie James **CSR#:** 7329

CLERK: Renee Sedgwick/Rosemarie Sims **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:04 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Mary Lou Wakefield and Harry Wallock present as representatives of Ralphs. Court convenes outside the presence of the jury. The Court and counsel discuss evidence. The Court and counsel discuss the deposition transcript of Michael Pruett.

9:16 a.m. The jury is present and **TRIAL RESUMES. MARY LOUISE WAKEFIELD**, previously sworn, resumes the stand for further examination.

10:17 a.m. A reported side-bar conference is held until 10:20 a.m. whereupon examination of the witness resumes.

10:40 a.m. The jury is excused. Court is in recess.

10:55 a.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel confer.

11:00 a.m. The jury is escorted into the courtroom and examination of the witness continues.

12:03 p.m. The jury is excused. Court is in recess.

1:33 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel discuss a note received from Juror Number Tweleve. The note reads as follows:

Your Honor
I'm going to San Felipe (Mexico) for the weekend. It's an approximately 4 hour drive. If possible could we get released early on Friday? One hour would be appreciated.
Thank you Juror #12

The note is marked and filed as Jury Note Number Two.

The Court and counsel discuss deposition testimony of Michael Pruett. The Court and counsel discuss scheduling.

1:43 p.m. Court is in recess.

1:47 p.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues. **The following pre-marked Court's exhibits are identified and received into evidence:**

Court's exhibit 106 - DFEH Publication "Sexual Harassment is Forbidden by Law"
Court's exhibit 108 - Ralphs Grocery Company's Administrative Manual Index 2/97
Court's exhibit 109 - Ralphs Grocery Company's Administrative Manual Section 10-11
Court's exhibit 110 - Ralphs Grocery Company's Employee Handbook

2:53 p.m. A reported side-bar conference is held until 2:55 p.m. whereupon examination of the witness continues.

3:04 p.m. The jury is excused. Court is in recess.

3:18 p.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues.

3:35 p.m. A reported side-bar conference is held until 3:39 p.m. whereupon examination of the witness continues.

3:57 p.m. Ms. Wakefield is excused. TINA SWANN is sworn and examined on behalf of the Plaintiffs.

4:28 p.m. The jury is excused. The Court and counsel discuss scheduling.

4:35 p.m. Court is adjourned until 10:00 a.m., Friday, May 1, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 1, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: **HON.** JOAN P. WEBER **JUDGE** **REPORTER B:** Carrie James **CSR#:** 7329

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

10:02 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Mary Lou Wakefield and Harry Wallock present as representatives of Ralphs. The jury is present, court convenes and **TRIAL RESUMES.**

TINA SWANN, previously sworn, resumes the stand for further examination. **The following pre-marked Court's exhibits are identified and received into evidence:**

Court's exhibit 29 - Authorization for Deduction of Initiation Fee and Union Dues
Court's exhibit 30 - Transfer Request

11:47 a.m. Ms. Swann is excused. **SARAH LANG** is sworn and examined on behalf of the Plaintiffs.

11:56 a.m. The jury is excused. The Court admonishes Mr. Kay.

12:06 p.m. Court is in recess.

1:30 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel discuss expert testimony and scheduling.

1:37 p.m. The jury is escorted into the courtroom and examination of the witness continues. **The following pre-marked Court's exhibits are identified and received into evidence:**

Court's exhibit 174 - S. Lang Payroll Authority

Court's exhibit 41 - Authorization for Deduction of Initiation Fee and Union Dues

Court's exhibit 32 is received into evidence.

3:31 p.m. The jury is excused. The Court and counsel discuss exhibits and scheduling.

3:38 p.m. Court is adjourned until 9:00 a.m., Monday, May 4, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 4, 1998	**DEPT.** C	**REPORTER A:** Robin Mach	**CSR#:** 8824
PRESENT: HON. JOAN P. WEBER **JUDGE**		**REPORTER B:** Carrie James	**CSR#:** 7329
CLERK: Renee Sedgwick		**REPORTER'S ADDRESS:** P.O. BOX 128	
BAILIFF: Chris Mata		SAN DIEGO, CA 92112-4104	

N72142

DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:07 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Mary Lou Wakefield present as a representative of Ralphs. The jury is present, court convenes and **TRIAL RESUMES**. **SARAH LANG**, previously sworn, resumes the stand for further examination.

9:29 a.m. A reported side-bar conference is held until 9:31 a.m. whereupon examination of the witness continues.

9:34 a.m. Ms. Lang is excused. **TERRILL FINTON** is sworn and examined on behalf of the Plaintiffs.

9:47 a.m. A reported side-bar conference is held until 9:48 a.m. whereupon examination of the witness continues.

10:30 a.m. The jury is excused. Court is in recess.

10:47 a.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues. **Court's exhibit 44 is received into evidence.**

11:33 a.m. A reported side-bar conference is held until 11:35 a.m. whereupon examination of the witness continues.

11:38 a.m. Ms. Finton is excused. **TALMA NOLAND** is sworn and examined on behalf of the Plaintiffs.

11:58 a.m. The jury is excused. Court is in recess.

1:34 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel discuss Ms. Noland's testimony and in limine rulings.

1:48 p.m. The jury is escorted into the courtroom and examination of the witness continues.

2:14 p.m. A reported side-bar conference is held until 2:19 p.m. whereupon examination of the witness continues. **The following pre-marked Court's exhibit is identified and received into evidence:**

Court's exhibit 148 - Ralphs' Sexual Harassment Training dated 1/7/98

2:56 p.m. The jury is excused. Court is in recess.

3:11 p.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues. **Court's exhibit 54 is received into evidence.**

3:58 p.m. A reported side-bar conference is held until 4:02 p.m. whereupon examination of the witness continues.

4:32 p.m. The jury is excused until 10:00 a.m., Tuesday, May 5, 1998. The Court and counsel discuss witness scheduling.

4:39 p.m. Court is adjourned until 9:30 a.m., Tuesday, May 5, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 5, 1998	**DEPT.** C	**REPORTER A:** Robin Mach	**CSR#:** 8824
PRESENT: **HON.** JOAN P. WEBER **JUDGE**		**REPORTER B:** Carrie James	**CSR#:** 7329
CLERK: Renee Sedgwick		**REPORTER'S ADDRESS:** P.O. BOX 128	
BAILIFF: Chris Mata		SAN DIEGO, CA 92112-4104	

N72142

DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:40 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Harry Wallock and Mary Lou Wakefield present as representatives of Ralphs. Court convenes outside the presence of the jury. The Court and counsel discuss witnesses excluded by in limine rulings. The Court affirms the in limine rulings for reasons fully set forth in the reporter's notes.

10:33 a.m. Court is in recess.

10:40 a.m. Court reconvenes with the jury and all parties present as noted above. **TRIAL RESUMES. TALMA NOLAND**, previously sworn, resumes the stand for further examination.

10:58 a.m. Ms. Noland is excused. **SUZANNE PAPIRO** is sworn and examined on behalf of the Plaintiffs.

11:48 a.m. A reported side-bar conference is held until 11:49 a.m. whereupon examination of the witness continues.

11:59 a.m. The jury is excused. The Court and counsel discuss witness scheduling.

12:07 p.m. Court is in recess.

1:31 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel discuss witness scheduling.

1:34 p.m. The jury is escorted into the courtroom and examination of the witness continues.

1:39 p.m. A reported side-bar conference is held until 1:42 p.m. whereupon examination of the witness continues.
The following pre-marked Court's exhibit is identified and received into evidence:
Court's exhibit 74 - Suzanne Papiro's Performance Evaluation dated 8/8/97
Court's exhibit 66 is received into evidence.

2:14 p.m. A reported side-bar conference is held until 2:17 p.m. whereupon examination of the witness continues.

2:34 p.m. Ms. Papiro is excused. **DIANNE GOBER** is sworn and examined on behalf of the Plaintiffs.

3:29 p.m. The jury is excused. The Court and counsel discuss scheduling.

3:39 p.m. Court is adjourned until 9:00 a.m., Wednesday, May 6, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 7, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: **HON.** JOAN P. WEBER **JUDGE** **REPORTER B:** Carrie James **CSR#:** 7329

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

10:13 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Harry Wallock and Mary Lou Wakefield present as representatives of Ralphs. Court convenes outside the presence of the jury. The Court denies the Plaintiffs' motion for a 402 hearing regarding Kathy Stahl. The Court and counsel discuss witness testimony.

10:40 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES.** **CHRISTINE MASTERS** is sworn and examined on behalf of the Plaintiffs.

12:00 p.m. The jury is excused. The Court and counsel discuss witness testimony.

12:06 p.m. Court is in recess.

1:32 p.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues.

2:54 p.m. A reported side-bar conference is held until 2:56 p.m. whereupon the jury is excused. Court is in recess.

3:13 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel confer.

3:16 p.m. The jury is escorted into the courtroom and examination of the witness continues.

3:27 p.m. A reported side-bar conference is held until 3:30 p.m. whereupon examination of the witness continues.

3:35 p.m. A reported side-bar conference is held until 3:36 p.m. whereupon examination of the witness continues.

4:29 p.m. The jury is excused. The Court and counsel discuss scheduling.

4:34 p.m. Court is adjourned until 10:30 a.m., Friday, May 8, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 8, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: **HON.** JOAN P. WEBER **JUDGE** **REPORTER B:** Carrie James **CSR#:** 7329

CLERK: Renee Sedgwick/Michael Garland **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

10:34 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Harry Wallock and Mary Lou Wakefield present as representatives of Ralphs. The jury is present, court convenes and **TRIAL RESUMES.** **KATHLEEN KROHNE** is sworn and examined on behalf of the Plaintiffs.

10:49 a.m. A reported side-bar conference is held until 10:52 a.m. whereupon examination of the witness continues.

11:02 a.m. A reported side-bar conference is held until 11:03 a.m. whereupon examination of the witness continues.

11:52 a.m. A reported side-bar conference is held until 11:54 a.m. whereupon examination of the witness continues.

11:59 a.m. The jury is excused. Court is in recess.

1:34 p.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues.

1:50 p.m. A reported side-bar conference is held until 1:54 p.m. whereupon examination of the witness continues.

2:15 p.m. A reported side-bar conference is held until 2:19 p.m. whereupon examination of the witness continues.

2:45 p.m. The jury is admonished and excused. Court is in recess.

3:00 p.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues.

3:15 p.m. A reported side-bar conference is held until 3:17 p.m. whereupon examination of the witness continues.

3:55 p.m. The witness is excused. The jury is excused until Monday, May 11, 1998, at 9:30 a.m. The Court and counsel confer regarding scheduling.

4:08 p.m. Court is adjourned until 9:00 a.m., Monday, May 11, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 11, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: **HON.** JOAN P. WEBER **JUDGE** **REPORTER B:** Carrie James **CSR#:** 7329

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:08 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Mary Lou Wakefield present as a representative of Ralphs. Court convenes outside the presence of the jury. The Court and counsel discuss the Pruett deposition. The Court and counsel discuss witness testimony.

10:15 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES**. **REINA ARAJUO MURPHY** is sworn and examined on behalf of the Defense.

10:25 a.m. A reported side-bar conference is held until 10:28 a.m. whereupon examination of the witness continues.

10:42 a.m. Ms. Murphy is excused. **KELLY OCONNOR** is sworn and examined on behalf of the Defense.

11:32 a.m. Ms. Oconnor is excused. **ESTHER LOPEZ** is sworn and examined on behalf of the Defense.

11:35 a.m. A reported side-bar conference is held until 11:38 a.m. whereupon examination of the witness continues.

11:40 a.m. Ms. Lopez is excused. **THERESE GEORGE** is sworn and examined on behalf of the Defense.

11:46 a.m. A reported side-bar conference is held until 11:50 a.m. whereupon examination of the witness continues.

11:59 a.m. The jury is excused. The Court and counsel discuss witness testimony.

12:09 p.m. Court is in recess.

1:33 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel discuss witness scheduling.

1:37 p.m. The jury is escorted into the courtroom and examination of Ms. George continues.

2:06 p.m. Ms. George is excused. **WENDY MILLS EAMES** is sworn and examined on behalf of the Defense.

2:34 p.m. Ms. Eames is excused. **HEATHER COOPER** is sworn and examined on behalf of the Defense.

2:52 p.m. Ms. Cooper is excused. The jury is excused. Court is in recess.

3:13 p.m. Court reconvenes with the jury and all parties present as noted above. Deposition testimony of **MICHAEL PRUETT** is read into the record by Mr. Dalton on behalf of the Plaintiffs.

4:08 p.m. Reading of the deposition concludes. The jury is excused. The Court and counsel discuss a possible stipulation and witness scheduling.

4:29 p.m. Court is adjourned until 9:00 a.m., Tuesday, May 12, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 12, 1998 **DEPT. C** **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: **HON.** JOAN P. WEBER **JUDGE** **REPORTER B:** Carrie James **CSR#:** 7329

CLERK: S. Seematter/Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:06 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Harry Wallock and Mary Lou Wakefield present as representatives of Ralphs. Outside the presence of the jury, Court and counsel confer re scheduling, reported. (2 minutes). With the jury now present **TRIAL RESUMES, CHRISTINE MASTERS**, previously sworn, resumes the stand for further examination.

10:07 a.m. Side-bar conference, reported. (2 minutes). Examination of the witness resumes.
10:20 a.m. Cross-examination by Attorney Glatzer.
10:33 a.m. The jury is admonished and excused. Court is in recess.
10:48 a.m. All parties supra and the jury are present in open court. Cross-examination of the witness resumes.
10:50 a.m. Redirect examination by Attorney Kay.

11:30 a.m. A reported side-bar conference is held until 11:34 a.m. whereupon Ms. Masters is excused. **DENISE SHURKO** is sworn and examined on behalf of the Defense. **The following Court's exhibits are marked for identification and received into evidence:**

Court's exhibit 232 - Duplicate time card report
Court's exhibit 233 - Payroll ledger

11:54 a.m. Ms. Shurko is excused. The jury is excused. Court is in recess.

1:31 p.m. Court reconvenes with the jury and all parties present as noted above. **RICHARD MIELKEY** is sworn and examined on behalf of the Defense.

1:34 p.m. Mr. Mielkey is excused. **LEO MYERS** is sworn and examined on behalf of the Defense.

1:53 p.m. A reported side-bar conference is held until 1:57 p.m. whereupon examination of the witness continues. The following Court's exhibit is marked for identification:

Court's exhibit 234 - Store schematic

2:00 p.m. Mr. Myers is excused. **P. COLLEEN THOMPSON** is sworn and examined on behalf of the Defense. **The following pre-marked Court's exhibit is identified and received into evidence:**

Court's exhibit 167 - Employee Member Assistance Program Booklet

2:02 p.m. A reported side-bar conference is held until 2:08 p.m. whereupon examination of the witness continues.

2:27 p.m. Ms. Thompson is excused. **PAMELA LEWIS** is sworn and examined on behalf of the Defense.

2:35 p.m. Ms. Lewis is excused. **TIM LIMBURG** is sworn and examined on behalf of the Defense.

2:38 p.m. A reported side-bar conference is held until 2:43 p.m. whereupon examination of the witness continues.

2:46 p.m. Mr. Limburg is excused. **JEANNIE MARIE JONES** is sworn and examined on behalf of the Defense.

2:51 p.m. The jury is excused. The Court and counsel discuss witness testimony.

3:11 p.m. Court is in recess.

3:18 p.m. Court reconvenes with the jury and all parties present as noted above. Examination of Ms. Jones continues.

3:40 p.m. Ms. Jones is excused. **DEBRA JEAN HARBERT** is sworn and examined on behalf of the Defense.

3:52 p.m. Ms. Harbert is excused. The jury is excused. The Court and counsel discuss scheduling. The Court and counsel discuss redactions to exhibits 166 a-g. **Exhibits 166 a and g are cumulative and will not be received. The Defense withdraws exhibit 166 c.**

4:39 p.m. Court is adjourned until 9:00 a.m., Wednesday, May 13, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 13, 1998	**DEPT.** C	**REPORTER A:** Robin Mach	**CSR#:** 8824
PRESENT: **HON.** JOAN P. WEBER **JUDGE**		**REPORTER B:**	**CSR#:**
CLERK: Renee Sedgwick		**REPORTER'S ADDRESS:** P.O. BOX 128	
BAILIFF: Chris Mata		SAN DIEGO, CA 92112-4104	

N72142

DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:06 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay and John Dalton appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Karen Mathes and Robert Spagat appear on behalf of the Defendant, with Harry Wallock and Mary Lou Wakefield present as representatives of Ralphs. Court convenes outside the presence of the jury. The Court and counsel discuss scheduling. The Court and counsel discuss testimony and evidence.

9:37 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES**. **DAVID DIDIER** is sworn and examined on behalf of the Defense. **The following pre-marked Court's exhibits are identified and received into evidence:**

Court's exhibit 166b - The UFC Worker dated April 1992
Court's exhibit 166d - The UFC Worker dated June 1993
Court's exhibit 166e - The UFC Worker dated January 1994
Court's exhibit 166f - The UFC Worker dated May 1994

10:01 a.m. Mr. Didier is excused. **JIM CHIARAMONTE** is sworn and examined on behalf of the Defense.

10:10 a.m. Mr. Chiaramonte is excused. The jury is excused. Court is in recess.

10:35 a.m. Court reconvenes with the jury and all parties present as noted above. **LESLIE FULLER**, previously sworn, is recalled on behalf of the Plaintiffs.

10:53 a.m. Ms. Fuller is excused. **ROBERT CONRAD** is sworn and examined on behalf of the Plaintiffs.

11:05 a.m. Mr. Conrad is excused. The jury is excused until 9:00 a.m., Thursday, May 14, 1998. **Court's exhibit 146 is received into evidence.**

11:11 a.m. Court is in recess.

1:37 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. Lawrence Organ is also present on behalf of the Plaintiffs. The Court hears argument on the Defense motion for directed verdict. The Court finds that the (i) claim is a reasonable and separate cause of action. The Plaintiffs have exhausted administrative remedies and the Court will allow it to come before the jury.

The Court finds that Plaintiff Peggy Noland, alleged the (f) claim in the Complaint. The other Plaintiffs did not exhaust their administrative remedies and cannot go to the jury regarding retaliation.

The Court hears argument on the Plaintiffs' motion regarding Evidence Code section 1106. The Court finds that the testimony of Heather Cooper and Jeannie Jones directly impeached Peggy Noland and the Court will not strike the testimony.

The Court hears argument on the Plaintiffs' brief regarding admission of rebuttal witnesses and Ralphs managers. The Court makes no ruling at this time.

3:17 p.m. Court is in recess.

3:30 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court hears further argument on the motion. The Court confirms her prior rulings regarding witness Kathy Stahl. The Court finds that the other witnesses do not directly rebut the trial witnesses and they will not be permitted to testify.

The Plaintiffs make an offer of proof regarding allowing Dr. Deloberson to testify in rebuttal.

4:28 p.m. Court is adjourned until 9:00 a.m., Thursday, May 14, 1998.

COUNTY OF SAN DIEGO SUPERIOR COURT NORTH COUNTY DIVISION STATE OF CALIFORNIA

I certify that this is a correct copy of the original on file with the Clerk, San Diego Superior Court, San Diego, California.
Attest my hand SEP 09 2008 (2 pages)
Clerk, by A. Alvarez **Deputy**

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 14, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: HON. JOAN P. WEBER **JUDGE** **REPORTER B:** **CSR#:**

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:03 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay, John Dalton and Lawrence Organ appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer and Karen Mathes appear on behalf of the Defendant. Court convenes outside the presence of the jury. The Court and counsel discuss scheduling. The Court and counsel discuss testimony. The Court finds that Dr. Deloberson's testimony would not rebut the testimony of Christine Masters. Dr. Deloberson will not be permitted to testify.
Court's exhibits 123 and 124 are received into evidence. The Court and counsel discuss exhibits.

9:14 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES. The following pre-marked Court's exhibits are identified and received into evidence:**
Court's exhibit 235 - Sales Volume Records from Escondido Store
Court's exhibit 236 - Sales Volume Records from Mission Viejo

9:18 a.m. **TINA SWANN**, previously sworn, is recalled to the stand by the Plaintiffs.

9:20 a.m. Ms. Swann is excused. The jury is excused until 9:30 a.m., Monday, May 18, 1998.
The Court hears argument on the Plaintiffs' motion for directed verdict regarding punitive damages.

9:28 a.m. Mr. Spagat arrives on behalf of the Defense. The Court denies the Plaintiffs' motion for directed verdict regarding punitive damages. The Court finds that the evidence does not support a directed verdict.

The Plaintiffs' make a motion for directed verdict regarding the (i) claim. The Court does not find it appropriate to grant a directed verdict on the (i) claim. The Plaintiffs' move to re-open their case on the (i) claim to allow the admission of additional evidence. The Court denies the motion.

The Plaintiffs' move for a mistrial based on judicial misconduct and failure to receive admissible evidence. The Court denies the motion.

10:20 a.m. Court is in recess.

10:35 a.m. Off the record, the Court and counsel discuss jury instructions until 12:05 p.m. whereupon court is adjourned until 8:30 a.m., Monday, May 18, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 18, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: **HON.** JOAN P. WEBER **JUDGE** **REPORTER B:** **CSR#:**

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

8:37 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay, John Dalton and Lawrence Organ appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Robert Spagat and Karen Mathes appear on behalf of the Defendant. Off the record, the Court and counsel further discuss jury instructions and verdict forms until 12:45 p.m.

1:34 p.m. Court convenes outside the presence of the jury with all parties present as noted above. Mary Lou Wakefield and Harry Wallock are present as representatives of Ralphs Grocery Company. The Court and counsel discuss jury instructions and verdict forms.

2:21 p.m. The jury is escorted into the courtroom and **TRIAL RESUMES**. Mr. Kay presents opening argument on behalf of the Plaintiffs.

3:11 p.m. The jury is excused and court is in recess.

3:27 p.m. Court reconvenes with the jury and all parties present as noted above. Mr. Kay continues with opening argument.

4:30 p.m. The jury is excused. Court is adjourned until 9:00 a.m., Tuesday, May 19, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 19, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: **HON.** JOAN P. WEBER **JUDGE** **REPORTER B:** **CSR#:**

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:09 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay, John Dalton and Lawrence Organ appear on behalf of the Plaintiffs, who are not present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Robert Spagat and Karen Mathes appear on behalf of the Defendant with Harry Wallock and Mary Lou Wakefield present as representatives of Ralphs Grocery Company. Court convenes outside the presence of the jury. The Court and counsel discuss jury instructions.

9:13 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES**. Mr. Kay resumes opening argument on behalf of the Plaintiffs.

10:32 a.m. The jury is excused. The Court and counsel discuss jury instructions.

10:36 a.m. Court is in recess.

10:48 a.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel further discuss jury instructions.

10:52 a.m. The jury is escorted into the courtroom and Mr. Kay continues with opening argument.

11:35 a.m. Ms. Glatzer presents closing argument on behalf of the Defense.

11:57 a.m. The jury is excused and court is in recess.

1:31 p.m. Court reconvenes with the jury and all parties present as noted above. Ms. Glatzer continues with closing argument.

2:56 p.m. The jury is excused. Court is in recess.

3:15 p.m. Court reconvenes with the jury and all parties present as noted above. Mr. Kay presents rebuttal argument on behalf of the Plaintiffs.

4:14 p.m. The jury is excused. Court is adjourned until 9:00 a.m., Wednesday, May 20, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 20, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: HON. JOAN P. WEBER **JUDGE** **REPORTER B:** **CSR#:**

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:03 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay, John Dalton and Lawrence Organ appear on behalf of the Plaintiffs who are all present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Robert Spagat and Karen Mathes appear on behalf of the Defendant with Mary Lou Wakefield present as a representative of Ralphs Grocery Company. The jury is present, court convenes and **TRIAL RESUMES**. The Court instructs the jury.

9:34 a.m. Counsel stipulate that the jury instructions and exhibits may be provided to the jury for deliberations. Counsel further stipulate that the jury may be released for breaks, lunch and the evening recess by the sworn bailiff. Deputy Mata is sworn to take charge of the jury and the **CONTESTED MATTER IS SUBMITTED.** The jury is escorted to the jury room by the sworn bailiff to commence deliberations.

9:35 a.m. A reported chambers conference is held with counsel. The Plaintiffs move to re-open their case based on Ms. Glatzer's closing argument. The Court does not find prejudice to the Plaintiffs and denies the motion. Mr. Kay raises objections to the jury instructions.

9:49 a.m. Chambers conference concludes. The Court places the alternate jurors on telephonic stand-by. The Court and counsel discuss an additional jury instruction.

9:50 a.m. The jury is in recess.

10:02 a.m. Court is in recess.

10:10 a.m. Court reconvenes with the jury and all parties present as noted above. The Court re-reads one of the jury instructions.

10:12 a.m. The jury is escorted to the jury room to continue deliberations. The Court and counsel discuss financial records for the punitive damages phase. The Court orders the Defense to produce the financial records to Plaintiff within five hours of the verdict.

10:20 a.m. Court is in recess.

12:00 p.m. The jury is in recess.

1:33 p.m. The jury is reassembled in the jury room to continue deliberations. The bailiff delivers the following note to the Court:

> We need a new special verdict form for Dianne Gober.
> Signed: #8

The note is marked and filed as Jury Note Number 3.

2:21 p.m. The jury is in recess.

2:32 p.m. The jury is reassembled in the jury room to continue deliberations. The bailiff delivers the following note to the Court:

> I would like to be removed from this case.
> Signed: G.K. Brown

The note is marked and filed as Jury Note Number 4. Counsel are notified and ordered to appear forthwith.

2:56 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel discuss Jury Note Number 4.

2:58 p.m. Juror number three is escorted into the courtroom. The Court and counsel inquire of the juror.

3:05 p.m. Juror number three is escorted back to the jury room. The Court and counsel further discuss the situation.

3:15 p.m. Juror number seven is escorted into the courtroom. The Court inquires of the juror.

3:20 p.m. Juror number seven is escorted back to the jury room. The Court and counsel further discuss the situation.

3:26 p.m. Court is in recess.

3:42 p.m. Court reconvenes outside the presence of the jury with all parties present as noted above. The Court and counsel further discuss the jury situation. The Court finds misconduct by juror number three.

3:49 p.m. Juror number three is escorted into the courtroom and excused.

3:52 p.m. The jury is escorted into the courtroom and excused until 9:00 a.m., Thursday, May 21, 1998.

3:54 p.m. At the direction of the Court, the clerk randomly selects alternate juror Joseph Mesch as to sit as juror number three.
The Court and counsel discuss financial documents.

4:03 p.m. Court is adjourned until 9:00 a.m., Thursday, May 21, 1998.

COUNTY OF SAN DIEGO SUPERIOR COURT NORTH COUNTY DIVISION STATE OF CALIFORNIA

I certify that this is a correct copy of the original on file with the Clerk, San Diego Superior Court, San Diego, California.
Attest my hand SEP 09 2008
Clerk, by L. Alvarez Deputy (3 pages)

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 26, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: **HON.** JOAN P. WEBER **JUDGE** **REPORTER B:** **CSR#:**

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

8:57 a.m. This being the time previously set for **JURY DELIBERATIONS** in the above-entitled cause, Ted Steger is sworn to take custody of the jury.

9:01 a.m. The jury is escorted to the jury room to resume deliberations.

10:20 a.m. The jury recesses.

10:37 a.m. The jury is reassembled in the jury room to continue deliberations.

11:05 a.m. Deputy Mata informs the Court that the jury has reached a verdict. Counsel are notified and ordered to appear forthwith.

12:05 p.m. Outside the presence of the jury, court convenes with Philip Kay and John Dalton appearing on behalf of the Plaintiffs who are present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Robert Spagat and Karen Mathes appear on behalf of the Defendant with Mary Lou Wakefield present as a representative of Ralphs Grocery Company. The Court and counsel briefly discuss scheduling.

12:09 p.m. The jury is escorted into the courtroom. The presiding juror reports that the jury has reached a verdict. **TRIAL RESUMES** when the clerk reads the attached verdicts at the direction of the Court. At Defense counsel's request, the clerk polls the jury. The jury responds as fully set forth in the court reporter's notes.

12:49 p.m. The verdicts are recorded. A reported side-bar conference is held until 12:54 p.m. whereupon the jury is excused until 1:30 p.m., Wednesday, May 27, 1998. The Court and counsel discuss expert depositions.

1:07 p.m. Court is adjourned until 1:30 p.m., Wednesday, May 27, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 27, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: **HON.** JOAN P. WEBER **JUDGE** **REPORTER B:** **CSR#:**

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

1:32 p.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay, John Dalton and Lawrence Organ appear on behalf of the Plaintiffs, who are present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Robert Spagat and Karen Mathes appear on behalf of the Defendant with Harry Wallock and Mary Lou Wakefield present as representatives of Ralphs Grocery Company. Court convenes outside the presence of the jury. The Court hears argument on the Plaintiffs' motion regarding expert testimony. The Plaintiffs move to re-open their case and call witnesses which have previously been excluded. The Court denies the motion and reiterates prior rulings regarding excluded witnesses.

1:58 p.m. The jury is escorted into the courtroom and **TRIAL RESUMES.** Mr. Kay presents opening statement regarding the punitive phase.

2:02 p.m. The Defense waives opening statement. **ARTHUR BRODSCHATZER** is sworn and examined on behalf of the Plaintiffs.

2:23 p.m. A reported side-bar conference is held until 2:28 p.m. whereupon examination of the witness continues.

2:47 p.m. A reported side-bar conference is held until 2:49 p.m. whereupon the jury is excused until 9:15 a.m, Thursday, May 28, 1998. The Court and counsel discuss exchange of documents. The Court and counsel discuss verdict forms.

3:01 p.m. Court is adjourned until 9:15 a.m., Thursday, May 28, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 28, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: **HON.** JOAN P. WEBER **JUDGE** **REPORTER B:** **CSR#:**

CLERK: Renee Sedgwick/Melanie Kroona **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:14 a.m. This being the time previously set for **JURY TRIAL** in the above-entitled cause, Philip Kay, John Dalton and Lawrence Organ appear on behalf of the Plaintiffs. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Robert Spagat and Karen Mathes appear on behalf of the Defendant with Harry Wallock and Mary Lou Wakefield present as representatives of Ralphs Grocery Company. Court convenes outside the presence of the jury. The Court and counsel discuss the alternate juror.

9:20 a.m. Alternate juror Donna Eggert is escorted into the courtroom. The Court advises her of the verdicts reached in the first phase of this trial.

9:23 a.m. The jury is escorted into the courtroom and **TRIAL RESUMES**. **ARTHUR BRODSCHATZER**, previously sworn, resumes the stand for further examination.

9:46 a.m. Dr. Brodschatzer is excused. **MARGARET SINGLETON** is sworn and examined on behalf of the Defense.

10:30 a.m. The jury is excused. Court is in recess.

10:47 a.m. Court reconvenes with the jury and all parties present as noted above. Examination of the witness continues. The following Court's exhibit is identified:

Court's exhibit 237 - Form 10-Q dated July 19, 1992

12:00 p.m. The jury is excused. The Court and counsel discuss a rebuttal witness.

12:13 p.m. Court is in recess.

1:32 p.m. CLERK MELANIE KROONA ASSUMES THE DUTIES. Court reconvenes with the jury and all parties present as noted above. Witness, Margaret Singleton, resumes the stand. Cross-examination by attorney Kay ensues.

1:42 p.m. Witness is excused. **JOHN THOMAS SANTANDER** is sworn and examined on behalf of the Defense.

1:50 p.m. Cross-examination by attorney Mathes.

1:57 p.m. Witness is excused. The parties rest. Attorney Kay presents closing argument regarding the punitive phase.

2:41 p.m. Attorney Glatzer presents closing argument regarding the punitive phase.

2:57 p.m. The jury is admonished and excused. The Court addresses counsel regarding an additional final instruction as read into the record.

3:00 p.m. Court is in recess.

3:16 p.m. Court is in session with the jury and all parties present as noted above. Attorney Kay presents rebuttal argument regarding the punitive phase.

3:41 p.m. The Court now instructs the jury in the law applicable to this case and reviews the verdict forms. The instructions will be provided to the jurors during deliberations.

3:44 p.m. The bailiff, Jeff Dill, is sworn to take custody of the jury, and he escorts the jury to the deliberation room. Out of the presence of the jury, the Court instructs the alternate juror to remain on telephone standby.

3:45 p.m. The alternate is admonished and excused. Court and counsel confer regarding instructions from the first phase. The Court finds that the previous instructions will not be submitted to the jurors at this time. This issue will be addressed further if requested by jurors during deliberation.

3:48 p.m. Court is in recess.

4:30 p.m. The jurors are admonished and excused. Court is adjourned. **JURY DELIBERATIONS ARE CONTINUED TO FRIDAY, MAY 29, 1998 AT 9:00 AM IN DEPARTMENT C.**

rfs/mjk

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 29, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: HON. JOAN P. WEBER **JUDGE** **REPORTER B:** **CSR#:**

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:05 a.m. This being the time previously set for **JURY DELIBERATIONS** in the above-entitled cause, the jury is escorted to the jury room to resume deliberations.

10:32 a.m. The jury recesses.

10:49 a.m. The jury is reassembled in the jury room to continue deliberations.

11:00 a.m. Deputy Mata delivers the following note to the Court from the jury:
If during our discussions it comes to our attention that one of our members is a stock holder of Fred Myer would that make a difference?
Signed: Juror #5

Counsel are notified and ordered to appear forthwith. The note is marked and filed as Jury Note Number 7.

11:40 a.m. Court convenes with Philip Kay and John Dalton appearing on behalf of the Plaintiffs. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Robert Spagat and Karen Mathes appear on behalf of the Defendant with Mary Lou Wakefield present as a representative of Ralphs Grocery Company. The Court and counsel discuss Jury Note No. 7.

11:44 a.m. Juror number 3 is escorted into the courtroom. The Court inquires of the juror.

11:45 a.m. Juror number 3 is escorted back to the jury room. The Court will excuse Mr. Mesch and substitute in the last alternate juror, Donna Eggert.

11:48 a.m. Juror number 3 is escorted into the courtroom and excused from further service on this case.

11:50 a.m. The jury is recessed. Court is in recess.

1:32 p.m. Court reconvenes with the jury and all parties present as noted above. The alternate juror is also present. The Court instructs the jury as to commencing deliberations anew.

1:35 p.m. The jury is escorted to the jury room to commence deliberations. The Plaintiffs request that Deputy Mata be removed from taking charge of the jury. The Court denies the request.

1:45 p.m. Court is in recess.

2:50 p.m. The jury recesses.

3:07 p.m. The jury is reassembled in the jury room to continue deliberations.

3:58 p.m. The jury is adjourned until 9:00 a.m., Monday, June 1, 1998.

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: June 1, 1998 **DEPT.** C **REPORTER A:** Robin Mach **CSR#:** 8824

PRESENT: HON. JOAN P. WEBER JUDGE **REPORTER B:** **CSR#:**

CLERK: Renee Sedgwick **REPORTER'S ADDRESS:** P.O. BOX 128

BAILIFF: Chris Mata SAN DIEGO, CA 92112-4104

N72142 DIANNE GOBER, SARAH LANG, TERRILL L. FINTON, TALMA (PEGGY) NOLAND, SUZANNE PAPIRO, and TINA SWANN,
Plaintiffs,

By: Andrew Edenbaum
John Dalton
Philip Kay
Lawrence Organ

vs.

RALPHS GROCERY COMPANY,
Defendant.

By: Bonnie Glatzer
Robert Spagat
Brooks Marshall
Karen Mathes

9:02 a.m. This being the time previously set for **JURY DELIBERATIONS** in the above-entitled cause, the jury is escorted to the jury room to resume deliberations.

10:15 a.m. The jury recesses.

10:34 a.m. The jury is reassembled in the jury room to continue deliberations.

10:46 a.m. The bailiff informs the Court that the jury has reached a verdict. Counsel are notified and ordered to appear forthwith.

11:33 a.m. Court convenes outside the presence of the jury with Philip Kay and John Dalton appearing on behalf of the Plaintiffs who are present. Robin Peluso, legal assistant to Mr. Kay is also present. Bonnie Glatzer, Robert Spagat and Karen Mathes appear on behalf of the Defendant with Mary Lou Wakefield present as a representative of Ralphs Grocery Company. Mr. Kay request further inquiry regarding excused juror Mr. Mesch.

11:54 a.m. Juror number 5 is escorted into the courtroom. The Court inquires of the juror.

11:56 a.m. The juror is escorted back to the jury room.

11:59 a.m. The jury is escorted into the courtroom. The presiding juror reports that the jury has reached a verdict. **TRIAL RESUMES** when the clerk reads the attached verdicts at the direction of the Court. At Defense counsel's request, the clerk polls the jury. The jury responds as fully set forth in the court reporter's notes.

12:13 p.m. The verdicts are recorded. The Court thanks the jurors for their participation, releases them from the admonition and further jury service. The jury is exits the courtroom.
The Defense moves for a stay of execution of the judgment pursuant to Code of Civil Procedure section 918. The Court grants the motion.
The Court orders the Plaintiffs to prepare the judgment.
The Court orders all exhibits returned to the offering parties. The Court orders all lodged documents and depositions returned to the offering parties.

12:18 p.m. Court is adjourned in this matter.

COUNTY OF SAN DIEGO SUPERIOR COURT NORTH COUNTY DIVISION STATE OF CALIFORNIA

I certify that this is a correct copy of the original on file with the Clerk, San Diego Superior Court, San Diego, California.
Attest my hand SEP 09 2008
Clerk, by L. Alvarez Deputy

THE STATE BAR OF CALIFORNIA

INTER-OFFICE COMMUNICATION

PRIVILEGED AND CONFIDENTIAL

DATE: August 4, 2003

TO: File

FROM: Alan Konig

SUBJECT: 20-day Meeting with Larry Organ and Jason Oliver

On Friday, August 1, 2003, I held the 20-day meeting with respondents' counsel. They both apparently represent both respondents as no distinction was made by them regarding representation. As the meeting proceeded, Organ asked if I minded if he recorded the meeting. I asked what purpose the recording served and he responded vaguely about properly documenting statements, etc. I told him I did object because it was not in the spirit of open and frank settlement discussions if the statements are recorded since the obvious implication is to use the recorded statements in the future.

In response to Organ's letter of August 1, 2003, I told him I did not have Judge Anello's e-mail in the file but would inquire of Bill Davis if he retained it. I told him my letter of February 14, 2003 to Judge Anello I considered to be attorney-work product. Finally, I looked through the file in the room while he was present to try and locate any letter from Robert to Judge Anello that Organ asked for. I did not see one in the file

We began by discussing the contact with the jurors allegation. They were of the opinion that once the jurors were discharged, Kay and Dalton were free to contact them and the court could place no limitation on the contact. I expressed my disagreement with that statement and provided them with the cites for *Townsel v. Superior Court, Lind v. Medevac, Jones v. Superior Court,* and provided them a copy of *In the Matter of Respondent A*. We seemed to reach agreement that if Kay and Dalton's intent was to harass the jurors or affect their future jury service that the contact was improper. Kay claims it was for jury "research." So I asked Organ and Oliver to provide me with evidence of the "research." I told them I was of the belief that the reason for disclosing excluded evidence to the jurors was to give them an unfavorable impression of Judge Anello. This is corroborated by the animosity Kay showed toward Judge Anello throughout the trial.

We discussed the disrespect to the court and they now seem to understand the difference between 6068(b) and 6103 and the fact that I do not need a contempt order for a violation of 6068(b). They claimed that all of Kay's statements were justified. I told them that's the problem I'm having. I did not see anything in their responses to Robert's letters that justified all of the comments. Instead of providing us facts or documents to show what Kay was stating to the judge was true, they instead gave us runaround and non-responsive answers that were cut and paste from motions. We agreed that if there is factual support for Kay's statements then the statements could not be disciplinable. I told them they have yet to provide the factual basis and they requested an opportunity to do so. I agreed to give them an additional two weeks to provide whatever factual basis they could for Kay's comments.

I also informed them that it would be impossible to provide sufficient factual basis for some of Kay's more egregious and outrageous comments, including accusing Judge Anello of "sponsoring perjury" and stating he was "intellectually dishonest." I told them it was almost certain that statements of that sort are indefensible as they cross the line and were personal attacks on the judge rather than the court. I told them I was almost certain there was a case that stated calling a judge "intellectually dishonest" can never be justified.

They brought up Kay's other 2 matters and said I could not prove either. I told them the matter with Exelrod is already proven since Exelrod admits to receiving a split of the fees and never seeing written authorization from the client. I also told them that Kay's letter to Exelrod describing the fee split does not copy the client, Ms. Weeks, but does copy Arthur Chambers. The omission of Weeks is significant as it shows she was not informed of the specifics of the fee split. I told them that Exelrod's testimony along with Kay's letter would provide sufficient evidence to support a finding of culpability and the burden would then be on Kay to show Weeks actually did sign a statement authorizing the specific split.

They then asked about a global solution to Kay's matters. They took to heart Judge Anello's comment that Kay should never be allowed to step foot into a courtroom again as meaning the State Bar was seeking his disbarment. I told them Judge Anello's comments do not determine the discipline and I was not particularly interested in imposing any actual suspension on Kay. I was more interested in having him admit responsibility as that would serve as an apology to Judge Anello and that I would consider entirely stayed suspension if that occurred. I also informed them that Kay is not doing himself any favors by his continued attacks on Judge Anello, the State Bar, the defense counsel in the Ralph's matter, and me. I told them if he wants the benefit of a lenient stipulation then he needs to stop the baseless attacks and accept responsibility. Otherwise, his lack of remorse and failure of rehabilitation will only serve as aggravation in the future. They seemed to understand and seemed open to the stayed suspension. I provided them a blank stayed suspension form for review which they took with them.

After Kay, we discussed Dalton and I indicated my primary concerns with Dalton are the 170.6 motions and any false statements in them. I also told them I was concerned with Dalton having Judge Anello personally served with legal process while on the bench instead of utilizing the clerk as required by the code. The final area I was concerned with was Dalton's snide comments or laughing during Judge Anello's comments. I told them they need to provide me the same factual basis information for any false statements in Dalton's 170.6 motions (i.e., that two contempt citations were issued). They said the reason Judge Anello was served while on the bench was because his clerk refused to accept service. I told them I need a statement from the process server to that extent and also the name and number of the clerk so I could verify the alleged refusal with him or her.

They agreed to provide all the requested information to me within two weeks.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LINDSAY MARCISZ et al.

Plaintiffs and Appellants,

v.

MOVIE THEATRE ENTERTAINMENT GROUP, INC.,

Defendant and Respondent,

D047009

(Super. Ct. No. GIC820896)

APPEAL from an order of the Superior Court of San Diego County, John S. Meyer, Judge. Order affirmed in part, reversed in part and matter remanded.

Lindsay Marcisz, Maureen Hora, and sisters Jessica Pollastrini (Jessica) and Blair Pollastrini (Blair, collectively Plaintiffs) appeal from an order granting a new trial in favor of their former employer, Movie Theatre Entertainment Group, Inc. dba UltraStar Cinemas (UltraStar), on the ground the jury awarded excessive compensatory and punitive damages awards. Plaintiffs assert that the jury's verdict should be reinstated because the trial court (1) lacked jurisdiction to rule on the new trial motion and (2) gave an insufficient statement of

reasons in its order. In the alternative, Plaintiffs assert that the trial court erred in granting the motion because it applied the wrong legal standard to evaluate their compensatory damage awards and failed to conduct an appropriate analysis to evaluate their punitive damage awards. Plaintiffs also contend the trial court made numerous evidentiary errors during trial that resulted in a prejudicially incomplete record in deciding UltraStar's new trial motion.

We reject Plaintiffs' procedural arguments but conclude that the trial court erred when it granted a new trial on the compensatory damage awards because it used an improper standard. The trial court, however, did not abuse its discretion in granting a new trial on the punitive damage awards because they were excessive based on the evidence presented. Finally, we decline to rule on Plaintiffs' evidentiary arguments because they are moot or improperly seek advisory rulings on issues that are more appropriately addressed to the trial court on retrial.

FACTUAL AND PROCEDURAL BACKGROUND

When they were between 16- to 17-years old, Plaintiffs began working at a movie theater operated by UltraStar, located in Poway, California. Other than the Pollastrini sisters, who previously worked at a car wash for one day, this was Plaintiffs' first job. Plaintiffs worked at the theater for a time period ranging between six and ten months, until each voluntarily resigned. During Plaintiffs' employment, Daniel Wooten was the theater manager and Adam Gustafson was the assistant manager.

In November 2003, Plaintiffs filed this action against Wooten, Gustafson and UltraStar alleging that the individual defendants engaged in conduct that created a hostile

work environment and discriminated against them based on their gender and that UltraStar failed to take reasonable steps to prevent the harassment. Plaintiffs dismissed the individual defendants with prejudice before trial and the trial court later bifurcated the trial against UltraStar on the punitive damages issue.

At the end of the first phase, the jury rendered verdicts in Plaintiffs' favor, concluding they suffered unwanted harassing conduct because of sex or gender that was so severe, widespread or persistent that a reasonable woman in their circumstances would have considered the work environment to be hostile or abusive, that each of the Plaintiffs considered the work environment to be hostile or abusive, that the harassing conduct was a substantial factor in causing their harm and that UltraStar failed to take all reasonable steps to prevent the harassment from occurring.

The jury awarded Plaintiffs emotional distress damages totaling $850,000, $300,000 each to Hora and Marcisz and $125,000 each to Jessica and Blair. The jury also determined that UltraStar acted with malice or oppression because it either ratified the individual defendants' misconduct or had advance knowledge of their unfitness and employed them with a conscious disregard of the rights and safety of others.

UltraStar filed for bankruptcy protection during the punitive damages phase of the trial, but Plaintiffs obtained relief from the automatic stay and the jury ultimately awarded *each* plaintiff $1.5 million in punitive damages. The trial court granted UltraStar's motion for a new trial on the ground that the amounts of compensatory and punitive damages the jury awarded were excessive in light of the evidence presented at trial. Plaintiffs appealed

from the order granting the new trial motion and UltraStar filed a protective cross-appeal, which it later dismissed.

DISCUSSION

I. *Procedural Issues*

A. Plaintiffs' Request for Judicial Notice

Plaintiffs seek judicial notice of certain documents filed in UltraStar's bankruptcy proceeding and with the California Department of Fair Employment and Housing. The request is denied because Plaintiffs have not shown that the documents were presented to the trial court or are relevant to the resolution of this appeal. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 [only relevant matters may be judicially noticed; although "courts may notice official acts and public records, they do not take judicial notice of the truth of all matters stated therein"], overruled on another point in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.)

B. The Trial Court Had Jurisdiction to Rule on the New Trial Motion

1. Facts

UltraStar filed for bankruptcy protection during the punitive damages phase of the trial and obtained an automatic stay of the matter under federal bankruptcy law. (11 U.S.C. § 362.) After Plaintiffs obtained relief from the stay to complete the trial, the jury reached its verdicts on punitive damages and the trial court entered judgments for the Plaintiffs. On June 1, 2005, UltraStar filed a notice of intent to move for new trial and nine days later the bankruptcy court issued an order lifting the stay to enable the parties to prosecute posttrial motions, appeals, and cross-appeals.

The bankruptcy court's order indicated that it granted UltraStar relief from the stay, effective the date of its order, to bring any posttrial motions or appeals, that any time periods for filing same were tolled and would commence to run from the date of its order and that "[a]ny posttrial motions filed in the State Court Action by the Debtor prior to the effective date of this Order [were] null and void. . . .[¶] Alternatively, if Debtor schedules a hearing on any posttrial motions in the State Court Action on or after July 15, 2005, then relief from the automatic [stay] shall be granted retroactively to June 1, 2005."

Plaintiffs objected to the new trial notice claiming it was void because UltraStar filed it while the bankruptcy stay was still in effect. The trial court presumably rejected Plaintiffs argument as it later ruled on the merits of UltraStar's motion.

2. Analysis

Relying on the former portion of the order, Plaintiffs claim that UltraStar's June 1, 2005 notice of intent to move for new trial was "null and void" and that the trial court lacked jurisdiction to rule on UltraStar's new trial motion because it never refiled its notice of intent after the bankruptcy court issued relief from the stay. Plaintiffs' argument, however, ignores the latter portion of the order granting UltraStar retroactive relief based on certain filing and hearing dates.

Although the order is not a model of clarity, its purpose was to allow the trial court to decide UltraStar's posttrial motions. Notably, UltraStar filed its notice of intent to move for new trial on June 1, 2005 and the motion was set for hearing, and ultimately heard, on July 15, 2005, the precise dates referenced in the bankruptcy court's order. Thus, we interpret the

order as granting UltraStar retroactive relief from the stay, thereby giving the trial court jurisdiction to rule on the motions.

C. The New Trial Order Adequately Specified the Trial Court's Reasons

Plaintiffs contend that the order is defective because the trial court failed to adequately state its reasons for granting the motion. Specifically, Plaintiffs note that the trial court failed to provide any discussion regarding the facts and evidence which led it to find that the damages awarded were excessive.

A trial court is required to specify the ground upon which it is granting a new trial and its "reason or reasons for granting the new trial upon each ground stated." (Code Civ. Proc., § 657.) The statement of reasons must be "specific enough to facilitate appellate review and avoid any need for the appellate court to rely on inference or speculation." (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 634.) While it is improper for the trial court to provide a specification of reasons that simply states the ultimate facts of the case, "'the trial judge is not necessarily required to cite page and line of the record, or discuss the testimony of particular witnesses,' nor need he undertake 'a discussion of the weight to be given, and the inferences to be drawn from each item of evidence supporting, or impeaching, the judgment.'" (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 370.) The failure to provide an adequate specification of reasons renders the new trial order defective, not void. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 896, 900.)

Here, the trial court explained that the compensatory damages awarded were excessive because the record lacked evidence of "severe, substantial and enduring emotional distress" and "[t]here was no evidence that [P]laintiffs suffered any physical manifestations

of emotional distress; [P]laintiffs did not seek medical or psychological assistance due to the emotional distress; there was no evidence that their lives were significantly disrupted, or that they were unable to work, attend school, or participate in their other everyday activities." This is a sufficient statement of reasons as the trial court provided a factual basis for its conclusion thereby allowing Plaintiffs to address the asserted deficiencies and this court to provide meaningful appellate review. (See e.g., *Romero v. Riggs* (1994) 24 Cal.App.4th 117, 121, 124 [statement that overwhelming evidence established defendant's failure to diagnose and treat glaucoma caused plaintiff's vision loss was an adequate statement of reasons].)

The trial court concluded that the evidence presented at trial did not support the punitive damages awards and that the awards were excessive as a matter of law and improper because the record contained "no definitive evidence" of UltraStar's net worth. The trial court also cited the requirement that the ratio of punitive damages to compensatory damages comply with due process principles and that the record contained no "special justification" for the high ratios awarded. This statement of reasons is similarly specific enough to facilitate appellate review.

II. *New Trial Order*

A. Compensatory Damages

1. Standard of Review

A trial court has the discretion to order a new trial on the ground of excessive damages if the jury clearly should have reached a different verdict. (Code Civ. Proc., § 657; *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412 (*Lane*).) Any time a new trial is granted for excessive damages, the court in effect is finding the evidence to have been

insufficient to support the jury's award. (*Dell'Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 549.) In deciding a new trial motion, the trial court acts as an independent trier of fact and can disbelieve witnesses, reweigh evidence and make reasonable inferences contrary to those made by the jury. (*Lane, supra*, 22 Cal.4th at p. 412.) As such, any factual determinations made by the trial court are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations and "[t]he presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the new trial order[.]" (*Ibid.*) The trial court, however, may not disregard the verdict or decide what result should have been reached if the case had been tried without a jury. (*Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 215-216.) Stated differently, the court may not grant a new trial simply because it disagrees with the jury's verdict; rather, its only role is to determine whether there is sufficient credible evidence to support the verdict. (*Ibid.*)

We review the trial court's ruling for an abuse of discretion (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872); however, an order granting a new trial will be reversed if it appears that the trial court based its order on an erroneous concept of legal principles applicable to the cause. (*Conner v. Southern Pacific Co.* (1952) 38 Cal.2d 633, 637.)

2. Sexual Harassment and the Law Regarding Emotional Distress Damages

Sexual harassment in the workplace is prohibited (Gov. Code, § 12940, subd. (j)(1)) and "'harassment' because of sex" includes sexual harassment and gender harassment. (Gov. Code, § 12940, subd. (j)(4)(C).) The prohibition includes protection from a broad range of

conduct that is hostile or abusive (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 461), including verbal harassment (epithets, derogatory comments or slurs), physical harassment (assault, impeding or blocking movement, or any physical interference with normal work or movement) and visual harassment (derogatory posters, cartoons, or drawings). (Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(A), (B) & (C).)

An injured employee who successfully asserts a sexual harassment claim can recover compensatory damages, including damages for emotional distress. (*Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 48 (*Peralta*).) A showing of physical harm is not required; all that is needed is some guarantee of genuineness in the circumstances of the case, such as an independent cause of action apart from the distress claim. (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928, 930.) Stated differently, "where mental suffering constitutes a major element of damages it is anomalous to deny recovery because the defendant's intentional misconduct fell short of producing some physical injury." (*State Rubbish etc. Assn. v. Siliznoff* (1952) 38 Cal.2d 330, 338.) Compensable emotional distress includes "the full gamut of intangible mental suffering," such as physical pain, fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. (*Peralta, supra*, 52 Cal.3d at p. 48 & fn. 4.) Although these terms refer to subjective states that are difficult to translate into monetary loss, the detriment suffered is genuine and compensable. (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 893.)

"'[T]here is no fixed or absolute standard by which to compute the monetary value of emotional distress.' [Citations.]" (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1068, fn.

result because the record lacked evidence of "severe, substantial and enduring emotional distress," finding that the distress suffered by Plaintiffs was "short in duration and, overall, relatively mild." Specifically, the trial court stated there was no evidence in the record showing that Plaintiffs: (1) suffered any physical manifestations of emotional distress; (2) sought medical or psychological assistance due to the emotional distress; or (3) suffered disruption of their everyday activities. The court also noted that the jury might have erroneously awarded compensatory damages for conduct that was not sexual harassment, to punish UltraStar or based on the overall conduct of Plaintiffs' counsel. Plaintiffs argue that the trial court erred because it used the wrong legal standard in evaluating the emotional distress damages. We agree.

As a threshold matter, the parties presented no juror declarations and the trial court cited no evidence to support its statements that the jury may have improperly awarded compensatory damages based on the conduct of Plaintiffs' counsel, for conduct that was not sexual harassment or to punish UltraStar. The trial court's statements amount to improper speculation regarding the subjective reasoning processes of the jury. (See Evid. Code, § 1150 [evidence concerning the mental processes of the jury is inadmissible].) Moreover, "[a]bsent some contrary indication in the record, we presume the jury follows its instructions [citations] 'and that its verdict reflects the legal limitations those instructions imposed.' [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803-804.)

Plaintiffs sought emotional distress damages as an element of compensatory damages. (Civ. Code, § 3333.) Accordingly, the trial court instructed the jury that the amount of any damage award should reasonably compensate Plaintiffs for any harm they suffered, including

fears, anxiety and other emotional distress, caused by UltraStar's conduct. (BAJI No. 12.88) The trial court defined the term "emotional distress" to mean "mental distress, mental suffering or mental anguish" including "all highly unpleasant mental reactions, such as fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain." (BAJI No. 12.72.) The trial court also instructed the jury that there was no standard by which to fix reasonable compensation for emotional distress, that no witnesses needed to opine as to the amount of such reasonable compensation, that the argument of counsel was not evidence of reasonable compensation, that jurors must exercise their "authority with calm and reasonable judgment" and damages must be "just and reasonable in the light of the evidence." (BAJI No. 12.88.)

The parties agreed on the instructions regarding emotional distress damages and there is no argument on appeal that the instructions were inaccurate or incomplete. Nonetheless, the trial court granted the new trial motion because the evidence Plaintiffs presented did not met the threshold for recovery in that it was not "severe, substantial and enduring." The trial court, however, did not instruct the jury that in order to be compensable, the emotional distress Plaintiffs suffered had to reach a particular threshold. Moreover, while a plaintiff subjected to sexual harassment might suffer physical manifestations of emotional distress, seek medical or psychological help or suffer a disruption of her everyday activities, there is no authority to support the trial court's apparent conclusion that such evidence is required to support an emotional distress claim. Because the trial court relied on an erroneous legal principle, that portion of the order granting UltraStar a new trial on compensatory damages is

reversed and the jury's awards as to each plaintiff are reinstated. (*Conner v. Southern Pacific Co.*, *supra*, 38 Cal.2d at p. 637.)

(Sexual harassment is considered to be "outrageous conduct" sufficient to constitute the outrageous behavior element of a cause of action for intentional infliction of emotional distress (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 618) and an essential element of such a claim is "severe" emotional distress suffered by the plaintiff (BAJI No. 12.70), with "severe" defined as "substantial or enduring as distinguished from trivial or transitory." (BAJI No. 12.73.) Plaintiffs, however, did not plead such a claim, nor was the jury so instructed.)

Although we need not reach the issue, we note that even if the trial court had used the correct standard, we cannot state as a matter of law that the evidence does not support the damages awarded. Marcisz testified that Gustafson would "brandish [a knife at her] or any other girls" and he once grabbed her arm and placed a three or four inch knife blade against her throat for about 30 seconds. Marcisz was so scared by the incident that she could not move. Gustafson waived a knife in Hora's face, used it to clean his fingernails and stab the counters. He also scared Hora by holding a knife blade to her throat and telling her that he could kill her. Although Jessica and Blair did not have a knife placed against their throats, Jessica testified that Gustafson frightened her by playing with a knife, jabbing at the counters and pointing it at people and Blair testified that Wooten and Gustafson scared and intimidated her by pointing at things with a knife.

Gustafson also subjected all Plaintiffs to "restraint holds" where he would come up behind them, grab one of their arms, twist it behind their backs, forcing them to bend over to

avoid the pain and press his hips into their rear ends. Although he did not do this often to Marcisz because she yelled at him, he did it "pretty frequent[ly]" to Hora and Blair stated that Gustafson placed "all the girls" working in the theater in restraint holds. Despite knowing that Marcisz had suffered an earlier shoulder injury, Gustafson dislocated her shoulder when he placed her in a restraint hold, causing her to experience "excruciating pain," fall off her stool and cry hysterically. Her mother took her to the emergency room and she ultimately required shoulder surgery.

Plaintiffs variously stated that the restraint holds were "shocking," "very scary," "terrifying," "intimidating," "embarrassing," and "humiliating." Jessica was very nervous working with Gustafson after he starting doing this and it was "really hard" to observe the other girls being treated this way.

Gustafson also liked to tilt Marcisz, Jessica and Blair backwards as they sat in tall stools in the box office, threatening to drop them and forcing their bodies against his chest. He did this so frequently that Marcisz described the conduct as "a normal thing." Jessica described feeling frightened and unsafe, experiencing knots in her stomach and feeling as if Gustafson was trying to intimidate her by showing her that he had power over her and could hurt her any second. Gustafson also hit Jessica in the face three or four times with a money bag filled with money as she screamed at him to stop. Jessica went home crying after this occurrence and quit a week later because she felt unsafe knowing that Gustafson could hit her in front of Wooten and Wooten did nothing to stop the conduct.

Wooten told sexual jokes to Plaintiffs, causing them to feel insulted, humiliated, embarrassed or disgusted. Gustafson bragged to Jessica and Blair that he liked to make all

the girls that worked at the theater cry. Blair recalled a specific instance where Gustafson repeatedly hit another female employee in the face until she cried. Wooten and Gustafson used profanity to communicate, including such words such as "fuck," "cunt," "bitch," and "pussy." They also humiliated Marcisz by making her wear a name tag saying "ditz." Gustafson threatened to fire Marcisz if she did not wear the name tag and she was embarrassed when coworkers, customers and one of her teachers commented on the name tag. Similarly, Gustafson required Hora to wear a name tag saying "jar head." When she complained about this name tag, Wooten gave her another one saying "princess."

In all, Plaintiffs suffered from frequent conduct that could be described as outrageous at best and criminal and terrorizing at worst. The jury could reasonably conclude that the individual defendants subjected Plaintiffs to this conduct, including the knife displays and restraint holds, because they were women. Compensable sexual harassment includes physical harassment (Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(B)) and the trial court cited no evidence to support its conclusion that Marcisz's shoulder injury and the emotional distress resulting from the knife displays were not compensable or that the jury reached the damage awards based on passion or prejudice. Although reasonable minds could certainly differ on the propriety of the compensatory damage awards, the record does not support the trial court's conclusion that different compensatory damages awards "clearly" should have been reached. (Code Civ. Proc., § 657.)

B. Punitive Damages

1. Principles Regarding Punitive Damage Awards

The purpose of a punitive damages award is to punish the defendant and deter the commission of similar acts. (Civ. Code, § 3294, subd. (a); *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 (*Neal*).) Under California law, three factors are considered in reviewing whether a punitive damages award is excessive: (1) the reprehensibility of the defendant's conduct; (2) the injury suffered by the victims; and (3) the wealth of the defendant. (*Neal* at pp. 928-929.) "Because the important question is whether the punitive damages will have the deterrent effect without being excessive, an award that is reasonable in light of the first two factors ... may nevertheless 'be so disproportionate to the defendant's ability to pay that the award is excessive' for that reason alone. [Citation.]" (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 620.)

The plaintiff bears the burden of producing "meaningful evidence" of a defendant's financial condition as a prerequisite for awarding punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 109, 123.) Ability to pay is the critical factor and "evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income." (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680.) Ability to pay is usually proved by net worth, but a jury may consider other factors (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 583) and the relevant time period for accessing the defendant's financial condition is the time of trial, not the time of the injury. (*Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1267.)

Under California law, a trial court can grant a new trial motion on the ground of excessive damages (Code Civ. Proc., § 657) and it reviews a motion challenging the excessiveness of a punitive damages award similar to other motions for new trial. (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1689; *supra*, section II, A, 1.) A punitive damage award can also be challenged on federal due process grounds as being constitutionally excessive, an issue that appellate courts determine independently. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1187.)

2. Analysis

As a preliminary matter, we reject Plaintiffs' assertion that the trial court based its ruling solely on constitutional excessiveness grounds and not on their failure to prove UltraStar's financial condition. The trial court found that the punitive damage awards were excessive in light of the evidence presented at trial, noting that the awards raised constitutional concerns and there was no special justification for the high ratios or "definitive evidence" of UltraStar's net worth and that the jury might have acted to punish UltraStar for changing its corporate structure and filing for bankruptcy. The trial court's statement that the awards were excessive in light of the evidence presented at trial was, in effect, a finding that the evidence of UltraStar's financial condition was insufficient to support the awards. (See *Dell'Oca v. Bank of New York Trust Co., N.A., supra*, 159 Cal.App.4th at p. 549.) We also reject Plaintiffs' contention that UltraStar waived any argument regarding the insufficiency of the financial condition evidence when it did not respond to their valid discovery requests because this contention is not supported by any references to the record showing that UltraStar failed to respond to a valid court order to produce financial records. (Compare,

Mike Davidov Co. v. Issod (2000) 78 Cal.App.4th 597, 608-609 ["by failing to bring in any records which would reflect his financial condition, despite being ordered to do so, and by failing to challenge that ruling on appeal, defendant has waived any right to complain of the lack of such evidence"].)

Turning to the trial court's rulings under state law, we conclude that the trial court did not abuse its discretion in granting a new trial on the ground that the punitive damages awards were excessive based on the evidence presented at trial.

Plaintiffs' point out that UltraStar generated yearly revenues of over $20 million dollars over the five years prior to trial, but ignore other evidence regarding UltraStar's overall financial condition. Roberta Jean Spoon, a certified public accountant, reviewed the financial statements for UltraStar for a four-year period, bank statements from January 2004 to February 2005, income tax returns for four years, the financial ledgers for each of the nine theaters for 2004 and a business evaluation conducted in November 2004. Spoon did a gross profit analysis and concluded that from 2000 to the end of November 2004, UltraStar's nine theaters generated $87.7 million in revenue and had a gross profit of about $50 million, but that was only one-half of the equation. She explained that the other half of the equation was the cost to operate the company and that operating expenses of the company were larger than its gross profits. Spoon testified that the business posted a net loss of income each year, but that it was able to stay in business and still post a loss because some of its expenses were noncash expenses. As of the November 2004 appraisal, the company had a negative net worth of about $300,000.

Spoon also reviewed the February 2005 sale of asset documents from Movie Theatre Entertainment Group, Inc. dba UltraStar Cinemas to UltraStar Cinemas, Inc. She could not come to a conclusion as to the current value of UltraStar based on the documents she reviewed because she did not review any documents after the sale. Spoon had no conclusion regarding the financial condition of UltraStar and did not expect the jury to come to any conclusion.

Based on this evidence, the $6 million punitive damages total far exceeded UltraStar's ability to pay and the jury clearly should have reached a different verdict. (Code Civ. Proc., § 657.) Accordingly, the trial court did not abuse it discretion when it granted a new trial on the ground that the punitive damages awards were excessive. This conclusion moots Plaintiffs remaining arguments regarding the propriety of the punitive damages awards under federal constitutional law.

III. *Evidentiary Issues*

Plaintiffs contend that the trial court made numerous evidentiary errors during trial that resulted in a prejudicially incomplete record in deciding UltraStar's new trial motion, that the erroneous rulings should be reversed and the matter remanded for a new trial with instructions regarding the admission of certain evidence. To the extent Plaintiffs' arguments pertain to evidence relevant to the jury's liability findings and the compensatory damages awards, they are moot. Assuming, without deciding, that the trial court prejudicially admitted or excluded certain evidence at trial so as to render the record incomplete on the punitive damages issue, the proper result would be to retry this issue, something that will already be done. We decline to provide an advisory opinion on these evidentiary matters.

DISPOSITION

That portion of the new trial order granting a new trial on the amount of compensatory damages is reversed and the original compensatory damage awards are reinstated. That portion of the new trial order granting a new trial on punitive damages is affirmed and the matter is remanded for a new trial on punitive damages. Plaintiffs are entitled to their costs on appeal.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P.J.

HUFFMAN, J.

D047009

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

LINDSAY MARCISZ, MAUREEN HORA, JESSICA POLLASTRINI AND BLAIR POLLASTRINI,

PLAINTIFFS/APPELLANTS & RESPONDENTS,

VS.

ULTRASTAR CINEMAS, DAN WOOTEN, ADAM GUSTAFSON, AND DOES 1 - 20,

DEFENDANTS/RESPONDENTS & APPELLANTS.

FROM SAN DIEGO COUNTY
HON. JOHN S. MEYER, JUDGE

COURT OF APPEAL
NO. D047009
CASE NO. GIC820896

TRIAL VOL. 27

REPORTER'S TRANSCRIPT ON APPEAL

FRIDAY, JULY 15, 2005

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SAN DIEGO SUPERIOR COURT

ORIGINAL

HONOR, THAT MTEG ARGUED VERY STRENUOUSLY AT THE OUTSET OF TRIAL AGAINST BIFURCATION OF THE PROCEEDINGS, IF THE CASE HAD PROCEEDED AS A SINGLE PHASE, THEN MTEG WOULD HAVE PRODUCED ALL OF THE DOCUMENTS IT PRODUCED AT THE OUTSET OF PHASE II AT THE OUTSET OF PHASE I AND THAT PERHAPS THAT WOULD HAVE AMELIORATED SOME OF THE PROBLEM THAT YOUR HONOR IS REFERRING TO.

THE COURT: PERHAPS. WE CAN ONLY SPECULATE.

MS. HOULAHAN: PERHAPS.

AND ALSO FOR THE RECORD, YOUR HONOR, IN ORDER TO PRESERVE THE RECORD, SINCE MR. KAY HAS REPEATEDLY REFERRED TO THE COURT OF APPEAL, MTEG WOULD ALSO ARGUE THAT THE OTHER BASIS FOR NEW TRIAL THAT WAS INCLUDED IN ITS MOVING PAPERS IS ALSO MERITORIOUS THIS COURT HAS NOT RULED ON OR HAS NOT BASED ITS RULING FOR NEW TRIAL SPECIFICALLY ONLY ON ATTORNEY MISCONDUCT AND DID NOT ADDRESS EVIDENTIARY RULINGS THAT MTEG DISCUSSED IN ITS NEW TRIAL MOTION. HOWEVER, AGAIN FOR THE PURPOSE OF PRESERVING THE RECORD, MTEG WHILE IT AGREES STRONGLY WITH THE COURT'S CONCLUSIONS REGARDING THE EXCESSIVENESS OF DAMAGES, ALSO WOULD URGE THAT THE OTHER ALTERNATIVE BASIS FOR NEW TRIAL CONTAINED IN ITS MOTION ARE MERITORIOUS.

THE COURT: I'VE THOUGHT ABOUT THAT, AND I RESPECTFULLY DISAGREE.

MS. HOULAHAN: FINALLY YOUR HONOR, PRESERVING THE RECORD, WITH RESPECT TO WHY A JNOV WOULD BE APPROPRIATE, THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT A LIABILITY FINDING FOR THE PUNITIVE PHASE OF THIS TRIAL