S280752

IN THE SUPREME COURT OF CALIFORNIA

NORTH AMERICAN TITLE COMPANY, et al.,
Petitioner,
v.

SUPERIOR COURT OF FRESNO COUNTY,
Respondent,

CAROLYN CORTINA, *et al.,*
Real Parties in Interest.

REVIEW OF A DECISION BY THE COURT OF APPEAL
FIFTH APPELLATE DISTRICT, CASE NO. F084913
FRESNO SUPERIOR COURT CASE NO. 07CECG01169

REAL PARTIES IN INTEREST'S OPENING BRIEF

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ISSUES PRESENTED

I. Is a party seeking to disqualify a trial judge for alleged lack of impartiality exempt from Code of Civil Procedure section 170.3(c)'s requirement that a verified statement of disqualification is to be filed "at the earliest practicable opportunity?"

II. Is Code of Civil Procedure section 170.2's provision that it is not grounds for disqualification that a judge "in any capacity expressed a view on a legal or factual issue presented in the proceeding," inapplicable if, on review, an appellate court determines such issue was not "properly" before the court?

INTRODUCTION

Carolyn Cortina, et al., Real Parties in Interest herein and Plaintiffs in the underlying wage-and-hour class action ("Plaintiffs" or "Plaintiffs/Real Parties") hereby submit their Opening Brief. This case involves a published Opinion of the Court of Appeal for the Fifth Judicial District (the "Opinion") that would, if not reversed and vacated, create new law in conflict with decades of the published decisions of this Court, as well as every Court of Appeal, interpreting the California judicial disqualification statutes set forth at Code of Civil Procedure, Sections 170.1 through 170.5.[1]

[1] Unless otherwise noted, all further statutory references will be to the California Code of Civil Procedure.

By reversing, this Court can correct and avoid the undesirable burdens this Opinion otherwise would place on courts, prevent the previously precluded abuses by disappointed litigants that would otherwise be enabled, and avoid the weakening of policy to promote public confidence in the impartiality of the judiciary that otherwise would occur.

The Opinion contains two specific erroneous holdings that will create confusion, conflicts with existing law, and poor policy. The first of these is a determination that, notwithstanding language in Section 170.3(c) requiring a party asserting disqualification of a judge to file a verified statement at the "earliest practicable opportunity," no time limit applies to such a filing if the alleged ground for disqualification is personal bias or prejudice, or prior involvement of the judge as an attorney or material witness in the matter over which he or she presides. As a corollary to this holding, the Opinion further holds that such claims can never be waived by an aggrieved litigant, and therefore, a judge may not strike them as untimely despite language in Section 170.4, subd. (b), expressly authorizing him or her to do so.

The purported basis for the Opinion is Section 170.3, subds. (b)(2)(A) and (b)(2)(B), which provide:

> (2) There shall be no waiver of disqualification if the basis therefor is either of the following:
>
> (A) The judge has a personal bias or prejudice concerning a party.

> (B) The judge served as an attorney in the matter in controversy, or the judge has been a material witness concerning that matter.

Since the time the foregoing language was added by amendment in 1990, courts have interpreted it as applicable only to the process of judicial self-disqualification pursuant to Section 170.3 subds. (a) and (b)(1), because subdivision (a) requires a judge to self-report if he or she determines a ground for disqualification exists, and subdivision (b)(1) authorizes such a judge to ask the parties if they wish to file a mutual written waiver of the disqualification. Subdivision (b)(1) adds the specific caveat that such request is not permitted if the ground for disqualification is one set forth in subdivision (b)(2)(A) or (b)(2)(B).

On the other hand, Section 170.3 (c) provides that if a judge who should disqualify himself or herself fails or refuses to do so, *a party* may seek disqualification by filing a verified statement setting forth the alleged grounds therefor. That section requires a party to file such a statement "at the earliest practicable opportunity," *regardless of the alleged grounds.*

The phrase "earliest practicable opportunity" predates the 1990 amendment by some 63 years, and this Court held long ago that it was clearly intended by the Legislature as an independent method of judicial disqualification, separate and distinct from judicial self-disqualification, with the obvious implication that the Legislature intended any objection not

filed at the earliest practicable opportunity after learning the relevant facts to be forfeited. (*Caminetti v. Pac. Mutual Life Ins. Co. of Cal.* (1943) 22 Cal.2d 386, 392-393.)

The policy underlying the brief limitations period for a party to file a verified claim of disqualification is consistent with all other rules relating to judicial disqualification: Public confidence in the impartiality of the judiciary requires prompt action, including prompt adjudication of any timely-filed claims. Judges who self-report are expected to do so without delay, and to step aside unless the parties agree to a permissible waiver. Appeals are not permitted for disputes involving judicial disqualification; the expedited process of writ review is required.

Promptness also supports a long-established policy that prevents litigants from withholding grounds for disqualification, intending not to seek disqualification unless a hearing or trial does not go well. The practice of "playing fast and loose" with the judiciary is precluded by the requirement that *all* disqualification claims asserted by a party must be asserted at the first practicable opportunity after learning the facts on which a disqualification claim is based. By holding that *a party's* bias, prejudice, and prior involvement grounds are *never waived*, the Court of Appeal would enable the very practice the Legislature intended to eliminate when it adopted the "earliest practicable opportunity" standard in 1927.

As discussed below, the Court of Appeal misinterpreted the Legislative history behind the enactment of the 1990 amendments, even though the Opinion cites to the leading case that explains it. The amendments were adopted at the request of the judiciary, and were intended to make the law consistent with self-imposed standards of judicial conduct, by limiting the grounds for disqualification *a judge* could ask the parties to waive. Ethical standards already prohibited a judge from asking parties to waive bias, prejudice, or personal involvement in a suit—the Judges Association thought the law should contain the same prohibition. The amendments were never intended to give litigants a pass to engage in gamesmanship by strategically withholding allegations of bias until the most opportune time. (Here, it was after 15 years of litigation, literally on the eve of entry of a $43.5 million judgment.)

The Opinion also fails to recognize that, despite the tendency within the courts and legal profession to use the term "waiver" somewhat broadly, Section 170.3 subdivision (b)(2) concerns waiver in the voluntary sense of an intentional relinquishment of a known right, but the "earliest practicable opportunity" requirement concerns *forfeiture,* in the sense of a loss of rights by the failure to act. Even if construed as broadly as the Opinion suggests, a limitation on *waiver* would not apply to a forfeiture of the right to challenge a judge due to a failure to act within the time prescribed by statute.

Because the Opinion also states that a statement of disqualification for bias can be filed with no time limit, and that the matter must be referred to another judge for determination if such statement contains *any* factual allegation supporting bias (whether or not true), it would permit disappointed litigants to use a last-minute bias charge as a standard last effort to revive a failed case. The alleged grounds for such a charge can date back to anything the judge did or said at any time, even before the commencement of the litigation. If not reversed, the Court of Appeal's holding in this case will unleash havoc on already overburdened courts, as the Judicial Council struggles to assign judges to hear post-trial disqualification charges that could become as routine as motions for new trial or judgment notwithstanding the verdict.

The second erroneous holding in the Opinion simply introduces judge-made conditions to the application of Section 170.2, subd. (b) which states "[i]t shall not be grounds for disqualification that a judge … [h]as in any capacity expressed a view on a legal or factual issue presented in the proceeding," with exceptions not applicable here. Although statements allegedly evidencing "bias" in this case occurred in the context of the judge expressing his belief that the defendants were being untruthful, evasive, and defiant of the court's discovery orders, the Court of Appeal declined to apply Section 170.2, subd. (b), erroneously stating that the matters on which the trial court expressed opinions were not "properly," before the

court and had not been "ultimately decided." The statute contains no such conditions or requirements, and the Opinion now suggests that parties can raise such grounds to deny a judge the obviously intended protection of Section 170.2 to make rulings on veracity, guilt, and other disputed matters, based on the evidence before him or her.

BACKGROUND

Although this wage and hour class action suit is complicated and ancient, the facts related to the instant dispute are relatively simple. The plaintiff class consists of approximately 400 California employees who, under various job titles, performed similar duties in escrow offices owned and operated by defendant/Petitioner from 2003 through 2012. The case was tried without a jury under California's Unfair Competition Law (Business & Professions Code Sections 17200 *et seq.*), and upon finding liability for unpaid overtime wages in favor of a class of approximately 400 exempt-classified employees, the court issued a Statement of Decision on October 20, 2016 which, *inter alia*, ordered hearings before a referee to determine individual awards of restitution.[2] After roughly 250 individual hearings, the referee issued a report that was adopted by the court with some modifications, setting the aggregate amount of restitution owed to

[2] Upon certification of the case as a class action, two sub-classes were identified, one consisting of employees who had been classified by Defendant/Petitioner as overtime-exempt, and the other consisting of employees classified as non-exempt. Respondent court made a finding of liability in favor of the exempt class and determined the non-exempt class should be decertified.

class members at approximately $43.5 million, including prejudgment interest accrued over many years. (RPA 1607-1705.)

In late 2018, with the referee proceedings still in progress and millions of dollars of restitution awards already reflected in the referee's findings, Plaintiffs/Real Parties learned of a transaction, on a national level, by which original Defendant/Petitioner North American Title Company appeared to sell its name, along with most of its assets, to an entity called States Title Company, without any compensation flowing directly to the defendant. (RPA 158-169.) Plaintiffs' knowledge of this transaction came through commercial advertisements and news reports, as there was no voluntary disclosure by counsel or notice of name change filed with the trial court.[3] (See, e.g., RPA-000158-000159; 000161-000163; 000165-000166; 000168-000169; 001147.)

Because the full effect or nature of the transaction was unknown, Plaintiffs conferred with Defendant/Petitioner in January 2019 to ask for the correct name of the class employer in California to "ensure the proper entity is named in the litigation." (RPA-000668.) Defendant/Petitioner did not respond. Plaintiffs again requested some kind of informal production, "to make sure after some twelve years of litigation and multiple changes in ownership or structure, the correct entity is named in this suit as of 2019." (RPA-000680; emphasis added.) Despite these requests,

[3] "An attorney has an unqualified duty to refrain from acts which mislead the court. (Bus. & Prof. Code, §§ 6068, 6128, subd. (a).) The representation to a court of facts known to be false is presumed intentional and is a violation of the attorney's duties as an officer of the court." (*Jackson v. State Bar* (1979) 23 Cal.3d 509, 513; Bus. & Prof. Code §§ 6068, 6103.)

Defendant/Petitioner declined to identify the correct legal name of the class employer post-transaction, and refused to produce any document or witness to confirm the details of the transaction, its effect on the Defendant's California employees, or the current name of the defending entity.

On April 3, 2019, in light of Defendant/Petitioner's refusal to provide information voluntarily, Plaintiffs filed a Motion to Reopen Discovery for a Limited Purpose. (RPA-000111-000124.) On April 12, 2019, some four months after news stories announced the "merger" between North American Title Company and States Title Company, Defendant/Petitioner filed its opposition to the motion, flatly (and falsely) stating, "the merger has neither changed the name of the entity that employed [Plaintiffs] nor the parties that will be subject to any judgment the Court enters." (RPA-000286-000287.)[4] On April 25, 2019, following oral argument, the Respondent court ordered Defendant/Petitioner to produce a "person most knowledgeable" for deposition, with a corresponding production of documents, on specific limited topics. (RPA-000317-000318.)

In response, Defendant/Petitioner produced Mr. Chad Barth for deposition on May 22, 2019. (RPA-000516-000546.) Mr. Barth's testimony

[4] Significantly, counsel who is the subject of the June 2021 comments signed the opposition as representing "North American Title Company." This representation was continuously made to the Trial and Appeals Courts over 60 separate times until Respondent filed a formal Notice of Name Change in April 2021. No reason has ever been given why counsel did not correct the record immediately or why he continued to claim to represent an entity that did not exist or was "sold" to a third party as ultimately argued.

indicated he had no personal knowledge of the subject transaction, and had made no effort to investigate the designated topics in preparation for his deposition. Beyond the limited information written on a set of notes he was given to bring to the deposition, Mr. Barth could not identify which assets were transferred, when or if a payment of consideration was received in return, or to whom such a payment, if any, was made. In fact, Mr. Barth admitted he had no involvement in the negotiation or execution of the transaction. (RPA-000526-000531.)

One thing Mr. Barth did know was that members of the Plaintiff Class who were still employed at the time of the subject transaction were never terminated from employment, but were somehow divided between "old NATC" (the original defendant) and "new NATC" (the entity to whom the original defendant sold its name and assets). Thus, in the aftermath of the transaction, some Plaintiff Class members in California were employed at "CalAtlantic Title, Inc." (the new name for North American Title Company) and others were employed by States Title FTS Title Company, a newly formed California corporation which had now assumed the name "North American Title, Inc." That name would later to be changed again, to "Doma Title of California, Inc." (RPA-002060.) At deposition, Mr. Barth confirmed that "at least half" of the existing employees of the original defendant (including Class Members) had become employees of the transferee. (RPA-000534, 72:13-17.) Mr. Barth also confirmed that the

signatory for the seller on the Transaction Agreement was "NATG" (North American Title Group), a separate entity which was not the employer of any member of the Plaintiff class, and which is not a party to the instant litigation. (RPA-000537-000538, 85:20-86:3.)

Following the Barth deposition, Plaintiffs again conferred with defendant/Petitioner to seek a production of relevant documents and a witness having sufficient personal knowledge of the subject transaction to discuss its relevant details, including *inter alia* the amount and recipient of any consideration received for the Defendant/Petitioner's transferred assets, and the correct name of the existing defendant. Plaintiffs also sought an explanation of the post-transaction difference, if any, between "North American Title Company" and "North American Title Company, Inc." Defendant/Petitioner continued to refuse these requests. (RPA-001466-001467; 001480-001485; 001487-001492; 001494.)

Plaintiffs then filed a motion to compel the appearance of an actually knowledgeable witness with a corresponding production of relevant documents. Defendant/Petitioner's response was to move for a protective order, and Respondent court consolidated the motions for a hearing on July 11, 2019.

At the hearing, Defendant/Petitioner's counsel admitted in oral argument that the former North American Title Company, Inc. was not a party to the transaction in which its name and most of its assets were sold:

> As to the idea that the Defendant—or that the Plaintiff should be able to discover detailed financial information regarding the transaction—this is a transaction where a company, **North American Title Group, LLC which was a Florida company sold certain of its holdings to a third party. Any—North American Title Company, Inc. was not a party to that transaction**.

(RPA-000940, 5:25-6:5, emphasis added.)

The two motions were submitted, and on September 12, 2019 Respondent court issued an 18-page Order in which it denied Defendant/Petitioner's motion for a protective order, overruled all but two of Defendant/Petitioner's objections to deposition questions, and ordered Defendant/Petitioner to produce relevant documents and answer specific deposition questions, including inquiries as to the name of the defendant.

Instead of proceeding as ordered, Defendant/Petitioner filed a Motion asking the court to stay its discovery order. On October 9, 2019, the Trial Court denied the motion, stating:

> Defendant has not provided evidence or legal argument to show debatable areas in [the September 12, 2019] ruling. It appears to argue it properly ordered the witness not to answer as to the actual name of defendant in 2019 based on an interrogatory answer given in 2007. That is incorrect. [Citation omitted.] **Counsel offers several documents which she, of course, cannot authenticate because they are from her client—that is why the client is the one that must answer discovery under oath. The problem of counsel attempting to substitute her knowledge for the client's was discussed as part of the underlying motions. The deponent was asked about assets transferred; counsel now offers what she (not the client) states is a page from the withheld materials stating 'none' is the answer to that**

> **question**. To the extent that defendant is attempting to reargue the motions, it is unsuccessful.
>
> **The Court considered defendant's position at length prior to issuing the ruling**. The delays of this case have been highly prejudicial to the plaintiffs, and no legal basis for arguing irreparable harm to the defendant has been articulated by moving party. A stay of the entire order is sought, and is denied.

(RPA-001078; emphasis added.)

Following this ruling, Defendant/Petitioner sought relief in the Court of Appeal to prevent the discovery. (RPA-001082-001131.) The writ petition was denied on November 26, 2019, and Plaintiffs finally were able to proceed with a *second* "Person Most Knowledgeable" deposition on December 18, 2019. (RPA-001133; 001205.)

Defendant/Petitioner produced Ms. Sandi Sigg, a junior employee to Mr. Barth. Like Mr. Barth, Ms. Sigg lacked personal knowledge and was not involved in the negotiation or drafting of the transaction agreement. In fact, she was completely unaware of the "merger" until after the deal was signed. (RPA-001232, ¶ 13.) Defendant/Petitioner's refusal to simply identify itself had now spanned a year.

On February 5, 2020, Plaintiffs filed a Motion for Leave to Amend the Complaint to correct the caption by adding the names "North American Title Company, Inc." (as opposed to simply "North American Title Company") and "CalAtlantic Title, Inc." to the Complaint, pursuant to Code of Civil Procedure section 473 and California Rules of Court,

Rule 3.1324. (RPA-001208.) Defendant/Petitioner filed its opposition to the motion on February 19, 2020, now claiming "North American Title Company, Inc." was a "new entity [that] should not be added as a defendant in these proceedings, as it would need to be served with the amended complaint and given the opportunity to defend itself." (RPA-001504, 1:8-11.)

Because Defendant/Petitioner's claims of bias against Respondent court raised issues as to whether Section 170.2 precludes such claims with respect to the hearing of the motion to amend the complaint, it is important to identify the matters that were actually before the court at the time of the June 24, 2020 hearing. Plaintiffs/Real Parties' Memorandum of Points and Authorities in support of the motion, filed on February 5, 2020, stated as follows:

> After liability was established, and a substantial judgment is all but certain, **NATC appears to have devised an elaborate shell game, to transfer its assets, silo its liability in an empty shell, and thereby insulate itself from liability** that reaped the benefit of its illegal activities. Such tactics should not, and cannot be rewarded.
>
> Plaintiffs have yet to get to the bottom of NATC's scheme due to its stubborn refusal to abide by this Court's orders, and provide discovery into the restructuring event that took place in the fall of 2018. Thus, the full extent of aliases potentially liable for the claim herein have yet to be determined. Discovery to date, and NATC's admissions, however, revealed that Defendant has a new contention: NATC goes by more than one name. It is now clear that – according to Defendant – 'North American Title Company,' 'North American Title Company, Inc.,' and 'CalAtlantic Title, Inc.'

> are interchangeable names for the same entity that is liable for the claims asserted herein.

(RPA-001216, 1:8-19, emphasis added.)

Plaintiffs' Memorandum also listed a series of unanswered questions concerning the 2018 transaction in which assets of the former North American Title Company, Inc. were sold, emphasizing that that company itself was not a party to the transaction, had no apparent corporate resolution or other records authorizing a sale of assets, and apparently received no consideration for the sold assets, while purportedly retaining liability for the impending judgment in the instant class action suit. The within action was specifically identified in the transaction agreement, by court and case number, for that purpose. (RPA-001218, 3:6-4:7.) Plaintiffs' Memorandum also reminded the court of the complete lack of personal knowledge on the part of the two "person most knowledgeable" deponents produced by Defendant/Petitioner, and of Defendant's subsequent stonewalling of Plaintiffs' "meet-and-confer" efforts to obtain insight into the details of the 2018 transaction. (RPA-001219-001220, 4:8-5:17.)

Plaintiffs' Memorandum further advised the trial court that, despite the September 2018 date of the Transaction Agreement, Plaintiffs did not learn the agreement had changed the name of the Defendant until late May 2019, and Defendant still had not advised the court that its name had been sold. **Plaintiffs argued: "This restructuring is a clear attempt on behalf**

of Defendant to become judgment proof by transferring its assets to a third party while excluding liability for this case." (RPA-00122-001223, 7:19-8:18, emphasis added.)

Plaintiffs' Reply memorandum, filed on February 25, 2020, **again argued that Defendant/Petitioner sought to avoid liability for judgment by attempting to deflect all liability into an asset-depleted CalAtlantic Title, Inc.,** and to prevent the name "North American Title Company, Inc." from being added to the complaint. Plaintiffs argued that even if it were true that "new" NATC were a legally separate entity that resulted from a merger, it still would be responsible under California Corporations Code section 1107 for the debts and liabilities of the company it replaced. (RPA-001554, 4:9-18.)

On June 23, 2020, the trial court issued a tentative ruling denying without prejudice Plaintiffs' motion to amend the Complaint. Specifically, the court questioned whether new parties or claims needed to be added to the Complaint to preserve the claims of the Plaintiff Class. On June 24, 2020, in oral argument, Plaintiffs' counsel clarified that the nature of the requested amendment was not to add new parties or allege any new claims, but rather to ensure that judgment would be entered against the defendant according to the names under which it then existed. Plaintiffs' counsel also expressed a concern that, in view of the transfer of assets, offices, and employees into a second entity (the so-called "merger"), the ensuing

judgment should be entered "against an entity of which there is an enforceable judgment." (RPA-001583, 4:10-13.) Plaintiffs' counsel added that, "[i]n the furtherance of justice, it appears that the employer of the [Plaintiffs], that is the defendant in this case, now goes by multiple names today." (RPA-001583, 4:14-16.) Plaintiffs requested the opportunity for further briefing and a continuation of the hearing date to address discrepancies between the parties' respective interpretations of the facts. Among these discrepancies was whether or not defendant CalAtlantic Title, Inc., was, as contended, "formerly known as" North American Title Company, Inc. In essence, Plaintiffs' contention was that Defendant/Petitioner CalAtlantic Title, Inc. (now called "Lennar Title, Inc.") and North American Title Company, Inc. (now called Doma Title of California, Inc.) *combined* constituted the original defendant which had appeared in the litigation when it was filed in 2007, and which had defended the case throughout the trial and subsequent referee proceedings. The trial court granted the request for additional briefing and continued the hearing to August 14, 2020.

At the June 24, 2020 hearing, Respondent court made one of the comments which, in a Defendant's Statement of Disqualification filed some 26 months later, was alleged to represent bias. Apparently agreeing with Plaintiffs' arguments, and using the exact language found in Plaintiffs' opening brief, the court said:

> ... It certainly feels like we are all in a carnival, and we're playing **a shell game** with a whole bunch of shells, and only one nut. It's-- you know, again, from the face of it, it doesn't even appear that defendant is trying to hide it very much, you know, **they are playing a shell game** on purpose. They've got a big potential liability, and they want to try to avoid it.

(RPA-001602, 23:6-16, emphasis added.)

The court went on to state it agreed with defense counsel that if NATC Inc. actually was a non-party, the court would not have legal support to add it as a defendant by simple amendment, and that if fraudulent transfer or alter ego claims were raised post-judgment, briefing from the parties would be needed. The court specifically acknowledged that such claims were not then before it, and were not then being considered. (RPA-001602-1603, 23:16-24:8.)

As discussed below, Plaintiffs/Real Parties contend that even if Defendant/Petitioner's Statement of Disqualification had been timely, Respondent court's comments at the June 24, 2020 hearing cannot constitute proper grounds for an attempted disqualification because Section 170.2 specifically precludes as a ground for disqualification that a judge "in any capacity expressed a view on a legal or factual issue presented in the proceeding." Here, the comments of the trial court directly corresponded to the arguments, facts, and law presented to it in briefing that was submitted in connection with the hearing at which the comments occurred. This

categorically excludes those comments as the basis for a disqualification claim. The Court of Appeal erred in failing to apply Section 170.2 here.

With the Motion for Leave to Amend the Complaint now continued, Plaintiffs filed a Supplemental Brief and Declaration on July 23, 2020. (RPA-001619-001626.) In the supplemental brief, Plaintiffs quoted the exact statements of Defendants/Petitioners' counsel at the previous hearing, noting that Defendants were again attempting to explain the transaction by substituting attorney statements for actual evidence:

> [T]his entity called States Title, completely third party, nothing to do with anything, didn't employ any of the plaintiffs, never -- didn't even exist in 2012, acquires certain stock and certain assets in -- it was a very large transaction, and it acquired certain things. (RPA-001592, 13:16-21.)
>
> One of the things it acquired, among a whole host of them, was the certain assets, not all the assets, but a limited number of assets of North American Title Company, Inc., a California Corporation. (RPA-001592, 13:22-24.)
>
> So the defendant in this case, the entity that has employed these people from day one, was North American Title Company, Inc. (RPA-001593, 14:18-20.)
>
> This is part of a much bigger -- there is a much bigger series of transactions. This was only a tiny little part of a much bigger series of transactions, but there is much bigger series of transactions that created a CalAtlantic entity. (RPA-001595, 16:6-10.)
>
> [T]here was a creation of this CalAtlantic entity that involved a creation -- conglomeration of some different entities. And in connection with that, this States Title was doing some kind of -- I can't -- I'll get it wrong. I'm not going to -- I'll get the situation not quite right and I don't want to do that because it was very complicated. (RPA-001595, 16:19-24.)

> [B]efore the transaction, and I think we put this all -- this is all in the papers somewhere, and the names of the entities are a bit -- I may get them wrong. But North American Title Company -- I'm not going to get them right -- was a subsidiary of an entity and was a subsidiary of another entity. That third level entity is the entity that I think was the entity involved in the transaction. That entity, you know, so the -- not the parent of North American Title Company, Inc., but the parent of the parent of the North American Title Company, Inc., became CalAtlantic, Inc., and it has a whole host of subsidiaries -- or became CalAtlantic, LLC, something of that nature. (RPA-001596, 17:5-17.)

(RPA-001624-001625.)

The hearing on the Motion to Amend was continued several times, during which time the parties submitted supplemental briefing. On February 25, 2021, the trial court issued a tentative ruling which subsequently became final, granting Plaintiffs leave to file an Amended Complaint. That ruling stated:

> Defense counsel admitted that CalAtlantic Title has defended this suit, and that it is a proper defendant, Defendant contends that CalAtlantic Title, Inc. stands in the shoes of North American Title Company, Inc., and that it formerly was North American Title Company, Inc. That is sufficient to permit addition of CalAtlantic Title Inc. as defendant. **The record also contains discovery admissions and representations to this Court and the Court of Appeal that defendant North American Title Company and North American Title Company, Inc. are the same entity.**
>
> **The sole point of dispute is the defense contention that private agreements served to make CalAtlantic the [sole] successor to a no-longer existing North American Title Company, Inc. However, the full agreement was never produced and the deponents produced to testify as to full corporate knowledge of the pertinent facts lacked the knowledge they were required to possess under Code of**

> **Civil Procedure section 2025.230. Evidence Code section 412 calls on the Court to treat the partial disclosures and conclusions that the defense seeks with distrust on this point of dispute. The motion is therefore granted, but additional language proposed by defendant is declined.**

(RPA-001702-001703; emphasis added.)

Pursuant to the court's order, Plaintiffs/Real Parties filed their Third Amended Complaint after adding Doma Title of California, Inc. and North American Title Company, Inc. to the caption. However, Plaintiffs elected not to serve a new summons and complaint on the theory that North American Title Company, Inc./Doma Title was merely a part of the original defendant and had been appearing in a different form and under a different name since the inception of the suit. Despite being a California corporation and clearly subject to personal jurisdiction in California courts, Doma made a purported "special appearance" through separately-employed counsel, and on April 8, 2021, filed a "Motion to Quash Service of Summons" (although no summons had been served). Defendant/Petitioner separately filed its own Motion to Quash Third Amended Complaint on April 15, 2021. (RPA-001767-001768.) The parties stipulated to combine the two motions for a single hearing on June 18, 2021. (RPA-001832-001833.)

Once again, it is important to identify the matters that were actually before the court at the June 18, 2021 combined hearing of the two motions, because Defendant/Petitioner's claim of bias raises issues

as to whether Code of Civil Procedure section 170.2 precludes a disqualification based on certain comments made by the court at that hearing. A summary of key matters before the court is as follows:

On April 26, 2021, Plaintiffs filed a Memorandum of Points and Authorities opposing each of the two Motions to Quash. The Plaintiffs' Memorandum opposing Defendant/Petitioner's Motion to Quash the Third Amended Complaint challenged the motion on statutory and procedural grounds, and also directly raised the factual and legal issues upon which the trial court's allegedly biased comments were made during the June 18, 2021 hearing. At the outset, Plaintiffs' Memorandum reminded the court that one of Defendant/Petitioner's attorneys had previously filed a Memorandum with the court, falsely characterizing NATC's September 2018 transaction and misrepresenting its effect on the litigation. Plaintiffs' Memorandum stated:

> After becoming aware that defendant began scheming to prevent collection of the forthcoming judgment through a corporate game of 'three-card, Monte,' plaintiffs filed a motion to reopen discovery on April 3, 2019, to ensure the pleadings correctly identify the current name of plaintiffs employer that has defended this case since 2007. (Citation.) Defendant opposed plaintiffs' motion on April 15, 2019 and represented to this Court (falsely) that such Discovery was not needed:
>
> > Plaintiffs erroneously claim the **merger** requires discovery for Plaintiffs to identify the proper name of the entity that employed them. (*See* Mot. at 1: 20–21.) Not so. It is not uncommon for the corporate structure of a

> corporate defendant to change during lengthy litigation or post-judgment, but that fact does not warrant reopening discovery. The **merger has neither changed the name of the entity that employed Plaintiffs, nor the parties that will be subject to any judgment the court enters.** Plaintiffs' request to reopen discovery is improper as a matter of law.

(RPA-001841. 2:2-12, bold emphasis added in Plaintiffs' April 26, 2021 Memorandum; RPA-001902-1902, 2:24-3:2.)

Plaintiffs' April 26, 2021 Memorandum in Opposition to the Motion to Quash the Third Amended Complaint concluded with the following footnote:

> [7] Plaintiffs object to the evidence presented and scope of the motion filed April 15, 2021. Repeatedly, Ms. Miller and Mr. Brewer claim they do not represent the alleged 'new' North American Title Company, Inc. Despite these claims, counsel are continually appearing before this Court making oral argument and filing motions on behalf of that entity they claim not to represent. Thus, counsel must either be making false statements to this Court, and in fact, do represent the 'new' North American Title Company, Inc., or – in egregious violation of California Rules of Professional Conduct, Rule 1.2, *et seq.* – are advocating on behalf of a client they do not represent.

(RPA-001844, 5:26-28, fn. 7.)

Plaintiffs' Memorandum of Points and Authorities in opposition to Doma Title of California, Inc.'s separate "Motion to Quash," also filed on April 26, 2021, challenged that motion on statutory and procedural grounds, and, for the purpose of emphasizing Doma's status as a new incarnation of the original defendant, **also reminded the court of the false**

statements of counsel concerning the effects of the 2018 transaction on the identities of the corporations and employers that survived that transaction.

In addition, as an exhibit to an accompanying Request for Judicial Notice, Plaintiffs' opposition provided a complete copy of the April 15, 2019 Memorandum of Points and Authorities in which the false statements were made. (RPA-001879-001890; 001901-1906.) Further, Plaintiffs' Memorandum and accompanying Request for Judicial Notice focused on public SEC filings under Rule 425 (Securities Act of 1933) and public S4 Merger/Acquisition Registration filings by a company called Capitol V Business Investment Securities. These SEC filings disclosed, *inter alia*, (1) that Capitol had merged with Doma Title (the parent of Doma Title of California, Inc.); (2) that the merger was heavily financed; (3) that Lennar Corporation (the parent of the original defendant herein) held a stake of $800 million in the venture, which then constituted 23 percent of Doma; (4) that Doma's "family of brands" then included States Title, North American Title Company, and North American Title insurance Company; (5) that a significant "risk factor" was the pending $40 million-plus judgment in the Cortina litigation and the trial court's granting of Plaintiffs' Motion for Leave to Amend the Complaint to add North American Title Company, Inc. as a defendant; (6) that States Title/Doma's agreement with Lennar to purchase assets of North American Title Company assured that any liability for a Cortina judgment was to remain with Lennar Title;

(7) that Doma/Capitol had made a demand for indemnity to Lennar Title in connection with the Cortina judgment; and (8) that Lennar Title, "a wholly-owned subsidiary of Lennar Corporation" had agreed it would continue to control and fund the defense of the Cortina litigation "for all Doma indemnified parties." (RPA-001886-1889; 001911-1912; 001918-001920; 001923-001926; 1928-1931. *See also, sua sponte* Motion by Fifth District Court of Appeal to take judicial notice of similar public filings making additional disclosures concerning the ongoing interrelationships between Doma and Lennar Corporation, RPA-002097-002098.)

All of the foregoing was before the trial court to support Plaintiffs/Real Parties' opposition to Doma Title of California's Motion to Quash and NATC's Motion to Quash Third Amended Complaint at a combined hearing on June 18, 2021. Given this background and the Defendant/Petitioner's history of deceit and stonewalling, there was considerable reason to ask why, if Defendant/Petitioner insisted Doma was "a stranger" to the litigation, were attorneys for North American Title Company (Lennar Title) filing a motion to quash the Third Amended Complaint on Doma's behalf, and *who* were NATC's attorneys actually representing? Thus, at the beginning of the June 18, 2021 hearing, when the attorney who had filed the misleading Memorandum stated his appearance by telephone (Courtcall), the following exchange occurred:

THE COURT: ANY OTHER APPEARANCES?

MR. BREWER: YES, YOUR HONOR. MICHAEL BREWER ALSO FOR DEFENDANT, NORTH AMERICAN, TITLE COMPANY, FORMERLY KNOWN AS NORTH AMERICAN, TITLE COMPANY, INC. AND CALATLANTIC, TITLE, INC., AND NOW KNOWN AS LENNAR TITLE, INC.

THE COURT: ARE YOU SURE? ARE YOU SURE, MR. BREWER?

I'M NOT HEARING YOU, MR. BREWER.

MR. BREWER: YES. AM I SURE?

THE COURT: YES. ARE YOU SURE ABOUT ALL OF THOSE NAMES? ARE YOU SURE YOU'VE GOT THE RIGHT ONES NOW OR NOT? I JUST WANT TO MAKE SURE.

MR. BREWER: I BELIEVE I DO, YOUR HONOR.

THE COURT: WELL, YOU ARE NOT SURE THOUGH, RIGHT? YOU JUST BELIEVE YOU DO OR YOU ARE SURE 100 PERCENT? IT'S NOT RHETORICAL, MR. BREWER. I NEED AN ANSWER.

MR. BREWER: YES. I AM APPEARING FOR DEFENDANT AND REAL PARTY. NORTH AMERICAN TITLE COMPANY, FORMERLY KNOWN AS NORTH AMERICAN TITLE COMPANY, INC., CALATLANTIC, TITLE, INC. AND NOW KNOWN AS LENNAR TITLE, INC.

Later in the hearing, the court concluded with the following comments:

I think the plaintiff encapsulated the posture of this case in one of the sentences that I read in their papers and I'll quote it.

'After becoming aware that Defendant began scheming to prevent collection of the forthcoming judgment through a corporate game of three-card Monte, Plaintiffs filed the Motion to Reopen Discovery to ensure the pleadings

correctly identify the current name of the Plaintiffs' employer that has defended the case since 2007.'

And that is still where we find ourselves, a game of name change shell game. We are rapidly approaching the five year anniversary, not of the case, but from the end of the trial, and the issuance of the statement of decision.

The trial began nearly 6 years ago on September 21, 2015; stipulated rested as of March 4, 2016; and defendants in whatever name they now like to be known, it's been consistently morphing since the end of trial, they've tried every device to delay the inevitable. They've tried every device to make sure that they evade the payment of their obligation.

You can go through all of the games that were played with the referee, the writ, and then the appeal, and just quoting from back in 2017 from the court of appeal about one of the gamesmanship's with the referee:

'Here, the cost order was not a grant of an injunction. Instead, it was simply an order that NATC pay the reference fees as part of the trial court's power to order a non-consensual reference to determine the restitution, bold underlined, to which the class members are entitled. Characterizing the cost order as an injunction is just a creative way of trying to shoehorn such an order into something otherwise appealable. In sum, the cost order is not an appealable – is not appealable as either a collateral (order) or an injunction.' And it goes on and on.

The motion to quash is denied. Response due in five days. Thank you.

(RPA-002044-2045, 6:11-7:21.)

The foregoing comments were made a full 14 months before Defendant/Petitioner filed its Statement of Disqualification. Nine months before the filing of said Statement, on November 10, 2021, the trial judge

filed an Answer to a similar disqualification attempt by Doma Title of California, Inc., in which the judge stated that his "shell game" comments referred to the conduct Defendant/Petitioner, not Doma. This Answer was served on Defendant/Petitioner and appears in its Appendix herein. (Petitioner's Appendix-1030, 8:2-4.)

But even if Defendant/Petitioner's Statement of Disqualification had been timely, it still could not properly have been based on the foregoing comments, because all of the matters addressed by the court also were argued in the papers filed in connection with the hearing, including the question of the identity of defense counsel's client, and on whose behalf defense attorneys actually were appearing. Defense counsel's previous misleading filing with the court and ongoing refusals to cooperate with court-ordered discovery were prominently featured in Plaintiffs' opposition papers, **which specifically challenged defense counsel's representations concerning on whose behalf they were appearing**. Further, Plaintiffs' opposition highlighted disclosures by Doma's merger partner that the acquisition of North American Title Company assets was intentionally structured to separate those assets from liability for the class action suit brought by employees who formerly and currently worked in the California offices being acquired.

In addition, the long history of the case read like a primer on how to prevent entry of judgment after losing at trial.[5] In fact, as indicated in the above transcript, the court's comments on this point were made primarily by reading from the Plaintiffs' opposition papers and from a Court of Appeal opinion issued earlier in the case, addressing the same subject. All of these matters presented in the briefs clearly had an impact on the court's

[5] This case has a long history of writ petitions and purported interlocutory appeals, all initiated by Defendant/Petitioner, except for one writ petition filed by former defendant Doma Title of California, Inc. These include the following: Writ petition filed July 15, 2008 by North American Title Company ("NATC") in **F055633** (denied July 18, 2008); writ petition filed July 14, 2009 by NATC in **F058063** (denied July 17, 2009); writ petition filed September 14, 2010 by NATC in **F060851** (denied September 17, 2010); writ petition filed October 15, 2012 by NATC in **F065900** (denied March 17, 2014, petition for review denied and remittitur issued July 14, 2014); writ petition filed December 20, 2016 by NATC in **F074869** (denied March 3, 2017); writ petition filed December 16, 2016 by NATC in **F074938** (motion to dismiss appeal granted in part November 7, 2017, petition for review denied January 26, 2018, appeal granted only as to an individual class member May 30, 2019, and remittitur issued July 30, 2019); notice of appeal filed May 31, 2018 by NATC in **F077659** (opinion filed June 18, 2020, petition for review denied and remittitur issued September 10, 2020); writ petition filed April 5, 2019 by NATC in **F079054** (denied September 13, 2019); notice of appeal filed April 3, 2019 by NATC in **F079128** (motion to dismiss appeal granted July 23, 2021 and remittitur issued September 22, 2021); writ petition filed October 11, 2019 by NATC in **F080110** (denied November 26, 2019); writ petition filed June 25, 2021 by North American Title Company, Inc. in **F082969** (peremptory writ and remittitur issued September 16, 2021); and writ petition filed October 22, 2021 by Doma Title of California Inc. (formerly known as North American Title Company, Inc.) in **F083454** (denied June 28, 2022).

decision to deny the motions before it. The court's expression as to the lack of merit and credibility in the defendants' position, albeit brusque, clearly fell within the ambit of Code of Civil Procedure section 170.2, as, "in any capacity, express(ing) a view on a legal or factual issue presented in the proceeding." Accordingly, the Court of Appeal erred in refusing to apply Section 170.2.

Judgment was entered herein in August 31, 2022. (RPA 002102-002104.) Defendant/Petitioner's Statement of Disqualification was not filed until August 18, 2022. The trial court struck the Statement as untimely, pursuant to the "earliest practicable opportunity" requirement of Section 170.3, subd. (c), and the express authorization given in Section 170.4, subd. (b). Defendant Lennar Title's writ petition to the Court of Appeal followed, resulting in the Opinion here under Review. This Court granted Plaintiffs/Real Parties' Petition for Review on August 30, 2023.

Opinion, Petition for Rehearing, and Order Modifying Opinion and Denying Rehearing

The Court of Appeal issued and filed its Opinion (the "Opinion") on May 19, 2023. Real Parties In Interest filed a Petition for Rehearing on June 5, 2023. The Petition asked for rehearing to correct certain erroneously stated facts, and to include omitted facts concerning (a) the actual allegations of Plaintiffs/Real Parties' operative Complaint at the time the trial judge made the comments which were the basis for the writ

petitioner's claim of bias, and (b) the disputes and issues that were before the trial judge at the time of the comments and during the two years leading up to that date. The Petition for Rehearing also asked the Court of Appeal to address these omitted facts in its discussions concerning the alleged bias of the trial judge, and the applicability of Section 170.2, subd.(b). The Court of Appeal issued and filed an Order Modifying Opinion and Denying Rehearing on June 13, 2023, with no change in judgment. The Petition for Rehearing and Order Modifying are discussed in greater detail in the Legal Discussion, below.

LEGAL DISCUSSION

I. THE OPINION INCORRECTLY DEPARTS FROM THE WELL-SETTLED INTERPRETATION OF THE "EARLIEST PRACTICABLE OPPORTUNITY" PROVISION OF CODE OF CIVIL PROCEDURE SECTION 170.3, SUBD. (C), BY HOLDING A PARTY'S JUDICIAL DISQUALIFICATION CLAIMS BASED ON ALLEGED BIAS OR PREJUDICE ARE NEVER WAIVED AND MAY NOT BE STRICKEN AS UNTIMELY.

A. Courts Have Long Interpreted Statutory Procedures for Judicial Disqualification by a Party's Verified Statement as Separate From Procedures for Judicial Self-Disqualification.

Section 170.3 provides two separate mechanisms for disqualification of a judge. First, Section 170.3 subd. (a) states a self-disqualification process by which a judge discloses grounds for disqualification to the parties. Section 170.3 subd. (b)(1) permits the judge, subject to restrictions

stated in Section 170.3 subd. (b)(2)(A) and (b)(2)(B), to ask the parties if they wish to file a mutual written waiver of the stated grounds, thereby allowing the judge to continue to preside over the case. The given restrictions are that the parties may not waive a disqualification if it is based on (A) a "personal bias or prejudice concerning a party," or (B) the judge's previous involvement in the matter in controversy as an attorney or material witness.

The second mechanism for judicial disqualification appears in Section 170.3 sub. (c), which applies where "the judge fails or refuses" to disqualify himself or herself, in which case *a party* may file a verified statement, setting forth alleged grounds for disqualification. This party-initiated disqualification process involves two statutory limitations periods. First, the complaining party's verified statement must be filed "at the earliest practicable opportunity after discovery of the facts constitution the ground for disqualification." Next, the filing of the statement commences a 10-day period during which the challenged judge must (a) file an answer, responding to the allegations in the verified statement, (b) without conceding any alleged impartiality, recuse himself or herself from further participation in the case, or (c) strike the statement as untimely or as failing to disclose on its face legal grounds for disqualification, pursuant to the express authority of Section 170.4 subd. (b). (See *Urias v. Harris Farms* (1991) 234 Cal.App.3d 420, 421; Civ. Proc. Code §§ 170.3 subds. (c)(2),

(c)(3), (c)(4), and 170.4 (b).) If the challenged judge files an answer, the question of disqualification will be determined by a different judge, pursuant to provisions in Section 170.3, subds. (c)(5) and (c)(6).

Prior to the Opinion of the Court of Appeal in the instant case, California Courts have not given identical treatment to the two disqualification mechanisms set forth in Section 170.3. The Opinion represents a radical departure from any previous interpretation of the disqualification statutes, which, as discussed below, conflicts with important policies and will, if not vacated, create unnecessary delays and impose unwarranted burdens on trial courts.

B. Courts Have Treated a Party's Failure to Seek Disqualification at the Earliest Practicable Opportunity as a Forfeiture, as Opposed to a "Waiver."

Whereas, a written, mutual waiver by the parties in a case of a judge's self-disqualification is a "waiver" in the traditional sense, courts have treated the "earliest practicable opportunity" requirement of Section 170.3 subd. (c) as a limitations period, resulting in *forfeiture* of the right to seek disqualification for any reason, if a verified statement is not timely filed.[6]

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[6] See *Goodwin v Commerica Bank* (2021) 72 Cal.App.5th 858, 867 fn. 8 ["Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right (Citation)"]; *People v. Simon* (2001) 25 Cal.4th 1082, 1097 fn. 9 ["[T]he terms 'waiver' and 'forfeiture' have long been used interchangeably"].

This Court has explained that the phrase "earliest practicable opportunity" first appeared in Section 170.3's predecessor statute in 1927, and that the Legislature's intention in adding it was to create a separate "waiver" mechanism, *independent of the written waiver* given mutually by the parties following a judge's voluntary disclosure of grounds for disqualification, (*Caminetti v. Pac. Mutual Life Ins. Co. of Cal.* (1943) 22 Cal.2d 386, 392 ["…the 1927 amendment affords an additional statutory means by which a disqualification arising under subdivision 3 of section 170 may be waived, viz., failure to urge such disqualification a the 'earliest practicable opportunity.'"]

In *Caminetti*, this Court also addressed the implicit forfeiture resulting from a party's failure to file a timely verified statement of disqualification: "While the 1927 amendment does not specify in so many words a penalty for failure to urge disqualification at the 'earliest practicable opportunity,' the intention is clear that failure to comply with the provision constitutes a waiver. Any other construction would render the amendment ineffective." (*Id.* at 392.) Thus, it is clear that, as applied to the "earliest practicable opportunity" provision of Section 170.3 subd. (c), cases use the term "waiver" not in the sense of an intentional relinquishment of a known right, but rather as a forfeiture, meaning "failure to make the timely assertion of a right." (*See* fn. 6, *infra*,)

The "earliest practicable opportunity" language has remained in subsequent revisions of the disqualification statutes as a requirement for the filing of a verified statement of disqualification by a party, and California courts have continued to treat it as an independent statute of limitations with which failure to comply results in a forfeiture of a party's right to seek disqualification, *regardless of the anti-waiver provisions* of Section 170.3, subd. (b)(2). (See, *e.g.*, *Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, 393-394 [failure of a party to file verified statement alleging actual bias at earliest practicable opportunity resulted in forfeiture of objection]; *People v. Seaton* (2001) 26 Cal. 4th 598, 698 [criminal defendant did not preserve claim of personal bias because he failed to make timely objection to judge's allegedly improper acts]; *People v. Hines* (1997) 15 Cal.4th 997, 1040-1041 [criminal defendant's failure to raise timely objection to judge's alleged pro-prosecution bias waived objection]; *Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, 1338 [petitioner's statement of objection to judge's alleged bias was properly stricken for failure to file at earliest practicable opportunity]; *People v. Scott* (1997) 15 Cal.4th 1188, 1207 [criminal defendant's failure to comply with Section 170.3 sub. (c) (1) by seeking judge's disqualification at earliest practicable opportunity forfeited right to pursue objection]; *People v. Bryant* (1987) 190 Cal.App.3d 1569, 1572-1573 [claim that judge who learned of past crimes, lying, and drug use while presiding over

criminal defendant's fitness hearing could not be impartial as trial judge was waived by failure to raise timely objection under Section 170.3 subd. (c)(1)].)

It is noteworthy that one of the numerous cases with which this newest holding of the Fifth District Court of Appeal conflicts is *Tri Counties Bank, supra,* which was also decided by the Fifth District.[7] Both *Tri Counties Bank* and the instant case concern a party's contention that a particular judge cannot be impartial. In *Tri Counties Bank*, the court said the objection was waived by failure to comply with the earliest practicable opportunity requirement of Section 170.3, subd. (c)(1). (*Tri Counties Bank, supra,* 167 Cal.App.4th at 1336-1337.) In the instant case, the same court said the timeliness requirement of Section 170.3, subd. (c)(1) is inapplicable when a party claims the judge is not impartial, *such that the claim can never be waived.* (Opinion at p. 32 ["…we hold as a matter of law the trial judge lacked authority to strike the statement of disqualification based on personal bias or prejudice as untimely.") Strangely, the court reached this conclusion by citing many of the same cases cited herein, an noting that "the Legislature is deemed to be aware of

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[7] In an earlier case, the Fifth District Court of Appeal held that a party's objection to a judge *pro tempore* who allegedly had served as an attorney in the proceeding (another ground not waivable by stipulation under Section 170.3 (b)(2) following a judge's self-disqualification) was waived when the complaining party failed to file a statement of disqualification at the earliest practicable opportunity. (*In re Steven O* (1991) 229 Cal.App.3d 46, 51-54.)

existing laws and judicial decisions at the time the legislation is enacted, and to have enacted and amended statutes 'in the light of such decisions as have a direct bearing upon them.'" (Opinion at p. 31, citation and internal quotation marks omitted.)

Next, conceding that the Legislature was aware of "a well-established body of law based on Supreme Court precedent holding the untimely presentation of a statement of disqualification results in waiver," the Opinion illogically concludes that the Legislature's insertion of restrictions on mutual waiver in self-disqualification cases *without any mention of statements of disqualification or Section 170.3 subd, (c)(1)* was intended by the Legislature to abrogate that entire body of law by inference. (Opinion at p. 31.) Based on this interpretation, the Opinion concludes that "the express language of Section 170, subd. (b)(2) and the relevant legislative history thereto makes clear a claim for bias or prejudice is now 'unwaivable.'" (*Ibid.*)

In sum, based on an amendment enacted 33 years ago, the published Opinion of the Court of Appeal in the instant case conflicts with decades of holdings by this Court and the various Courts of Appeal as to the proper interpretation of the statutes applicable to judicial disqualification. As discussed below, this proffered new interpretation will foment counterproductive and unnecessary delay in trial court proceedings, and will unravel the well-settled policy favoring prompt and expeditious

resolution of claims the judiciary lacks impartiality, made by both civil and criminal litigants.

C. The Opinion Misinterprets the Legislative History of Sections 170.3 subds. (b)(2)(A) and (b)(2)(B), and Conflicts With Established Statutory and Case Law Holding a Party's Right to Challenge a Judge Is "Waived" If Not Raised by Writ Petition.

The Opinion in this case relies in part on *People v. Barrera* (1999) 70 Cal.App.4th 541, which discusses the legislative history of Section 170.3, subds. (b)(2)(A) and (b)(2)(B). Those subdivisions, added by amendment in 1990, prohibit a stipulation of the parties to waive two bases for disqualification following a judge's disclosure of such grounds. *Barrera* states:

> …the California Judges Association sponsored the bill to 'bring "Code of Civil Procedure Section 170.3 *on judicial self-disqualification* into conformity with the new restrictions voted into the Code of Judicial Conduct by California judges last year…The new language helps assure that even the shadow of bias is kept out of our courts, and provides useful conformity between the judiciary's *self-imposed guidelines* and the law."'

(*Id.*, at 550, Emphasis added.)

However, the Court of Appeal's Opinion herein does not consider (a) that *Barrera* made the foregoing comment concerning the process of "judicial self-disqualification," and guidelines for self-policing by the judiciary, and (b) that *Barrera* added: "The stated purpose of the amendment, to 'assure that even the shadow of bias is kept out of our

courts' and to provide 'useful conformity between the judiciary's self-imposed ethical guidelines and the law,' does not outweigh the public policy considerations underlying the requirement of prompt review of the question of a disqualification *which has been disclosed by the judge and waived by the parties and their attorneys*." (*Id.*, at 551, emphasis added.)

From this point, *Barrera*'s legislative history analysis continued on to flatly contradict the logic employed by the Court of Appeal in the instant Opinion concerning to conclusions to be drawn from the legislative history of Section 170.3 (b)(2)'s waiver limitations:

> The Legislature amended section 170.3, subdivision (b) to provide that a judge may ask the parties and their attorneys whether they wish to waive his or her disqualification *except* in the case of two specified bases of disqualification. ***The subdivision which was amended governs the procedural steps to be taken when a judge determines himself or herself disqualified*** and the different ways the various bases for disqualification are to be treated. However, the Legislature did not, in so amending section 170.3, subdivision (b), also amend section 170.3, subdivision (d), to provide for different means of review of the question of disqualification depending on which basis for disqualification is involved. When the Legislature amended section 170.3, had it intended that the nonwaivable bases for disqualification be subject to review on appeal, it presumably would have so provided, either by so stating in subdivision (d) or by deleting the requirement of writ review as to the nonwaivable bases. "**'The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.'** [Citations.]"

(*Barrera, supra*, 70 Cal.App.4th at 551, emphasis added.)

In other words, *Barrera* analyses the legislative history of Section 170.3, subd. (b)(2) as applicable *only* to the process of judicial self-disqualification, and unlike the Court of Appeal in the instant Opinion, concludes that the Legislature's silence concerning subdivision (d) meant it did *not* intend to change it. Significantly, *Barrera* concludes that the Legislature intended a party's right to pursue *any* judicial challenge a judge at the appellate level to be forfeited if not raised by writ petition, but the Opinion herein holds that the Legislature intended such a claim is *never* waived, if based on personal bias or prior participation as a witness or as counsel. Therefore, to remain consistent with the Opinion, appellate courts would have to disregard *Barrera,* contradict Section 170.3, subdivision (d), and permit disqualification matters to be raised on appeal.

D. If Allowed to Stand, the Court of Appeal's New Interpretation of Section 170.3 Would Contradict Prior Holdings of This Court and Would Undermine the Policy Objectives of Prevention of Abuses by Litigants, Expeditious Resolution of Disqualification Claims, and Preservation of Public Confidence in an Impartial Judiciary.

The Court of Appeal's Opinion herein incorrectly asserts that "it would be incongruent to prohibit express waiver of certain grounds of disqualification but allow for implied waiver of the same grounds should a party inadvertently wait too long to file a statement of disqualification." (Opinion at p. 32.) Real Parties in Interest respectfully disagree. As *Barrera* points out, public policy considerations associated with expeditious

resolution of claims of bias or prejudice are paramount. (*Barrera, supra*, 70 Cal.App.4th at 551.) Those policy considerations include the prevention of parties holding a claim of bias in reserve, depending on the outcome of a trial or important hearings (which is exactly what happened in the instant case), as well as the need to avoid wasteful undoing of months or years of legal process because a late-filed claim of bias causes past rulings to be vacated. (*Ibid.;* see also *People v. Hull* (1991) 1 Cal.4th 266, 272-273; *People v. Brown* (1993) 6 Cal.4th 322, 334; *People v. Williams* (1997) 16 Cal.4th 635, 652, all emphasizing that the rule limiting appellate review of judicial disqualification issues to writ proceedings is consistent with the policy that such matters be resolved expeditiously.) Of course, **the Opinion's position that a claim of bias or prior participation as attorney or witness is never waived is inconsistent with this Court's view that such a claim is waived for purposes of appellate review if not brought promptly by writ petition.**

Similarly, both judicial self-disqualification and disqualification based on a party's verified statement under Section 170.3 are designed to assure prompt resolution at the trial court level. Section 170.3 (a) requires a judge to make prompt disclosure upon his or her discovery of grounds for disqualification and to refrain from any further participation of substance in the case unless all of the parties agree to an allowable waiver of the disqualification.

In cases of disqualification initiated by a party, Section 170.3, subd. (c)(1) requires a verified statement to be filed at the earliest practicable opportunity, and Sections 170.3, subd. (d) and 170.4, subd. (b) require the judge to respond within 10 days by answering, choosing recusal, or striking the statement. If the judge chooses to answer, Section 170.3 subd. (d) requires proceedings that will promptly resolve the issues raised by the verified statement and answer, to determine whether disqualification is warranted.

Thus, it is not at all incongruous for the Legislature to have adopted a statute of limitations resulting in forfeiture of *any* claim, if not asserted promptly by a party upon learning facts indicating a ground for disqualification exists. To the contrary, it would be incongruous for the Legislature, out of concern for public confidence in the courts, to have provided for a policy of swift resolution of all claims of disqualification, *except* where a party believes a judge is biased or has had a personal involvement in the case. As noted in *Hull, supra, Brown, supra, Williams, supra,* and *Barrera, supra,* much mischief can occur if adversarial litigants are permitted to withhold a claim of disqualification *indefinitely,* for strategic purposes, playing "fast and loose" with the judicial disqualification statutes. The same concerns do not exist where it is the responsibility of the judiciary, acting in concert with its own self-imposed

ethical principles, to come forward promptly when grounds for disqualification become evident.

II. THE OPINION INJECTS AN INAPPROPRIATE, NON-STATUTORY CONDITION TO THE APPLICABILITY OF SECTION 170.2, SUBD. (b), WITHOUT ANALYSIS OR EXPLANATION.

Section 170.2 provides, in relevant part, that "[i]t shall not be grounds for disqualification that the judge…(b) has in any capacity expressed a view on a legal or factual issue presented in the proceeding, except as provided in Paragraph (2) of Subdivision (a) of, or subdivision (b) or (c) of Section 170.1."[8]

When initially issued on May 19, 2023, the Court of Appeal's Opinion took the position that the trial judge's June 18, 2021 comments concerning the defendants' and their counsel's pattern of obfuscation, non-disclosure, and non-cooperation were not related to any matters that were before the court at that time, and therefore did not fall within the scope of Section 170.2, subd. (b).

As noted in the Background section, above, since early 2019, Real Parties (the plaintiff class) had been seeking information concerning a transaction in which the original defendant herein transferred more than half of its assets to another newly-formed corporation, receiving no apparent consideration in return. Real Parties had been attempting to amend

[8] The named exceptions are not applicable under the facts of this case.

their Complaint to add the new corporation, based on evidence that the assets, offices, and employees of the original defendant ("North American Title Company") were, after the 2018 transaction, split into two corporations—CalAtlantic Title, Inc. (now known as Lennar Title, Inc.), and States Title FTS Title Co. (which briefly took the name "North American Title Company, Inc.," and is now known as Doma Title of California, Inc.)

Beginning in early 2019, by way of motions to amend the Complaint and Motions to reopen discovery, the subject of the instant litigation revolved almost exclusively around the 2018 transaction. Despite defendants' intransigence, information obtained by Plaintiffs/Real Parties raised serious concerns that the original defendant's assets had been substantially depleted by the transaction. In particular, Plaintiffs doubted the veracity of CalAtlantic Title's (now Lennar Title's) assertion that it was "formerly known as North American Title Co., Inc." Plaintiffs contended the evidence showed that the entities currently known as "Lennar Title, Inc." and "Doma Title of California," *combined,* were formerly known as North American Title Company, Inc., the original defendant that answered Plaintiffs' Complaint in 2007 and defended the case through and beyond trial.

The merits of these disputes were not at issue in the writ petition before the Court of Appeal and are not at issue here. What is important

is that for the last four years, all of the motions to amend, to reopen discovery, to compel production of documents and "person most knowledgeable" depositions, as well as at least one intervening writ petition and the defendants' various efforts to extricate Doma Title of California from the litigation, have concerned Plaintiffs/Real Parties' efforts to determine the true identity and composition of the surviving defendant(s) following the 2018 transaction. With liability and dollar amounts of restitution to class members already determined, the remaining focus of the case was to assure that the impending judgment would not be entered solely against the asset-depleted shell of a token defendant.

The Court of Appeal has made no secret, in the current Opinion and in previous rulings, that it does not approve of the procedural and legal avenues chosen by Real Parties to attempt to protect their interests as class action plaintiffs. **But the relevant question relating to the judicial disqualification statutes, is whether, in the instances where the trial judge expressed his disbelief in the veracity of Defendant Lennar Title, Inc. and its counsel, he was "express(ing) a view on a legal or factual issue presented in the proceeding."**

In holding Section 170.2, subd. (b) inapplicable, the Opinion incorrectly stated that Plaintiffs/Real Parties' operative Complaint contains no allegations against Doma Title of California. In addition, in taking the position the trial judge's comments did not relate to a legal or factual issue

presented in the proceeding, the Opinion emphasized that Real Parties had not filed alter ego or fraudulent transfer actions. Instead, Real Parties cited authority for an amendment to their Complaint based on Code of Civil Procedure sections 473(a)(1) and 187, and the trial court ultimately granted a motion to amend, commenting that defendant's refusal to provide information in discovery invoked Evidence Code section 412 (those with power to provide stronger evidence but fail to do so are viewed with mistrust). Although only the requirement that Doma Title be served with summons and complaint came before the Court of Appeal on writ review, that court clearly indicated it does not approve of Plaintiffs/Real Parties' underlying legal theories. But Section 170.2 neither requires nor invites an appellate court's opinion as to the merits of a matter on which a trial judge expresses his or her opinion.

Whether or not the Court of Appeal agreed that Real Parties and/or the trial court adopted meritorious legal or procedural positions, it is undeniable that Lennar Title's failure for two years to disclose its name change to the court, the false statements of Lennar Title's counsel as to the identity of his client, Lennar Title's stonewalling of the court's discovery orders, and Lennar Title's repeated failure to produce a "person most knowledgeable" deponent having actual knowledge of relevant matters, were all relevant to disputes which had been before the court for more than

two years, and which were before the court during the hearings in which the trial court's disputed comments were made.

Plaintiffs/Real Parties responded to the initial Opinion of the Court of Appeal by filing a Petition for Rehearing, quoting six paragraphs from the operative complaint, alleging theories of joint enterprise and collusion among corporate defendants in various permutations. The Petition for Rehearing also chronicled the various hearings and events that focused on the specific subjects concerning which the trial judge made allegedly biased comments expressed his disbelief in Defendant/Petitioner's arguments. At the hearings in question, a relevant issue was always whether Lennar Title and Doma Title *together,* constituted the then-current incarnation of the original defendant in the within action. Real Parties' Petition for Rehearing asked the Court of Appeal to grant rehearing to include these omitted relevant facts in its Opinion, and then to *address* those facts in its ruling concerning the applicability of Section 170.2.

The Court of Appeal denied the Petition for Rehearing and issued an Order (submitted with Plaintiffs/Real Parties' Petition for Review) amending the Opinion by simply inserting the word "properly," such that one sentence in the Opinion now reads: "At the time of the comments, no judgment had been entered, and issues of fraudulent transfer, alter ego, or successor liability were never *properly* presented to the court, let alone ultimately decided." (Opinion, at p. 2.)

The Court of Appeal provided no analysis or explanation concerning the definition or significance of this single word; however, considering the actual language of Section 170.2, subd. (b), the foregoing change accomplished little. Section 170.2 does not require the factual or legal issues presented in the proceeding to be found meritorious or approved by an appellate court, nor does it require that any expressions of opinion concerning such issues are only excluded as grounds for disqualification after they have been "ultimately decided" by the judge.

Plaintiffs/Real Parties have found little case law even mentioning Section 170.2. Even so, it is manifest that the purpose of Section 170.2, subd. (b) is to distinguish between prejudgment (prejudice) and actual judgment, based on law, evidence, and argument. Cases are legion (several cited above), in which charges of bias are leveled against judges by non-prevailing parties, especially criminal defendants after judges have made findings of guilt or have pronounced sentence. Judges must not subjected to bias proceedings for making findings or expressing opinions as to the issues and evidence before them, including opinions as to the credibility of arguments or evidence offered by adversarial litigants. Section 170.2, subd. (b) has the obvious purpose of insulating the judiciary from routine claims of bias by disappointed litigants.

Federal cases involving analogous judicial recusal rules echo this principle. The leading case is *Liteky v. United States*, 510 U.S. 540 (1994),

in which the Supreme Court held that a judge's statements made in a judicial setting and reflecting "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." (*Id.* at 555.) "Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." (*Id.*) This is because such statements often reflect information that the judge "properly and necessarily acquired in the course of the proceedings" that was "necessary to the completion of the judge's task." (*Id.* at 551.) *Liteky* explains:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: 'Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those courthouse dramas called trials, he could never render decisions.' *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (CA2 1943). Also not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same

> case upon its remand, and to sit in successive trials involving the same defendant.

(*Liteky, supra,* 510 U.S. at 550-551.) According to *Liteky,* opinions held by judges, and statements originating resulting from what they learned in the proceedings ("intrajudicial" sources) require recusal "only in the rarest circumstances." (*Id.* at 555, 557.) In almost all cases, a recusable preconceived bias must come from "extrajudicial" sources. (*Id.*)

The distinction between "intrajudicial" and "extrajudicial" sources directly reflects the difference between a judge's obligation *to judge,* but not to *pre*-judge. In *Belue v. Leventhal*, 640 F.3d 567 (4th Cir. 2011), relying on *Liteky,* the court noted that "[l]itigation is often a contentious business, and tempers often flare. But to argue that judges must desist from forming strong views about a case is to blink the reality that judicial decisions inescapably require judgment. Dissatisfaction with a judge's views on the merits of a case may present ample grounds for appeal, but it rarely — if ever — presents a basis for recusal." (*Id.* at 575.) *Belue* rejected a party's recusal motions for reasons the Fourth Circuit described as "the court's strong views about the merits of the case and how to best handle it," and defined actionable prejudice as proof "that the judge had a result in mind prior to starting the trial." (*Id.* at 575, citing to *Liteky.*) *Belue* added:

> No appellate court can afford to leave trial judges prey to a slew of groundless calls for recusal from litigants whose major objection to those judges appears to be a perceived disagreement with them. Appellate courts must remain

> cognizant that trial judges make some of the most difficult calls on some of the most volatile matters in our system. Those judges are singularly exposed to the displeasure of counsel and litigants alike, and the motion in this case cannot become a contagion that is permitted to spread.
>
> California Code of Civil Procedure section 170.2, subd. (b)

expresses a principle that is entirely consistent with the rationale supporting *Liteky* and the line of cases that follow it. (*See, e.g., Hanson v. Hanson* (Alaska 2002) 36 P.3d 1181, 1184 ["To succeed on a motion to disqualify a judge for bias, the movant must show the judge's actions were the result of personal bias developed from a nonjudicial source"].) Section 170.2, subd. (b) limits disqualifications on the basis of this same distinction – disqualification cannot result where that the judge has in any capacity expressed a view on a legal or factual issue presented *in the proceeding*. The grounds for disqualification must come from an "extrajudicial" source.

Here, Respondent court's statements and opinions all derive from information obtained by the court from within the course of proceedings. The history and sources of that information are set forth in detail in the "Background" discussion, above, and no hint of a suggestion has occurred in this case that the court's opinions as to the merits of Defendant/ Petitioner's case or the credibility of it arguments originated from any source outside the courtroom. The Court of Appeal may not have liked the Respondent court's comments, but that simply is neither the law nor the appropriate test. As *Liteky* pointed out, "expressions of impatience,

dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display," are generally insufficient to support a recusal motion. (*Liteky, supra*, 510 U.S. at 555-556.) "A judge's ordinary efforts at courtroom administration – even a stern and short tempered judge's ordinary efforts at courtroom administration – remain immune." (*Id.* at 556.)

If the Opinion herein is not reversed, it will signal to litigants that bias claims which otherwise would be barred by Section 170.2, subd. (b) must be permitted to proceed to hearing before another judge, or to the Court of Appeal, based on arguments that the legal theories being argued by the non-complaining party were not entirely or partially valid, or that the subject matter to which the judge's comments pertained were not "properly" before the court or were not "ultimately decided." The door also will be opened to bias claims based on a court's negative impressions of a party's evidence, credibility, legal arguments, or attorneys. The Opinion herein, if not reversed, would impermissibly amend rather than interpret the statute. It is axiomatic that a reviewing court, in determining the intent of the Legislature, must interpret rather than amend a statute. (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1323; *California Fed. Savings & Loan Ass'n. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

III. THE OPINION'S CONCLUSION THAT THE STATEMENT OF DISQUALIFICATION HEREIN WAS FACIALLY SUFFICIENT CONTRADICTS SECTION 170.2'S PROVISION THAT A DISQUALIFICATION CANNOT BE BASED ON OPINIONS DERIVED FROM JUDICIAL PROCEEDINGS

Section 170.4, subdivision (b) allows a trial court to strike any challenge that "discloses no legal grounds for disqualification." In concert with this provision, Section 170.2, subdivision (b) states that "it shall not be grounds for disqualification" if the trial judge "in any capacity expressed a view on a legal or factual matter in the proceeding ..."

Here, the trial judge struck Defendant/Petitioner's application for disqualification both as untimely and because it did not state legal grounds for disqualification. The Court of Appeal disagreed, and concluded Defendant/Petitioner's Statement of Disqualification was, in fact, facially sufficient. This conclusion amounts to a compounding of the erroneous conclusion that Section 170.2, subdivision (b) is inapplicable herein. Where, as here, all of a challenged judge's allegedly biased statements fall within the scope of Section 170.2, a statement of disqualification that complains of such statements cannot be facially sufficient, and a court may properly strike the statement for that reason, pursuant to Section 170.4, subdivision (b).

IV. THE OPINION SHOULD BE VACATED AS INCONSISTENT WITH DECADES OF SETTLED LAW AND POLICY DESIGNED TO PREVENT ABUSES, RESOLVE CLAIMS PROMPTLY, AND PRESERVE PUBLIC CONFIDENCE IN THE IMPARTIALITY OF THE JUDICIARY.

Law and public policy will be negatively affected if the instant Opinion is not vacated. According to the Opinion, a claim of bias or prejudice raised months or years after a party learns of the facts giving rise to the claim is still valid, as it is exempt from the "earliest practicable opportunity" requirement of Section 170.3, subd. (c). Furthermore, if a party's verified statement alleges any facts which could appear to a reasonable person to constitute bias, the question would have to be sent to a different judge for adjudication, regardless of a party's delay in filing. If the parties cannot agree on a different judge, the burden would then fall to the Judicial Council to appoint a judge. (Section 170.3, subd. (c)(5).)

According to the Court of Appeal's Opinion, a statement of disqualification for bias or prior participation as an attorney or witness can be based on any event or comment that has occurred *at any time,* from before the inception of a case through post-trial and appeal, because those grounds are never waived. Parties can acquiesce to prior judicial participation as attorney or witness, or some arguably offensive comment, banking the information like a "Get out of Jail Free Card," to be used in case things don't go well at a hearing or trial. Post-trial statements of

disqualification will become as automatic and ubiquitous as motions for new trial, or for judgment notwithstanding the verdict.

An increase in disqualification attempts, coupled with elimination of a judge's ability to strike untimely statements, will increase burdens on the Judicial Council and on the many judges who will have to conduct hearings concerning the alleged misconduct of their fellow judges. A proliferation of bias and prejudice charges against judges is not likely to promote public confidence in the impartiality of the judiciary. The opposite effect is more probable.

Finally, the Opinion should be reversed to reject the implication that an appellate court may condition the applicability of Section 170.2, subd. (b), based on its own opinion of the merit or validity of the matters before a trial judge at the time he or she expresses a point of view. The Legislature has clearly stated that certain expressions by a judge are not grounds for disqualification, and it is inappropriate for an appellate court to add judge-made conditions to that enactment.

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CONCLUSION

For the foregoing reasons, Plaintiffs/Real Parties in Interest respectfully request that this Court reverse and vacate grant the Opinion of the Court of Appeal in this matter.

Dated: September 29, 2023

WAGNER, JONES, KOPFMAN & ARTENIAN LLP

CORNWELL & SAMPLE, LLP

WANGER JONES HELSLEY PC

By: /s/ *Lawrence M. Artenian*
Lawrence M. Artenian
Patrick D. Toole

CERTIFICATE OF WORD COUNT
(California Rules of Court, rule 8.504(d)(1).)

The text of this Petition consists of 13,459 Words, as counted by the Microsoft Word word-processing program used to generate the Petition.

September 29, 2023

/s/ Lawrence M. Artenian
Lawrence M. Artenian

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EXECUTED ON **September 29, 2023**, at Fresno, California.

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/s/ Kimberly R. Noble
Kimberly R. Noble (knoble@wjhattorneys.com)

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Date

/s/Kimberly Noble

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Toole, Patrick D. (190118)

Last Name, First Name (PNum)

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