# No. S210804

# In the Supreme Court of California

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

vs.

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

SUPREME COURT
FILED

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Deputy

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## OPENING BRIEF ON THE MERITS

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

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

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# I.

# ISSUE PRESENTED

Code of Civil Procedure section 473(b) requires a court to grant a motion for mandatory relief from a dismissal, default, or default judgment "*whenever* an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect ... unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (Ital. added; all unspecified statutory references are to the Code of Civil Procedure.)

When a defendant (1) has previously but unsuccessfully moved to vacate a default or default judgment under section 473(b), and (2) files a subsequent and proper motion for mandatory relief from the default or default judgment under section 473(b) based on his or her attorney's admission of fault, but (3) does not present new or different facts, circumstances, or law under section 1008(b):

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

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

## II.
## INTRODUCTION

When section 473(b) conflicts with section 1008(b)—that is, when a party makes a proper and timely renewed motion for relief from a dismissal, default, or default judgment, without proffering new or different facts, circumstances or law—must a court grant that motion, as section 473(b) requires and as *Standard Microsystems* holds? Or must the court deny the motion, as the Court of Appeal here held? Section 473(b)'s plain language answers this question, as it requires relief "whenever" a motion for such relief under that statute is timely, contains the requisite showing, and is in the proper form.

Even if section 473(b)'s single, expansive, and unambiguous "whenever" term is not dispositive, the legislative history of the two statutes and the policies that underlie them point unerringly to the same result. The legislative history of section 473(b) makes plain that relief is required when an attorney admits fault in a timely and proper motion for relief. As such, the statute is remedial—it requires a court to set aside a dismissal, default, or default judgment, thereby obviating the need for a legal malpractice action and permitting the client to prosecute or defend his or her case on

the merits. And although the legislative history of section 1008(b) makes clear that the Legislature intended to reduce the number of renewed motions, nothing in it undermines the legislative goal of section 473(b). Nor does that history show that the Legislature intended to mandate the forfeiture that section 1008(b) causes when a party shows entitlement to the anti-forfeiture result that section 473(b)'s mandatory relief provision guarantees.

*Standard Microsystems* thus correctly construed the two statutes to hold that, in the case of a conflict, section 473(b) prevails over section 1008(b). The Court of Appeal here erroneously refused to follow *Standard Microsystems,* undermining the policies that the Legislature sought to further in section 473(b) and requiring a forfeiture even when, as here, a party brings a meritorious yet renewed motion under that statute.

The Court of Appeal was frustrated with defendants for purportedly not making a proper showing of relief in their first section 473(b) motion. But it unnecessarily punished defendants rather than their attorney for that alleged shortcoming by reinstating the defaults and default judgment, setting the stage for a malpractice action by defendants against their attorney for failing to respond to plaintiff's complaint. The trial court, however, understood that it was improper—as well as pennywise and pound foolish—to blame defendants for their attorney's neglect. It struck the appropriate balance by granting defendants relief and ordering their attorney to pay plaintiff $34,000 for the fees and costs plaintiff incurred in

litigating the section 473(b) motion. This was the balance the Legislature struck in section 473(c)—which requires the court to give the non-moving party that relief when it grants the motion. Because both sides can be made whole in such a situation and there is only a six-month period after a judgment within which a party may bring a section 473(b) motion—meaning multiple and endless renewed motions are unlikely—this Court should embrace *Standard Microsystems*' construction of the statutes and reject the Court of Appeal's.

The trial court found on undisputed evidence that defendants' renewed motion met the requirements of section 473(b) and that their attorney, not defendants, was the sole cause of the defaults and default judgment. That ruling was correct. This Court should therefore reverse the Court of Appeal's judgment.

## III.
## FACTUAL AND PROCEDURAL BACKGROUND

The account of the facts that gave rise to the parties' dispute is drawn from plaintiffs' complaint, the allegations of which have not been tested by discovery or any adversary judicial process. Those facts are in any event irrelevant to the purely procedural question of law this case poses.

## A. Plaintiffs Sue Dr. Fersht And Their Jointly-Owned LLC, Alleging Nonpayment Of Sums Defendants Purportedly Owe Plaintiffs For Work On A Jointly-Owned Condominium Development Project

Israel Even Zohar (Zohar) is the principal of plaintiff and appellant Even Zohar Construction & Remodeling, Inc. (EZ), a corporation. 1AA/2-4.[1] In 2007, Zohar and defendant and respondent Dr. Samuel Fersht formed Bellaire Townhouses LLC (Bellaire), with Zohar and Dr. Fersht each owning a 50 percent share; Zohar is a member of Bellaire, while Dr. Fersht is its President. *Id.* Each contributed capital to Bellaire in the form of cash and adjoining parcels of real property in North Hollywood that each owned or had acquired, with the intent of combining the parcels so they could be developed as a condominium project. *Id.* Bellaire later entered into a contract with EZ, providing that EZ would act as a general contractor to develop the condominium project. 1AA/2, 5-6.

Allegedly, at Bellaire's request, EZ performed work in addition to the work their contract specified (including work that was Bellaire's responsibility as developer) and incurred related expenses, enhancing the project's value and making the

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1 "_AA/__" refers to the Appellant's Appendix, by volume and page number; "RT/__" refers to the Reporter's Transcript, by page number; and "MJN/RaymondDecl/__:__" refers to the Declaration of Jan S. Raymond in Support of the Motion for Judicial Notice, by number of the declaration in question and by page number of the attachment.

condominium units more marketable. 1AA/2. Dr. Fersht allegedly authorized this work and promised EZ and Zohar that Bellaire would pay for the work when the project was completed, but purportedly "reneged" on those promises. *Id.* EZ and Zohar allegedly then undertook to market and oversee the sale of the units, which resulted in the sale of most of them, but Bellaire and Dr. Fersht did not pay Zohar and EZ the sums they maintain are due them for their work. 1AA/3-4, 5-11.

In March 2011, Zohar and EZ filed a complaint against Bellaire and Dr. Fersht, the latter individually and as trustee of the Fersht Family Living Trust (defendants), in the Los Angeles County Superior Court, alleging breach of contract, breach of the covenant of good faith and fair dealing, quantum meruit, unjust enrichment, fraud and deceit, negligent misrepresentation, breach of fiduciary duty, and unfair business practices. 1AA/1-40.

### B. Defendants Unsuccessfully Petition To Compel Arbitration But Then Do Not Respond To The Complaint, So Plaintiffs Have The Clerk Enter Defendants' Defaults

After plaintiffs filed the complaint, defendants petitioned to compel arbitration. 1AA/44-45. In late August 2011, the court denied the petition as to EZ, finding the arbitration agreement was unenforceable as to it, but ruling that the arbitration agreement "does apply to plaintiff Zohar[.]" *Id.* Because of the overlap of the two plaintiffs' claims, the court stayed the arbitration of Zohar's

claims until the disposition of EZ's claims. *Id.*; *see* § 1281.2(c)(4) (permitting a stay of arbitration in such situation).

On August 31, 2011, plaintiff mail-served notice of entry of the order denying the petition on defendants, which triggered a September 20 due date by which defendants had to respond to the complaint. 2AA/233-38; *see* §§ 1281.7, 1013(a). Defendants did not file a responsive pleading, so on September 23, 2011, EZ notified defendants' attorney, Daniel Gibalevich (Gibalevich), that it would seek entry of default the following week unless a responsive pleading was filed immediately. 2AA/243-44. No pleading was filed, so at EZ's request, the clerk entered defendants' defaults. 2AA/252-60.

### C. After The Trial Court Enters A $1.7 Million Default Judgment, Defendants Move For Mandatory Code Of Civil Procedure Section 473(b) Relief Based On Both The Excusable And The Inexcusable Neglect Of Their Attorney, But The Court Denies The Motion

After EZ moved for entry of a default judgment, in early December 2011, the court conducted a prove-up hearing and entered a $1,701,116.70 default judgment (plus interest) against defendants. 1AA/115-79.

Eight days later, defendants moved for relief from the defaults and default judgment, titling the motion one for "Mandatory Relief Under C.C.P. § 473[.]" 1AA/180-87. Defendants argued in their

motion that Gibalevich had committed both excusable neglect and inexcusable neglect, 1AA/183-85, with Gibalevich's supporting declaration stating that his need to spend "substantial" time away from the office on "personal issues" that required his "undivided attention," combined with his staff's failure to inform him of issues that needed his "personal attention," caused him not to file a responsive pleading:

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

1AA/186.

EZ opposed the motion. 1AA/189-306. It urged that Gibalevich was not credible to the extent he claimed unawareness of the deadline for a responsive pleading, noting that Gibalevich had been aware that a response was due by September 20 and that EZ had informed him of its intent to seek a default unless the deficiency was cured immediately. 1AA/204-05. EZ also challenged Gibalevich's claim of inattentiveness, noting that his mother is married to Dr. Fersht and that Gibalevich and Dr. Fersht "have frequent contact," which, EZ said, rendered not credible the notion that Gibalevich "was not staying on top of this case." 1AA/193. EZ claimed that the record "amply shows" that Gibalevich and Dr. Fersht "deliberately allowed defendants' defaults to be taken as part of a gambit to delay these proceedings and increase plaintiff's attorney's fees. This case does *not* involve the 'totally innocent client' to which Section 473(b) was directed." 1AA/194.[2]

Zohar also submitted a declaration disputing that Gibalevich had spent substantial time away from his law practice, claiming that in the fall of 2011, Dr. Fersht "repeatedly told [him] ... that Mr. Gibalevich was very successful, busy in his law practice and frequently in court." 2AA/292-93. Petra Sutter, Zohar's ex-wife and the listing real estate agent who was charged with marketing the condominium units, also filed a declaration, stating that at no time during her communications with Dr. Fersht, Gibalevich, and

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2 We address EZ's "totally innocent client" argument *post*, at 54-56.

Gibalevich's mother during fall 2011 did Gibalevich state he was unable to attend to his law practice or was spending substantial time away from his office. 2AA/302-03. Finally, Andrew Hunter, EZ's former attorney, submitted a declaration stating that he had attempted, unsuccessfully, to resolve the case with defendants in 2010, and concluded that Gibalevich and Dr. Fersht "had no genuine interest" in resolving the dispute but, rather, wished to delay and "prevent EZ from recovering what it was owed for having successfully constructed the Bellaire condominium project." 2AA/296-97.

Defendants then filed a reply, 2AA/307-20, explaining that Gibalevich had failed to properly file or calendar the order concerning the petition to compel arbitration, which explained why a response date was not calendared; that Gibalevich's personal problems caused his absence from his office in September, October, and the early part of November 2011, which also caused him not to file a responsive pleading; and that in mid-November, he contacted EZ's counsel to secure a stipulation setting aside the default, but counsel refused to stipulate. 2AA/308. EZ then filed a surreply, reiterating that, although it had informed Gibalevich that his clients were facing default, Gibalevich did nothing. 2AA/323. Gibalevich had not disputed this fact.

On January 9, 2012 (all subsequent references to dates are to dates in 2012), the trial court conducted a hearing on the motion. RT/A-1. The court stated that while the motion was styled as one

based on section 473(b)'s mandatory relief provision, Gibalevich's declaration "fuzzes up the issue by referring to his mistake and excusable neglect"; as to the "mandatory relief aspect," the court observed, the declaration was "entirely too vague and conclusory." *Id.*

Gibalevich responded that "I'm basically taking the blame for failing to file a responsive pleading due to my personal problems," that his declaration stated "that it is my fault for not filing the responsive pleading," "that it was my mistake in not filing the responsive pleading," and that "I'm not blaming this on anybody else. The buck stops with me. This is my practice. At no point did I blame or point a finger at anybody else." RT/A-2, A-5. As to the declaration's references to excusable neglect, Gibalevich said, "that was a mistake in the language, because there was no intent on my behalf to ask for any kind of discretionary relief, it was always under mandatory relief." RT/A-3. Gibalevich also asked if he could file "an additional declaration outlining the extent of the personal problems I was having and what mandated my absence ... from the office and my failure to follow up on this matter," noting that "I don't think that my clients should be prejudiced by my mistakes ...." RT/A-5. The court did not respond to this request but ordered the matter submitted. *Id.*

That same day, the court denied the motion in a brief written order, stating that Gibalevich's declaration was "not credible, in light of the showing made by plaintiff, and it is entirely too general.

It does not show attorney Gibalevich *is solely at fault* in not filing a timely responsive pleading.[3] Moreover, attorney Gibalevich tries to have it both ways: see paragraph 4 of his declaration, which claims he has demonstrated 'excusable neglect.' He has not demonstrated excusable neglect." 2AA/340 (ital. added).

### D. Defendants Again Move For Mandatory Section 473(b) Relief Based On Their Attorney's Neglect, Which EZ Opposes; The Trial Court Stays Execution Of The $1.7 Million Default Judgment Pending The Hearing On The Motion

Six days after EZ served notice of entry of the order, defendants filed a second motion to vacate the defaults and default judgment, titled again as a "Motion for Mandatory Relief under C.C.P. § 473[.]" 2AA/341-57. In the motion, defendants stated that during the hearing on the first motion, the court had observed that although defendants were requesting mandatory section 473(b) relief, "defense counsel's declaration was not sufficiently clear and made contentions under the discretionary portion of section 473(b). Despite [defense] counsel's argument, the Court denied the motion. [¶] In order to address Court's concerns regarding the perceived generality of defense counsel's declaration, and to avoid harm to the defendants, at the hands of their attorney, this motion follows." 2AA/345. The motion did not mention section 1008(b).

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3 We address the court's "solely at fault" comment *post*, at 58 n.6.

Accompanying the motion was another declaration from Gibalevich, entitled "Declaration of Fault," which stated:

> 4. On August 25, 2011, investigators with the Los Angeles District Attorney's office served [a] search warrant ... at my office ....
>
> 5. The investigation focused on medical providers and not on me or my practice.... [T]he search warrant was executed by a Special Master ... [who] proceeded to search the whole office violating various sections of the Penal Code as well as the attorney client privilege and attorney work product doctrine. It was later determined that the Special Master is a principal with a law firm which actively litigates matters with my office....
>
> 6. ... [O]ver 200 client files were unlawfully seized by the Special Master. Many of the seized files were active litigation files. All of the active litigation matters had various appearances, depositions, and motions on calendar. Some matters had [im]minent or approaching trial dates. To complicate matters, one of my associates, Mr. Savransky, resigned his position right after the search. That left me and Ms. Gina Akselrud as [the] only attorneys [in my office]....
>
> 7. In my effort to secure the return of my client files, I engaged Mr. Shkolnikov, a criminal defense attorney. I volunteered to assist him in his research and drafting efforts....

. . .

9. ... I spent all of my time on efforts to return my client's files. I researched and wrote many drafts of the motions that were filed. This consumed me. I was working on this most of the day, every day. When I wasn't in front of the computer, I thought of nothing else.

10. I began to obsess over my reputation and the disclosures that I had to make to Judges and opposing counsel alike [about the search].... I have to confess that this feeling of embarrassment is the reason why I failed to set out these facts in the declaration previously filed. I will never forget that day or the hell that followed....

11. ... I did experience a period of time, from middle of September through October of 2011, where I stayed away from the office, for days at a time.... I was ashamed and embarrassed. I was embarrassed in front of my employees, opposing counsel and judges that I had to face. This feeling of embarrassment is still with me.

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

> 13. Had I filed the responsive pleading on time, prior to defaults being taken, the defaults and default judgments would have been avoided. It is clear that my mistake, inadvertence and neglect resulted in the entry of defaults and default judgments against my clients, the Defendants herein.

2AA/350-52.

Defendants filed two additional declarations. The first was from Akselrud, Gibalevich's associate. She confirmed that the execution of the search warrant occurred on August 25, 2011 and that Savransky had resigned the following day. 2AA/356-57. Akselrud also averred that Gibalevich was "frequently absent" from the office from the end of August through November 2011 and that "approximately in the middle of September of 2011, [she] noticed that the stress of the situation was taking its toll on Mr. Gibalevich.... He stayed away from the office preferring to work at home. It seemed that he only worked on getting his client files back. All else took a back seat. He began to obsess over it. He didn't answer his phone nor respond to email...." *Id.* She then noted, however, that "[r]ecently, many of the seized files began to arrive back at the office. Mr. Gibalevich has recovered from his bout with 'depression' and is back to himself. He has hired two more attorneys and we are back at full strength." *Id.*

The second declaration was from Shkolnikov, the attorney representing Gibalevich "in a matter of In Re Search Warrant."

2AA/354-55. Like Akselrud, Shkolnikov stated that Gibalevich was "frequently absent" from his office through November 2011 as a "direct result of the search warrant and the seizure of the large number of files," spent a "substantial amount of time assisting me in preparation and presentation of various complicated motions for return of property seized, and "became consumed with this process and devoted all of his time and effort to getting the files and his property back." 2AA/354. He stated that "right after" the August 25, 2011 search, one of Gibalevich's associates resigned, leaving Gibalevich "very short handed" and requiring him and Akselrud to make appearances to continue hearings and trial. 2AA/354-55.

Shkolnikov added that the incident caused Gibalevich to become "obsessed" over the impact on his clients, his practice, and him; "depressed"; "withdrawn"; and "reclusive" such that he did not "answer his phone or respond to email, spending "all of his time obsessing over the motions for the return of the seized property. 2AA/355. Shkolnikov also stated that, now that a large number of documents had been retrieved as improperly seized, Gibalevich had "rebounded," his practice and things were "looking up," and he had hired additional associates to assist him. *Id.*

On January 30, defendants applied ex parte to stay execution of the $1.7 million default judgment pending a ruling on their section 473(b) motion. 2AA/358-443. In a supporting declaration, Gibalevich stated that that motion had alleged "different facts, in accordance with C.C.P. section 1008(b)," which he set forth in the

declaration, explaining that those facts "deal with the circumstances surrounding my failure to file a responsive pleading in this matter." 2AA/368. He then recounted the facts set forth in the declaration accompanying his pending section 473(b) motion, attached it and those of Akselrud and Shkolnikov, and included a proposed Answer to the complaint. 2AA/368-71, 416-43.

The court granted the ex parte application over EZ's objection, stayed execution on the judgment, and continued the matter for a January 31 hearing on defendants' section 473(b) motion. 2AA/444-59, RT/B-10. At the hearing, however, the court stated the facts in Gibalevich's second declaration were "not new" and that he could have presented "all of that" with his original motion. RT/B-2. It said that Gibalevich was "presenting an entirely different story with this application than [he had] presented to the court originally," in that before, Gibalevich had "tried to blame [the default] on a miscalendaring when the evidence is that [his] office received multiple, multiple notices before the defaults were entered in all different kinds of ways." RT/B-1. The court said his "story about being obsessed with this search warrant for the entire period of time" was "not credible" since Gibalevich had originally stated he had to be out of the office for "substantial periods of time," while now he was saying he had been "conducting all kinds of research on your computer in your office." RT/B-1-B-2.

Gibalevich responded that his accounts were consistent, in that he "had to be out of the office ... on business relating to the search

warrant for extended periods of time" and that because the court had termed his first declaration "too vague," he was "bringing forth substantial facts ... that takes away that vagueness argument that the court confronted me with last time." RT/B-2. He noted that "any argument that [the default] was an intentional act ... to expose someone to a 1.7 million dollar judgment on a vague hope that a 473 motion would be granted—that's suicide." RT/B-3. He denied he had blamed the default on "miscalendaring," and reaffirmed that at no time did he place the blame "on anybody else." RT/B-4.

In its opposition to the section 473(b) motion, 3AA/460-536, EZ argued that defendants had not complied with section 1008(b) in failing to show why they had not presented the new information—Gibalevich's stress caused by the execution of the search warrant—in their first motion. EZ also stated that Gibalevich's latest explanation was not credible. It claimed defendants had offered "*no* evidence showing that they were 'totally innocent' or disputing that they participated in a gambit to allow their defaults to be taken and then seek to have such defaults vacated based on their belief that such relief was 'automatic.' " 3AA/463-65, 471. Defendants' "strategy," EZ said, included causing entry of default so they could delay the eventual adjudication of EZ's complaint. 3AA/465-66. EZ added, however, that if the court granted the motion, it should award EZ the approximately $34,000 in fees and costs EZ had incurred "on the extensive default proceedings." 3AA/479-81.

In reply, defendants emphasized that there was no evidence to "impute culpability" to them, and submitted another declaration from Gibalevich. 3AA/537-53. He confirmed that "[d]ue to my frequent absences, my state of mind and obsessions with getting my client files back, I neglected this matter. I failed to enter a responsive pleading and did not respond to [EZ's counsel's] emails notifying me of the default." 3AA/546-47.

Defendants also submitted a declaration from Dr. Fersht. 3AA/548-49. He stated that he did not know until January 2012 that Gibalevich was having problems at his office, that he had never discussed the state of Gibalevich's practice with anyone, including Sutter, and "especially" Zohar (both of whom had claimed earlier that Dr. Fersht never told him that Gibalevich was unable to attend to his law practice, 2AA/292-93, 302-03), and that Sutter had sent him an email, complaining that she could not reach Gibalevich and that he was not returning her calls or emails. 3AA/548-49. Dr. Fersht stated that he had "never advised, counseled, conspired, contemplated, ordered, suggested or even thought of not filing a responsive pleading in this case timely," and had "never directed anyone, especially Mr. Gibalevich, to avoid filing an answer in this matter." 3AA/549. Indeed, Dr. Fersht said he "would never contemplate or agree to allow Even Zohar to take my default and default judgment. I always believed and continue to believe that I am right and my cause is just. I want my day in Court and would not do anything to jeopardize an opportunity to prove my position." *Id.*

In their legal memorandum, defendants noted that none of the three declarations EZ had presented in its opposition to defendants' first motion (Hunter's, Sutter's, and Zohar's, 2AA/291-303) undermined Dr. Fersht's statement that he was in no way complicit in causing the defaults or default judgment. 3AA/538-39. Defendants also claimed that the more detailed declaration Gibalevich submitted "fully complied" with section 1008(b) but that if it didn't, to the extent there was a conflict between section 1008(b) and section 473(b), the latter governs over the former, under *Standard Microsystems*. 3AA/540-42. Finally, defendants maintained that they had established that Gibalevich alone was responsible for the defaults and default judgment and that they were entitled to mandatory relief as a result. 3AA/542-45.

### E. Concluding That Defendants' Showing Was Adequate And That *Standard Microsystems* Governs Any Conflict Between Section 473(b) And Section 1008(b), The Trial Court Enters An Order Vacating The Defaults And Default Judgment And Orders Defendants To Pay EZ $34,000 In Fees And Costs

The court conducted a hearing on the motion on March 2. RT/C-1. Gibalevich argued that the "only difference between [his first and second] declarations ... was that [he] provided additional facts to [the court] setting the background as to why [he] was unavailable and why [he] did not file it." RT/C-8. Gibalevich claimed that "[t]he story never changed." The court disagreed, stating that it "changed every time you presented it, Mr. Gibalevich." *Id.* Gibalevich noted, however, that "whether

you find my excuse or my declaration credible or not, the only credibility issue before the court is whether my client was guilty of any kind of misconduct in not filing." *Id.*

On that point, EZ urged the court to find Dr. Fersht's declaration denying such complicity not credible because it had not been filed earlier. EZ reasoned that had Dr. Fersht been telling the truth, defendants would have proffered his declaration at the outset of the section 473 litigation. RT/C-13. EZ thus claimed "the only reasonable inference" from the evidence was that the default was "part and parcel" of a strategy by Gibalevich and Dr. Fersht to delay and thwart EZ's effort to recover from defendants. RT/C-13-C-17.

Later that same day, the court filed an order granting defendants' motion. 3AA/554-55. In part, the order stated:

> Attorney Gibalevich first blamed the default[s] and default judgment entered against defendants ... on the lawyers he employed in his office.... In this first motion, attorney Gibalevich argued both that he was entitled to mandatory relief on the ground of attorney fault and on the ground of excusable neglect on his part.
>
> When he lost the first motion, attorney Gibalevich filed another motion. The second motion fails to comply with the requirements of section 1008(b). In this motion, attorney Gibalevich changed his story and blamed the default[s] and default judgment on his

having become obsessed with the consequences of a search warrant executed on his office by the Los Angeles County District Attorney. (Neither the search warrant nor its consequences concerned the files of the defendants in this action.)....

The associate [Akselrud] in Mr. Gibalevich's office did not support the claim in attorney Gibalevich's December 15, 2011 declaration that she failed to maintain the [case] file or notify Mr. Gibalevich of the entry of default[s] and default judgment against [defendants].

[D]efendants cite *Standard Microsystems Corp. v. Winbond Electronics Corp.*, 179 Cal.App.4th 868, 893-894, which holds that insofar as any conflict actually exists between section 1008 and section 473(b), it must be resolved in favor of section 473(b). Plaintiff argues that this case is an outlier, but the court does not agree. The decision seems correct, and this court is bound to follow it. *The legislature has determined that even in cases involving conduct such as that demonstrated by attorney Gibalevich, where no part of the fault is shown to be attributable to the defendant clients, relief is mandatory*.

*Id.* (ital. added).

The court vacated the defaults and default judgment, directed the clerk to file defendants' proposed answer, and ordered Gibalevich to pay EZ some $34,000 in fees and costs it had incurred

"in connection with the default[s] and default judgment and defendants' attempts to have [them] vacated." 3AA/555.

### F. The Court Of Appeal Reverses The Order Vacating The Defaults And Default Judgment, Disagreeing With *Standard Microsystems* And Holding That A Renewed Motion For Mandatory Section 473(b) Relief Requires New Or Different Facts, Circumstances, Or Law, Which Were Absent Here

EZ timely appealed the order granting defendants' second motion and vacating the defaults and default judgment. 3AA/556-57; *see* slip op. at 13. (Although defendants also appealed the order requiring the payment of the $34,000 in fees and costs, CT/138-39, they later requested dismissal of that appeal, which was granted, Dkt. Entry 11/26/12.) The Court of Appeal reversed, holding that because defendants' section 473(b) motion constituted a "renewed motion" under section 1008(b) and defendants had not presented new or different facts, circumstances, or law, the court lacked jurisdiction to grant it under section 1008(e). Slip. op. at 2-3, 13, 21-22.

The Court also held that section 1008(b) prevails over section 473(b). *Id.* at 16, 19-22. Thus, it held, because neither defendants nor Gibalevich presented new or different facts, circumstances, or law, under section 1008(e), the trial court lacked jurisdiction to grant the motion. *Id.* The Court "disagree[d] with *Standard Microsystems*'s conclusion that [the two statutes] are in conflict," finding them "complimentary [*sic*]." *Id.* at 19. As it noted, section

473(b) "states the requirements of making a motion for relief from default in the first instance," and "says nothing about second or subsequent motions made on the same grounds"; "[t]hat situation is governed by section 1008 for all renewed motions of every type, without exception." *Id.* (ital. omitted).

The Court did not address that portion of section 473(b) that states that any motion for mandatory relief from default "shall" be granted "*whenever*" it is made within six months of entry of judgment. Indeed, nowhere did the Court even acknowledge the presence of the word "whenever" in the statute. In any event, the Court was "not persuaded by *Standard Microsystems*' conclusion that to resolve the purported conflict, section 473 must prevail over section 1008 because the former is a remedial statute whereas the latter creates a procedural forfeiture." *Id.* Although the Court of Appeal acknowledged that section 473(b) is a "remedial statute," it believed that section 1008(b) does "not work a forfeiture for parties who bring second or successive motions," but "simply state[s] the conditions under which second or successive motions can be granted, in addition to the specific requirements" of section 473(b). *Id.* at 19-20. We discuss the Court's reasoning further below.

## IV.

## THIS COURT SHOULD REVERSE THE JUDGMENT OF THE COURT OF APPEAL AND HOLD THAT, IN THE EVENT OF A CONFLICT, CODE OF CIVIL PROCEDURE SECTION 473(b) PREVAILS OVER CODE OF CIVIL PROCEDURE SECTION 1008(b)

Section 473(b) is comprehensive in scope. It provides that a court *must grant* a motion for relief from a dismissal, default, or default judgment based on attorney fault "whenever" the motion is made within six months after entry of judgment, is in proper form, and is accompanied by an affidavit by the attorney attesting to his or her fault.

Section 1008(b) is similarly comprehensive in scope. It provides that a court *must deny* a renewed motion—i.e., one that seeks an order that a prior motion unsuccessfully sought—unless the renewed motion is based on new or different facts, circumstances, or law.

Although section 473(b) and section 1008(b) do not necessarily conflict with each other, they may conflict in certain circumstances, as this case shows. When they do, which statute prevails? Does section 473(b) require the court to *grant* the renewed motion for mandatory relief? Or does section 1008(b) require the court to *deny* it?

*Standard Microsystems* answers this question by holding that section 473(b) prevails over section 1008(b). In contrast, the Court of Appeal below answered this question by holding that section 1008(b) prevails over 473(b). *Standard Microsystems* was right and the Court of Appeal below was wrong. Because that is so, this Court should reverse the judgment of the Court of Appeal and permit reinstatement of the order setting aside the default and default judgment.

### A. Section 473(b) Is Comprehensive In Scope: It Governs All Motions For Relief From A Dismissal, Default, Or Default Judgment Based On Attorney Fault

Section 473(b) governs all motions for relief from a dismissal, default, or default judgment based on attorney fault. *See* 8 Bernard E. Witkin, *California Procedure* Attack on Judgment in Trial Court § 145(1), (3) (5th ed. 2008) (Westlaw) (§ 473(b) applies to "[a]ll civil actions and special proceedings, including summary proceedings," in "all trial courts").

The Legislature enacted the predecessor of section 473(b) in 1872. *See* Civ. Proc. Code § 473 (1872). The Legislature amended the statute several times in the years that followed. *See* Code Am. 1873-74, c. 383, § 60; Code Am. 1880, c. 14, § 3; Stats. 1917, c. 159, § 1; Stats. 1933, c. 744, § 34; Stats. 1961, c. 722, § 1; Stats. 1981, c. 122, § 2.

Before 1988, section 473 allowed a court to grant a motion for relief based on attorney fault, but only if any such fault was *excusable*. *E.g.*, *Metropolitan Service Corp. v. Casa de Palms, Ltd.*, 31 Cal.App.4th 1481, 1486-87 (1995); *Beeman v. Burling*, 216 Cal.App.3d 1586, 1602 (1990). However, the statute did *not* allow a court to grant a motion for any relief if the fault was *inexcusable*. Any such fault by an attorney had "traditionally [been] imputed" to the attorney's client and the client relegated to seeking redress via a malpractice action against the attorney. *Metropolitan Service Corp.*, 31 Cal.App.4th at 1487; *accord, e.g.*, *Beeman*, 216 Cal.App.3d at 1602.

In 1988, the Legislature amended what would become section 473(b). *See* Stats. 1988, c. 1131, § 1.[4] In addition to *allowing* a court to grant a motion for relief based on attorney fault if such fault was excusable, the statute henceforth *required* a court to grant a motion for relief from a dismissal, default, or default judgment, even if the fault was *inexcusable*. *E.g.*, *Metropolitan Service Corp.*, 31 Cal.App.4th at 1487; *Beeman*, 216 Cal.App.3d at 1604-05 & n.14. The only two requirements were that the party had to

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4 We say "what would become section 473(b)" because the 1988 amendment to section 473 did not break the statute into subdivisions. That occurred later, in 1996, with the Legislature placing the paragraph containing the mandatory relief provision in subdivision (b). Stats. 1996, c. 60, § 1. Even though subdivision (b) as such did not come into being until 1996, throughout this brief, and for simplicity's sake, we refer to the provision containing the mandatory relief provision as section 473(b).

(1) make a "timely" motion—i.e., act with diligence, *Billings v. Health Plan of America,* 225 Cal.App.3d 250, 258 (1990), and (2) furnish a proper affidavit in which the attorney attested to his or her fault. Stats. 1988, c. 1131, § 1.

In 1991, the Legislature further amended section 473(b). *See* Stats. 1991, c. 1003, § 1. The Legislature replaced the statute's "diligence" requirement with a provision requiring the party to make the motion "no more than six months after entry of judgment." Stats. 1991, c. 1003, § 1. In other words, so long as the party acts within six months, it need not act with "diligence." *See Milton v. Perceptual Development Corp.*, 53 Cal.App.4th 861, 868 (1997) (1991 amendment does not "include a requirement of diligence").

As a result of these amendments, section 473(b) now provides that, "even if" attorney fault "was inexcusable," the trial court *must* grant a motion for relief from a dismissal, default, or default judgment based on attorney fault so long as the motion complies with the conditions the statute specifies, *Metropolitan Service Corp.*, 31 Cal.App.4th at 1487—or, more accurately, so long as the motion complies with the conditions at least "substantially," *Carmel, Ltd. v. Tavoussi*, 175 Cal.App.4th 393, 396 (2009).

Thus, to quote the current version of section 473(b), the court "*shall*" grant a motion for relief from a dismissal, default, or default judgment based on attorney fault "*whenever* [the] application ...

[1] is made no more than six months after entry of judgment, [2] is in proper form, and [3] is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect." *Id.* (ital. added). Section 473(b) specifies only one exception: The court need not grant the motion if it "finds" that the dismissal, default, or default judgment that is the object of the motion "was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." *Id.*

The Legislature's purpose in amending section 473(b) into its present form "was three-fold: to relieve the innocent client of the consequences of the attorney's fault; to place the burden on counsel; and to discourage additional litigation in the form of malpractice actions by the defaulted client against the errant attorney." *Solv-All v. Superior Court*, 131 Cal.App.4th 1003, 1009 (2005) (fn. omitted); *accord*, *e.g.*, *Metropolitan Service Corp.*, 31 Cal.App.4th at 1487.

To ensure that the attorney at fault does not avoid the burden he or she should bear, the Legislature also provided, in section 473(c), that in granting a motion for mandatory relief, the court "may" "[i]mpose a penalty" of as much as $1,000 upon the attorney, "[d]irect" the attorney to "pay an amount" of as much as $1,000 to the State Bar Client Security Fund, and "[g]rant other relief as is appropriate." § 473(c)(1) (ital. added). Additionally, to ensure that the attorney at fault does not shift any of his or her burden to the opposing party or its attorney and that the opposing

side be made whole, the Legislature has provided that, in granting a motion for mandatory relief, the court "*shall* ... direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties." § 473(b) (ital. added).

As amended into its present form, section 473(b) is a "remedial statute." *People ex rel. Reisig v. Broderick Boys*, 149 Cal.App.4th 1506, 1517 (2007); *accord, e.g.*, *Fasuyi v. Permatex, Inc.*, 167 Cal.App.4th 681, 698 (2008). Specifically, section 473(b) aims to promote the public policy that favors permitting a party to have its day in court and obtain a decision on the merits. *See, e.g.*, *Zamora v. Clayborn Contracting Group, Inc.*, 28 Cal.4th 249, 256 (2002) (§ 473(b) is " 'to be liberally construed and sound policy favors the determination of actions on their merits' "); *Elston v. City of Turlock*, 38 Cal.3d 227, 233 (1985) ("because the law strongly favors trial and disposition on the merits, any doubts in applying" § 473(b) "must be resolved in favor of the party seeking relief from default"). These policies were frustrated by the pre-1988 version of the statute, which gave the defaulted party his or her day in court only via a legal malpractice action against the errant attorney—at best, a cumbersome, uncertain, lengthy, and expensive alternative.

**B. Section 1008(b) Is Also Comprehensive In Scope: It Governs All Renewed Motions**

Section 1008(b) is equally comprehensive in scope, as it governs all renewed motions. *See* § 1008(e) (§ 1008 "applies to all

applications ... for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final").

The Legislature enacted the predecessor of section 1008(b) in 1872. *See* Civ. Proc. Code § 182 (1872). The Legislature amended the provision several times in the years that followed. *See* Code Am. 1880, c. 35, § 1; Stats. 1933, c. 744, § 177; Stats. 1951, c. 1737, § 134; Stats. 1978, c. 631, § 1.

Before 1992, section 1008(b) allowed a party to make a renewed motion "upon an alleged different state of facts." Stats. 1978, c. 631, § 2. This Court construed the statute as non-jurisdictional or exclusive. *See, e.g., Imperial Beverage Co. v. Superior Court*, 24 Cal.2d 627, 633-34 (1944); *Salowitz Organization, Inc. v. Traditional Industries, Inc.*, 219 Cal.App.3d 797, 807-08 (1990). And the Court of Appeal construed the statute not to apply to interim orders and hence not to affect the trial court's inherent power to grant a motion that it had previously denied. *See, e.g., Greenberg v. Superior Court*, 131 Cal.App.3d 441, 445 (1982).

In 1992, the Legislature amended section 1008(b). Much as before, section 1008(b) now allows a party to make a renewed motion "upon new or different facts, circumstances, or law." Stats. 1992, c. 460, § 4. But, unlike its predecessor, section 1008(b) allows a party to do so *only* upon new or different facts, circumstances, or law.

In addition, the current version of section 1008(b) is jurisdictional and exclusive. *Le Francois v. Goel*, 35 Cal.4th 1094, 1099 (2005). The statute now also applies to "interim" as well as "final" orders. § 1008(e). Thus, the statute "specifies the court's jurisdiction with regard to applications for ... renewals of previous motions, and applies to all applications ... for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application ... for the renewal of a previous motion may be considered by any judge or court unless made according to" the statute's terms. *Id.*; stats. 1992, c. 460, § 4 (amending § 1008(e) to so state).

Consequently, section 1008(b) *requires* a court to *deny* a renewed motion *unless* the motion is based on new or different facts, circumstances, or law. That said, although the statute "limit[s] the parties' power to file repetitive motions," it does not limit "the court's authority to reconsider interim rulings on its own motion." *Le Francois,* 35 Cal.4th at 1107.

The Legislature's purpose in amending section 1008(b) in 1992 was " 'to reduce the number of ... renewals of previous motions heard by judges in this state' " so as " 'to conserve the court's resources by constraining litigants who would attempt to bring the same motion over and over.' " *Le Francois*, 35 Cal.4th at 1098, 1100. The legislative history is in accord. That history reflects the Legislature's awareness of, and concern about, decisions (such as *Imperial Beverage*, *Salowitz*, and *Greenberg*) that had

construed the pre-1992 version of section 1008(b) as non-jurisdictional or exclusive and not applicable to interim orders. *See*, *e.g.*, MJN/RaymondDecl/1:15, 43-44, 54, 148-50, 157-58 (citing *Imperial Beverage*, *Salowitz*, and *Greenberg*). That history also reflects the Legislature's purpose to reduce the renewal of motions to conserve court resources. *See*, *e.g.*, MJN/RaymondDecl/1:12, 21-28, 35-39.

By requiring a court to deny a renewed motion unless it is based on new or different facts, circumstances, or law, section 1008(e) necessarily requires a court to deny such a motion *in spite of the merits*—i.e., no matter how meritorious—if the moving party does not offer such facts, circumstances, or law. And importantly, by requiring a court to deny a renewed motion in spite of its merits, the statute results in "procedural forfeiture." *California Correctional Peace Officers Assn. v. Virga*, 181 Cal.App.4th 30, 48 (2010) (ital. and internal quotation marks omitted). For it requires a court to deny the renewed motion not because the motion lacks merit, but because the moving party has not offered anything new or different in the way of facts, circumstances, or law. By forcing this result, the statute operates in derogation of the " 'strong public policy' " that "seeks to dispose of litigation on the merits rather than on procedural grounds." *Barrington v. A. H. Robins Co.*, 39 Cal.3d 146, 152 (1985). This aspect of section 1008(b), we shall see, is an important consideration in deciding whether section 473(b)'s anti-forfeiture provisions trump the procedural forfeiture that section 1008(b) mandates.

### C. Section 473(b) And Section 1008(b) May Conflict With Each Other, And The Court Of Appeal Erred In Holding Otherwise

In spite of the comprehensive scope of each statute, section 473(b) and section 1008(b) do not necessarily conflict with each other. A party may move for mandatory relief from a dismissal, default, or default judgment based on attorney fault in the first instance. And a party who renews a motion may not necessarily seek mandatory relief from a dismissal, default, or default judgment based on attorney fault. As often occurs, whenever a motion for such mandatory relief based on attorney fault is made in the first instance, it does not implicate section 1008(b) and hence does not give rise to any conflict with section 473(b). Similarly, as often occurs, whenever a renewed motion does not seek mandatory relief from a dismissal, default, or default judgment based on attorney fault, it does not implicate section 473(b) and hence cannot give rise to any conflict with section 1008(b).

This said, the two statutes may conflict in certain situations. That occurs when, as here, a party makes a renewed motion for mandatory relief from a dismissal, default, or default judgment within six months, in proper form, and with an attorney-fault affidavit, but without proffering new or different facts, circumstances, or law. Under such circumstances, section 473(b) requires the trial court to *grant* the motion but section 1008(b) requires the court to *deny* it. Obviously, the court may do only one or the other; it cannot do both.

Although *Standard Microsystems* does not hold that the two statutes *necessarily* conflict with each other, it leaves little doubt that they may do so in a given circumstance. For it states that "the two statutes" would be brought "into direct conflict" if a party were to make a renewed motion for mandatory relief from a dismissal, default, or default judgment within six months of judgment, in proper form, and with an attorney-fault affidavit—which would require a *grant*—but without new or different facts, circumstances, or law—which would require a *denial*. 179 Cal.App.4th at 894.

The Court of Appeal below, however, held that section 473(b) and section 1008(b) *cannot* conflict with each other. Slip op. at 19. In doing so, the Court ignored the possibility—which became an actuality in this case—that a party may make, *and a court must grant*, a renewed but timely and proper motion for mandatory relief from a dismissal, default, or default judgment, without new or different facts, circumstances, or law. The Court of Appeal ignored this possibility by ignoring section 473(b)'s language requiring the court to grant such a motion "whenever" it is made—initially or on renewal—as long as it is timely and in the proper form and contains the requisite affidavit of fault. By ignoring that word, the Court of Appeal violated the rule of statutory construction that provides that "the office of the Judge is simply to ascertain and declare what is in terms or in substance contained [in the statute], not to insert what has been omitted, or to omit what has been inserted ....." § 1858.

Apparently to avoid this conclusion, the Court of Appeal reasoned that section 473(b) and section 1008(b) are not "in conflict," but are instead "complimentary [*sic*]." It observed that "[s]ection 473, subdivision (b) states the requirements of making a motion for relief from default in the first instance. It says nothing about second or subsequent motions made on the same grounds." Slip op. at 19.

The Court of Appeal's reasoning was unsound. Section 473(b) does *not* "state the requirements of making a motion for mandatory relief from default *only* in the first instance." Rather, the statute states the requirements of making *any* motion for mandatory relief from a default (and from a dismissal or default judgment as well). The statute's words are not confined to initial or first-time section 473(b) motions, nor can its words be reasonably construed as such. Because there thus *can be* a conflict between section 473(b) and section 1008(b), when there is, as here, it is necessary to determine which statute prevails over which. We turn next to that issue.

## D. In Case Of Conflict, Section 473(b) Prevails Over Section 1008(b), And The Court Of Appeal Erred In Concluding Otherwise

### 1. The Rules of Statutory Construction Favor The Conclusion That, In Case Of Conflict, Section 473(b) Prevails Over Section 1008(b)

To determine whether, in case of conflict, section 473(b) or section 1008(b) prevails over the other, this Court must first construe the two statutes—i.e., it must perform the "fundamental task" of "ascertain[ing] the intent of the lawmakers so as to effectuate the purpose of the statute." *Day v. City of Fontana*, 25 Cal.4th 268, 272 (2001); *Cummins, Inc. v. Superior Court*, 36 Cal.4th 478, 487 (2005). Doing so, as noted, requires "ascertain[ing] and declar[ing] what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted ...." *Manufacturers Life Ins. Co. v. Superior Court*, 10 Cal.4th 257, 274 (1995) (citing § 1858). When the statute's words are "clear and unambiguous," the task begins and ends with its words. *Solberg v. Superior Court*, 19 Cal.3d 182, 198 (1977).

After construing section 473(b) and section 1008(b), this Court then looks to two rules for guidance. One is that a remedial statute prevails over one resulting in procedural forfeiture. *See Rodrigues v. Superior Court*, 127 Cal.App.4th 1027, 1036-37 (2005). A court must construe a remedial statute "liberally," *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal.4th 524, 533

(2011), but construe a statute that results in procedural forfeiture "strictly," *People v. United Bonding Ins. Co.*, 5 Cal.3d 898, 906 (1971). The other rule is that a more specific statute prevails over a more general one. *See* § 1859 ("when a general and particular provision are inconsistent, the latter is paramount to the former").

When this Court construes the two statutes here, it becomes clear that, in case of conflict, section 473(b) prevails over section 1008(b).

Section 473(b) provides that a court *must grant* a motion for relief from a dismissal, default, or default judgment based on attorney fault "whenever" the motion is timely, in proper form, and accompanied by the requisite affidavit of fault. "Whenever" means "as often as," "at any time," "at any time when," "at whatever time," "at whatever time it shall happen," and "at what time soever." *Morse v. Custis*, 38 Cal.App.2d 573, 576-77 (1940) (internal quotation marks omitted). The "whenever" term in section 473(b) makes plain that a court must grant the motion without regard to whether it is a renewed one, based on new or different facts, circumstances, or law, or something else.

The rule that favors a remedial statute over a statute that causes a procedural forfeiture confirms that, in case of conflict, section 473(b) prevails over section 1008(b). So holds *Standard Microsystems*. 179 Cal.App.4th at 894 ("[S]ection 1008 inflicts a procedural forfeiture, such that uncertainties should be resolved

against its application. Section 473(b), in contrast, is a remedial statute, and as such is to be construed liberally, which is to say expansively, to favor its object that cases be adjudicated on the merits rather than determined by default."). Correctly so. As a remedial statute, section 473(b) aims to promote the public policy that favors permitting a party to have its day in court and obtain a merits decision. In contrast, as a statute that results in "procedural forfeiture," section 1008(b) requires a court to deny a renewed motion, even if meritorious, if the moving party does not offer new or different facts, circumstances, or law.

The rule favoring a more specific statute over a more general one independently confirms that, in case of conflict, section 473(b) prevails over section 1008(b). So holds *Standard Microsystems*, 179 Cal.App.4th at 895 ("Section 1008 deals with the general subject of motions to reconsider previous orders and renewals of previous motions. Section 473(b) deals with applications for relief from a default or default judgment entered through the fault of the defendant's attorney. As the latter subject is considerably narrower and more specific than the former, the latter provision will, absent some countervailing consideration, govern in any conflict."). Again, correctly so. Section 473(b) is more specific statute than section 1008(b), as it governs solely motions for mandatory relief from a dismissal, default, or default judgment based on attorney fault. In contrast, section 1008(b) is more general, governing renewed motions of all kinds.

Of course, notwithstanding the statutes' plain language and both of these rules, the Legislature could have intended section 1008(b) to prevail over section 473(b). Presumably, had it so intended, it would have given some indication somewhere—in section 1008(b) itself or its legislative history. But it didn't. In the absence of any such indication, this Court applies the statutes' plain language. Here, section 473(b)'s plain language requires relief from a dismissal, default, or default judgment "whenever" the moving party meets the statute's requirements.

### 2. Public Policy Supports The Conclusion That, In Case Of Conflict, Section 473(b) Prevails Over Section 1008(b)

Even going beyond plain language, public policy supports the conclusion that section 473(b) prevails over section 1008(b). As *Standard Microsystems* explains:

> Prior to 1988, [section 473(b)] allowed relief, in the trial court's discretion, where the order sought to be vacated was the product of the 'mistake, surprise, inadvertence, or excusable neglect' of the moving party or of those—primarily his attorneys—whose conduct was imputed to him.... In 1988 the Legislature inserted language *mandating* relief where the order was due to attorney fault, whether excusable or not. This provision was manifestly intended to end the prior regime insofar as it had relegated victims of inexcusable attorney neglect to a separate action for malpractice.... That remedy was not only uncertain and expensive for the

> client, but extremely inefficient for the justice system as a whole, in that it generated a complex second lawsuit, typically involving the virtual recreation of the first in order to prove causation and damages, rather than simply litigating the first one on the merits by lifting the default—having due regard, in the process, for any harm suffered by the opposing party as the result of the attorney's conduct. The Legislature's solution ... was to mandate relief upon the attorney's attestation to his own fault, while minimizing prejudice to the opposing party by entitling him to reasonable compensation for his fees and costs.

179 Cal.App.4th at 893-94 (ital. orig. and fn. and citations omitted).

While section 1008(b) appears to favor courts over litigants, since it aims to conserve court resources by reducing the incidence of renewed motions, no matter how meritorious, section 473(b) appears to favor litigants over courts, since it mandates the revival of an action that has been disposed of by an early dismissal, default, or default judgment. Things are more complex than they appear, however. Section 1008(b) also favors litigants, by relieving non-moving parties of the obligation to respond to a renewed motion in the absence of new or different facts, circumstances, or law. And section 473(b) also favors courts, by sparing them from having to entertain and adjudicate a legal malpractice action in which a client who suffered a dismissal, default, or default judgment because of attorney fault seeks relief via the "case-within-a-case" causation

element in the malpractice action. *See Ambriz v. Kelegian,* 146 Cal.App.4th 1519, 1531 (2007); *Church v. Jamison*, 143 Cal.App.4th 1568, 1585 (2006).

But even if section 1008(b) might appear to favor courts over litigants and section 473(b) might appear to favor litigants over courts, which *should* prevail? The answer: Section 473(b). For even though the "pro-court" policy is strong, the "pro-litigant" policy is stronger.

Indeed, this Court said as much in a related context in *Elkins v. Superior Court*, 41 Cal.4th 1337 (2007). There, the Court invalidated a local rule and trial scheduling order requiring litigants in dissolution matters to present their cases by means of written declarations and permitting witness cross-examination only in "unusual circumstances." *Id.* at 1345, 1369. The Court held the rule and order were inconsistent with the Evidence Code and the Code of Civil Procedure. *Id.* *Elkins* observed that when two policies similar to those at issue here "collide head-on"—the "collision" there was between "delay reduction and calendar management," on the one hand, and "the strong public policy in favor of deciding cases on the merits when possible," on the other hand—the latter "outweighs the competing policy favoring judicial efficiency." *Id.* at 1364 (internal quotation marks omitted). This was unsurprising, given that "[t]he courts exist for litigants. Litigants do not exist for courts." *Neary v. Regents of University of California*, 3 Cal.4th 273, 280 (1992).

The upshot of this is that a statute like section 473(b), which permits a litigant to have its day in court, prevails over a statute like section 1008(b), which forbids renewed motions altogether, no matter how meritorious, in the absence of new or different facts, circumstances, or law.

### 3. None Of The Reasons The Court Of Appeal Offered For A Contrary Conclusion Withstand Scrutiny

The Court of Appeal offered four reasons for holding that section 1008(b) prevails over section 473(b). None supported its holding.

First, the Court stated that the language of section 1008, including section 1008(b), "is clear and unambiguous." Slip op. at 17. Section 1008(e) "provides that section 1008's provisions 'appl[y] to *all* applications ... for the renewal of a previous motion' and that '*[n]o application* ... for the renewal of a previous motion may be considered by any judge or court unless made according to this section' "; the "use of 'all' and 'no' in section 1008 conveys the clear meaning that every renewal motion, without exception and not excluding one for mandatory relief from default based upon an affidavit of attorney fault, is governed by section 1008's requirements"; therefore, "[u]nless the moving party meets those criteria, the trial court lacks jurisdiction to consider the motion." Slip op. at 18 (ital. orig.).

The Court of Appeal was correct as far as it went. But it didn't go far enough. Section 473(b)'s language is no less clear and unambiguous in requiring a court to grant a motion for mandatory relief from a dismissal, default, or default judgment based on attorney fault "whenever" its requirements are satisfied. The statute's "whenever" term is fatal to the Court of Appeal's reasoning and result. Curiously and significantly, however, the Court failed to quote or otherwise refer to that important word in its opinion.

Second, the Court of Appeal observed that the Legislature is "deemed to be aware of existing statutes" when it enacts new statutes; it "enacted the relevant amendments to section 1008," including section 1008(b), "in 1992" after it had enacted the relevant amendments to section 473(b) in 1988 and 1991; had it "intended to exempt renewed motions for mandatory relief ... from the requirements of section 1008, it could have done so through appropriate language in either statute"; but "it did not." Slip op. at 18-19.

There are two flaws in this reasoning. First, it is true that section 1008(b) was amended in 1992, four years after the Legislature enacted section 473(b)'s mandatory relief provision in 1988. *See* Stats. 1988, c. 1131, § 1; Stats. 1992, c. 460, § 4. But later in the same 1992 legislative session, i.e., *after* amending section 1008(b), the Legislature amended section 473(b), by (1) inserting references to "dismissal" where it occurs throughout the statute; (2) inserting a sentence relating to lengthening the time in

which an action is brought to trial at the end of the third paragraph; (3) substituting "party" for "defaulting party" in the statute's fourth paragraph; and (4) making other nonsubstantive changes. Stats. 1992, c. 876, § 4.

This Court "presume[s] the Legislature is aware of existing law when it amends a statute. Therefore, when the Legislature does not change a statute in a particular respect but does change it in other respects, [this Court] infer[s] an intent to leave the statute as it stands in the aspects of the statute that were not amended." *Reidy v. City and County of San Francisco*, 123 Cal.App.4th 580, 592 (2004) (citing *Estate of McDill*, 14 Cal.3d 831, 837-38 (1975)). Because the same Legislature that amended section 1008(b) then amended section 473(b) in some substantive respects but left the all-important "whenever" word unchanged even in light of newly-amended section 1008(b), this Court should infer that the Legislature intended section 473(b) to prevail over section 1008(b) in the event of the kind of a conflict that presents here.

The second flaw in the Court of Appeal's reasoning involves the doctrine against implied repeals. If one assumes that the Legislature's amendment to section 1008(b) in 1992 reflected an intent to have that statute prevail over the 1988 enactment of section 473(b) when the two statutes conflict, that would mean the Legislature intended to impliedly repeal the latter to the extent there is such a conflict. "All presumptions," however, "are against a repeal by implication." *Schatz v. Allen Matkins Leck Gamble &*

*Mallory LLP*, 45 Cal.4th 557, 573 (2009) (internal quotation marks omitted); *see Toyota Motor Corp. v. Superior Court*, 197 Cal.App.4th 1107, 1124 n.16 (2011) ("[i]mplied repeal is disfavored"). Nothing overcomes the presumption in this case.

A later statute, like the amendment of section 1008(b) in 1992, is "not construed as an 'implied repeal' " of an earlier statute, like the amendment of section 473(b) in 1988 and 1991, "unless it is clear" that the Legislature "intended [the later one] to supersede" the earlier one. *California Oak Foundation v. County of Tehama*, 174 Cal.App.4th 1217, 1221 (2009). There is no evidence the Legislature intended the 1992 amendment to section 1008(b) to supersede the 1988 or 1991 amendments to section 473(b). Specifically, there is no evidence in the 1992 amendment of section 1008(b) itself, which contains no reference whatsoever to section 473(b). Neither is there any evidence in the extensive legislative history of the 1992 amendment of section 1008(b), which fills hundreds of pages and does not once refer to section 473(b). Had the Legislature intended section 1008(b) as amended in 1992 to supersede section 473(b) as amended in 1988 and 1991, it would have surely left some evidence of its intent. It didn't.

Similarly, an earlier statute, like the amendment of section 473(b) in 1988 and 1991, "dealing with a narrow, precise, and specific subject is not submerged" by a later statute, like the amendment of section 1008(b) in 1992, which covers "a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426

U.S. 148, 153 (1976); *see Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553, 568 (1998) ("the implied repeal doctrine applies '[w]hen two or more statutes [enacted by the same legislature] *concern the same subject matter*' " (ital. added)). Section 473(b), as amended in 1988 and 1991, is the earlier statute "dealing with [the] narrow, precise, and specific subject" of motions for mandatory relief from a dismissal, default, or default judgment based on attorney fault. Section 1008(b), as amended in 1992, is the later statute "covering [the] more generalized spectrum" of renewed motions. Although the two statutes can overlap in their application, on their face they do not deal with the "same subject matter."

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

This was wrong. Section 1008(b) *does* "work a forfeiture" for any party who makes a "second or successive motion[ ]" for mandatory relief from a dismissal, default, or default judgment based on attorney fault. It "works" that forfeiture whenever the

party cannot present new or different facts, circumstances, or law yet can satisfy section 473(b)'s requirements.

Fourth and final, the Court of Appeal reasoned that "*Standard Microsystems*' remedial/forfeiture analysis, if accepted, 'would create a proverbial "slippery slope" and foment even more litigation concerning what is in fact "remedial." ' " Slip op. at 20. "Carried to its logical conclusion," the Court of Appeal said, "*Standard Microsystems*' analysis would exclude from the reach of section 1008 any renewal motion claimed to be remedial, thereby nullifying the plain language of section 1008 that it applies to *all* renewal motions and thwarting the Legislature's intent to limit repetitive motions." *Id.* at 21 (ital. orig.). "As a matter of fact, this process has begun" in *Ron Burns Construction Co., Inc. v. Moore*, 184 Cal.App.4th 1406 (2010). Slip op. at 20.

The Court of Appeal was wrong again. *Standard Microsystems* holds only that *section 473(b),* a remedial *statute*, prevails over *section 1008(b)*, a procedural forfeiture *statute*. It goes no further. It certainly did not suggest that "*any* renewal motion claimed to be remedial" automatically "nullifies the plain language" of section 1008(b). To be sure, if a "renewal motion" were based on a statute like section 473(b), that *requires* relief *whenever* a party complies with its requirements, such a motion should be granted, because the Legislature's "intent to limit repetitive motions" would have to take a back seat to its intent to promote merits-based decisions. But the Court of Appeal was

wrong to state that *any* "renewal motion claimed to be remedial" would "nullify" section 1008(b)'s "plain language" even if such a motion—unlike a section 473(b) mandatory relief motion—was not authorized by a statute that required relief.

Notwithstanding the Court of Appeal's statement, the "slippery slope process" has not "begun" in *Ron Burns Construction*. There, the court held only that a motion for *discretionary* relief from a dismissal, default, or default judgment based on attorney fault under section 473(b) was not a motion for reconsideration of a prior order denying attorney's fees under section 1008(a) or a renewed motion for attorney's fees under section 1008(b). 184 Cal.App.4th at 1419-20. (*Ron Burns Construction* also stated in dictum that, in case of conflict, section 473(b) prevails over section 1008(b) to the extent the former provides for *discretionary* relief. *Id.* Whether that was correct is beyond the scope of this case, which involves only mandatory relief.)

In conclusion, in case of conflict, section 473(b) prevails over section 1008(b).

### 4. To Hold That, In Case Of Conflict, Section 473(b) Prevails Over Section 1008(b) Will Not Incentivize A Party To Make Excessive Renewed Section 473(b) Motions Since Both Statutes Contain Strong Deterrents Against Doing So

To hold that section 473(b) prevails over section 1008(b) will not result in the endless renewal of motions for mandatory relief from a dismissal, default, or default judgment based on attorney fault. First, there is a strict, and relatively brief, period in which a party may renew such a motion—six months after judgment. That limited period makes it unlikely that a party could make, and a court could hear, many renewed motions for section 473(b) relief. Here, defendants filed their renewed motion twelve days after the trial court denied their first section 473(b) motion, yet the court did not hear that motion until nearly two months later—in early March 2012, four months after entering the default judgment. RT/C-1. Given the time necessary to prepare, brief, and calendar such a motion, it is likely that only one additional motion could have been made had the second one been denied. Thus, this Court should reject any argument by EZ that reversing the Court of Appeal here will result in "endless" renewed motions.

More importantly perhaps, a defendant pays a high price in making and prevailing on *any* section 473(b) motion for mandatory relief—and a higher price still for making any *renewed* motion for such relief. As noted, the statute permits a trial court to impose both a $1,000 penalty and a $1,000 assessment payable to the State Bar Client Security Fund, and any other relief as is deemed

appropriate, and *requires* the court to award reasonable attorney's fees and costs to the opposing party or its attorney. § 473(b), (c). These provisions serve as strong deterrents to any party or attorney who makes successive or renewed section 473(b) motions, since at the same time the party obtains relief from a dismissal, default, or default judgment, the victory comes at substantial cost—$34,000 in this case. 3AA/555. The discretion to award the non-moving party appropriate relief together with the requirement to award it fees and costs thus serve to level the playing field—the moving party is relieved from having to sue his or her lawyer and the non-moving party is compensated for the time and expense in opposing the motion.

Finally, there is no benefit to a party who makes an unsuccessful renewed motion for section 473(b) relief. That is because section 1008 permits a court to punish a party for a "[a] violation of this section ... as a contempt and with sanctions as allowed by Section 128.7." § 1008(d). Under section 128.7, a court may award sanctions against both the attorney and client if a motion is made "primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," if its "allegations and other factual contentions" do not have "evidentiary support," or if its "denials of factual contentions" are not "warranted." Thus, an attorney who makes a renewed motion for section 473(b) relief may pay one way or the other—he or she must compensate the non-moving party if the

motion succeeds, and he or she may face contempt and sanctions if the motion fails.

Together, these provisions provide a limited window within which a party may renew a motion for section 473(b) relief and provide a strong incentive not to abuse the rights that that statute confers on parties who seek such relief.

### E. The Court Of Appeal Erroneously Reversed The Trial Court's Order Granting Defendants' Motion For Mandatory Section 473(b) Relief Based On Their Attorney's Neglect

The Court of Appeal erred by reversing the order granting defendants' second section 473(b) motion. As explained above, section 473(b) prevails over section 1008(b) and defendants had no obligation to present new or different facts, circumstances, law, as section 1008(b) provides.

As the trial court concluded, defendants met section 473(b)'s requirements. They filed the motion on January 18, 2012, well within six months after entry of the default judgment on December 8, 2011. 1AA/178-79; 2AA/342; 3AA/56. They put the motion in proper form, including a proposed answer to the complaint and a proposed cross-complaint. 2AA/342-49, 424-42. And they accompanied the motion with (1) a declaration in which Gibalevich attested to his neglect based on the execution of the search warrant and its consequences, 2AA/350-53; (2) declarations in which

Akselrud, Gibalevich's associate, and Shkolnikov, the criminal defense attorney Gibalevich had engaged, confirmed Gibalevich's neglect, 2AA/354-57; and (3) a declaration in which Dr. Fersht, Gibalevich's client, denied any complicity in the defaults and default judgment, 3AA/548-49. *See ante*, at 19.[5]

The only potential bar to relief would have been evidence that would have allowed the trial court to "find[ ]" that the defaults and default judgment were "not in fact caused by" Gibalevich's "neglect." § 473(b). But there was no such evidence and the trial court made no such finding. Rather, in vacating the defaults and default judgment, the court found credible the declaration by Dr. Fersht, who, as noted, denied his complicity in the defaults and default judgment. As the court found, "*no* part of the fault is shown

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5 The Court of Appeal stated that one portion of Akselrud's declaration "contradicted" the claim that Gibalevich had worked only on the search warrant issue. Slip op. at 8. Quite the contrary.

Akselrud explained in her declaration that "[b]ecause so many of the files taken [when the search warrant was executed] were active litigation files, Mr. Gibalevich and I, had to make many appearances, in the civil matters, to continue hearings and trials. Much of my and his time was spent in attempts to recreate files and throw ourselves on the sword by explaining what transpired to clients, opposing counsel and judges." 2AA/356.

Rather than "contradicting" the claim that Gibalevich had worked only on the search warrant issue, this portion of the declaration supported it. As Gibalevich and Akselrud consistently explained, the "search warrant issue" was not limited to its execution but extended to all the consequences of its execution—and to Gibalevich's and Akselrud's efforts to avoid or mitigate prejudice to clients.

to be attributable to the defendant clients." 3AA/555 (ital. added). The court's finding is supported by substantial evidence. *See Shamblin v. Brattain*, 44 Cal.3d 474, 479 (1988). It is undisputed that the defaults and default judgment burdened Dr. Fersht with an obligation to pay EZ $1.7 million—an obligation he believed he should not bear. 1AA/178-79; 3AA/549. It is also undisputed that Dr. Fersht was rational. 3AA/549. It follows that Dr. Fersht could not have been complicit in the defaults and default judgment. There is no evidence he was.

EZ may attempt to salvage the Court of Appeal's reversal by reviving its "totally innocent client" argument. That attempt should fail.

In *Lang v. Hochman*, 77 Cal.App.4th 1225 (2000), the court stated that a dismissal, default, or default judgment is "not in fact caused" by attorney fault, § 473(b), "only if the party is totally innocent of any wrongdoing and the attorney was the *sole* cause of the default or dismissal." *Id.* at 1248 (ital. added).

But one year after *Lang*, *Benedict v. Press*, 87 Cal.App.4th 923 (2001) disagreed with *Lang*'s statement: "On its face, section 473, subdivision (b), does not preclude relief under the mandatory provision when default is entered as a result of a combination of attorney and client fault. The statute merely requires that the attorney's conduct be a cause in fact of the entry of default ..., but does not indicate that it must be the *only* cause." *Id.* at 928-29 (ital.

orig. and citation omitted). The court added: "The few cases where the appellate courts have affirmed the denial of relief under section 473, subdivision (b), even though the attorney's conduct contributed to the entry of default, have all involved circumstances where the client's *intentional misconduct* was found to be responsible, at least in part, for the dismissal or entry of default." *Id.* at 929 (ital. added).

Five years after *Benedict, SJP Ltd. Partnership v. City of Los Angeles*, 136 Cal.App.4th 511, 519-20 (2006) agreed with *Benedict*, but did not mention *Lang*. And four years after that, *Gutierrez v. G & M Oil Company, Inc.*, 184 Cal.App.4th 551, 558 (2010) noted, but did not resolve, the "split" between *Lang*, on the one side, and *Benedict* and *SJP Ltd. Partnership*, on the other.

This Court need not resolve the split in this case because that split is irrelevant. That is because EZ's "totally innocent client" argument lacks merit based on the evidence. As the trial court found on the more-than-sufficient-evidence of Dr. Fersht's declaration, "*no* part of the fault is shown to be attributable to the defendant clients." 3AA/555 (ital. added). Thus, the trial court found that Dr. Fersht was, in *Lang*'s words, "totally innocent of any wrongdoing" and that Gibalevich was "the *sole* cause of the default or dismissal." *Lang,* 77 Cal.App.4th at 1248 (ital. added). That also means, in the language of *Benedict* and *SJP Ltd. Partnership*, that there was no "*intentional* misconduct" by defendants—indeed, no misconduct *at all*—which was "responsible," even "in part," for

the defaults and default judgment. *Benedict*, 87 Cal.App.4th at 929 (ital. orig.); *accord SJP Ltd. Partnership*, 136 Cal.App.4th at 519-20.

EZ may also argue that *Standard Microsystems* carved out of its ambit a case such as this one, by stating that the case before it did not involve a party that "invokes the mandatory provisions of section 473(b) unsuccessfully, and then seeks to invoke them again." 179 Cal.App.4th at 895. Such an argument too should fail.

*Standard Microsystems* states: "We observe that this is not a case where a party invokes the mandatory provisions of section 473(b) unsuccessfully, and then seeks to invoke them again. We doubt that any categorical rule could govern such situations, for in some cases the second motion may be only a rehash of the first, while in others it might assert attorney mistakes directly involved in *bringing about the first denial.*" *Id.* (ital. orig.). In this case, however, defendants' second motion was *not* a mere "rehash" of the original motion, but instead "asserted mistakes" by Gibalevich that caused the trial court to deny the first motion, including that he had not recounted the facts about the execution of the search warrant and its consequences.

To reverse the judgment of the Court of Appeal, this Court need only consider the order that the Court of Appeal reviewed—an order granting defendants' second motion for mandatory relief under section 473(b). If, however, the Court considered the order denying

defendants' *first* motion, it should find that the Court of Appeal's *affirmance* of that order was no less erroneous that its *reversal* of the order granting defendant's second motion.

In affirming the order denying defendants' first motion, the Court of Appeal reasoned: "[T]he trial court denied defendants' first motion for relief because it found that Gibalevich's declaration was far too conclusory to require the grant of relief based upon a theory of attorney fault. This ruling was not an abuse of discretion. In order to obtain relief, the moving party must submit an affidavit from the attorney containing a straightforward admission of fault. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 609-610.) Gibalevich's first declaration did not meet that test." Slip op. at 14.

The Court of Appeal was wrong at the threshold: An order denying a motion for mandatory relief under section 473(b) is generally "subject to de novo review," not abuse of discretion. *Carmel*, 175 Cal.App.4th at 399. Worse still, the Court of Appeal was wrong on the merits. Gibalevich expressly admitted his "neglect." 1AA/186. That he happened to characterize it as "excusable" did not make his admission of fault any less "straightforward." After all, an attorney need only "attest[ ]" to his own "neglect," § 473(b), whether excusable or inexcusable, *see, e.g.*, *Metropolitan Service Corp.*, 31 Cal.App.4th at 1487, to trigger the client's entitlement to mandatory relief. Not to the contrary is *State Farm Fire & Casualty Co. v. Pietak*, 90 Cal.App.4th 600

(2001). There, an attorney executed two declarations, neither of which contained *any* "admission of fault"; in addition, the attorney submitted a legal memorandum expressly *denying* any "neglect on his part." *Id.* at 609. Here, as noted, Gibalevich expressly admitted his "neglect." 1AA/186.[6]

Therefore, just as the Court of Appeal erred in reversing the order granting defendants' second motion for section 473(b) relief, it also erred in affirming the order denying their first motion.

## V.
## CONCLUSION

The trial court correctly applied *Standard Microsystems* and granted defendants' motion for mandatory relief, properly setting aside the default and default judgment. The Court of Appeal's reversal is based on a misreading of section 473(b)'s plain language and underlying policy—a policy that, in this limited circumstance, prevails over the policy that underlies section 1008(b). Accordingly, this Court should reverse the judgment of the Court of Appeal.

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6 As noted, the trial court commented that Gibalevich's first declaration did not show that he was "*solely at fault* in not filing a timely responsive pleading." 2AA/340 (ital. added). The court did not imply, however, that *defendants* were at fault in any way. Indeed, as the subsequent proceedings confirmed, defendants were "totally innocent of any wrongdoing," *Lang*, 77 Cal.App.4th at 1248, and not responsible, even "in part," for not filing a responsive pleading, *Benedict*, 87 Cal.App.4th at 929; *accord SJP Ltd. Partnership*, 136 Cal.App.4th at 519-20.

DATED: September 30, 2013.

Respectfully Submitted,

GIBALEVICH AND ASSOCIATES

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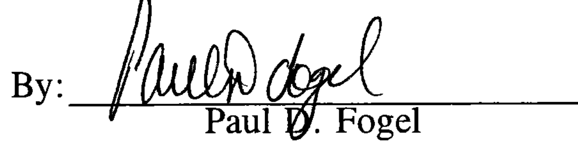
REED SMITH LLP

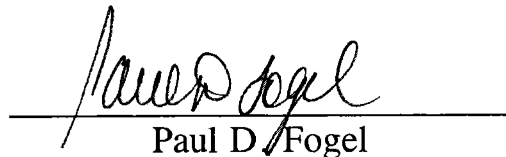
By: 
Paul D. Fogel

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

**WORD COUNT CERTIFICATE**

This Opening Brief on the Merits contains 13,695 words (including footnotes, but excluding cover, tables, the signature block, and this certificate). In so stating, I have relied on the word count of Microsoft Office Word 2010, the computer program used to prepare the petition.

Executed on September 30, 2013, at San Francisco, California.


Paul D. Fogel

## PROOF OF SERVICE

*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC, et al.*
California Supreme Court No. S210804;
Second District, Div. Four, No. B239928; Los Angeles Super. Ct. No. BC458347

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, California 94105-3659. On October 1, 2013, I served the following document(s) by the method indicated below:

**OPENING BRIEF ON THE MERITS;**

**MOTION FOR JUDICIAL NOTICE;**

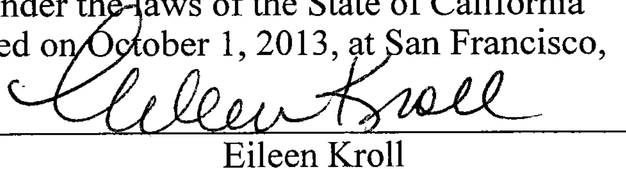
**FIRST DECLARATION OF JAN S. RAYMOND IN SUPPORT OF MOTION FOR JUDICIAL NOTICE; AND**

**SECOND DECLARATION OF JAN S. RAYMOND IN SUPPORT OF MOTION FOR JUDICIAL NOTICE**

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

| | |
|---|---|
| Daniel B. Harris, Esq.<br>3450 Sacramento Street, Suite 108<br>San Francisco, CA 94118 | Attorneys for Plaintiff and Appellant Even Zohar Construction & Remodeling, Inc.<br><br>Tel: 415.994.1727<br>Fax: 415.723.7411<br>dbh2007@sbcglobal.net |

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 1, 2013, at San Francisco, California.



Eileen Kroll