S158965

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIAN REID
Plaintiff and Appellant

v.

GOOGLE INC.
Defendant and Respondent

After a Decision of the Court of Appeal
Sixth Appellate District
Civil No. H029602

Santa Clara County Superior Court Case No. Cv023646
Honorable William J. Elfving, Judge

OPENING BRIEF ON THE MERITS

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MARINA C. TSATALIS (Bar No. 178897)
AMY K. TODD (Bar No. 208581)
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ISSUES PRESENTED

1. Should California courts continue to apply the well-established "stray remarks" doctrine, thereby avoiding jury trials in employment discrimination cases based primarily on anonymous comments by co-workers and ambiguous comments unrelated to the alleged unlawful motivation in question or to the adverse employment decision at issue?

2. When a moving party properly files objections to evidence opposing a successful summary judgment and pursues rulings from the trial court, yet does not receive them, should Courts of Appeal be permitted to reverse the trial court's grant of summary judgment, overrule all of the successful party's objections, and presume that all evidence provided by the non-moving party is admissible, no matter how irrelevant or flawed?

II.

INTRODUCTORY STATEMENT

This Court has granted review on two separate issues that have far-reaching implications not only in employment discrimination cases, but for all civil lawsuits filed in California state courts. First, this Court will determine whether the well-established "stray remarks" doctrine should survive in the state of California. The answer to this question – consistently provided by numerous California Courts of Appeal and all the federal Circuit Courts of Appeals around the country – is a resounding "yes." To date, in addressing motions for summary judgment in employment discrimination cases, trial courts throughout the land have been able to

disregard discriminatory comments by co-workers and nondecisionmakers or comments unrelated to the employment decision in question by relying on the judicially created "stray remarks" doctrine to ensure that unmeritorious cases principally supported by such remarks are disposed of before trial.

The "stray remarks" doctrine is built on well-founded principles of relevance and reliability in the assessment of motives of decisionmakers, as opposed to "stray" comments bearing no actual or analytic connection to the decisionmaker, the decision in question, or the motives behind it. This useful doctrine has been applied by several other Districts in the state, scores of federal District Courts, and all the federal Circuit Courts of Appeals. Yet, in this case, the Court of Appeal explicitly rejected the doctrine, leading the Court to reverse summary judgment in an age discrimination case in direct reliance upon (1) the "recreational atmosphere" of the employer's workplace, (2) anonymous and unreported age-based comments by co-workers, and (3) management comments relating only to ideas and performance of the plaintiff. Application of the "stray remarks" doctrine would have recognized that none of these comments are probative of whether age discrimination motivated the termination decision, and would have thus affirmed the Superior Court's grant of summary judgment on these facts.

At stake is whether employers and courts will be burdened with jury trials in age discrimination cases based on evidence once considered inadmissible or non-probative "stray remarks." More specifically, the question raised in this case is whether an age discrimination jury trial is warranted where the employer permits "recreational" activities by its employees, some of whom make unreported age-related comments, coupled

with remarks by management that make no reference to age, but comment negatively on the ideas and speed of performance of an employee over 40.

Second, this Court will determine the appropriate role of the trial and appellate courts in considering a party's objections to evidence and consequently establishing the parameters of the evidentiary record on summary judgment. The Court of Appeal's "presumption" that the trial court, in granting summary judgment, admitted all the evidence submitted in opposition to the motion, despite the moving party's repeated objections to the evidence and requests for rulings on them, defies basic principles of due process and usurps the trial court's role in establishing the evidentiary record. The Court of Appeal based its presumption on the trial court's failure to expressly rule on the objections, though the court made clear in its written order that it granted summary judgment to Google based solely on "admissible and competent evidence," in reliance on *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410 (*Biljac*) (hereinafter referred to as a "*Biljac* ruling").

In following its "presumption," the Court of Appeal not only considered all the evidence otherwise excludable under the "stray remarks" doctrine for purpose of its analysis, it also considered fatally flawed "statistical evidence" that did not even relate to terminations—the principal employment decision at issue in this case. By "presuming" that all of this evidence was considered by the trial court, and then by using this "presumption" to overrule the trial court, the Court of Appeal grievously denied Google its opportunity to have its objections considered and ruled upon, a harsh result that would similarly prejudice future litigants if the Court of Appeal's reasoning were adopted by this Court. Indeed, the more logical "presumption" would have been that, in granting Google's

dispositive motion, the trial court more obviously sustained Google's objections and excluded this flawed evidence. Taking the Court of Appeal's ruling to its logical conclusion, evidence would now be admissible on appeal, no matter how weak or even irrelevant, any time a trial court grants a summary judgment motion but fails to expressly rule on the moving party's evidentiary objections. This result is simply untenable, unfair to the successful moving party, and illogical.

For all of these reasons, Google urges this Court to reverse the judgment of the Court of Appeal and find that the trial court properly granted summary judgment to Google. Alternatively, the Court should either find that by issuing a *Biljac* ruling, the trial court implicitly sustained objections to Reid's summary judgment evidence, or should require the Court of Appeal to remand the matter to the trial court to rule on Google's evidentiary objections. By following any one of these three approaches, the Court will address fundamental questions that have perplexed lower courts, appellate courts, and litigants since *Biljac*, and will draw a clear map to guide all of these parties out of the dizzying maze created by the Court of Appeal's decision, and by other Courts of Appeal's varying interpretations of *Biljac*. In doing so, the Court will ensure that litigants will no longer suffer the uncertainty and prejudice of enduring the loss of any right to the protections of their evidentiary objections through no fault of their own.

III.

STATEMENT OF FACTS

A. Wayne Rosing, Who Is Three Years Older Than Reid, Hired Reid When Reid Was 52 Years Old.

On May 1, 2002, Reid initiated contact with Google regarding

employment opportunities. (Appellant's Appendix ("App") 664-66, 709-17.) After Google responded to Reid's solicitation and invited him in for interviews, Google's Vice President of Engineering, Wayne Rosing, made the decision to hire Reid. (App559 [Undisputed Material Fact ("UMF") 12], 568 [¶¶1-2], 585-86, 619, 678-79, 695, 785-86.) At the time, Reid was 52 years old and Mr. Rosing was 55. (App560 [UMF 18], 584, 765.) Reid started his employment with Google on June 17, 2002, and reported to Mr. Rosing throughout the one year and ten months of his Google employment. (App559 [UMF 12], 568 [¶2], 585-88, 619, 678-79, 695, 766, 785-86.)

B. Mr. Rosing Transfers Reid To A Unique Function Heading Google's Graduate Degree Program.

Reid initially held the joint positions of Director of Engineering and Director of Operations. (App590, 596-597.) In January 2003, Mr. Rosing decided to hire an executive coach to help Reid improve his working relationships and effectiveness as a manager, at Google's expense. (App648-49, 651-53, 796-97, 882-83.) On October 13, 2003, Mr. Rosing removed Reid from the Director of Operations position and took away his responsibilities and reports as Director of Engineering. (App558 [UMF 1], 568-69 [¶¶3-4], 590-97, 737-38, 798-99, 2921-23.) Mr. Rosing made this decision because, despite the efforts that he had made to help Reid succeed, Mr. Rosing and others remained unhappy with Reid's performance in Operations and in the traditional engineering functions. (App568-69 [¶3], 788-95, 813-18, 821-22, 877-79, 884-86, 895.)

Rather than terminating Reid's employment, Mr. Rosing arranged for him to transfer to a new role. (App569 [¶4].) Although Mr. Rosing allowed Reid to retain the Director of Engineering title, from October 2003 until his termination in February 2004, Reid's primary function was to

develop and implement a new program aimed at retaining engineers by enabling them to obtain a masters' degree by attending courses taught by CMU professors at Google (the "Graduate Degree Program"). (App569 [¶4], 558-59 [UMFs 1-2, 6], 565 [¶2], 568-69 [¶¶3-4], 590-99, 659-60, 669, 734-35, 737-38, 800, 823-24, 827, 836, 2921-23.) Reid also was responsible for developing a new program aimed at hiring more engineers by which Google would provide funding to engineering undergraduates to complete their degrees so that they would later join Google (the "Google Scholar Program"). (App558 [UMF 3], 569 [¶4], 659-60, 731, 798, 800-01.) Reid was the only employee who had these responsibilities. (App558 [UMF 4], 569 [¶¶4, 8], 594-95, 668, 727-33, 828, 835, 2921-23.)

C. Mr. Rosing Decides To Discontinue The Graduate Degree And Google Scholar Programs And Determines That There Is No Other Position For Reid In Engineering.

By February 2004, it was clear that there was very little interest in the Graduate Degree Program among Google's engineers. While CMU required at least ten applicants to run a pilot program with Google, no more than six employees had even shown interest in the Program, and only one employee had actually signed up. (App559 [UMF 8], 565-66 [¶¶4-6], 569 [¶¶5-6], 670-72, 774-77, 802-04, 844, 846-55, 866, 872-74, 927-29.) Thus, Mr. Rosing decided to discontinue the Program, eliminating Reid's main function. (App559 [UMFs 6, 8], 565-66 [¶¶4-6], 569 [¶¶4-6], 590-92, 670-72, 734-35, 774-77, 802-04, 823-24, 836, 844, 846-57, 866, 872-74, 927-29.) Mr. Rosing also decided to eliminate the Google Scholar Program after Google changed its strategy and decided to recruit a large number of individuals who were already fully qualified engineers rather than recruit engineering students. (App559 [UMF 10], 569 [¶6], 777, 781, 802, 806,

833, 843.) After determining that there was no other role for Reid in the Engineering organization, Mr. Rosing made the decision to terminate Reid. (App559 [UMF 13], 569 [¶6], 777-79, 781, 806-07.)

On February 13, 2004, Mr. Rosing met with Reid and informed him that the Graduate Degree and Google Scholar Programs were being eliminated, that there was no other function for Reid within Engineering, and that Reid's employment with Google was therefore being terminated. (App7 [¶25], 35 [¶25], 561 [UMF 22], 645, 669-70, 703-04, 777-78, 781, 808, 866, 869.) Mr. Rosing also outlined the terms of a severance package that he championed for Reid. (App617-18, 675, 809.) Reid asked whether he could speak to other Vice Presidents to determine whether there were any opportunities for him in other organizations within Google, and Mr. Rosing agreed. (App601-02.)

Thereafter, Reid spoke with two other Vice Presidents, both of whom determined that there was no position that suited Reid's skills in their organizations. (App626, 858, 862-65, 867-68.) Accordingly, on February 27, 2004, Reid turned in his access card, left Google, and did not return. (App645, 703-04.) Nevertheless, Google continued to pay Reid's salary, provided him with full benefits, and vested his stock options until April 20, 2004. (App611, 619-20, 645-46.) Thereafter, Mr. Rosing made a personal loan to Reid to enable him to exercise his vested Google stock options. (App613.) As a direct result of Mr. Rosing's loan, Reid has already reaped $13 million in profits from the sale of most of his stock options, and the current market value of his remaining options is another $16 million. (App576 [¶2], 579-80, 613.)

Google's Graduate Degree and Google Scholar Programs were in fact discontinued. (App559 [UMFs 8, 10], 565-66 [¶¶4-6], 569 [¶¶5-6],

670-72, 774-77, 781, 802-04, 806, 833, 843-44, 846-55, 866, 872-74, 927-29.) Neither Program has been reinstituted, nor has anyone assumed any of the duties that Reid had at the time of his termination. (App559 [UMFs 8-11], 565-66 [¶¶4-7], 569 [¶¶5-6, 8], 670-72, 674-75, 727, 731, 736, 741, 774-77, 781, 802-04, 806, 828-34, 837-55, 866, 872-74, 927-29, 931-32.)

IV.

PROCEDURAL HISTORY

On July 20, 2004, Reid filed a lawsuit against Google, asserting age discrimination under the Fair Employment and Housing Act, among other claims. (App1-22.) Google filed its Motion for Summary Judgment on the 11 causes of action that were still pending in Reid's first amended complaint on May 27, 2005. (App29-62, 523-55.) After consideration of the parties' briefs and oral argument, the Honorable William J. Elfving of the Santa Clara Superior Court granted Google's Motion by Order dated September 21, 2005, and dismissed Reid's case. (App2852-58.) Although Google timely filed its written objections to Reid's evidence and, during oral argument at the hearing on the motion, further objected and twice requested that the trial court rule on its evidentiary objections, the Superior Court declined to render specific rulings on Google's objections, instead stating that in reaching its determination, "the Court relied only on competent and admissible evidence pursuant to *Biljac Assoc. v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419-1429." (App2853.)

Reid appealed the Superior Court's grant of summary judgment and its previous order striking hiring and promotion claims from Reid's complaint. (App2867-70.) At the time Google submitted its appellate opposition brief, it requested that the Court of Appeal similarly "disregard

all inadmissible evidence," in part because, "Google's counsel repeatedly referred the court to its evidentiary objections during the oral argument and asked the court twice to review those objections, [thus] Google's objections are preserved on appeal." (Reporters Transcript ("RT") at 45:23-46:9, 48:25-49:2; see also RT at 85:20-87:9.)

Notably, at the time of this request, *Biljac* was good law in the First and Sixth Districts in September 2005, when the Superior Court first granted summary judgment for Google. Google filed its opposition to Reid's appeal and renewed its objections to Reid's evidence on July 28, 2006, again operating in a world where *Biljac* rulings were common and almost always upheld on appeal. The First District did not overrule *Biljac* until it decided *Demps v. San Francisco Housing Auth.* (2007) 149 Cal.App.4th 564 (*Demps*) almost one year later, on April 9, 2007, long after Google filed its opposition to Reid's appeal of the grant of summary judgment.

On October 4, 2007, the Court of Appeal issued its decision reversing the Superior Court's grant of summary judgment. Despite Google's efforts to pursue its objections to evidence, the Court of Appeal reversed the Superior Court's ruling without remanding the case to the Superior Court for a clarification of the record, including the admissible evidence considered. The Court of Appeal modified its decision on November 1, 2007.

Google filed its Petition for Review of the Court of Appeal's decision on December 11, 2007, which this Court granted on January 30, 2008. On February 6, 2008, for good cause, Google requested an extension of time to file its Opening Brief on the Merits. This Court granted Google's request for an extension on February 21, 2008, extending

Google's deadline to file this Opening Brief to March 28, 2008.

V.

LEGAL ARGUMENT

Issue No. 1

Should California courts continue to apply the well-established "stray remarks" doctrine, thereby avoiding jury trials in employment discrimination cases based primarily on anonymous comments by co-workers and ambiguous comments unrelated to the alleged unlawful motivation in question or to the adverse employment decision at issue?

A. Contrary To The Court of Appeal's Decision, The Stray Remarks Doctrine Has Been Applied On Summary Judgment By California's Appellate Courts And All Federal Circuit Courts To Appropriately Disregard Comments Unrelated To Whether The Employment Decision Was Based On Discriminatory Animus.

The Court of Appeal's decision did what no other appellate court in this state, and indeed no federal appellate court in the land, has done in directly rejecting application of the stray remarks doctrine on summary judgment. In particular, the Court of Appeal considered (a) statements by supervisors that explicitly related only to Reid's ideas, the speed of his work performance, and a vague reference to "cultural fit," and (b) anonymous age-based comments made by co-workers that were not attributed to any decisionmakers as evidence of a discriminatory atmosphere at Google that creates a triable issue of fact as to pretext. (Opn.[1] pp. 19-21.)[2]

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[1] Throughout this brief, the Court of Appeal's decision is cited as "Opn." and referred to as the "Opinion."

In considering these comments—none of which have any connection to whether Google's decision to terminate Reid was based on his age—the Court of Appeal explicitly rejected the stray remarks doctrine, stating that "[w]e do not agree with suggestions that a 'single isolated discriminatory comment' [citation] or comments that are 'unrelated to the decisional process' are 'stray' and therefore, insufficient to avoid summary judgment." (Opn. p. 20.) The Court of Appeal further refused to adopt this widely accepted doctrine because, in its characterization, the stray remarks doctrine was "the assumption by the court of a factfinding role." (*Ibid.*) This mischaracterization and rejection of the doctrine defies the U.S. Supreme Court's landmark *Price Waterhouse v. Hopkins* decision, this Court's decision in *Guz v. Bechtel Nat'l, Inc.*, other California Court of Appeal decisions, and all federal circuit courts that have considered the issue for over the last twenty years.

1. Courts Have Recognized for Over Two Decades that Stray Remarks are Irrelevant to the Issue of Discriminatory Intent and Do Not Save Plaintiffs from Summary Judgment.

a. Nascent Iterations of the Stray Remarks Doctrine.

As early as the mid-1980s, federal courts considered whether various remarks offered by a plaintiff employee were relevant or sufficient to

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[2] The Court of Appeal also relied on "a general 'youthful' atmosphere at Google, including employees participating in recreational activities like hockey, foosball and skiing" as demonstrating an environment that was "biased toward older workers." (Opn. p. 19.) While evidence of recreational activities and any alleged atmosphere they create are not technically stray remarks, that type of "evidence" suffers from the same lack of probative value and immateriality to the challenged employment decision.

support a discrimination claim in the employment context. For example, in *Williams v. Williams Elecs. Inc.* (7th Cir. 1988) 856 F.2d 920, the Seventh Circuit Court of Appeals held that comments by nondecisionmakers were not probative of the decisionmaker's allegedly discriminatory intent, and did not allow a plaintiff employee to survive summary judgment. Specifically, the court affirmed summary judgment even where the plaintiff alleged that she "heard from another employee that some of her fellow technicians had said that a black person should not be working as an electronics technician." (*Id.* at p. 922; see also *Mauter v. Hardy Corp.* (11th Cir. 1987) 825 F.2d 1554, 1558 [affirming summary judgment where vice president's comment that the employer "was going to weed out the old ones," was "too attenuated to present a genuine issue of material fact" because he "played no part in the decision to terminate" the plaintiff].)

Likewise, another circuit court recognized that abstract or ambiguous comments are not probative of a determination as to whether employment discrimination occurred. In *Chappell v. GTE Prods. Corp.* (6th Cir. 1986) 803 F.2d 261, 268 fn. 2 (*Chappell*), the Sixth Circuit affirmed judgment notwithstanding the verdict despite a supervisor's comment that '"you must have noticed the young people taking over up front"' and an exchange between an employee and supervisor where the employee commented that '"we old timers know the procedure as to how things operate"' and the supervisor responded, "Don't categorize me in that with you." The Sixth Circuit reasoned that the comments were "too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination." (*Ibid.*)

With these and other federal court decisions in the 1980s regarding the irrelevancy of comments unrelated to the employment decision—

several years before the United States Supreme Court's seminal *Price Waterhouse* decision, and over twenty years before the instant matter—the stray remarks doctrine had begun to root itself into American jurisprudence.

b. Justice O'Connor Coins the Term "Stray Remarks" in Affirming the Doctrine's Principles in Her 1989 Concurring Decision in *Price Waterhouse*.

In the United States Supreme Court's 1989 landmark *Price Waterhouse* decision regarding sex discrimination in employment, Justice O'Connor coined the term "stray remarks" and affirmed the principles underlying what has become known as the stray remarks doctrine. (*Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 277 (*Price Waterhouse*).) In *Price Waterhouse*, a former accountant alleged she was denied entry into the defendant's partnership because of her sex and offered various gender-related remarks as proof that her gender played a motivating part in the employer's decision. (*Id.* at pp. 244-45.) Although Justice O'Connor and the plurality opinion agreed that the identified remarks evidenced a discriminatory intent, Justice O'Connor specifically sought to limit the use of discriminatory remarks as evidence by clarifying that the remarks uttered were only relevant because they were uttered by decisionmakers in the decisionmaking process. (*Id.* at pp. 251-52, 261-62, 276-77.) Justice O'Connor made clear in her discussion that "stray remarks" and "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" were not probative and could not satisfy a plaintiff's evidentiary burden of showing discriminatory intent by the employer. (*Id.* at p. 277.)

c. All of the Federal Circuit Courts Have Adopted and Applied the Stray Remarks Doctrine, Often to Affirm Summary Judgment.

Consistent with O'Connor's language in *Price Waterhouse*, federal circuit courts have since routinely recognized evidence of remarks made by nondecisionmakers as insufficient to withstand summary judgment.[3]

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[3] (See, e.g., *Hill v. Lockheed Martin Logistics Mgmt., Inc.* (**4th** Cir. 2004) 354 F.3d 277, 283, 295 (en banc) [affirming summary judgment where repeated comments by employee that plaintiff was a "useless old lady who needed to be retired," a "troubled old lady," and "damn woman" were not relevant absent evidence that employee was a decisionmaker]; *Sandstad v. CB Richard Ellis, Inc.* (**5th** Cir. 2002) 309 F.3d 893, 898, 900-01 [affirming summary judgment where comments by nondecisionmakers regarding "too much grey hair" and "skipping a generation" were not reasonably linked to the decision to terminate]; *Smith v. Leggett Wire Co.* (**6th** Cir. 1999) 220 F.3d 752, 759-60 [racially insensitive comment deemed stray when they were remote in time and not made by decisionmakers]; *Hemsworth v. Quotesmith.com, Inc.* (**7th** Cir. 2007) 476 F.3d 487, 489 [affirming summary judgment where a comment from a nondecisionmaker manager that plaintiff "looked old and tired" was deemed stray]; *Chiramonte v. Fashion Bed Group, Inc.* (**7th** Cir. 1997) 129 F.3d 391, 402 [affirming summary judgment where nondecisionmaker CEO told plaintiff "age had to be a factor [in the termination] . . . but I don't know"]; *Bright v. Standard Register Co.* (**8th** Cir. 1995) 66 F.3d 171, 172-73 [affirming summary judgment where stray remarks by union president that he "thought that the company planned to get rid of the older people" were deemed "lacking in apparent probative value"]; *Sprenger v. Fed. Home Loan Bank of Des Moines* (**8th** Cir. 2001) 253 F.3d 1106, 1113 [affirming summary judgment where presenter made reference to plaintiff in the context of "teaching old dogs new tricks" in reference to the "difficulty bankers over fifty have in keeping up with new technology"]; *Cone v. Longmont United Hosp. Assn.* (**10th** Cir. 1994) 14 F.3d 526, 531 [affirming summary judgment of ADEA case, where comment by CEO that two employees over 40 years old were terminated because "the hospital need[s] some new young blood" were stray remarks because CEO was not decisionmaker]; *Hall v. Giant Food, Inc.* (**D.C.** Cir. 1999) 175 F.3d 1074, 1077, 1079 [plaintiff cannot establish pretext through nondecisionmaker's comments that plaintiff was "too old" for the job, that she "wanted younger and safer drivers in here," and that "the true reason for his termination was

(continued...)

Remarks made by decisionmakers outside of the decisionmaking context have also been repeatedly identified by numerous federal circuit courts as stray remarks.[4] Likewise, general or ambiguous remarks unrelated to a

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his age"].)

[4] (See, e.g., *Wallace v. O.C. Tanner Recognition Co.* (**1st** Cir. 2002) 299 F.3d 96, 100 [affirming summary judgment where occasional inquiries about plaintiff's retirement and a reference to plaintiff's membership in a protected age category during a termination meeting were deemed "brief, stray remarks unrelated to the termination decisional process"]; *Glanzman v. Metro. Mgmt. Corp.* (**3d** Cir. 2004) 391 F.3d 506, 513 [finding supervisor's inquiries about age and retirement to be stray remarks, but supervisor's comment that he wanted to fire plaintiff and replace her with a younger women not stray]; *Sandstad v. CB Richard Ellis, Inc.* (**5th** Cir. 2002) 309 F.3d 893, 900-01 [affirming summary judgment where comment by decisionmaker that "You old guys don't always get it right" was not discriminatory in context]; *Waggoner v. City of Garland, Texas* (**5th** Cir. 1993) 987 F.2d 1160, 1163, 1166 [affirming summary judgment where evidence that supervisor called plaintiff an "old fart" and told him that a younger person could do faster work was deemed "a mere 'stray remark'. . . insufficient to establish age discrimination"]; *Adelman-Reyes v. Saint Xavier Univ.* (**7th** Cir. 2007) 500 F.3d 662, 666-67 [affirming employer's summary judgment where supervisor's comment that plaintiff was a "liberal union-oriented Jew" was a stray remark unrelated to the employment decision]; *Ramlet v. E.F. Johnson Co.* (**8th** Cir. 2007) 507 F.3d 1149, 1152-53 [affirming employer's summary judgment where decisionmaker's comments that he wanted to hire "a bunch of young, dumb . . . guys" and that he "intended to hire 'young studs' to replace older sales people . . . .were not related to the decisional process"]; *Mathews v. Trilogy Commc'ns, Inc.* (**8th** Cir. 1998) 143 F.3d 1160, 1166 [affirming summary judgment where supervisor's comment during his deposition that plaintiff viewed himself as a "diabetic poster boy" deemed unrelated to the decisional process and therefore "insufficient to raise an inference of discriminatory bias"]; *Coleman v. Quaker Oats Co.* (**9th** Cir. 2000) 232 F.3d 1271, 1285 [affirming summary judgment in deeming evidence that a manager used the words "young and promotable" insufficient to raise a question of fact on pretext].)

protected class and not providing any indication of discriminatory animus have been recognized by federal circuit courts as stray remarks,[5] including

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[5] (See, e.g., *Arraleh v. County of Ramsey* (**8th** Cir. 2006) 461 F.3d 967, 975-76 [affirming summary judgment in favor of employer where comment that "black people are expected to leave their blackness behind," was an "ambiguous statement by a decisionmaker unrelated to the decisional process"]; *Nesbit v. Pepsico, Inc.* (**9th** Cir. 1993) 994 F.2d 703, 705 [affirming summary judgment where supervisor's comment that "we don't necessarily like grey hair" was "uttered in an ambivalent manner" and "not tied directly to" plaintiff's termination]; *Nidds v. Schindler Elevator Corp.* (**9th** Cir. 1996) 113 F.3d 912, 915, 919 [affirming summary judgment where supervisor made stray remark that he wanted to "get rid of all the 'old timers' because they would not 'kiss my ass,'" recognizing that the comment was ambiguous because it "could refer as well to longtime employees or to employees who failed to follow directions as to employees over 40"]; *Standard v. A.B.E.L. Serv., Inc.* (**11th** Cir. 1998) 161 F.3d 1318, 1329-30 [affirming summary judgment where nondecisionmaker's comment that "older people have more go wrong" was "too vague to prove even generalized discriminatory animus"]; *Gonzalez v. El Dia, Inc.* (**1st** Cir. 2002) 304 F.3d 63, 66, 70 [affirming summary judgment where ambiguous remarks, referring to plaintiff as "out of style," "colorless," "mom," and expressing surprise that plaintiff was still working, were insufficient to establish discriminatory animus]; *Fortier v. Ameritech Mobile Commc'ns, Inc.* (**7th** Cir. 1998) 161 F.3d 1106, 1109, 1113 [affirming summary judgment where supervisor's comments that she wanted "new blood," a "quick study," and someone with "a lot of energy" did not necessarily relate to age]; *Bickerstaff v. Vassar College* (**2d** Cir. 1999) 196 F.3d 435, 456 [comment that "[w]e can ill afford to tenure as associate professor yet another black faculty member who seems destined to be stuck in that rank forever" not relevant, as the comment likely did not refer to plaintiff]; *Merrick v. Farmers Ins. Group* (**9th** Cir. 1990) 892 F.2d 1434, 1438 [hiring executive's comment that he chose a "bright, intelligent, knowledgeable young man" over appellant was merely stray remark]; *Cone v. Longmont United Hosp. Assn.* (**10th** Cir. 1994) 14 F.3d 526, 531 [affirming summary judgment of ADEA case, where comment by decisionmaker that "long-term employees have a diminishing return" were stray remarks because the "statement could apply equally to employees under age forty"].

comments about the process of aging and generational change.[6] The stray remarks doctrine is demonstrably alive and well in the federal courts, and has been for nearly two decades.

d. California Courts of Appeal Have Repeatedly Applied the Stray Remarks Doctrine.

In California, the Courts of Appeal have also adopted and applied the stray remarks doctrine for over a decade. In the half-dozen published cases that have applied the doctrine, four of them have affirmed summary judgment, while the other two ultimately concluded the remarks did not qualify as "stray." (*Horn v. Cushman & Wakefield Western, Inc.* (1st Dist. 1999) 72 Cal.App.4th 798, 803, 809 (review denied) (*Horn*) [affirming summary judgment for employer, finding that remark to plaintiff, "'[T]his is 1994, haven't you ever heard of a fax before?'" was "at most, a 'stray' ageist remark" by a nondecisionmaker and was "entitled to virtually no weight in considering whether the firing was pretextual or whether the decisionmaker harbored discriminatory animus."]; *Gibbs v. Consol. Servs.*

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[6] (See *Mereish v. Walker* (**4th** Cir. 2004) 359 F.3d 330, 336-37 [rejecting claim that concerns expressed about the aging workforce and the "problem" of the "average age going higher" reveal a discriminatory animus and establish pretext, and recognizing that "[W]e have consistently held, along with other circuits, that general or ambiguous remarks referring to the process of generational change create no triable issue of age discrimination"], citation omitted; *E.E.O.C. v. Clay Printing Co.* (**4th** Cir. 1992) 955 F.2d 936, 942-43 [holding that references to the need to "attract newer, younger people" or "young blood" were insufficient evidence of age bias because they were isolated and merely reflected a truism of business life]; *Cone v. Longmont United Hosp. Assn.* (**10th** Cir. 1994) 14 F.3d 526, 531 [holding that the reference to needing "some new young blood" was insufficiently probative of age bias]; *Gagne v. Northwestern Nat. Ins. Co.* (**6th** Cir. 1989) 881 F.2d 309, 314 [holding that the reference to needing "younger blood" was insufficiently probative of age bias].)

(2d Dist. 2003) 111 Cal.App.4th 794, 798 [affirming summary judgment, finding that supervisor's comment that plaintiff was "getting too old" to transfer to a driver position and that plaintiff should "let the younger guys do it" were stray remarks because they "played no role in the decision to terminate him" and accordingly "do not establish discrimination"]; *Slatkin v. Univ. of Redlands* (4th Dist. 2001) 88 Cal.App.4th 1147, 1160 [affirming summary judgment, holding that "an isolated remark by a person not involved in the adverse employment decision 'is entitled to virtually no weight in considering whether the firing was pretextual . . .'"]; *Trop v. Sony Pictures Entm't* (2d Dist. 2005) 129 Cal.App.4th 1147-48 [affirming summary judgment where decisionmaker's derogatory comments about pregnant women in the workplace were unconnected to termination decision given decisionmaker's lack of knowledge of plaintiff's pregnancy]; cf. *Sada v. Robert F. Kennedy Med. Ctr.* (2d Dist. 1997) 56 Cal.App.4th 138, 145 (review denied and certified for partial publication) [reversing summary judgment because decisionmaker's statement during plaintiff's interview that plaintiff should "just go back to Mexico" was directly related to decision not to hire plaintiff]; *Kelly v. Stamps.com, Inc.* (2d Dist. 2005) 135 Cal.App.4th 1088, 1094, 1102 [decisionmaker's "intonations about plaintiff being pregnant" and statements that she was "mentally checked out" did not qualify as "stray remarks" because they were connected with the termination process].)

2. Application of the Stray Remarks Doctrine Serves Important Functions for Courts and Litigants in Employment Discrimination Cases.

a. As Justice O'Connor Indicated in *Price Waterhouse*, Application of the Stray Remarks Doctrine Insures that Courts Disregard Evidence that is Not Probative of the Reasons for the Contested Employment Action.

As Justice O'Connor acknowledged in *Price Waterhouse*, employers and decisionmakers are inevitably aware of and often comment on an employee's age (or other protected characteristic). (*Price Waterhouse, supra,* 490 U.S. at p. 277.) However, Justice O'Connor noted that although many comments show the employer's awareness of the characteristic, such awareness by no means proves that employment decisions regarding the employee are motivated by that characteristic. (*Ibid.*) Given this understanding, Justice O'Connor illuminated the features of the stray remarks doctrine in recognizing that discriminatory or ambiguous comments unrelated to the challenged employment decision, whether uttered by a decisionmaker or not, do not satisfy a plaintiff's burden of showing that the employment decision was not based on legitimate criteria. (*Ibid.* ["Nor can statements by decisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden…"].) Indeed, Justice O'Connor did not even effectively believe that stray remarks could assist a plaintiff in proving a prima facie case of discrimination and shifting the burden to the employer to state its nondiscriminatory reasons for the decision. (*Ibid.* ["[S]tray remarks in the workplace, while perhaps probative of sexual harassment [citation], cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria."].)

Justice O'Connor's discussion of the evidence required for a discrimination claim underscores the crucial function of the stray remarks doctrine: to recognize that remarks unrelated to the allegedly discriminatory employment decision are not probative of whether the challenged decision was motivated by a prohibited factor (here, age), and must be disregarded. To this end, courts are able to separate such stray remarks as irrelevant to the consideration, particularly for a summary judgment motion, of whether the plaintiff employee has actually met his/her burden on the "ultimate issue [of] whether the employer acted with *a motive to discriminate illegally*." (*Guz v. Bechtel Nat'l Inc.* (2000) 24 Cal.4th 317, 358 (*Guz*), emphasis in original.) Indeed, as noted in the scores of cases cited above, courts have consistently recognized that stray remarks are insufficient in the summary judgment context to create a triable issue of whether discrimination occurred or whether the employer provided a pretextual reason for the challenged employment action. (See, e.g., footnotes 4-7, *supra*; *Horn*, *supra*, 72 Cal.App.4th at pp. 809-10 (stray remarks are "entitled to virtually no weight in considering whether the employment action was pretextual or whether the decisionmaker harbored discriminatory animus"), citing Lindemann & Grossman, Employment Discrimination Law (1989 Supp.), pp. 231-32.)

In contrast to this consistent recognition, the Court of Appeal in this case cited disapprovingly to *Horn* as an illustration of what the Court of Appeal chidingly characterized as an impermissible form of "factfinding" by trial courts at the summary judgment stage. (Opn. p. 20, fn. 5, citations omitted.) The *Reid* Court took issue with the *Horn* Court's apparent contradiction between acknowledging that "weighing of the evidence" is prohibited on summary judgment and recognizing that a stray and

ambiguous comment was "entitled to virtually no weight in considering whether the firing was pretextual or whether the decisionmaker harbored discriminatory animus." (Opn. p. 20, fn. 5, italics omitted, citing *Horn*, *supra*, 72 Cal.App.4th at pp. 807, 809.) Ironically, however, this Court *approvingly* cited *Horn* in its discussion of the proper approach of a trial court evaluating summary judgment motions in employment discrimination cases. (*Guz, supra*, 24 Cal.4th at p. 361.) More ironically, the *Reid* Court then contradicted itself in the paragraph directly following its critical footnote regarding *Horn*, recognizing that some cases would contain remarks that "provide such weak evidence" (requiring an assessment, or weighing, of the strength of the evidence) that a judgment resting on them could not be sustained, while contending that the remarks' "'weight' as evidence cannot enter into the question." (Opn. pp. 20-21.)

Ultimately, both this Court and the U.S. Supreme Court have recognized that a court must assess the relative strength and nature of the evidence presented on summary judgment, particularly because a plaintiff employee must offer "substantial evidence" of pretext such that a factfinder could conclude the employer discriminated against the employee, and an assessment of the evidence offered may only create "a weak issue of fact" warranting summary judgment. (See *Reeves v. Sanderson Plumbing Prod. Co.* (2000) 530 U.S. 133, 148-49, emphasis added, quoted by *Guz*, *supra*, 24 Cal.4th at p. 362; *Horn*, *supra*, 72 Cal.App.4th at pp. 806-07, emphasis added, cited by *Guz*, 24 Cal.4th at 361 fn. 24; *Guz*, 24 Cal.4th at p. 361, citations omitted ["[T]he great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive

was discriminatory."].)

b. The Doctrine Also Facilitates Exclusion of Irrelevant, Prejudicial, and Otherwise Inadmissible Evidence.

The exclusion of stray remarks also facilitates the function of state and federal evidentiary rules that cabin the types of evidence that are admissible and properly before the court. Stray remarks, by their very nature, are irrelevant to the allegedly discriminatory decision at issue, and should be excluded as inadmissible evidence. (See Cal. Evid. Code §§ 210, 350; *Saulsberry v. St. Mary's Univ. of Minnesota* (8th Cir. 2003) 318 F.3d 862, 864, 867-68 [finding that nondecisionmaker's references to plaintiff as "Shaft" and "black dog," and decisionmaker's ambiguous comment that plaintiff "needed lotion for his ashy skin" were properly deemed stray remarks and inadmissible by the trial court]; *Crabtree v. Nat. Steel Corp.* (7th Cir. 2001) 261 F.3d 715, 723 [finding that trial court did not abuse its discretion in excluding "stray remarks made by [a] nondecisionmake[r]" that two employees over the age of 40 "were too old to go with him through the millennium"].) Moreover, many stray remarks are of a derogatory or inflammatory nature, which may trigger the prejudices of the factfinder, and prompt the invocation of evidentiary rules excluding such prejudicial remarks from consideration, particularly when the remarks provide little probative value. (See Cal. Evid. Code § 352; *Chappell, supra,* 803 F.2d at p. 268 fn. 2 [comments were "too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination."].) Further, stray remarks can oftentimes constitute inadmissible hearsay that may not be considered by the court.

c. Consistent with this Court's Guidance in *Guz*, Application of the Stray Remarks Doctrine Successfully Winnows Out Cases "Too Weak to Raise a Rational Inference that Discrimination Occurred."

In *Guz,* another age discrimination case, this Court recognized that trial courts should winnow out (at the summary judgment stage) cases "too weak to raise a rational inference that discrimination occurred." (24 Cal.4th at p. 362.) Quoting the U.S. Supreme Court's decision in *Reeves v. Sanderson Plumbing Prod. Co.* (2000) 530 U.S. 133, the *Guz* opinion recognized that trial courts must engage in some limited consideration of the evidence at summary judgment, such as evaluating "the strength of the plaintiff's prima facie case" and assessing "the probative value of the proof [plaintiff offers to demonstrate] that the employer's explanation is false." (*Guz,* 24 Cal.4th at p. 362, quoting *Reeves*, *supra,* 530 U.S. at pp. 148-49.) To date, the stray remarks doctrine has served a noteworthy role in this winnowing process, because it allows trial courts to identify and dismiss such statements lacking probative value of discriminatory animus, even assuming that such facts are true. The doctrine ultimately provides a vehicle for the court to determine that a plaintiff does not have sufficient evidence to support a discrimination claim and cannot survive a motion for summary judgment.

Were this Court, however, to affirm the Court of Appeal's rejection of the stray remarks doctrine, despite the plethora of federal and state courts who have recognized and applied the doctrine and this Court's guidance in *Guz*, every age-related comment in the workplace or any other comment in the workplace based upon a protected category could serve as "evidence" to support a rational factfinder's inference of discrimination. Motions for

summary judgment would be granted much less frequently, thereby clogging the courts with an increase in the number of cases that proceed to trial based on evidence once disregarded as legally insignificant. In addition, not only would discrimination cases reach trial more often, the volume of discrimination cases before this state's already overburdened courts would swell as the plaintiffs' bar would be more willing to litigate weaker cases, with less supporting evidence that could now achieve the effectively lowered hurdle of surviving summary judgment. Such survival of weaker cases past summary judgment would also penalize employers for having to defend such cases all the way to trial based on behavior they cannot control.

The stray remarks doctrine, then, operates to insure that evidence actually related to the allegedly discriminatory decision, if any, is presented by plaintiffs and is considered by courts in determining whether a discriminatory criterion was the basis for the decision. (See *Guz*, *supra*, 24 Cal.4th at p. 361 ["[T]here must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions. [Citation]"], emphasis in original.) Correspondingly, evidence unrelated to the decision, such as racist, ageist, or sexist remarks uttered by nondecisionmakers that would likely prejudice a jury against the employer, are disregarded by the court. The exclusion of such irrelevant remarks from the factfinder's ultimate determination of whether discrimination occurred provide employers an opportunity to obtain summary judgment on cases with minimal or no evidence supporting the plaintiff's claim that the employment decision was discriminatory.

B. As The Stray Remarks Cited By Reid And The Court of Appeal Are Not Probative Of Whether Reid's Termination Was Based On His Age And Are Not Evidence Of Pretext, The Stray Remarks Should Be Entirely Ignored.

The Court of Appeal's erroneous refusal to filter out various irrelevant comments relied on by Reid allowed this case to survive to a jury trial based in part on statements made by unidentified co-workers and vague comments that are simply unrelated to age. Not only are such comments textbook examples of stray remarks that are not probative of whether the decision to terminate Reid was based on his age, but they also do not constitute the substantial evidence required to be set forth by Reid to show that the nondiscriminatory reasons for his termination were pretextual and that his claims should survive summary judgment. (*Horn*, *supra*, 72 Cal.App.4th at pp. 806-07, cited by *Guz*, *supra*, 24 Cal.4th at 361, fn. 24.) Nonetheless, the Court of Appeal relied on a collection of stray remarks to determine that a triable issue of fact of pretext exists, warranting reversal of the trial court's grant of summary judgment. In particular, the Court of Appeal relied on the following facts:

- Statements made by Urs Hoelzle, a co-worker who did not participate in the termination decision, telling Reid that he was "slow," "fuzzy," "sluggish," "lethargic," did not "display a sense of urgency," and "lack[ed] energy." (Opn. pp. 2, 19.)

- Statements made by Hoelzle that Reid's ideas were "obsolete" and "too old to matter." (Opn. p. 19.)

- Unreported statements made by anonymous co-workers referring to Reid as an "old man" and an "old fuddy-duddy" and joking that "his office placard should be an 'LP' instead of a 'CD.'" (*Id.*)

- Wayne Rosing's statement to Reid on two occasions at or around the time of his termination that he was not a "cultural fit." (*Id.*)

All of the foregoing statements identified by the Court of Appeal fall solidly within the framework of the stray remarks doctrine. First, ambiguous comments—open to interpretation and unrelated to age—do not constitute evidence of discriminatory animus.[7] Here, Hoelzle's alleged comments, even if made, are not age-related. People of all ages exhibit the characteristics that Hoelzle allegedly used to describe Reid – slow, fuzzy, sluggish, lethargic, and lacking energy and urgency. Reid admits that he did in fact exhibit these characteristics, which indicates that the comments were not a code for ageist remarks. (App1532 [admitting that he had "bouts of slowness and fuzziness" and "being in a daze"], App1679 [he had "lethargic feelings"]; see *Fortier, supra,* 161 F.3d at p. 1113 [statements about employee's "energy level" do not raise inference of age discrimination].) Likewise, Mr. Rosing's alleged statements to Reid that he was not a "cultural fit," even if made,[8] do not relate to age.[9]

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[7] Ambiguous remarks not clearly related to age or any other protected class fall into the stray remarks category. (See footnote 6, *supra*; *Gonzalez v. El Dia, Inc.* (1st Cir. 2002) 304 F.3d 63, 66, 70 [affirming summary judgment where ambiguous remarks, referring to plaintiff as "out of style," "colorless," "mom," and expressing surprise that plaintiff was still working, were insufficient to establish discriminatory animus]; *Fortier v. Ameritech Mobile Commc'ns, Inc.* (7th Cir. 1998) 161 F.3d 1106, 1113 (*Fortier*) [affirming summary judgment where supervisor's comments that she wanted "new blood," a "quick study," and someone with "a lot of energy" did not necessarily relate to age].)

[8] Contrary to Reid's contention, there is no evidence that he was told "twice by Rosing" that he was not a "cultural fit" at Google. (Opn. p. 19.) The only evidence that Reid has cited for this contention is his understanding of one conversation with Mr. Rosing on February 13, 2004,

(continued...)

As for Mr. Hoelzle's alleged comment that Reid's ideas were "obsolete" and "too old to matter," there is no evidence that rejecting outmoded ideas reflects age animus or that a cutting-edge technology company like Google expected only its older workers to keep up with the latest innovations. (See, e.g., *Guz, supra*, 24 Cal.4th at p. 365 [citing plaintiff's failure to become "computer literate" as one of the "non-age-related business reasons" plaintiff was not selected for an alternate position]; footnotes 6 and 7, *supra*.)

Ultimately, neither speed and efficiency nor an individual employee's ideas or "cultural fit" are protected by the Fair Employment and Housing Act, nor do they serve as a reasonable basis for an age discrimination claim.[10]

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not any affirmative statement by Mr. Rosing: "***My understanding*** after my conversation with him [Mr. Rosing] is that, ***for some reason that he did not tell me***, I was no longer considered a cultural fit to engineering." (App1516, emphasis added.) Thus, Reid's "evidence" is simply his supposition after the fact of what Mr. Rosing meant—not Mr. Rosing's actual statements.

[9] Reid admitted that Google's "culture" was never defined. (App686-87.) The only meaning ascribed to this term in the record is the testimony of Mr. Rosing, who explained, when asked, that the Google "culture" has nothing to do with age and is instead "a value system of: Question everything. Find the best answer. Don't take the easy way. And if it's the hard way, and it's the right way, do it the hard way and get better results." (App795.) Further, Reid submitted a declaration from someone who was never even employed by Google in an attempt to equate the term "cultural fit" with age. Google objected to this attempted equation and this declaration extensively. (App2159-65, 2788-96.)

[10] Moreover, it is undisputed that Mr. Rosing, the person who made the decision to terminate Reid, never made any derogatory remarks about Reid's age. (App620-21, App676-77.) In fact, Reid even described Mr. Rosing as "fair," "even handed," and "a good guy." (App620, App879,

(continued...)

Second, remarks by nondecisionmakers are irrelevant to a discrimination claim, where the ultimate issue is whether the decisionmaker acted with discriminatory animus. (*Guz*, *supra*, 24 Cal.4th at pp. 358, 361.) This is particularly true where, as here, the remarks are not even attributable to a particular person.[11] Thus, unreported, anonymous jokes and comments by Reid's co-workers that he was an "old man" and an "old fuddy-duddy" have no connection with Reid's allegedly discriminatory termination, nor does Reid even attempt to provide evidence otherwise. In fact, Reid testified that each of these comments was made in 2002 or early 2003, more than one year before his termination, and that he never complained about any of these comments to anyone at Google, further distancing the anonymous comments from the allegedly discriminatory decision. (App634-35, App641-42.)

Given that each of the comments relied on by the Court of Appeal fall squarely within the stray remarks doctrine, and thus, are not probative

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App894.) Reid also actually admitted that even he does not believe that Mr. Rosing discriminated against him on the basis of his age:

> Q. [D]o you believe that Mr. Rosing discriminated against you on the basis of your age?
> A. **I do not.**

(App647, App560, emphasis added.)

Thus, it is untenable for Reid to claim that Mr. Rosing's comments evinced discriminatory animus in the decision to terminate his employment.

[11] Reid did admit that although he could not identify the speakers, he is certain that they were not his peers or superiors. (App632-34, 637-38, 640, 642 ["*None of my peers ever said anything disparaging to me and none of my superiors ever said anything to me*"], emphasis added.)

evidence of Reid's discrimination claim, let alone the required substantial evidence for demonstrating a triable issue of pretext, the Court of Appeal erred in reversing the trial court's grant of summary judgment on the basis of these remarks. Accordingly, this Court should reverse the judgment of the Court of Appeal and affirm the trial court's grant of summary judgment.

Issue No. 2.

When a moving party properly files objections to evidence opposing a successful summary judgment and pursues rulings from the trial court, yet does not receive them, should Courts of Appeal be permitted to reverse the trial court's grant of summary judgment, overrule all of the successful party's objections, and presume that all evidence provided by the non-moving party is admissible, no matter how irrelevant or flawed?

A. The Court Of Appeal's Holding That Google's Evidentiary Objections Are Presumptively Overruled Should Be Reversed.

Reid seeks to hold Google liable for intentional age discrimination, a claim based almost entirely on stray remarks made by his colleagues and dubious statistical evidence that are entirely unrelated to Reid's termination from employment. The spurious evidence described in the Opinion was, no doubt, disregarded by the Superior Court when it granted Google's summary judgment motion. Judge Elfving made clear that his decision was based only on "competent and admissible evidence," a statement made in reliance on *Biljac Associates v. First Interstate Bank of Oregon* (1990) 218 Cal.App.3d 1410, 1421 (*Biljac*) (overruled by *Demps, supra,* 149 Cal.App.4th at p. 566). In a decision divorced from basic standards of appellate review, the Court of Appeal reversed this judgment, determining

that the Superior Court's *Biljac* ruling equated to an overruling of all of Google's evidentiary objections. (Opn. p. 17.) It further engaged in a presumption that all of Reid's evidence was admissible, no matter how irrelevant or flawed. Specifically, the Court of Appeal opined, "... if the [trial] court neglects to expressly rule on the objection, it is presumed to have overruled it and admitted the challenged matter into evidence" (referred to herein as the "Presumed Admitted Rule" or the "Rule"). (*Id.* p. 15.)

Based on the Presumed Admitted Rule, the Opinion literally accepted all of Reid's proffered evidence, engaging in the legal fiction of turning the trial court's stated reliance only on "admissible" evidence into a wholesale acceptance of all of the evidence, regardless of its patent inadmissibility and complete lack of probative value. In doing so, the Court of Appeal established itself as the first California Court of Appeal, in a once-published decision, to second-guess a trial court's *Biljac* ruling while admitting all evidence, disregarding the successful moving party's evidentiary objections, and then, on those grounds, reversing a grant of summary judgment, sending all parties back to try the case.

The Court of Appeal's logic in establishing the Presumed Admitted Rule defies not only common sense, but also the stated intent of *Biljac* itself.[12] The Opinion is at basic odds with recent guidance from the United States Supreme Court in *Sprint/United Mgmt. Co. v. Mendelsohn* (2008)

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[12] The *Biljac* court held that "being able to identify particular flaws in the lower court's reasoning has no value because . . . summary judgment must be upheld if correct on any ground – regardless of wrong 'reasons' which may have guided the court." (*Biljac, supra,* 218 Cal.App.3d at p. 1419, citations omitted.)

128 S.Ct. 1140 (*Sprint*), and deprives Google and other successful summary judgment litigants of basic due process. Finally, the Opinion underscores the need for this Court to guide California trial and appellate courts out of the dense procedural thicket created by *Biljac* and its progeny.

B. This Court Should Provide Clear Guidelines For Litigants, Trial Courts, and Appellate Courts To Use In Navigating The Summary Judgment Process.

As opposed to the Presumed Admitted Rule, Google submits that, in light of controlling legal principles and in the interests of justice, one of the following three alternatives should be followed in this case: (1) the Superior Court's grant of summary judgment should be sustained on the grounds that it properly followed applicable law at the time; (2) the Court should find that by issuing a *Biljac* ruling when granting the summary judgment, the Superior Court implicitly sustained objections to Reid's summary judgment evidence; or (3) this Court should require the Court of Appeal to remand the matter to the Superior Court to rule on Google's evidentiary objections and decide the summary judgment motion on a clear and reviewable record. By following any one of these three approaches, the Supreme Court will provide clear guidelines for litigants, trial courts, and appellate courts to follow. In the process, this Court can reaffirm basic evidentiary principles critical to the summary judgment process, and, finally, ensure that litigants will no longer be saddled with the uncertainty and potential prejudice of the presumed waiver or overruling of their valid objections to evidence due to no fault of their own.

1. The Court of Appeal's Presumed Admitted Rule Threatens the Continued Utility of Summary Judgment Motions in this State.

Taken to its logical conclusion, the Presumed Admitted Rule places

successful summary judgment motions in California on a "judicial endangered species list." This is true because under the Rule, if a successful summary judgment is subject to a *Biljac* ruling, appellate courts following the Presumed Admitted Rule will have little choice but to reverse summary judgment in every case, no matter how weak or clearly objectionable the evidence may be.

The Presumed Admitted Rule is contrary to clear precedent set by this Court, which recognizes that summary judgment serves an important role for California litigants and the court system. (See *Guz*, *supra*, 24 Cal.4th at p. 361; *Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 299 [facilitating summary judgment is a laudable goal and is "a vehicle to weed the judicial system of an unmeritorious case which otherwise would consume scarce judicial resources"].) The purpose of summary judgment is to dispose of substantively meritless claims and defenses, thus avoiding the significant expenditures of time and resources required for trial for both the court and the party entitled to judgment. (See *Blair v. Pitchess* (1971) 5 Cal.3d 258, 284.) This Court has declared that "the great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz, supra*, 24 Cal.4th at p. 361.) This Court further noted that, based on the strength of an employer's showing of legitimate nondiscriminatory reasons for its adverse employment decision, summary judgment may be appropriate where a plaintiff's evidence is "too weak to raise a rational inference that discrimination occurred." (*Id.* at p. 362.)

Evidence is clearly "too weak" when it suffers from an evidentiary

defect, such as being irrelevant, or hearsay, or lacking in foundation, and is thus subject to the opposing party's objections at the summary judgment stage. On those objections, the trial court may determine that a party's evidence is too weak or otherwise flawed, and thus may deem the evidence inadmissible and outside the scope of the record reviewed by the court in reaching its ruling. (*Vineyard Springs Estates, LLC v. Wyatt* (2004) 120 Cal.App.4th 633, 642 [holding that a trial court "cannot decide whether a [summary judgment] motion should be denied or granted until it has first determined what admissible evidence is in play on the motion"].) This is particularly true because evidence submitted in opposition to a summary judgment motion "must be decided on admissible evidence." (*Guthrey v. State of Cal.* (1998) 63 Cal.App.4th 1108, 1119; Cal. Code Civ. Proc. § 437c (c)(d).) Accordingly, objections to evidence "are an integral part of the summary judgment process" because "[p]art of the judicial function in assessing the merits of a summary judgment or adjudication motion involves a determination as to what evidence is admissible and that which is not." (*City of Long Beach v. Farmers & Merchants Bank of Long Beach* (2000) 81 Cal.App.4th 780, 782, 784 (*Long Beach)*.) By creating and applying the Presumed Admitted Rule, the Court of Appeal turned these essential judicial functions on their heads, because evidence is now admissible on appeal, no matter how weak or even irrelevant, any time a trial court grants a summary judgment motion, but fails to expressly rule on the moving party's evidentiary objections.

2. The Court of Appeal Improperly Seized the Trial Court's Role in Defining the Scope of the Evidentiary Record.

The Opinion's usurpation of the trial court's role warrants a brief discussion about the relevant standards of review that the Court of Appeal

should have utilized and where it instead veered off course. In granting a motion for summary judgment, the trial court first considers the evidentiary objections from both parties and, with the resulting evidentiary record, makes a ruling on the merits. On appeal, the Court of Appeal reviews the decision to grant summary judgment *de novo*, but reviews the underlying evidentiary rulings with an abuse of discretion standard. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900 (*Ripon*) ["Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence"].) In fact, "[t]he burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." (*Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815, emphasis added.) As described more fully below, this approach is clearly endorsed by the United States Supreme Court, which recently reversed a Tenth Circuit decision largely because the intermediate court attempted to usurp the trial court's role of establishing the admissible evidence contained in the record. (*Sprint*, *supra*, 128 S.Ct. at p. 1145 [finding that "the Court of Appeals did not accord the District Court the deference we have described as the 'hallmark of abuse-of-discretion review.'"].)

When confronted with these dual standards of review, however, the Opinion abandons this well-established framework, stating: "It does not matter what evidence was taken into account. What matters is what evidence *should* have been taken into account, and whether the order under review—granting or denying summary judgment—can be sustained in light of that evidence, coupled with the governing substantive law." (Opn. p. 16,

emphasis in original.) Effectively, then, the Court of Appeal adopted a *de novo* review of the entirety of the summary judgment pleadings, as if stepping into the shoes of the trial court. In doing so, it improperly seized the trial court's duties of determining the parameters of the admissible evidentiary record on which to base a decision on summary judgment.[13] Overstepping these bounds is particularly troubling in cases like this, where Judge Elfving of the Superior Court had already spoken about the scope of evidence he considered in reaching his determination to grant Google's summary judgment motion, by specifically stating his reliance "only on competent and admissible evidence." (App2853.) This statement presupposes that of the totality of the evidence proffered by both parties, *some* of the evidence was deemed inadmissible and therefore *some* of the evidentiary objections were sustained. As a result, the Court of Appeal's finding that all of Reid's evidence was admitted not only defies logic and common sense, but also flies in the face of a straightforward reading of the Superior Court's written order.

As a result, the *Reid* Court's approach is contrary to overwhelming case authority permitting the trial court to determine the evidentiary record and tempering the appellate court's role. (*Guz*, *supra*, 24 Cal.4th at p. 363 ["On appeal after a motion for summary judgment has been granted, we

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[13] The Court of Appeal went further by making a wholly unfounded and novel statement of law that "all reasonable doubts about the admissibility of evidence, like doubts on other aspects of the motion, *must* be resolved in favor the party opposing summary judgment." (Opn. p. 16.) While it is well-established that all inferences and conflicts in the evidence must be resolved in favor of the non-moving party, no court, until now, has stated that "close calls" on whether to admit evidence must also be accorded that deference. Evidence is either admissible or it is not.

review the record *de novo*, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained."]; see also *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694 ["Although it is often said that an appellate court reviews a summary judgment motion 'de novo,' the weight of authority holds that an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard."]; *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169; *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 192, fn. 15.) This approach is also consistent with the Sixth District's own standard utilized just two years ago. (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 159 ["[I]n determining whether the parties have met their respective burdens, the court considers all admissible evidence and the inferences reasonably drawn therefrom in the light most favorable to the party opposing the motion"], emphasis added.)

3. The Superior Court Correctly Decided that Reid's Proffered Evidence Failed to Create any Material Issues of Fact to Survive Summary Judgment.

The Superior Court determined that Reid failed to state a claim based on age discrimination or anything else, thus dismissing his Complaint subject to Google's summary judgment motion. Judge Elfving's reasoning in reaching this conclusion was sound, because he specifically relied only on competent and admissible evidence. (App2853.) In doing so, he necessarily excluded incompetent and inadmissible evidence. (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26 [non-moving party must show through "competent and admissible evidence" that a triable issue of fact exists].) In direct contrast, by adopting the Presumed Admitted Rule, the

Court of Appeal "admitted" patently inadmissible evidence and then relied upon it to opine on how the summary judgment motion should have been decided. Included in the inadmissible evidence presumed admitted and relied upon in the Opinion were stray remarks that lack personal knowledge and constituted hearsay, irrelevant generalities of Google's "youthful atmosphere," and irrelevant statistical evidence.

In addition to the reasons described above in Issue No. 1 relating to the stray remarks doctrine, purportedly ageist remarks Reid self-servingly offered at his deposition also should not have been admitted *post hoc* by the Court of Appeal, particularly in light of Google's evidentiary objections, including hearsay. Reid was unable to attribute a number of these remarks to any particular individual, nor did he present any argument about why the hearsay rule should not bar admission. (See *Jenner v. City Council of City of Covina* (1958) 164 Cal.App.2d 490, 496 ["mere uncorroborated hearsay or rumor is not competent evidence"].)

Reid's unprovable claim of a "general youthful atmosphere" at Google is similarly incompetent evidence because it lacks a factual foundation and is entirely irrelevant to the termination decision. "Reid asserts that a general 'youthful' atmosphere at Google, including employees participating in recreational activities like hockey, foosball and skiing demonstrate the environment was biased toward older workers." (Opn. p. 19.) Reid does not contend that he or any other employees who are over 40 were excluded from these activities, nor is there any basis to conclude that these activities are age-related. Moreover, the fact that Google employees may play foosball and go on ski trips is not probative of whether Reid was terminated due to his age. Similarly, the fact that Google has a "general youthful atmosphere" is not probative at all of Reid's claim that his

termination was because of his age. (See *Guerin v. Genentech, Inc.* (N.D. Cal. Oct. 24, 2005, C04-03099 JSW) 2005 WL 2739305, at *6 [granting summary judgment to defendant and holding that the fact that supervisors wore younger-looking clothes and sponsored pop music performances allegedly manifesting a youthful "corporate culture" was "of no probative value whatsoever"].)

Reid's proffered statistical evidence is also irrelevant, and thus not admissible, because his expert's statistics say nothing about Google's decision to terminate Reid's employment. (App1791-1802.) Reid's expert's declaration makes no mention of discriminatory animus relating to his termination, and, in fact, makes clear that his statistics have nothing to do with terminations in any context at Google. (See Reid's Opening Appellate Brief at p. 29 ["[A] meaningful analysis of Google's termination practices could not be performed."].) Thus, Reid's statistics fail to shed any light on the very claim he attempts to prove – that Reid's termination was motivated by Google's intentional age discrimination. Nevertheless, the Court of Appeal determined that a statistical analysis by Reid's expert of Google employees' bonuses and performance ratings, not terminations, was probative on the issue of whether Reid's termination was discriminatory.

Applying its Presumed Admitted Rule, the Court of Appeal considered this evidence sufficient to raise a triable issue of material fact, even though none of this evidence has any connection to whether Google's decision to terminate Reid was based on his age, and all were subject to

Google's vigorous objections to evidence.[14] (See, e.g., App2774-805; App2124-68 [Response to Reid's Additional Fact Nos. 8, 14, 26, 49, 66-71]; RT at 45:23-46:9, 48:25-49:2; see also RT at 85:20-87:9.) Based on Google's objections and the clear irrelevance of the statistics, the Superior Court correctly disregarded Reid's expert's evidence in granting Google's summary judgment motion. On the other hand, the Court of Appeal should not have considered the statistics, because courts generally disregard such evidence, particularly when it has no connection to the allegedly discriminatory employment action; here, Reid's termination. (See *Smith v. Leggett Wire Co.* (6th Cir. 2000) 220 F.3d 752, 762 [granting summary judgment for failure to show pretext because statistics relating to the percentage of minority supervisors were not relevant to the issue of whether the plaintiff was terminated because of his race]; *Kier v. Commercial Union Ins. Cos.* (7th Cir. 1987) 808 F.2d 1254, 1258 [holding that statistical

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[14] By so ruling, the Court of Appeal also essentially found that all plaintiffs who proffer statistical evidence, no matter how weak or irrelevant, will automatically survive summary judgment, because "... any question about the validity of the statistical evidence in this case, and what it suggests, is clearly a question of the weight of the evidence and is the province of the jury." (Opn. p. 19.) The Court of Appeal's failure to take into account that at least some statistics will not satisfy a plaintiff's burden of persuasion on summary judgment, or even to consider the serious flaws in Reid's statistical evidence, is directly contrary to this Court's opinion in *Guz*. In *Guz*, this Court discussed the weaknesses in plaintiff's statistical evidence and ultimately concluded that the small sample size was insufficient to create a triable issue of material fact. (*Guz, supra,* 24 Cal.4th at p. 367; *Fallis v. Kerr McGee Corp.* (10th Cir. 1991) 944 F.2d 743, 746 [finding sample size of 9 carried "little or no probative force"].) Based on this Court's analysis in *Guz*, Reid's sample sizes of 18 and 23 are too small to be probative, which is yet one more reason that Reid's statistics should have been discarded.

evidence relating to the employer's hiring practices is irrelevant in discriminatory discharge case]; see also *LeBlanc v. Great Am. Ins. Co.* (1st Cir. 1993) 6 F.3d 836, 848 [finding that statistical evidence does not raise a triable issue of fact for a number of reasons, including that "[t]here is... no evidence whatsoever to connect the statistics to [the employer's] specific decision to dismiss [plaintiff]"]; *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 663, fn. 6 ["In this context, statistical evidence in a disparate treatment case, in and of itself, rarely suffices to rebut an employer's legitimate, nondiscriminatory rationale for its decision to dismiss an individual employee."].)

Google further objected vigorously to Reid's expert's (Matloff) declaration, which contains the non-probative statistical regression analyses at issue, on the grounds that Reid's "evidence" presented was inadmissible because it was irrelevant, hearsay, not the best evidence, unduly prejudicial, misleading and impermissibly vague, conclusory, lacked foundation, and was improper opinion testimony. (App2774-2805.) Rather than address Google's evidentiary objections, the Court of Appeal characterized Google's arguments regarding the Matloff declaration in its opposition brief as follows: "Google challenges the statistical evidence offered by Reid on numerous grounds, including Matloff's methodology and sample sizes analyzed." (Opn. p. 13.) The Court thus barely referenced Google's eight pages of written objections that specifically object to each of the relevant portions of the Matloff declaration, and provided no analysis of any of Google's objections to evidence.

Indeed, rather than consider the Superior Court's determinations of Google's objections and the substance of Google's objections, the Court of Appeal simply leapt to the conclusion that, "Statistical evidence is clearly

admissible in the present case." (Opn. p. 17.) In so finding, the Court of Appeal apparently made its own pronouncement on this evidentiary issue and simply refused to consider Google's valid objections to Matloff's declaration. By doing so, the court would have established a far-reaching precedent that allows litigants in discrimination cases to virtually insure that they will cross the summary judgment threshold and head to trial, so long as they first hire a statistical expert — even if, as in this case, the statistics do not even purport to measure the ultimate employment decision at issue.

4. The Court Should Adopt a Rule that by Issuing a *Biljac* Ruling the Trial Court Implicitly Sustained Objections to Summary Judgment Evidence.

If the Courts of Appeal are going to adopt a presumption about what evidence was admitted by the trial court in ruling on a summary judgment motion, it is more logically consistent to presume that the trial court, in granting summary judgment and issuing a *Biljac* ruling, implicitly ruled in favor of the prevailing party on all evidentiary objections, which is one of the many approaches chosen by Courts of Appeal confronted by *Biljac* rulings. Instead, by "presuming" that all of the objectionable evidence was admitted, and then using this "presumption" to overrule the trial court, Google has been grievously denied its opportunity to have its objections considered and ruled upon. Indeed, the more logical "presumption" would have been that in granting Google's dispositive motion, the Superior Court more obviously sustained Google's objections and excluded this flawed evidence.

In *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 241, 244 (*Sambrano*), the Fourth District affirmed summary judgment for

defendant, who objected to the admission of a key piece of evidence on the basis that it was hearsay, irrelevant, and lacked foundation. In granting summary judgment to defendant, the trial court declined to rule on defendant's evidentiary objections, relying instead on *Biljac* and stating that it relied on competent and admissible evidence. (*Id.* at 229.) The Court of Appeal carefully considered the impact of the *Biljac* ruling, ultimately determining that, "if the *Biljac* theory is accepted, the evidence was not admitted, and summary judgment should be upheld. We believe that is the only appropriate approach on this record." (*Id.* at p. 237, emphasis added.) Thus, the *Sambrano* Court specifically found that the trial court refused to admit key evidence based on its inadmissibility, even though the trial court relied entirely on *Biljac* and stated only that it relied on admissible evidence in reaching its determination. (*Id.* at pp. 234, 241.) The result of the Fourth District's ruling was that the key evidence at issue was found inadmissible at both the trial court level and on appeal, affirming summary judgment accordingly.

Similarly, in *Hayman v. Block* (1986) 176 Cal.App.3d 629, 640, the Second District, reviewing a grant of summary judgment, noted that "if the trial judge does not rule specifically upon the objections but only considers legally admissible evidence in making its ruling, the appellant [i.e., the losing party, Reid] has the burden of pointing out any evidentiary errors that prejudiced his position." This holding recognizes that the burden of appeal is on the non-prevailing party and, thus, impliedly accepts that evidentiary rulings should be presumed to have been made in the prevailing party's favor. (See also *Gatton v. A.P. Green Servs., Inc.* (1998) 64 Cal.App.4th 688, 692 [reviewing grant of summary judgment where the prevailing party asserted unresolved evidentiary objections, Second District

held that "the court implicitly sustained the objection"].)

Applying this approach would lead to a clean appellate posture, in that the non-prevailing party could appeal both the ruling on the merits of the motion and also the implied overruling of their objections. In contrast, under the Opinion, even if a party prevails on a summary judgment motion, and even if that same party vigorously raised its objections to inadmissible evidence at every possible turn, if the trial court issues a *Biljac* ruling, then the prevailing party must appeal its own evidentiary objections, just in case the Court of Appeal decides to rely on flawed, objected-to evidence in its review. Thus, every time a summary judgment is granted, *both* parties will be forced to appeal: the losing party to seek *de novo* review of the trial court's ruling on the merits of the motion and the prevailing party to challenge any presumptive overruling of its evidentiary objections. Such a result is absurd and only further confuses the procedural posture at appeal. If this Court were to adopt a presumption that evidentiary objections were implicitly ruled in favor of the prevailing party, only the losing party would be in a position to appeal. Instead, the Court of Appeal's after-the-fact "presumption" that all evidence was admitted in this case, despite the fact that Google was successful in its dispositive motion, deprived Google of its opportunity to squarely appeal issues of admissibility.

5. Alternatively, Consistent with the United States Supreme Court's Guidance, this Court Should Require the Court of Appeal to Remand the Matter to the Trial Court to Rule on the Unresolved Evidentiary Objections and Decide the Merits of the Motion on a Clear and Reviewable Record.

On a similar procedural posture in *Sprint/United Mgmt. Co. v. Mendelsohn* (2008) 128 S.Ct. 1140, the United States Supreme Court recently recognized that the appropriate judicial framework is for lower

courts to determine evidentiary rulings, while appellate courts should defer to the trial courts in this respect. In *Sprint*, an age discrimination case, the district court excluded testimony similar to much of the evidence put forward by Reid here, i.e., "me too" testimony by witnesses alleging age discrimination by employees of the company who "played no role in the adverse employment decision challenged by the plaintiff." (*Id.* at p. 1144.) The Court of Appeals in *Sprint* engaged in its own evidentiary analysis, found that the district court applied an improper *per se* rule in reaching its decision, and remanded to the lower court with instructions to admit the challenged evidence.

The Supreme Court vacated the Court of Appeals' decision and remanded to the District Court "to conduct the relevant inquiry under the appropriate standard." (*Id.* at p. 1143.) In reaching this determination, the Supreme Court criticized the Court of Appeals' involvement in an evidentiary inquiry, finding that "the Court of Appeals should not have engaged in that inquiry," but, instead, given "the unclear basis of the District Court's decision, the Court of Appeals should have remanded the case to the District Court for clarification." (*Id.* at p. 1144.)

The Supreme Court opined that, in the event of an ambiguous ruling from a lower court, the Court of Appeals should remand to the trial court. That is particularly true when the ruling at issue involves evidentiary rulings, as discussed in detail by the Court:

> When a district court's language is ambiguous, as it was here, it is improper for the court of appeals to presume that the lower court reached an incorrect legal conclusion. A remand directing the district court to clarify its order is generally permissible and would have been the better approach in this case. [Furthermore, specifically with respect to evidentiary rulings by a lower court,] a district court virtually always is in

> the better position to assess the admissibility of the evidence in the context of the particular case before it.

(*Id.* at p. 1146.)

The Court further discussed that it has long recognized the principle that a lower court should be afforded "broad discretion" for its evidentiary rulings by an appellate court, stating:

> A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules. Assessing the probative value of [the proffered evidence], and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403…

(See *Sprint*, *supra*, 128 S.Ct. at p. 1145, citing *U.S. v. Abel* (1984) 469 U.S. 45, 54.)

In line with these basic principles, California Courts of Appeal have similarly recognized that remanding the issue to the trial court is appropriate, with an order to first rule on the unresolved evidentiary objections and then re-adjudicate the merits of the dispositive motion. In fact, as some Courts of Appeal have lamented, the appellate stage is the wrong time and place to establish the parameters of the evidentiary record, as the trial court is better-suited to perform that judicial function. (See *Sambrano, supra,* 94 Cal.App.4th at p. 236, citing *Long Beach*, *supra*, 81 Cal.App.4th at p. 780 [holding that preserving objections for appellate review under the *Long Beach* "approach seemingly transfers the evidentiary ruling job to the appellate court. This is not always a simple task, and not one suitable to this court, normally sitting as a three-judge panel committed to reviewing issues of law, not fact."].)

In *Vineyard Springs Estates, LLC v. Wyatt* (2004) 120 Cal.App.4th 633, 642, the trial court promised the parties three times that it would rule

on the evidentiary objections, yet failed to do so. The Third District observed that the trial court could not decide whether a summary judgment motion should be granted or denied without first deciding what "admissible evidence is in play on the motion." (*Id.*) Thus, the Court issued a writ of mandate commanding the trial court to vacate its order denying the summary judgment, to rule on the evidentiary objection, and then reconsider the motion on the evidence remaining after its rulings on the evidentiary objections. (*Id.* at p. 643.)

In *Parkview Villas Assn., Inc. v. State Farm Fire & Cas. Co.* (2005) 133 Cal.App.4th 1197, 1205 (*Parkview*), the defendant moved for summary judgment and filed fifteen pages of written objections to the evidence plaintiff submitted in its opposition papers. During oral argument, defendant's counsel continued to press its objections and repeatedly stated that he did not wish to waive them. The trial court assured counsel that "You didn't waive anything. I'm taking your objections on both sides under submission." (*Id.* at p. 1206.) Yet, when the trial court granted summary judgment, it did not expressly sustain or overrule any of the defendant's written objections. On appeal, the Second District panel refused to hold that the objections were waived, instead finding that the *Long Beach* exception applied given defendant's repeated attempts to assert its continued objections. (*Id.* at p. 1217.) However, instead of considering the preserved objections at the appellate level (thereby performing the duties left by the trial court's omission), the panel exercised judicial restraint and remanded the matter back to the trial court for it to complete its duties and rule on the objections.

More recently, the Second District again remanded unresolved evidentiary objections back to the trial court for adjudication. In *Hall v.*

Time Warner, Inc. (2007) 153 Cal.App.4th 1337, 1348 (*Hall*), on an appeal of the denial of an anti-SLAPP motion to strike, the Second District panel recognized that rulings on evidentiary objections involve an exercise of discretion for the trial court. For the appellate court to assume this trial court responsibility and adjudicate objections would conflate the *de novo* review of the ruling on the dispositive motion with the abuse of discretion review of the evidentiary objections. (See *Mitchell v. United Nat. Ins. Co.* (2005) 127 Cal.App.4th 457, 467.) Instead, the Second District reversed and sent the matter back to the trial court with directions to rule on the objections and enter a new order based on the resulting evidentiary record. (*Hall, supra*, 153 Cal.App.4th at p. 1350.)

There is an appealing quality to this line of cases. These cases require the trial court to complete the task it started, rather than prejudicing litigants who vigorously pursued their rights, and requiring the Court of Appeal to look into an evidentiary crystal ball to divine which evidence the trial court considered "admissible" and which it did not based on an ambiguous *Biljac* ruling. (See, e.g., *Sprint*, *supra*, 128 S.Ct. at p. 1146) [holding that when a lower court's evidentiary ruling is "ambiguous . . . it is improper for the Court of Appeals to presume that the lower court reached an incorrect legal conclusion;" thus remand is warranted].) By remanding to the trial court and ordering it to clarify how it performed its required duties, this approach guarantees both that all of the evidentiary objections are fully considered and that the record on appeal is clear and unambiguous. The Court of Appeal may then review the grant or denial of summary judgment *de novo* and revisit the evidentiary rulings only under an abuse of discretion standard. (*Ripon, supra,* 100 Cal.App.4th at p. 900.) A Court of Appeal that attempts to cure the trial court's ambiguous *Biljac* ruling by

itself, ruling on evidentiary objections for the first time, breaches the review limitations placed upon it by the abuse of discretion standard.

Accordingly, should the Court choose not to adopt the approach outlined in Sections B.3 and B.4 above, Google urges that the Court rule that Courts of Appeal must refrain from ruling in the first instance on unresolved evidentiary objections, and instead should remand or issue a writ of mandate, as appropriate, requiring the trial court to rule on evidentiary objections. This approach will result in two benefits to the judicial system. First, if trial courts are faced with the prospect of having seemingly final dispositions punted back to them for proper express rulings, the trial courts will forgo the convenience of such *Biljac* rulings and will be forced to take the time making the required express rulings on each objection.[15] This will serve to eliminate this repeated procedural headache for Courts of Appeal. Secondly, it will eliminate the ongoing erosion of the abuse of discretion standard for evidentiary issues, which is starkly illustrated by the Court of Appeal's opinion in this underlying matter. (See Opn. p. 16 ["Nor is the trial court often, if ever, in a better position than a reviewing court to weigh the discretionary factors" of admitting

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[15] Google appreciates that a number of trial courts, including the one in *Biljac*, have lamented what a time-consuming task it can be to make express rulings to the sometimes voluminous written evidentiary objections in a summary judgment proceeding. Google is mindful of the overworked trial-level judiciary and does not argue that trial courts making *Biljac* rulings are being indolent. However, it is worth noting that California Rule of Court 3.1354, as amended on January 1, 2007, now simplifies this process, because it requires that written evidentiary objections conform with specific content and format requirements that point the court to the exact location of objectionable evidence and provides the trial court with a simple "sustained" or "overruled" check box for each objection. With these requirements in place, express rulings should be considerably less taxing.

questionable evidence].)

C. This Court Should Expressly Reject Interpretations Of *Biljac* That Punish Litigants Because Of A Trial Court's Failure To Rule On Evidentiary Objections.

Among the various *Biljac* interpretations that have emerged from the California Courts of Appeal, there are at least two approaches mentioned in the Opinion that warrant an additional express ruling by this Court. Several Courts of Appeal, including the Sixth District here, have held that a trial court's failure to expressly rule on evidentiary objections results in a finding that either: (1) all objections are waived, and are not preserved for appellate review; or (2) all objections are overruled that were not expressly sustained, thus the objections are preserved for appellate review. (See Opn. p. 14.) To date, the ongoing *Biljac* dialogue on these issues among the Courts of Appeal has been largely academic, because the general rule is that all of the published, binding cases have affirmed summary judgment in scenarios, like this one, where a party made and pursued its objections to evidence.[16] This Opinion is the only striking exception to this general rule.

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[16] By way of example, in the **First District**, while affirming summary judgment, the Court of Appeal recently overturned *Biljac*, and now will generally consider all objections subject to a *Biljac* ruling waived. (*Demps, supra,* 149 Cal.App.4th at p. 579.) In the **Third District**, while affirming summary judgment, the Court of Appeal purportedly follows *Ann M. v. Pacific Plaza Shopping Ctr.* (1993) 6 Cal.4th 666 (*Ann M.*), but holds that *Ann M.* "teaches that we must take this [*Biljac*] statement as an implied overruling of any objection not specifically sustained." (See *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 736 (*Laird*).) As such, the **Third District** "may not consider [the objecting party's] renewed objections [to evidence]" on appeal. (*Ibid.*, emphasis added.) On the opposite end of the spectrum from the **Third District**, the **Fourth District** interpreted "the *Biljac* theory" to require that "the [objected-to] evidence was not admitted, and summary judgment should be upheld," thus reading (continued...)

Thus, prior to the *Reid* Opinion, so long as parties pursued their objections, they were generally not prejudiced by a Court of Appeal's interpretation of *Biljac*, regardless of the Court's opinions regarding evidentiary objections, because the trial court's decision remained unchanged. The Opinion presents a very different and far more prejudicial story, as the Sixth District stands alone in its reversal of a trial court's order of summary judgment and creation of a Presumed Admitted Rule, although Google made every effort to secure rulings on the objections.

1. The Origins of the Waiver Rule and Overruling Principle.

In *Ann M.*, this Court noted in a footnote that "because counsel failed to obtain rulings, the [evidentiary] objections are waived and are not preserved for appeal." (*Ann M., supra,* 6 Cal.4th at p. 670, fn. 1.) This dicta was repeated by this Court again in a footnote six years later. (*Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186, fn. 1 (*Sharon P.*).) Without further discussion, these fateful words have been interpreted to mean that the trial court is obligated to rule expressly on all evidentiary objections and, if the court fails to do so, the court's silence on the issue effects a "waiver" of objections, so that the party's objections are not preserved for appellate review. (See, e.g., *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 623-24, fn. 7; *Demps, supra*, 149 Cal.App.4th at p. 578 ["The objections are deemed waived and the objected-to evidence included in the record. This we, conclude, is the holding dictated by *Ann*

(...continued from previous page)
the trial court's silence as sustaining the prevailing party's objections and affirming summary judgment for defendant. (*Sambrano, supra,* 94 Cal.App.4th at p. 241, citing *Biljac*, *supra*, 218 Cal.App.3d at p. 1410.)

M."].) The Third District has similarly interpreted *Ann M.* as supporting an overruling principle, determining not only that a *Biljac* ruling overrules objections, but that the Court of Appeal then cannot consider a party's renewed evidentiary objections on appeal. (See *Laird, supra,* 68 Cal.App.4th 727, 736.) On this posture, as well as in the underlying appellate decision, the overruling principle is indistinguishable from the waiver rule in its prejudicial effect. For example, in *Laird*, the Court of Appeal refused to consider objections, while in the Opinion, the Court of Appeal simply failed to do so. Regardless of whether being waived or overruled, the moving party's objections received no credence or consideration. Thus, the fact that the Sixth District purportedly did not waive, but instead overruled, Google's objections is small consolation to a formerly victorious party now heading back to trial.

2. Due Process Concerns Warrant against either Waiver or Overruling a Party's Objections Based on the Trial Court's Failure to Act.

Due process concerns of fundamental fairness prohibit waiving or overruling a party's objections where the failure to rule on properly asserted evidentiary objections is due to the trial court's omission. Due process requires that the parties be permitted to have a "a meaningful opportunity to be heard." (*Cal. Teachers Assn. v. State of Cal.* (1999) 20 Cal.4th 327, 338-39; Cal. Const. Art. 1, § 7; U.S. Const. Amend. 14; *Simmons v. U.S.* (1955) 348 U.S. 397, 401 [holding that both "constitutional limitations" and federal law compelled the FBI to provide a summary of unfavorable evidence that would "permit the registrant to defend against the adverse evidence"]; *Crowell v. Benson* (1932) 285 U.S. 22, 47 [opining that administrative hearings providing for "due notice, proper opportunity to be

heard, and . . . findings are based upon evidence" satisfy due process requirements].) Where a litigant lodges written evidentiary objections, objects during the hearing, and requests a ruling on these objections, it cannot be said that the trial court's refusal to rule constitutes a waiver on the part of the objecting party. (*Cardosa v. Fireman's Fund Ins. Co.* (1956) 144 Cal.App.2d 279, 282, citing *Bastanchury v. Times-Mirror Co.* (1945) 68 Cal.App.2d 217, 240) (["A waiver is defined . . . as the 'intentional relinquishment of a known right . . . and may result from an express agreement or be inferred from circumstances indicating an intent to waive.'"]). Put another way, the omissions of the judicial system cannot operate to prejudice the rights of the litigants. (See generally *Corbett v. Corbett* (1931) 113 Cal.App. 595, 600 [reciting the maxim that "'a delay of the court shall prejudice no one'"].)

3. The Plain Language of the California Code of Civil Procedure Prevents a Finding of Waiver.

California Code of Civil Procedure Section 437c, the summary judgment statute, specifically addresses when evidentiary objections may be deemed waived. Section 437c(b)(5) states that "[e]videntiary objections not made at the hearing shall be deemed waived." The familiar maxim of statutory construction of *inclusio unius est exclusio alterius*, inclusion of the one is the exclusion of the other, requires a finding that the Legislature intended to omit other circumstances where waiver of evidentiary objections may be asserted. (See generally *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 373 [citing the maxim with approval].) Therefore, it cannot be convincingly argued that in addition to those objections not made at the hearing being waived, other objections that are indeed made at the hearing, but that are not ruled upon by the trial court, are also waived. (See Cal.

Code Civ. Proc. § 437c(b)(5).)

4. Courts of Appeal Have Created Exceptions to Mitigate the Draconian Effects of the Waiver or Overruling Rules.

A growing number of Courts of Appeal have recognized the offense given to due process and fundamental fairness concerns by the waiver rule and overruling principle and, in response, have carved out an exception where the party diligently pursued its written objections at the motion hearing and requested a ruling. In *Long Beach, supra,* 81 Cal.App.4th at p. 784, the Second District noted that in *Ann M.* and *Sharon P.* there was "no indication that any effort was made to secure a ruling on the evidentiary objections." Based on this distinction, the Second District found waiver unpalatable where counsel pressed the court to rule on its evidentiary objections, by "twice orally rais[ing] the issue of securing a ruling on the previously filed written evidentiary objections in court before the trial judge." (*Ibid.*) The court observed that the omission was that of the trial court, who had the duty to rule on evidentiary objections once they are properly raised, and "there was nothing further defense counsel could be expected to do in terms of seeking rulings on the previously filed evidentiary objections." (*Ibid.*) As such, the court held that the objections were not waived. (*Id.* at p. 784-85.)

Numerous appellate panels have also recognized such an exception to the waiver rule where the record indicates a party made efforts to pursue a ruling on its objections. (*Parkview*, *supra*, 133 Cal.App.4th at p. 1217 [recognizing and following the *Long Beach* exception]; *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1580 [following the *Long Beach* exception, noting that Defendant "cannot be faulted merely because the trial court did not provide the response he sought" to his objections]; *West v. Sundown*

Little League of Stockton, Inc. (2002) 96 Cal.App.4th 351, 356 [following the *Long Beach* exception where defendants made "repeated efforts" to obtain a ruling on their evidentiary objections, yet the trial court "refused to address them"]; cf. *People v. Braxton* (2004) 34 Cal.4th 798, 814 [no waiver where trial court fails to rule on motion but defendant "did all that could reasonably be expected or required under the circumstances"].)

5. The Court of Appeal's Approach to *Biljac* in this Case Prejudiced Google, Creates Uncertainty and Inefficiency in The Judicial System, and Should be Rejected.

Although the *Long Beach* exception directly applied to the facts of this case, as Google made every effort to secure rulings on its objections, the Court of Appeal ignored this equitable exception, and instead created the Presumed Admitted Rule. Though the Court lauds the Presumed Admitted Rule as creating the "simplest and soundest approach," the Rule is rife with prejudice to the prevailing party and entirely supplants the discretion of the trial court. (Opn. p. 15.) A presumption that all objections were overruled and all proffered evidence was admitted greatly increases the probability that summary judgment will be reversed, for the simple reason that the appellate court will be reviewing an evidentiary record much broader than the Superior Court originally considered in reaching a determination on the merits of the motion.

Such a result fosters both uncertainty and inefficiency in the judicial system. The Presumed Admitted Rule also runs afoul of this Court's warning that "it is proper to say, and has been said before, that the practice of receiving evidence that is objected to, subject to the objection and without a ruling thereon, is not, except under very exceptional circumstances, to be commended." (*Clopton v. Clopton* (1912) 162 Cal.

27, 32-33.) The Court of Appeal panel below engaged in this very practice, by adopting a rule that Google's objections were presumptively overruled and thereby otherwise accepting Reid's irrelevant and inadmissible evidence.

Rather than allowing confusion and injustice to continue based on the appellate courts' flawed analyses described above, this Court should reject the waiver and overruling approaches and, instead, provide clear guidelines for litigants and judges to follow. Those guidelines should preserve the trial court's role as the primary decisionmaker in establishing the parameters of the evidentiary record. The guidelines should also honor basic summary judgment principles, including the abuse of discretion standard for evidentiary rulings. By following any one of the approaches proposed herein, the Supreme Court will achieve these results.

VI.

CONCLUSION

The Superior Court, in granting Google's motion for summary judgment, properly found that Reid entirely failed to satisfy his burden of proving that his termination was caused by discrimination on the basis of age by anyone at Google. To reach the opposite result, the Court of Appeal strayed far afield from basic evidentiary principles and time-honored rules setting forth the varying responsibilities of trial courts vis-à-vis appellate courts in this state. Simply put, the Court of Appeal usurped the Superior Court's role in establishing the parameters of the admissible evidence in the record in this, or any given case. In doing so, the Court of Appeal afforded the Superior Court's *Biljac* ruling no deference, despite the fact that the lower court made clear that it chose to grant summary judgment based only

on competent and admissible evidence.

The approach adopted by the Court of Appeal was certain to cause prejudice to litigants and ongoing uncertainty among the trial courts and appellate courts. First, the Court of Appeal's rejection of the stray remarks doctrine was at odds with decisions by numerous Courts of Appeal and all of the federal circuits. The decision would have permitted Reid, and countless plaintiffs sure to follow in his wake, to fashion a triable issue of fact from anonymous or off-hand comments entirely divorced from an employer's actual decisionmaking process. As a result, plaintiffs could routinely successfully avoid summary judgment based on "evidence" unrelated to the adverse employment decision central to the case.

Second, the Court of Appeal's dangerous Presumed Admitted Rule, finding that a trial court's failure to rule on specific evidentiary objections makes all evidence admissible on the record of any case, would undermine both the trial court's long-held discretion to make evidentiary determinations and the objecting party's due process rights on appeal. Similarly, this Rule could also result in a marked increase of plaintiffs leaping over the summary judgment hurdle based on evidence that the lower court may well have discarded as irrelevant and inadmissible.

For all of the foregoing reasons, Google respectfully requests that this Court reverse the Court of Appeal and order that judgment again be entered in favor of Google. Alternatively, Google respectfully requests either that this Court hold that a trial court's issuance of a *Biljac* ruling equates to an implicit sustaining of a moving party's objections, and sustain Google's objections in this case, or find that the case should be remanded to

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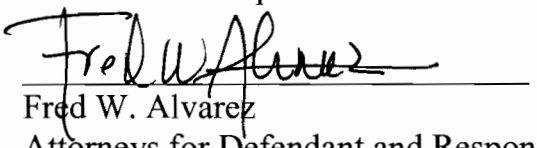
the Superior Court for express rulings on Google's objections to evidence and on Google's motion for summary judgment.

DATED: March 28, 2008

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation



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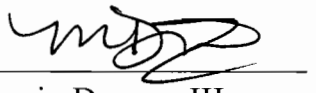
CERTIFICATE OF WORD COUNT

(Cal. Rule of Court 8.504(d)(1))

The text of this brief consists of 13,946 words (including footnotes), as counted by the Microsoft Word 2003 word-processing program used to generate it.

Respectfully submitted,

Dated: March 28, 2008 By: 

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Jo Ann Hylton