IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

NORTH AMERICAN TITLE COMPANY, et al.,

Petitioners,

SUPERIOR COURT OF FRESNO COUNTY,

Respondent,

CAROLYN CORTINA, et al.

Real Party in Interest.

Case No. S280752

ANSWER BRIEF ON THE MERITS

On review from the decision of the Court of Appeal of the State of California, Fifth Appellate District, Case No. F084913

Superior Court of California, County of Fresno, Case No. 07CECG01169

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I. INTRODUCTION

The court of appeal decision is faithful to the text, purpose, and history of California's statutes governing judicial disqualification. The text of Code of Civil Procedure Section 170.3(b)(2)[1] provides two non-waivable grounds for judicial disqualification, one of which formed the basis for Lennar Title's[2] disqualification statement[3] here: "personal bias or prejudice concerning a party." Section 170.3(b)(2)(A). Applying the plain language of the disqualification statutes, after a lengthy analysis of the history and purpose of those enactments, the court of appeal correctly concluded that the legislature meant what it said: two disqualification grounds cannot be waived. As a result, the accused judge cannot prevent a neutral judge's evaluation of the statement of disqualification by striking the disqualification allegations as untimely.

This interpretation "aligns with the purpose of the [legislature's disqualification statute] amendments to assure that even the shadow of

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[1] All citations are to the Code of Civil Procedure unless otherwise noted.

[2] This brief refers to Petitioner in the court of appeal as "Lennar Title," reflecting its current name. Real Parties in Interest—Petitioners in this Court—are referred to in this Brief as "Plaintiffs."

[3] "Disqualification statement" refers to "a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge," that a party files with the clerk's office if a "judge who should disqualify himself or herself refuses or fails to do so." Section 170.3(c)(1).

bias is kept out of California courts … [just as it] conforms with prior statutory language and judicial construction." (Op. 31).[4]

To be sure, Section 170.4(b) allows a judge to sometimes strike a disqualification statement as untimely and Section 170.3(c)(1) states that disqualification should be sought at the earliest practicable opportunity. But those statutes yield to the legislature's overriding judgment that some grounds for disqualification, like personal bias, must be evaluated by a neutral judicial officer, regardless of the time at which they are presented. This aligns with the jurisprudence of this Court, which recognized non-waivable bias scenarios more than 100 years ago. See *Lindsay-Strathmore Irrigation Dist. v. Superior Court* (1920) 182 Cal. 315, 331-32. This Court reiterated that prohibition on waiver even when it recognized other grounds for disqualification that may be waived if not presented "at the 'earliest practicable opportunity.'" *See Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 22 Cal.2d 386, 390.

Plaintiffs' proposed, alternative interpretation theorizes that Section 170.3(b)(2)'s restrictions on the waiver of certain grounds for judicial disqualification only applies when a judge self-identifies the grounds. Such a counter-intuitive interpretation does not honor the statutory language or the rule that "the disqualification statute should

[4] The court of appeal's decision is cited to the slip opinion ("Op. __").

be broadly construed" in order to "instill public confidence in the judiciary." (Op. 20). It is the judge who tries to suppress an independent evaluation of alleged, disqualifiable conduct who should be the greater concern, not the judge who acknowledges potential bias and steps aside.

Plaintiffs suggest there is a distinction between prohibited "waiver," under Section 170.3(b)(2), and "forfeiture" by failing to assert grounds for disqualification at an earlier time. But this is an untenable distinction because, when Section 170.3(b)(2) was amended to prohibit "waiver," extensive case law treated "waiver" as extending not only to affirmative surrenders of a position but also to the failure to assert a right at a particular time.

The result reached by the court of appeal is measured and appropriate. It means a neutral, independent judicial officer will evaluate Lennar Title's allegations of Judge Hamilton's bias and prejudice towards it. The court of appeal found that Lennar Title stated a prima facie case for disqualification meaning a further, independent judicial inquiry is warranted.

The rule announced by the court of appeal will not promote gamesmanship or chaos, as Plaintiffs suggest. The facts of this case and the circumstances creating the need for Lennar Title's disqualification

statement are likely to be unique. Plaintiffs sought to add a new party years after trial concluded and the judge, without evidence or a motion presenting the issue for adjudication, formed an unjustified belief that the new party and Lennar Title engaged in a sham transaction as an attempt to avoid paying the (now, subsequently-bonded) judgment. The disqualification statement was filed late in these proceedings because the events creating the need for disqualification occurred late in the proceedings. And, in all circumstances, Lennar Title's statement of disqualification was timely—as this was a cumulative effect situation—and made at the earliest practicable opportunity after the court of appeal lifted a stay that was in place.

Turning to Plaintiffs' second issue for review, the court of appeal should be affirmed in holding that Lennar Title's allegations were sufficient to require a neutral judicial officer to evaluate the allegations of bias. Under Section 170.2(b), it shall not be grounds for disqualification that the judge "[h]as in any capacity expressed a view on a legal or factual issue presented in the proceeding." This language requires the issue to be actually "presented" for a ruling. Section 170.2(b) does not protect a judge who predetermines issues never presented to the court and then continues to wield resulting, unfounded misimpressions while presiding over the case. Moreover, the court of

appeal decision envisions that the accused trial judge should provide a response to Lennar Title's disqualification statement, whereupon the issues would be considered by a neutral judge. The basis for, and legitimacy, of the statements made by the accused judge are best evaluated on a full record considered by a trier of fact.

II. STATEMENT OF THE CASE

This is a wage and hour class-action case that has been pending for more than fifteen years. It has a complex procedural history. The events relevant in this Court began after the trial and before judgment. Although Plaintiffs attribute delay to Lennar Title, Plaintiffs' strategic choices and new caselaw largely drove the litigation timeline.[5]

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[5] For example, Plaintiffs filed their case in April 2007 and then initially moved for class certification as to Lennar Title in April 2010. When Judge Hamilton's predecessor issued his final order granting class certification as to the Exempt Class and the Non-Exempt Class on August 4, 2010, Plaintiffs did not proceed to trial but instead sought to add a new defendant to the proceedings, North American Services, LLC ("NAS"). This new party led to another wave of discovery and a second class certification motion as to NAS, in May 2011. At that point, more than four years into the case, with the five-year time limit to bring the action to trial under Code of Civil Procedure 583.310 rapidly approaching, the parties stipulated to extend the five-year statute, in June 2011. The court granted class certification as to NAS in September 2011.

The trial was also delayed three years as the parties and trial court grappled with and litigated the impact of this Court's decision in *Duran v. U.S. Bank National Association* (2012) 203 Cal.App.4th 212, on whether class certification was still proper. That led to writ proceedings.

Although late in the proceedings, Judge Hamilton's disqualification remains necessary given post-judgment motions remain pending, including Plaintiffs' motion seeking more than $14 million in attorneys' fees and nearly $1 million in non-statutory costs and expenses as prevailing parties on the judgment that is on appeal.

A. Plaintiffs add a new party after trial occurred and liability was determined.

Claims against Lennar Title were tried to the court in 2015. After liability was fixed, referee proceedings began to determine restitution. (Op. 3).

In 2018, various business transactions unrelated to the wage and hour case occurred: certain of Lennar Title's assets were sold in the ordinary course of business and transferred to a separate entity now called Doma Title of California, Inc. ("Doma")[6] (the "Doma Transaction"). (Op. 4). The transaction took place between "North American Title

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(5th Dist. Case No. F065900). In 2014, a peremptory writ was ultimately denied, and the trial court set a trial date a year later to give Plaintiffs time to formulate a trial plan that would satisfy *Duran*. The case went to trial in 2015. The statement of decision was issued in 2016. Referee proceedings began in 2018. Much of the time consumed since 2018 results from Plaintiffs' strategic choice to add a new party to this case, with the trial judge's assent, only for Plaintiffs to then dismiss that party when it looked like that change in parties would result in the trial judge's disqualification.

[6] Doma was previously known as "States Title FTS Title Company" and then "North American Title Company, Inc."

Group, Lennar Corporation, and States Title, Inc." None of them were parties to the litigation. Lennar Title, which was then known as North American Title Company, Inc., was not a party to this Doma Transaction, even though certain of its assets were involved.

Among the assets Doma acquired was Lennar Title's former name: "North American Title Company, Inc." Doma briefly operated under that name but was recognized at all times in California's state corporation records as a corporation distinct from Lennar Title, which has a separate California state corporate ID number. (Op. 4). Both Lennar Title and Doma amended their respective articles of incorporation in 2019 to reflect the changes brought about by the Doma Transaction. (Op. 4). A series of name changes culminated in the current name, "Lennar Title, Inc."

The class members here, as set forth in Plaintiffs' class definitions, were employed by Lennar Title between April 2003 and December 31, 2012. In 2018, six years after the end of the class period, certain of Lennar Title's employees took jobs with Doma—as a result of the Doma Transaction. This had no effect on class members or class definitions, which remained unchanged, as the class period ended in 2012.

B. The trial judge allows Plaintiffs to reopen discovery into the Doma Transaction.

At the time of the Doma Transaction, the claims against Lennar Title had already been adjudicated and discovery was closed.

Nevertheless, the trial judge allowed Plaintiffs to reopen discovery. Lennar Title cooperated. It produced all documents it was ordered to produce along with a privilege log.[7] Included among those documents were board of director minutes changing the name of what is now Lennar Title from its former name, North American Title Company, Inc., to CalAtlantic Title Company, Inc., along with amended articles of incorporation. Lennar Title also produced the entire Doma Transaction agreement and the relevant schedules and exhibits.

The trial judge also ordered a PMK deposition. Lennar Title produced for deposition Chad Barth, the president of the company, but his knowledge was limited because the Doma Transaction was undertaken by a different corporation in the Lennar corporate family.[8]

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[7] Given the disagreement over the relevance of the Doma Transaction to the case, there were disputes between the parties as to legitimate scope of the reopened discovery.

[8] A PMK deposition allows discovery from a designated individual on behalf of a party. It is not a means by which to achieve third-party discovery. *See* Section 2025.230.

Plaintiffs were unhappy with the reality that because no one at Lennar Title was involved in the actual transaction, anyone they deposed—even the company president—would have limited knowledge for them to discover by way of the PMK mechanism. The trial court allowed a second PMK. In connection with this second corporate deposition, Lennar Title produced records showing those of its assets that were conveyed, listing such assets by category. Lennar Title produced records showing the value received for these assets.

The information exchanged in discovery was never before the trial court in connection with any motion on which the court could have made a merits determination. No occasion for actual presentation of evidence regarding the legal impact of the transaction ever took place.

C. The trial judge strays beyond the issues and the evidence by stating it "feels like" Lennar Title is playing a "shell game" to avoid judgment.

Plaintiffs successfully prosecuted a motion for leave to file a third amended complaint to add CalAtlantic and "North American Title Company, Inc." as defendants.[9] Lennar Title did not object to adding CalAtlantic, which was its new name, but it did object to adding "North

[9] At that time CalAtlantic Title, Inc. was the legal name of the entity now known as Lennar Title. North American Title Company, Inc. was at that time the legal name of the entity now known as Doma. The respective companies had separate corporate identity numbers registered with the Secretary of State.

American Title Company, Inc.," a separate corporate entity. Lennar Title explained that such an amendment to add a new defendant was improper because "North American Title Company, Inc." was the name of a separate corporate entity—Doma—that was not a party to the case and that, if the amendment was allowed, the amended complaint would have to be served on Doma and Doma given the opportunity to defend itself.

Judge Hamilton's tentative ruling did not embrace the amendment Plaintiffs proposed: "The proposal to add the current holder of the name North American Title Company, Inc. is premised on the transfer agreement and other conduct occurring after the finding of liability, and appears to be premised on the Fraudulent Transfer Act, found at Civil Code section 3439 et seq. or some similar theory. That does not relate back to the original pleading, and would appear to require a new cause of action or another case." (Op. 6-7).

But something changed one day later. At the June 24, 2020 hearing on the motion, and without any evidence supporting his assertion, Judge Hamilton stated: "You know, just at the base of it all, it certainly feels like we're all in a carnival and we're playing a shell game with a whole bunch of shells and only one nut. It's –you know, again, from the face of it, it doesn't even appear that defendant [referring to

Lennar] is trying to hide it very much, you know, they are playing a shell game on purpose. They've got a big potential liability and they want to avoid it." (Op. 5-8).

Judge Hamilton allowed the amended complaint.

D. Doma moves to quash the complaint because it is a separate and unserved corporate entity.

Following the amendment, Plaintiffs did not serve Doma with process. For this reason, Doma moved to quash the complaint as to it. (Op. 8-9).

At the time of the motion to quash hearing, in June 2021, Lennar Title was operating under its current name. Judge Hamilton battered Lennar Title's counsel asking him if he "was sure about all those names"; the court disputed counsel's statements, saying "Well you're not sure though; right? You just believe you do or are you 100 percent?" (Op. 9-10). Then, addressing Doma's counsel, Judge Hamilton asserted his belief that there was a "name game shell game that we are playing." He berated Doma's counsel about an obvious typo in a filed document where the word "Title" was instead spelled "Titel," asking if this was "more trickery."[10] (Op. 10). Judge Hamilton expressly embraced Plaintiffs' view that there was "scheming to prevent collection of the

[10] Plaintiffs' recitation of events, notably, leaves this accusation out.

forthcoming judgment through a corporate game of three-card monte." (Op. 10).

As the court of appeal was later to note, at the time of these statements "issues of fraudulent transfer, alter ego, or successor liability were never properly presented to the [superior] court."[11] (Op. 2).

At that same hearing, Judge Hamilton—again without any evidence—expressed his belief that "Defendants [referring to Lennar Title] in whatever name they now like to be known, it's been consistently morphing since the end of trial, they've tried every device to delay the inevitable. They've tried every device to make sure that they evade the payment of their obligation."

Judge Hamilton denied the motion to quash for lack of service of process on Doma based on his mistaken insistence that Doma and Lennar Title were the same entity despite California state corporation records showing them to be separate entities. (Op. 11).

E. Doma successfully seeks writ relief.

Consequently, Doma secured from the court of appeal a writ of mandate requiring that Doma be served with process. (Op. 12). The

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[11] Although Plaintiffs' third amended complaint included alter ego and joint enterprise allegations, there was no motion presented by any party through which it would have been proper to adjudicate those issues. No version of Plaintiffs' complaints alleged fraudulent transfer.

court of appeal held that Doma "is a separate entity under California law from [Lennar] with a different corporate entity number, different corporate officers, and different agents for service of process." Because Doma was a separate entity, it needed to be properly served. The court of appeal explained that "[t]o the extent the superior court" made "legal and factual findings [Doma] and [Lennar] are the same legal entity, and therefore have been served and have already made a general appearance in the action," the court erred under any standard of review and those findings "cannot stand."

F. Once properly served, Doma seeks to disqualify Judge Hamilton.

Once Plaintiffs served Doma, it exercised its right to file a peremptory challenge to Judge Hamilton under Section 170.6. Judge Hamilton denied that challenge and Doma filed another writ petition. (Op. 13).

Doma also filed a statement of disqualification for cause pursuant to Section 170.1 based on Judge Hamilton's statements accusing Doma of participating in a sham transaction with Lennar Title. (Op. 13). Judge Hamilton answered on November 10, 2021 with a verified statement that he was not biased against Doma, because, in making his statements about such things as a "shell game" and "three-card monte"

the court "was CLEARLY referring to [Lennar Title] attempting to avoid payment of the judgment award, not some nascent corporation" and that "this court's comment about a shell game was directed at [Lennar] and could not have been directed at Doma." (Op. 14). Judge Hamilton maintained his errant belief that Lennar Title was transferring assets to "avoid what everyone now knew would be a judgment in the tens of millions of dollars when judgment finally entered." (Op. 13). This accusation was at all times without any basis, a fact underscored and confirmed when Lennar Title bonded the judgment in full for purposes of its appeal of the judgment entered in the wage and hour case.[12] (Op. 49 fn.9 [commenting after noting the judgment had been bonded that "[c]oncerns whether Lennar Title is attempting to evade payment of the judgment appear unwarranted, and raise questions whether such concerns were ever warranted"]).

G. The court of appeal issues an alternative writ to review the decision refusing to enforce Doma's peremptory challenge to Judge Hamilton.

On January 6, 2022, the court of appeal issued an alternative writ in connection with Doma's 170.6 petition. Plaintiffs then secured Doma's dismissal from the case, facilitated by Judge Hamilton, clearing

[12] That judgment is currently on appeal at the Fifth Appellate District, Case No. F08539. No briefs have yet been filed.

the path for the argument that Doma's peremptory challenge to Judge Hamilton had become moot. This was despite the court of appeal having issued its alternative writ directing the superior court to either vacate its October 6, 2021 order denying the motion to disqualify under section 170.6 or show cause why the requested relief should not issue. (Op. 15). This signaled that Judge Hamilton might not have the power to act in the case. Shortly thereafter, on February 9, 2022, the court of appeal implemented a stay.

Eventually, writ relief was denied as to Doma's Section 170.6 challenge on the ground the petition was not timely filed. The court held that Doma's belated addition to the case as a new defendant did not create another peremptory challenge opportunity. In so holding, the court was careful to state that "[n]othing in this opinion should be read as implying that these entities are, or are not, alter egos or that Doma Title is, or is not, a successor in interest liable for the debts of Former NATC/Lennar Title." (Op. 16).

After that ruling, when the stay lifted, the neutral judge who had been assigned to evaluate Doma's separate 170.1 challenge declared that proceeding moot given Doma had been dismissed as a defendant.

H. Based on the cumulative effect of Judge Hamilton's comments showing bias towards it, Lennar Title files a Section 170.1 judicial disqualification request based on cause.

Lennar Title's basis for seeking disqualification has always rested on a cumulative effects rationale. See *Jolie v. Superior Court* (2021) 66 Cal.App.5th 1025, 1042 (in identifying the earliest practicable time for a disqualification challenge for cause, the fact that some events occurred months or years before will not necessarily defeat the timeliness of the challenge because "the cumulative effect of potentially disqualifying events sometimes will matter").

Plaintiffs' brief in this Court ignores Judge Hamilton's response to Doma's 170.1 challenge, where he stated his comments and views were directed at Lennar Title, which occurred on November 10, 2021. Then in January 2022, despite being subject to an alternative writ, which indicated that he might lack power over the matter,[13] Judge Hamilton

[13] The court of appeal had ordered that Judge Hamilton either (1) vacate his order denying Doma's peremptory challenge, in which case he would have been disqualified and lacked power to act, or (2) show cause why the court of appeal should not order him to do so, which raised the real possibility the court of appeal would find that he should have granted the peremptory challenge. Either scenario raises questions as to whether Judge Hamilton should have been exercising judicial power at this time and he had not yet chosen either of the two options in the alternative writ. When Judge Hamilton did respond to the show cause order, he then cited Doma's dismissal as good cause for the writ not to issue. (Op. 15).

still exercised his judicial power to facilitate Plaintiffs obtaining Doma's dismissal. Doma's dismissal had the effect of mooting the evaluation by a neutral judge of the pending Section 170.1 challenge against Judge Hamilton. As these events unfolded, and given the ongoing bias proceedings brought by Doma, Lennar Title rightfully became increasingly concerned there were cumulative data points that would cause a reasonable observer to question Judge Hamilton's ability to remain unbiased against it.

Less than three weeks after the court of appeal lifted the stay resulting from Doma's Section 170.6 writ proceedings, Lennar Title filed its own Section 170.1 disqualification statement, based on these recent events, which built upon Judge Hamilton's earlier comments. (Op. 17). Lennar Title's verified statement sought to disqualify Judge Hamilton for cause on the grounds that (1) "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial," and (2) the judge has displayed "[b]ias or prejudice toward a lawyer in the proceeding."

Judge Hamilton struck that statement as untimely. He reiterated his belief that Lennar Title and Doma are "inextricably intertwined" despite the court of appeal's repeated caution that there was no basis in the record for this belief—no such issue has ever been presented for

decision in any court. (Op. 17). This further underscores the prejudice Lennar Title faces before a judge who is convinced it and its attorneys are engaged in improprieties, and who must rule on Plaintiffs' post-trial motions that seek approximately $15 million in attorney's fees and costs.[14]

I. Lennar Title seeks writ relief after Judge Hamilton strikes its disqualification statement as untimely, without addressing the merits.

Lennar Title timely sought writ relief, which the court of appeal granted. The court of appeal issued a thorough and well-reasoned decision concluding that, under the statutory scheme, the grounds on which Lennar Title moved to disqualify Judge Hamilton are not waivable such that implied waiver, by delay in seeking disqualification, is not a basis for the accused judge to strike the statement of disqualification and prevent resolution of the disqualification

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[14] Plaintiffs' motion for fees: (1) characterizes this litigation as a "David versus Goliath-type case" that Plaintiffs were fighting "tooth and nail"; (2) calls Lennar Title's defense strategy "largely built around delay" and designed "to make relentless and time-consuming challenges at each and every juncture of this litigation"; (3) states that "[Lennar Title] . . . incessantly file[d] meritless motions and appeals in an effort to avoid judgment and/or force Plaintiffs into submission"; and (4) claims that because of "[Lennar Title's] evasive, careless, unethical, and unprincipled tactics and/or strategy, Plaintiffs incurred additional years of litigation and millions of dollars in additional attorneys' fees and costs." *See* Pet. Suppl. Br. at 11. These statements go to the crux of Lennar Title's bias claims.

accusations by a neutral judge. The court surveyed 130 years of case law addressing the various iterations of California's judicial disqualification rules. It also considered this Court's command that "the disqualification statute should be broadly construed" in order to "instill public confidence in the judiciary." (Op. 20).

Based on that review, the court concluded that, when the legislature enacted 1990 statutory amendments, resulting in the current language of Section 170.3(b)(2), it was well aware of case law concerning implied waiver of bias claims based on untimely presentation. The legislature nevertheless wrote broadly and unconditionally, preventing waiver as to the types of judicial bias it specified. (Op. 29-32). Thus, that prohibition on waiver must be viewed as extending to implied waiver associated with the time when the disqualification statement is filed. Concluding that Lennar Title had stated a "facially sufficient" case of bias that should be considered by a neutral judge (Op. 38-47), the court of appeal directed that the order striking Lennar Title's disqualification statement be vacated. (Op. 47).

III. ARGUMENT

California's judicial disqualification statutes, California Code of Civil Procedure Section 170 *et seq.*, provide for two different types of disqualification: challenges for cause based on one of the grounds

identified in Section 170.1 and peremptory challenges as provided for in Section 170.6. This case involves a disqualification for cause pursuant to Section 170.1. Whereas Section 170.1 sets forth what qualifies as a ground for disqualification, Section 170.2 sets forth what is not a ground for disqualification. Section 170.3 then provides for how the judicial officers and parties should proceed when they believe grounds for disqualification under Section 170.1 exist. The powers of a challenged judicial officer are then set forth in Section 170.4.

This case specifically presents the question of how Section 170.3(b)(2), which designates certain grounds for disqualification non-waivable, works with other features of the disqualification statutory scheme set forth in Section 170.2(b), Section 170.3(c), and Section 170.4(b).

A. Section 170.3(b)(2) establishes grounds for judicial disqualification that may not be waived.

The Code of Civil Procedure establishes a comprehensive framework addressing the disqualification of judges. These statutes are "not solely concerned with the rights of the parties before the court but [are] also intended to ensure public confidence in the judiciary." *People v. Freeman* (2010) 47 Cal.4th 993, 1000-1001. Consequently, the disqualification statutes "should not receive a technical or strict

construction, but rather one that is broad and liberal." *North Bloomfield Gravel Mining Co. v. Keyser* (1881) 58 Cal. 315, 322. In interpreting these statutes, and discerning the legislature's intent, the whole of the statutory framework must be considered. See *People v. Canty* (2004) 32 Cal.4th 1266, 1276 ("The language is construed in the context of the statute as a whole and the overall statutory scheme, and we give significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.").

1. The plain meaning of the statutory text establishes that the grounds for disqualification that cannot be waived, per Section 170.3(b)(2), may not be stricken as untimely under Section 170.4(b).

Section 170.1 establishes nine bases for disqualification. Seven of the nine may be waived in certain circumstances. *See* Section 170.3(b)(1) (allowing waiver of disqualification in certain instances). Under Section 170.3(b)(2), however, two grounds may not be waived: (1) personal bias or prejudice and (2) serving as an attorney or witness for the matter in controversy. *See* Section 170.3(b)(2)(A)-(B). Per the statute, "[t]here shall be no waiver of disqualification if the basis therefor is . . . [t]he judge has a personal bias or prejudice concerning a party" and where "[t]he judge served as an attorney in the matter in controversy, or the judge has been a material witness concerning that

matter." The text is clear. Section 170.3(b)(2) contains no limiting language—"there shall be no waiver."

As a whole, Subdivision (b) is comprised of provisions that specify when certain grounds for judicial disqualification may be waived and the effect of disqualification on prior rulings by the judge.

Subdivision (b)(1) establishes that when a judge determines that he or she may need to be disqualified, the judge may invite the parties to waive the disqualification. This subdivision provides a process for obtaining and implementing such waiver. However, a judge is not permitted to invoke this waiver machinery "where the basis for disqualification is as provided in paragraph (2)." Section 170.3(b)(1).

Subdivision (b)(2) sets forth two grounds where "[t]here shall be no waiver of disqualification." Section 170.3(b)(2).

Subdivision (b)(3) provides that a "judge shall not seek to induce a waiver and shall avoid any effort to discover which lawyers or parties favored or opposed a waiver of disqualification." Section 170.3(b)(3).

Subdivision (b)(4) addresses what happens when the grounds for disqualification are "learned of or arise" after the judge already has made rulings in the case. It provides that "unless the disqualification be waived," the judge "shall . . . disqualify himself or herself," but pre-

disqualification rulings "shall not be set aside" "absen[t] good cause." Section 170.3(b)(4).

That Section 170.3(b) sets forth generally applicable rules addressing the many-fold ways in which waiver can impact a case, and not just specific rules for when a judge self-identifies grounds for disqualification, is clear from a review of all the statutory language. Subdivision (b)(1) discusses what happens when the judge self-identifies grounds for disqualification and what must occur if that judge wishes to invite the parties to expressly waive the disqualification. Subdivision (b)(2) generally prohibits waiver of disqualification on certain bases. Subdivision (b)(3) prevents a judge from inducing waiver or generally seeking to discover the parties' position on waiver. Subdivision (b)(4) provides that if a disqualification is not waived, any prior rulings by the now-disqualified judge will not be set aside by the new judge except for good cause.

Nor do the specific features of Subdivision (b)(2) provide any basis to conclude it only applies to instances of self-disqualification. As noted above, Subdivision (b)(2) contains no limiting language in relation to the phrase "waiver." And the legislature did not condition Subdivision (b)(2)'s application on any other provision in Section 170.3 (or otherwise). Nor did the legislature indicate that the provision was dependent on

(b)(1), such that Subdivision (b)(1)'s discussion of how a judge should proceed if he learns there are grounds for disqualification, would act to limit Subdivision (b)(2)'s application to circumstances where the grounds for disqualification were self-determined and not where a party had to seek disqualification pursuant to Section 170.3(c). If the legislature had wished to limit Subdivision (b)(2)'s application to the circumstances described in Subdivision (b)(1), in amending the statute it could have made the language currently housed in Subdivision (b)(2) part of or a subdivision to Subdivision (b)(1). But it did not.

Subdivision (b)(2) is not the only subdivision found in Section 170.3(b) that is not tied to or conditioned on another section. Subdivision (b)(4) applies whenever disqualification is at issue, regardless of whether it became an issue because the judge raised it or a party did through the Subdivision (c) process. Regardless of the genesis of the disqualification issue, only Section 170.3(b)(4) provides guidance as to the permissible use of the accused judge's pre-disqualification rulings. This is more textual evidence that the legislature included in Section 170.3(b) rules governing disqualification that apply broadly and that are not dependent on whether the disqualification issue was raised by the judge.

Turning to Section 170.3(c), it provides the procedures by which a party may seek to disqualify a judge where "a judge who should disqualify himself or herself refuses or fails to do so[.]" Section 170.3(c)(1). Under Section 170.3(c), a "party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge." Section 170.3(c)(1). This "statement shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." *Ibid.* Section 170.3(c) then sets forth the time period in which a challenged judge must respond and the effect of any failure to respond. *See* Section 170.3(c)(3)-(4). If a judge does not consent to the disqualification or to the substitution of another judge, *see* Section 170.3(c)(2), then the issue of disqualification will be evaluated by another judicial officer that the parties agree on or that the Judicial Council appoints. Section 170.3(c)(5).

In short, there are not, as Plaintiffs contend, two different tracks for judicial disqualification—self-disqualification under Section 170.3(a) and by party-initiated application under Section 170.3(c). In fact, Section 170.3 is generally titled "Judge determining himself or herself to be disqualified," yet the statute more broadly contains rules that apply to all disqualification scenarios and includes procedures to address when

a judge disputes that he should be disqualified. Section 170.3(b) sets forth rules applying generally to judicial disqualifications,[15] as it anticipates that in the ordinary course a judge should disqualify himself upon learning grounds for disqualification under Section 170.1, and Section 170.3(c) then provides a mechanism for a party to obtain a disqualification where the judge fails to do so.

While Section 170.3 addresses the process that occurs when a judge or party identifies grounds for disqualification, Section 170.4 addresses the powers of a challenged judge. As Section 170.4(d) makes clear, "[e]xcept as provided in [Section 170.4], a disqualified judge shall have no power to act in any proceeding after his or her disqualification or after the filing of a statement of disqualification until the question of his or her disqualification has been determined." One exception is that, after a statement of disqualification has been filed, "if a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification, the trial judge against whom it was filed

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[15] For example, it makes sense that the express waiver scenario contemplated by Section 170.3(b)(1) would only apply in disqualifications arising from self-determination and would be inapplicable where a party needs to seek disqualification under Section 170.3(c). If a party is affirmatively seeking a disqualification, that party is clearly not waiving the grounds for disqualification. That Section 170.3(b)(1) addresses and creates a rule governing instances of self-disqualification should not be taken as a textual "clue" that the entirety of Subdivision (b) only applies in instances of self-disqualification, as Plaintiffs claim.

may order it stricken." Section 170.4(b). Section 170.4(b) also expressly states it is conferring this power as an exception to a prohibition set forth in Section 170.3(c)(5), which requires that a challenged judge "shall not pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise." *See* Section 170.4(b) (setting forth that it applies "[n]otwithstanding paragraph (5) of subdivision (c) of Section 170.3.").

The restrictions on waiver established by Section 170.3(b)(2) are not modified by Section 170.4(b), especially when analyzed in the light of the entirety of the statutory scheme. See *Canty*, 32 Cal.4th at 1276. Section 170.4(b) allows a disqualification challenge to be stricken if facially insufficient or untimely. But this must be read against the backdrop of the legislature's intent, expressed in section 170.3(b)(2), that some grounds cannot be waived. If the legislature wanted Section 170.4(b) to apply not withstanding Section 170.3(b)(2), it would have expressly said so as it did when it stated that Section 170.4(b) operated "[n]otwithstanding paragraph (5) of subdivision (c) of Section 170.3." *See* Section 170.4(b). This is yet more textual evidence that the legislature intended that Section 170.4(b) does not override Section 170.3(b)(2)'s waiver restrictions.

Thus, under Section 170.3, certain grounds for disqualification are not waivable, and Section 170.4(b) does not override Section 170.3(b)(2). As a result, under Section 170.4(b), a judge can strike a statement of disqualification as untimely for any of the many reasons specified by section 170.1 other than the ones of personal bias and prior participation as an attorney or witness identified in Section 170.3(b)(2).

2. A broad application of Section 170.3(b)(2)'s waiver prohibition comports with the legislative history.

As the court of appeal explained, the legislative history shows that the disqualification statutes were amended to add Section 170.3(b)(2) in order to conform to the language of the Code of Judicial Ethics, Canon 3(C)(1)(a), as amended on September 18, 1989. Sen. Bill Lockyer, Chairman, Sen. Com. on Judiciary, letter to Gov. George Deukmejian, Aug. 22, 1990 ("When the state's judiciary has agreed to impose more severe constraints on the entrance of even the appearance of bias into the courts, we should waste no time in putting the weight of statutory law behind the new restrictions. Conformity between the Code of Judicial Conduct and the Code of Civil Procedure is also helpful to judges and attorneys as they deal with these issues on a day to day basis."); Cal. Code Jud. Ethics, canon 3(C)(1)(a).

"[T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes 'in the light of such decisions as have a direct bearing upon them.'" *Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 146 (quoting *People v. Overstreet* (1986) 42 Cal.3d 891, 897). More than 100 years ago, this Court recognized that some grounds of judicial bias could not be waived. See *Lindsay-Strathmore Irrigation Dist.*, 182 Cal. at 331-32. This Court adhered to that view in a later case where it recognized that some, different grounds for disqualification that could be waived if not presented "at the 'earliest practicable opportunity.'" *See Caminetti*, 22 Cal.2d at 390. Thus, in interpreting what the legislature meant when it adopted the term "waiver" in amending section 170.3 in 1990, the legislature is deemed to be aware that the term "waiver" includes implied waiver through the failure to present the accusation sooner.

At the time of the amendment adding Section 170.3(b)(2), the term "waiver" had been broadly understood for at least 50 years to include implied waiver or forfeiture by failing to file the statement at the "earliest practicable opportunity." *Caminetti*, for example, recognized that "[w]hile the 1927 amendment does not specify in so many words a penalty for failure to urge disqualification at the 'earliest practicable

opportunity,' the intention is clear that failure to comply with the provision constitutes a ***waiver***." 22 Cal.2d at 391 (emphasis added); see also *Sacramento & San Joaquin Drainage Dist. v. Jarvis* (1959) 51 Cal.2d 799, 801 ("where an objection to the judge on the ground of his disqualification was not made at the earliest practicable opportunity, it was waived by the conduct of the parties"). The term "waiver" was understood to include failing to take required action within a specified period of time. Contemporaneous case law confirms this: "waiver by conduct may occur where the disqualification is not urged at the 'earliest practicable opportunity' as provided in section 170." *Muller v. Muller* (1965) 235 Cal.App.2d 341, 345. Hence, when the legislature established that certain grounds for disqualification may not be waived, it must have intended for the word waiver to carry the accepted meaning at that time, namely, that it extended beyond an affirmative disclaimer to include the failure to seek or invoke the "waived" right by a specified time.

As explained in *Muller*, 235 Cal.App.2d 341, the term waiver swept more broadly than written waiver and included forfeiture theories based on failing to comply with the statutory "earliest practicable opportunity" requirement. *Id.* at 345. Thus, Plaintiffs' attempt to draw a difference between express written waiver and forfeiture by untimely filing falls flat.

Plaintiffs cite *Caminetti*, 22 Cal.2d at 392, stating that "the 1927 amendment affords an additional statutory means by which a disqualification arising under subdivision 3 of section 170 may be waived, viz., failure to urge such disqualification at the 'earliest practicable opportunity'" and they latch onto the phrase "additional statutory means" for waiver. But what is important is that *Caminetti* refers to this statutory requirement for timely filings as a form of "waiver" and does so in 1947. When Section 170.3(b)(2) was enacted in 1990, the legislature would have known that the phrase housed in the current Section 170.3(c)(1) had been held to constitute a form of waiver if not complied with. As such, if the legislature had wanted something less than a broad interpretation of the "waiver" prohibition on disqualification, it would have used different language. But it did not.

Nor does *People v. Barrera* (1999) 70 Cal.App.4th 541, require a different conclusion. Plaintiffs cite to the discussion of Section 170.3(b) in that case. But *Barrera* does not hold, as Plaintiffs suggest, that the legislature's amendments only apply to instances where the judge inaugurates the disqualification process and not when a party has to affirmatively seek disqualification. Although self-disqualification was one concern given the judicial ethics canons, as discussed above, *ante* at

30, that distinction does not make sense when taking account of all of the language in Section 170.3(b).

Barrera's actual holding, that the legislature left intact the requirement that appellate review could only be by writ, supports the court of appeal's decision because it is another example showing that the judicial disqualification statutes generally set forth rules applicable in disqualification situations generally and not rules that are conditioned on how the issue of disqualification is first raised.

Nor are *Barrera*'s policy concerns implicated here. *Barrera* expressed concern about the delay associated with the appellate process as a reason to take a different view of the prohibition on waiver of grounds for judicial disqualification, as they reflect on the integrity of the judiciary and public respect for judicial institutions. *See* 70 Cal.App.4th at 551. But, when the disqualification issue arises prior to judgment, other features of Section 170.3 limit a party's ability to set aside rulings an accused judge makes and encourage parties to promptly raise grounds for disqualification. Section 170.3(b)(4) provides that where a judicial disqualification occurs after rulings are made but before judgment is entered, those ruling "shall not be set aside" except for "good cause." Section 170.3(b)(4). Thus, a party has no incentive to sit on his or her rights and wait during proceedings in the trial court and hope a

new judge revisits the disqualified judge's rulings, because there is not necessarily a second bite at the apple to be gained.

Insofar as Plaintiffs are suggesting that the court of appeal decision clears the path to raise disqualification issues on an appeal, the court addressed no such thing and the statute plainly instructs otherwise. *See* Section 170.3(d) ("The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal[.]"). The fact the legislature left in place established rules and timetables for perfecting appellate review is not uncommon. Rights can be lost if appellate review is not sought in the required manner even if those rights are not themselves subject to waiver.[16]

Much of the delay here is the result of Judge Hamilton refusing to send the issue of his disqualification to a neutral officer, by way of his order striking the challenge. In cases that proceed without such complications, the disqualification issues are promptly referred to a neutral judge, who assesses the claim followed by expedited writ review if the disqualification claimant wants to continue pursuing the allegations.

[16] For example, by failing to timely file a notice of appeal.

3. Section 170.3(b)(2) represents the legislature's judgment that certain grounds for disqualification so implicate public confidence in the judiciary that the parties cannot waive them.

The court of appeal decision properly effectuates an overarching objective of disqualification proceedings. See *Freeman*, 47 Cal.4th at 1000-1001 (the statutory disqualification scheme in the Code of Civil Procedure "is not solely concerned with the rights of the parties before the court but is also intended to ensure public confidence in the judiciary"); *Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 391 ("The applicable disqualification standard is an objective one: if a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial, the judge should be disqualified.").

It makes no sense that the legislature would have identified through Section 170.3(b)(2) two types of judicial bias that could not be waived, but then permitted those same accusations of bias to be waived when a party has to pursue disqualification because the judge will not. If a personally biased judge presiding over a case is so problematic that the parties cannot knowingly and affirmatively waive disqualification, waiver should not rest on the basis that they deferred seeking disqualification—particularly in a case like this where the problem is that the facts supporting disqualification emerged and expanded over

time. As the court of appeal stated, "it would be incongruent to prohibit express waiver of certain grounds of disqualification but allow for implied waiver of the same grounds should a party inadvertently wait too long to file a statement of disqualification." (Op. 32).

Moreover, it is the judge who tries to suppress independent examination of his impartiality who should receive the greater scrutiny. It makes no sense that waiver would be prohibited only where a judge is aware enough to recognize his bias and call it to the parties' attention. The judge who is unable to recognize bias is the one who merits more scrutiny. Other cases have agreed with this conclusion and held that it would be problematic to adopt a rule "that the requirement of a written waiver applies only where the judge actually finds himself or herself disqualified" as it "would permit a disqualified judge to avoid the consequences of disqualification, even in the absence of a waiver, by simply failing to acknowledge his or her own disqualifying conduct." *Hayward v. Superior Court* (2016) 2 Cal.App.5th 10, 49. Here, Judge Hamilton not only failed to recognize his bias and self-disqualify; he effectively prevented an independent evaluation of the accusations against him by striking Lennar Title's challenge as untimely.

The provisions of the Code of Civil Procedure, including the judicial disqualification statutes "are to be liberally construed, with a

view to effect its objects and to promote justice." Section 4; *see also Howell v. Budd* (1891) 91 Cal. 342, 353. The ends of justice here are served by ensuring an independent judicial officer evaluates Lennar Title's disqualification statement based on the grounds identified as non-waivable in Section 170.3(b)(2).

4. There is no conflict with the court of appeal's decision and the existing caselaw.

Plaintiffs erroneously contend that the court of appeal departs from the way other cases have addressed the statutory language concerning "earliest practicable opportunity." Not so. As to all grounds for disqualification, other than those identified in Section 170.3(b)(2) as non-waivable, a disqualification challenge is waived if not filed at the earliest practicable opportunity.[17] The cases identified do not involve grounds for disqualification designated as not waivable under Section 170.3(b)(2). Therefore, they do not address how that provision interacts with Section 170.3(c)(1).

Plaintiffs rely on *Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332, to claim that giving effect to Section 170.3(b)(2)'s anti-

[17] Lennar Title believes it has complied with the earliest practicable opportunity requirement in Section 170.3(c)(1) as set forth extensively in the briefing to the court of appeal. Should this Court reverse here (and it should not), it would be necessary to remand to the court of appeal to address the parties' argument on this issue.

waiver provisions would upset the existing caselaw. But the asserted ground for disqualification in *Tri Counties* was that the judge conducted an independent factual investigation of an issue he decided by citing in his order a judicially noticeable document. That is not an accusation of personal bias or prejudice and therefore does not fall into the category of non-waivable bias under Section 170.3(b)(2). Not surprisingly, therefore, *Tri-Counties* does not discuss the non-waiver provision in Section 170.3(b)(2) at all. Nothing about the court of appeal's decision here disturbs the *Tri-Counties* holding and, likewise, nothing in *Tri-Counties* conflicts with the decision here.

Plaintiffs cite other distinguishable cases. *Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385, does not address the statute that prohibits waiver of some grounds of disqualification. While the court found the disqualification accusation in that case was untimely, *Alhusainy* nevertheless decided that the untimely allegations of bias necessitated the assignment of a new judge on remand. *Id.* at 395. That result underscores the public policies served by having bias claims considered and not squelched by the unilateral action of the accused judicial officer.

Similarly, in *People v. Seaton* (2001) 26 Cal.4th 598, 698, even though the litigant did not raise the issue of bias until direct appeal

(making it technically unreviewable since it was not presented through the exclusive avenue of statutory writ review), this Court stated it still reviewed the record and decided the judge was not biased. In *People v. Hines* (1997) 15 Cal.4th 997, 1041 and *People v. Scott* (1997) 15 Cal.4th 1188, 1207, the issue of disqualification was not preserved on appeal because there was no objection or statement of disqualification filed at the trial court level.

As discussed above, the issue of whether a party may wait until appeal to raise a question of bias is an entirely different issue given the statutory writ mechanism providing for appellate review and Section 170.3(c) laying out the process for neutral evaluation of facially sufficient bias allegations. See *People v. Bryant* (1987) 190 Cal.App.3d 1569, 1572.

There is no conflict between the court of appeal's decision and the existing caselaw. Moreover, to the extent this Court thinks otherwise, there is no reason not to course correct and adopt a rule which is more faithful to the statutory text and purposes of the amendment and disqualification scheme as a whole. None of these cases address the holistic statutory framework or even invoke Section 170.3(b)(2)—this Court would not be disturbing any deeply engrained legal rule by affirming the court of appeal.

5. Plaintiffs' concerns with the court of appeal's interpretation of Section 170.3(b) are overstated.

Plaintiffs contend that the court of appeal decision will promote delay tactics and gamesmanship. Not so. As the court of appeal astutely noted, "[i]f a party is truly concerned the trial judge lost his or her objectivity, there would be no incentive to wait to raise the issue of disqualification until after obtaining a ruling, as the party would be under no illusion the judge would provide a favorable ruling." (Op. 32).

First, the non-waiver rule prior to judgment adopted by the court of appeal is very limited. It only applies to two grounds for disqualification: "personal bias or prejudice" and where the judge served as a witness or advocate. Section 170.3(b)(2).

Second, as the court of appeal recognized, there is no reason to think that litigants will not take the first opportunity to disqualify a biased judge before adverse, tainted rulings occur. (Op. 32). This is especially true because pursuant to Section 170.3(b)(4) there is a strong statutory presumption that these rulings will not be set aside after the judge's disqualification.

Third, even if the court of appeal decision were to promote more disqualification requests, the legislature is the proper body to address any issues that arise. The legislature crafted the policy trade-off when it

made certain grounds for disqualification not subject to waiver. The legislature can always revisit or modify its rule to the extent it thinks necessary.

Fourth, the legislature has already mitigated any delay tactics by providing, under Section 170.4(c), that accused judges may continue to act, where the disqualification is truly sought on the eve of trial, as a neutral judge evaluates the disqualification accusation. Section 170.4(c)(1)-(2). As the court of appeal noted, these provisions are "further safeguards" to prevent potential abuse by parties using statements of disqualification for dilatory gamesmanship. (Op. 32-33).

Here, if Judge Hamilton had simply answered the disqualification statement, instead of striking it as untimely, the process could have expeditiously proceeded with evaluation by the neutral decisionmaker followed by any writ review that one of the parties cared to seek thereafter.

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The text, history, purpose, rules of statutory construction, and public interest support the court of appeal's decision, which should be affirmed.

B. While Section 170.2(b) prevents disqualification based on a judge's prior rulings, that rule does not undermine the court of appeal's decision.

A judge cannot be disqualified in a matter based on prior rulings. *See* Section 170.2(b). That rule is not implicated here. Part of Lennar Title's allegations rest on the trial judge predetermining issues that were never "presented" to him within the meaning of Section 170.2(b). Section 170.2(b) does not protect a judge who forms opinions on subjects never presented and then wields his misimpressions about never addressed issues against parties and counsel who come before him on unrelated issues. Moreover, whether Section 170.2 might possibly apply to bar Lennar Title from pursuing its accusation that Judge Hamilton is biased (it does not), is an issue better suited for consideration by the neutral judicial officer contemplated under Section 170.3(c)(5).

1. Section 170.2(b) is aimed at preventing a judicial officer from having to disqualify himself based on prior rulings.

Under Section 170.2(b) "[i]t shall not be grounds for disqualification that the judge … [h]as in any capacity expressed a view on a legal or factual issue presented in the proceeding." Section 170.2(b). Plaintiffs gain no benefit from this provision.

Section 170.2(b) concerns issues that are "presented" to the court. Section 170.2(b) (disqualification does not result if a judge "expressed a

view on a legal or factual issue presented in the proceeding"). Using the language of "presented" (as opposed to more general terms like "arising during the proceeding" or "relating to the proceeding") is best interpreted in context to mean intentionally brought before the judge for adjudication.

Therefore, Section 170.2(b) is best read to exempt prior judicial rulings as grounds for disqualification and not to exempt judicial predetermination of issues never before the court. This interpretation is in accord with other analogous statues, such as Government Code Section 11425.40(b)(2), which pertains to disqualification of administrative law judges. It provides that if there is no other evidence of bias, prejudice, or interest, the fact that an administrative law judge "has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding" is not alone grounds for disqualification. Cases interpret this provision to mean that, if an ALJ previously issued a ruling in administrative proceedings, the ALJ need not voluntarily disqualify himself from subsequent proceedings. See, e.g., *Cnty. of San Diego v. Alcoholic Beverage Control Appeals Bd.* (2010) 184 Cal.App.4th 396, 406-07.

Similarly, here, Section 170.2(b) prevents a party that obtains an unfavorable ruling on a properly considered and presented issue from using that as evidence of judicial bias.[18]

2. California caselaw supports characterizing Judge Hamilton's statements as indicative of bias or prejudice.

Plaintiffs contend that Judge Hamilton's array of provocative accusations and statements ("shell games," "three-card monte," "trickery," "scheming,") (*see* Op. 42), were comments on the credibility of the parties based on opinions he formed while overseeing a discovery dispute. That assertion is untenable. For example, the comment about "trickery" was directed to Lennar Title's counsel over a typo.

Further, as the court of appeal observed, some of the comments "were made while ruling on a motion to quash due to lack of service of process and were not relevant to the determination of the motion." (Op. 41-43).

In the verified answer to Doma's Section 170.1 challenge, Judge Hamilton stated his comments—and therefore his bias—were "CLEARLY" directed towards Lennar Title. That was an admission as to his state of mind and not a comment on the parties' credibility or

[18] Plaintiffs admit that they were unable to identify caselaw interpreting Section 170.2(b), much less caselaw that supports interpreting the provision in the way they propose.

reference to any proper, previously issued ruling. As the court of appeal explained, a reasonable observer could conclude that when considering the context, the statements evidenced improper bias creating a concern Judge Hamilton may have prejudged issues. (Op. 43-44).

Judge Hamilton formed a persistently expressed, incorrect belief about the relationship between Doma and Lennar Title before being "presented" with a motion, evidence, or argument addressing whether any such relationship exists. Under well-established caselaw, "[w]here a judge gratuitously offers an opinion on a matter not yet pending before him and thereby shows a bias or prejudice against a party, a writ of mandate will issue precluding the opining judge from hearing that matter." *Pacific & Southwest Conference of United Methodist Church v. Superior Court* (1978) 82 Cal.App.3d 72, 84.

This conclusion aligns with California's objective standard, whereby a party seeking disqualification need not show actual bias, but only that "a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial," whereupon "the judge should be disqualified." *Wechsler*, 224 Cal.App.4th at 391. Providing for disqualification in these circumstances "represents a legislative judgment that due to the sensitivity of the question and inherent difficulties of proof as well as the importance of public confidence in the

judicial system, the issue is not limited to the existence of an actual bias. Rather, if a reasonable man would entertain doubts concerning the judge's impartiality, disqualification is mandated." *Jolie*, 66 Cal.App.5th at 1039. "Bias" exists where the judge evidences a "predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction." *Pacific & Southwest*, 82 Cal.App.3d at 86 (internal quotations omitted).

For example, in *Pacific & Southwest*, the challenged judge wrote to counsel, stating "I believe the plaintiffs' claims against [defendant] are meritorious and that they will in all probability prevail at time of trial." *Id.* at 77. The defendant responded by seeking disqualification, which was denied. The court of appeal granted writ relief. It held the challenged judge's statements were evidence that he had prejudged the liabilities of the parties, and this prejudgment constituted bias as a matter of law. *Id.* at 87-88. The court reasoned that the parties "should not be required to proceed to trial without the benefits afforded by an impartial, unbiased judge hearing entire pretrial matters." *Id.* at 79. The court further reasoned: "[t]he issue of jural bias, if left unresolved, may infect the entire subsequent proceedings with fatal error. This issue must be promptly resolved." *Id.* The challenged judge's comments

established that "[t]he horses were not yet out of the paddock yet the winner was chosen." *Id.* at 86.

Here, Lennar Title is faced with a judge who made up his mind that it was trying to evade paying a judgment (a judgment which has now been fully bonded on appeal) and that it was engaged in a sham corporate transaction to avoid doing so—despite never having a presentation of evidence from all parties in the form of motion to adjudicate alter ego, fraudulent transfer, successor liability, etc. That Judge Hamilton had prejudged the issues is not subject to reasonable dispute—after all, he explained in his verified answer to Doma's writ petition that "[the court] was CLEARLY referring to [Lennar] attempting to avoid payment of the judgment award, not some nascent corporation." And despite repeated cautions from the court of appeal to treat Doma and Lennar Title as separate entities, Judge Hamilton reiterated his belief that the two entities were "inextricably intertwined," as recently as his order striking Lennar Title's disqualification statement. It does not matter, as Plaintiffs contend, that Judge Hamilton oversaw discovery disputes or that Plaintiffs pleaded alter ego in their amended complaint. What matters is there was never an opportunity to formally adjudicate the relationship between Doma and Lennar Title (and never will be now given Plaintiffs

dismissed Doma from the case). Nor was there ever any basis to issue a finding that Lennar Title was trying to avoid the judgment.

Realizing California caselaw is a wasteland for their position, Plaintiffs turn to out of jurisdiction cases. They suggest that Section 170.2(b) should be interpreted in line with *Hanson v. Hanson* (Alaska 2002) 36 P.3d 1181, which limits disqualification to views "developed from a nonjudicial source." But California has through its case law, see, e.g., *Pacific & Southwest*, 82 Cal.App.3d at 86, recognized that disqualification is required in a broader array of circumstances and recognized that impermissible bias can form during judicial proceedings. It is well established in California that the "failure to maintain an open mind" is a hallmark of improper judicial bias requiring disqualification. It would severely upend settled law to hold that bias only requires disqualification where it results from a "nonjudicial source."

And the main United States Supreme Court case on which Plaintiffs rely expressly recognizes that in some circumstances "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings" may require disqualification when "they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States* (1994) 510 U.S. 540, 555. Likewise, *Belue v. Leventhal* (4th Cir. 2011) 640 F.3d 567, 575,

recognizes that recusal is required when there is evidence a judge has prejudged an issue. That is exactly the situation here—there is strong evidence that Judge Hamilton prejudged the issue of whether Lennar Title would pay the judgment in this case if it is ultimately affirmed.

3. At a minimum, an independent judicial officer should in the first instance determine whether Judge Hamilton's statements constitute bias or instead fall within Section 170.2(b).

At a minimum, the question of whether Section 170.2(b) provides Judge Hamilton with a safe harbor here should be evaluated within the context of the Section 170.3 process and not by this Court in the first instance.

The court of appeal did not evaluate the merits of the disqualification request or make a finding that Judge Hamilton's statements required disqualification. Instead, the court held that Lennar Title had "facially sufficient" grounds for relief even considering Section 170.3(b)(2). (Op. 41-42.) In so concluding, the court acknowledged it was "possible to argue the comments were merely expressing a view in a legal proceeding" but likewise "it is similarly possible to construe the comments as violative of section 170.1, subdivision (a)(6)(A)(iii) and Canon 3 of the Code of Judicial Ethics." (Op. 43.) For this reason, the court of appeal decided "it is not tenable to

hold that on its face [the disqualification statement] discloses no legal grounds for disqualification" and that for this reason "the issue of disqualification should have been reviewed on the merits by another judge." (Op. 44.)

There has not yet been a merits determination—Judge Hamilton struck the statement without responding to it on the merits. As a result, the court of appeal determined that on remand Judge Hamilton should be able to file an answer responding to Lennar Title's disqualification statement. Judge Hamilton will, at that time, have the ability to offer his evidence. These are facts not yet before any court.

Public policy supports allowing this record to be developed. Accusations of judicial bias are serious. Public confidence in the judiciary is promoted by a full presentation of all facts and allowing the independent evaluation of the evidence. See *Freeman*, 47 Cal.4th at 1000-1001. To the extent there is any question whether Judge Hamilton's statements fall within Section 170.2(b) or Section 170.3(b)(2), this should be addressed on a full record before a trier of fact like the neutral judge who should be assigned to evaluate these issues. As explained in *North Bloomfield Gravel Mining Co.*, 58 Cal. at 322, it is an "ancient maxim" that "no man ought to be a judge in his own cause."

Where there is any colorable question, the guidance of that maxim should be followed.

Any other interpretation of how Section 170.3(c) and Section 170.2(b) interact would swallow Section 170.3 whole. There would be no needed for Section 170.3(c)(5)-(6) if it was always clear from the outset when a party first alleges facts meriting disqualification that the facts rise to the level of one of the nine grounds for disqualification set forth in Section 170.1 or whether instead Section 170.2(b)'s safe harbor applied. Instead, Section 170.3(c) anticipates that a judicial officer and a party might dispute whether there are grounds for disqualification and provides mechanisms for resolving that dispute. At a minimum, this Court should allow the record to further develop through the Section 170.3(c) process and for an independent evaluation to occur as the legislature intended.

IV. CONCLUSION

The court of appeal correctly held that Lennar Title's accusation that Judge Hamilton's bias could not be waived, making those accusations subject to review by a neutral judicial officer. If, however, this Court concludes otherwise, remand is necessary for the court of appeal to determine whether Lennar Title's statement of disqualification was timely filed.

The court of appeal also correctly determined that Section 170.2(b) did not prevent the evaluation of the bias accusations by a neutral judicial officer.

Dated: November 16, 2023

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: */s/ Barbara J. Miller*
Barbara J. Miller
Attorneys for North American Title Company (Formerly Known as North American Title Company, Inc., and CalAtlantic Title, Inc., and Now Known as Lennar Title Inc.)

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.504(d)(1), I certify that this Answer to Petition for Review is proportionately spaced, using Microsoft Word 2016, is set in Century Schoolbook font, has a typeface of 13 points or more, and contains 10,932 words.

By: */s/ Barbara J. Miller*
Barbara J. Miller

CERTIFICATE OF SERVICE

I, Thomas M. Peterson, hereby declare I am a resident of the State of California. I am over the age of eighteen years and not a party to the within action; my business address is Morgan, Lewis & Bockius LLP, One Market Street, Spear Tower, San Francisco, California 94105.

On November 16, 2023, I served on the interested parties in this action the within document entitled:

ANSWER BRIEF ON THE MERITS

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 16, 2023, at San Francisco, California.

By: */s/ Thomas M. Peterson*
Thomas M. Peterson

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **NORTH AMERICAN TITLE COMPANY v. S.C. (CORTINA)**
Case Number: **S280752**
Lower Court Case Number: **F084913**

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11/16/2023

Date

/s/Thomas Peterson

Signature

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