No. S158965

In the Supreme Court
of the
State of California

Brian Reid,
Plaintiff and Appellant,

vs.

Google, Inc.,
Defendant and Respondent.

ANSWER BRIEF ON THE MERITS

After a Decision by the Court of Appeal,
Sixth Appellate District, Case No. H029602
Superior Court for the County of Santa Clara
Case No. CV023646

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I. INTRODUCTION

As the Court of Appeal correctly held, Plaintiff Dr. Brian Reid produced evidence sufficient to enable a jury to conclude that Google's reasons for terminating him at age 54 were untrue and that Google acted with age-related discrimination. It is impossible to support the trial court's summary judgment ruling below without digging very far into the facts of this case, and making a host of conclusions regarding credibility of witnesses, reconciliations of conflicting testimony and correspondence, and inferences from competing accounts of disputed events, all of which are for the jury to resolve.

Reid raised triable issues based on a combination of proof: ageist statements directed at Reid by Google managers, supervisors and co-workers; statistically significant expert findings of age-related discriminatory practices at Google; conflicting reasons from Google for his termination; a "job elimination angle" created after the fact; and a company youth culture that evinces a disdain for older workers. In its decision, the Court of Appeal addressed and rejected the two arguments Google brings before this Court – that a portion of Reid's evidence of discrimination should be disregarded as "stray remarks" and that Google's unresolved objections to some of Reid's evidence should have been sustained. Neither issue alters the outcome of this appeal.

First, as to the "stray remarks" issue, Google contends that some of the discriminatory comments made by Reid's supervisors and coemployees were simply "stray," with no connection to decisionmakers or the adverse employment actions at issue. (Google's Opening Brief on the Merits ("OB") at 10-29.) But this case does not involve mere isolated remarks made by non-decisionmakers, as are present in the cases relied on by Google. Instead, both Wayne Rosing and Urs Hoelzle, on whose remarks Google's Brief primarily focuses, were both decisionmakers and

supervisors of Reid, and their ageist comments were made repeatedly, including at or around the time of Reid's demotion and termination. Combined with repeated ageist comments by Reid's young co-workers, the discriminatory statements Google attacks are not "stray remarks" at all, but constitute probative evidence of Google's age-related discriminatory animus. They are for the jury, not the court, to weigh and assess.

Moreover, the ageist comments by Hoelzle, Rosing and Reid's co-workers were not the only evidence of discrimination Reid presented in opposition to Google's summary judgment motion. Reid also established triable issues of fact relating to the discriminatory employment decisions through statistical evidence, through Reid's demotion to a nonviable position before Google terminated him, and through Google's changing rationales for his termination. Thus, even if Google were correct that the ageist comments by Hoelzle, Rosing and the co-workers were merely "stray remarks" to be discarded, the summary judgment remains reversible based on the triable fact issues created by Reid's other evidence.

Second, as to Google's evidentiary objections, Google lacks standing to complain. Although the trial court did not resolve Google's objections, instead stating it was only relying on "competent and admissible evidence" pursuant to *Biljac Associates v. First Interstate Bank of Oregon* (1990) 218 Cal.App.3d 1410 ("*Biljac*"), Google nonetheless had a full opportunity to pursue its objections on appeal. And rather than find Google's failure to obtain evidentiary rulings constituted a waiver, the Court of Appeal considered Google's objections on the merits, consistent with *Biljac*. (See Slip Opinion (hereinafter "Op.") at p.14.) This was exactly the approach Google itself urged in its Respondents' Brief. (See Google's Respondent's Brief ("RB") filed in Court of Appeal at 28, n.4.)

Google's *Biljac* arguments also are inconsequential to the appeal. Other than Google's objections to the declaration of Reid's statistical

expert—which objections the Court of Appeal addressed and correctly rejected on the merits—Google either did not object in the trial court, or failed to raise objections properly in the Court of Appeal, to any of the other evidence the Sixth District relied upon in reversing summary judgment. The ageist remarks directed at Reid by his Google supervisors and co-workers, the conflicting reasons from Google for Reid's termination, the phony "job elimination angle" created after the fact, and the descriptions of Google's youth culture were all contained in deposition testimony and company e-mails to which Google either did not object or did not challenge on appeal.

The judgment of the Court of Appeal, reversing the trial court's summary judgment, should be affirmed and the matter remanded for trial.

II. STATEMENT OF FACTS

A. Google Recruits and Hires Dr. Brian Reid.

Dr. Reid was hired by Google on June 17, 2002, at age 52, as Director of Operations and Director of Engineering. (Op.2; Appellant's Appendix ("APP") 6APP1404-5, 1424-26.) Google was a young company at the time, attempting to establish credibility among startup investors wary of investing in a company founded by two individuals under thirty, Sergey Brin (then age 28) and Larry Page (then age 29), and run by recent college graduates. (Op.2; 6APP1446-56, 12APP2925.) Reid's credentials were well-suited to instill confidence in potential investors. (*Id.*) When he was hired, Reid was at the pinnacle of a distinguished 30-year career in computer science. He had worked on the telemetry for Apollo 17; was part of the team that defined internet e-mail standards; helped develop a page-description language called Scribe, a precursor to HTML; managed the team that built the first high-powered Internet search engine, AltaVista; co-founded the company that later became Adobe Systems; created and managed the team that built the first Internet firewall; designed and

implemented the winning bid to replace NASDAQ's computer network; was a leader in creation of the Digital Equipment Corporation website, the first Fortune 1000 website; created the State of California election internet service, resulting in the world's first live web election results; created the first municipal website in the world; created a successful interdepartmental network at Stanford using Ethernet; and participated in the apprehension of the first super-hacker, Kevin Mitnick. (6APP1425-31.) Reid was named by Newsweek magazine in 1995 as one of its "50 for the Future." (6APP1426.) Reid holds a doctorate from Carnegie Melon University in computer science, and has served as an associate professor in electrical engineering at Stanford University. (*Id.*; Op.2.)

After Google's CEO Eric Schmidt instructed that Reid be "pursue[d]" for employment, Vice President of Engineering Wayne Rosing extended the Company's offer, which Reid accepted. (Op.2; 6APP1426, 1446-58, 7APP1698, 1703, 12APP2909, 3092-93.) Reid managed Google's multi-million dollar operations budget, made decisions affecting the company's rapid expansion, acted as a conduit between management and employees, and was involved in Google's extensive recruitment and hiring process. (6APP1426-27.) He trained managers, instituted recognition programs, implemented a successful operations "helpdesk," and generally oversaw the explosive expansion of Google operations. (*Id.*) Company revenue tripled during his tenure. (6APP1427.)

In recognition of his work, Reid received commendations from executives, including Rosing, Schmidt and CFO George Reyes. (6APP1463, 1487-89, 1573-77.) Reid reported to both Rosing and his Vice President of Engineering Operations, Urs Hoelzle, both of whom supervised Reid. (Op.2-4; 7APP1748-49, 1754-57, 12APP2921-22.) Rosing commented, in Reid's only written performance evaluation, that Reid "has an extraordinarily broad range of knowledge concerning

Operations, Engineering in general, and an aptitude and orientation towards operational and IT issues," he "project[s] confidence when dealing with fast changing situations," "has an excellent attitude about what 'OPS' and 'Support' mean," is "very intelligent," "creative," "a terrific problem solver," and noted that the "vast majority of Ops runs [sic] great." (Op.2; 6APP1578-83.) Rosing gave Reid a performance rating indicating he "consistently [met] expectations." (Op.2; 6APP1584-86.) From February 2003 to February 2004, Reid received several bonuses, including additional stock options. (Op.2; 6APP1573-77.)

But Rosing's performance evaluation also warned about "cultural fit:" "Adapting to the Google culture is the primary task for the first year here....Right or wrong, Google is simply different: Younger contributors, inexperienced first line managers, and the super fast pace are just a few examples of the environment." (Op.2; 6APP1579.) Reid was later terminated because he was not a "cultural fit" at Google. (6APP1515-16, 1523-26; see Op.2.) At Google, "not a cultural fit" meant "too old." (6APP1515-16, 1523-26, 7APP1786, 1789-90.)

B. Reid Begins Receiving Derogatory Age-Related Comments From Supervisors, Co-workers And Google's Founders.

Reid was subjected to ageist comments starting his first week at Google. (Op.2; 6APP1496-97.) His supervisor, Urs Hoelzle, then age 38, and a close friend of the Google founders, made age-related discriminatory comments to Reid "every few weeks," including during weekly hiring meetings. (Op.2; 6APP1546-47, 7APP1748-49.) Among other things, Hoelzle told Reid his opinions and ideas were "obsolete" and "too old to matter." (Op.2; 6APP1530-31.) He asked Reid whether he had "anything that's more current to say" and repeatedly told Reid that he was "slow,"

"fuzzy," "sluggish," "lethargic," did not "display a sense of urgency," and "lack[ed] energy." (Op.2; 6APP1492-93, 1532, 1534-36, 1546-48.)

Evidencing the prominence of youth culture at Google, Reid's co-workers referred to him as "old man," "old guy," and "old fuddy-duddy." (Op.3; 6APP1494-1500, 1527-29.) He heard a coworker say behind his back in the men's room, "Geez, these old guys are just taking forever on this, aren't they?" (6APP1494-95.) Co-workers told him his knowledge was "ancient" and joked that his CD jewel case office placard should be an "LP" instead of a "CD." (Op.3; 6APP1496-97.) He was made to feel like an outsider because of his reluctance to participate in company snowboard trips, with slumber-party-like accommodations, or in lunchtime roller-hockey games, or to use bean bags in lieu of normal chairs. (6APP1427.)

Reid endured ageist comments from Google's founders as well. Larry Page stated in front of Reid that he "likes having younger workers at Google" because "**hiring younger people just worked better**." (6APP1551-52 [emphasis in all e-mails added].) Echoing Page, Hoelzle reminded Reid and others that Google preferred younger workers. (6APP1550, 1553-54.) Hoelzle drew graphs in hiring meetings depicting experience (i.e., age) on one axis and job position on the other. (6APP1427.) He ordered Google's hiring committee to select candidates who were, all things being equal, younger and who could be paid less. (*Id.*)

C. Reid Is Removed From Operations And Replaced By Hoelzle, 15 Years Younger.

The age discrimination against Reid intensified in the fall of 2003. On September 5, 2003, two days before the company's fifth anniversary, Google co-founder Sergey Brin sent an e-mail to executives setting out his goals for the next five years. Under the heading "Payroll," he instructed: "We should avoid the tendency toward bloat here particularly with highly paid individuals." (12APP3128-29.) Three hours later, Rosing—perhaps

feeling his own job in jeopardy as he was then 55—responded to his boss: "Excellent memo and very timely.... Let me disclose what I am up to organizationally....I WILL be moving Brian Reid to a new role and have asked Urs to take over Operations....**We are looking for a senior Director (note I did not capitalize Sr.)** or VP level person to run this operation...." (Op.2; 12APP3127.)

A month later, on October 13, 2003, Reid was stripped of his Director of Operations title and removed from his responsibilities and reports as Director of Engineering. (Op.3; 6APP1628, 1631-32.) Hoelzle (39) took over Reid's position as Director of Operations and Douglas Merrill (34) assumed his other job responsibilities. (Op.2-3, 22; 6APP1585, 1590.)

D. Reid Is Subsequently Shunted To A Dead-End Position And Then Abruptly Terminated.

After his removal as Operations Director, Reid was assigned to a variety of special projects in the Engineering Department that could have been delegated to someone with significantly lesser qualifications, including college recruiting, mentoring, a "train-to-hire" program, and establishing an in-house graduate degree program. (Op.3; 6APP1504-9, 1558-63, 1638-48, 1661-62, 1758-59.) While CEO Schmidt reassured Reid in January 2004 that the in-house degree program was important and would last at least five years, Reid was never given any budget or staff to support it. (Op.3; 6APP1484-86, 12APP3100.) In fact, there is no evidence indicating the program was ever intended to be launched–no meeting minutes, no memos, nothing discussing the creation or need for such a program, except a lone e-mail announcing Reid's assumption of new duties. (6APP1638.)

In January 2004, Brin, Page, Rosing and Hoelzle further increased the pressure on Dr. Reid, making a collective decision to pay him a zero

bonus. (Op.3; 6APP1597, 1605-6.) But Rosing responded privately to Schmidt on February 7, 2004 expressing doubt about the group's zero bonus decision. (12APP3135-36.) The e-mail begins "[o]n our favorite person," and goes on to candidly acknowledge that Reid was being treated differently than other similarly situated employees: "I am having second thoughts about the full zero out of the $14K bonus **vs. treating it consistent with all similarly situated performers**." (Op.3; 12APP3135.) Rosing then urges that Reid be given a nominal sum ($11,300) and as to Reid's termination, Rosing continued, "[s]o I think we just eliminate the assignment and conclude there is no other assignment which matches his skills.... **I cannot imagine a judge concluding we acted harshly**...." (Op.3; 3APP762, 12APP3136.) Schmidt responded the same day with an e-mail directing Rosing to provide a "proposal...next week on getting Brian out." (Op.3; 12APP3135.)

Finally, on February 13, 2004, Rosing met with Reid, told him he was not a "cultural fit," and was no longer welcome in the Engineering Department. (Op.4; 6APP1509-19, 1566, 7APP1677.) When Reid asked Rosing if Page (28-years-old) had made the decision, Rosing nodded yes. (Op.4; 6APP1518-19.)

E. Though To His Face Google Encouraged Reid To Apply To Other Departments, Google's Managers Conspired Behind His Back To Assure There Was No Spot For Him And Agreed To Justify The Termination Based On A "Job Elimination Angle."

While Rosing encouraged Reid to apply for positions with other Google departments, e-mails behind Reid's back indicated the Google executives had conspired to deny him a position. (Op.4.) On February 18, 2004, five days after his meeting with Rosing, Reid met with CEO Schmidt to tell him he had been terminated. (6APP1565-67.) Although just eleven days earlier Schmidt had commanded Rosing to prepare a plan on "getting

Brian out," Schmidt feigned ignorance and told Reid, "I don't know anything about this...." (6APP1565-67, 12APP3135.) Schmidt also told Reid, "please understand this is not performance related" and reassured him that the Graduate Degree program was continuing. (6APP1565-67.)

Reid had scheduled a February 24 meeting with Shona Brown, the Vice President of Business Operations. (Op.4; 6APP1515-16, 12APP3133, 3138.) The day before, she wrote privately to Rosing and Human Resources Director, Stacy Sullivan, "We should probably get me clear on this before tomorrow." (Op.4; 7APP1686.) And later, "you should make sure I am appropriately prepped. **My line at the moment is that there is no role for him in the HR organization**." (Op.4; 12APP3138.)

Sullivan then responded: "Seems [Reid's] first interest is to continue his work on the college programs he's been working on.... I propose [Brown] ... meets with him on [February 24,] lets him know there's no role [for him] in her org ... I've talked to [CFO] George [Reyes] live, he will not have an option for Brian ... [T]his is The Company Decision." (Op.4; 12APP3138-39.) Sullivan ended her message: "**we'll all agree on the job elimination angle**...." (Op.4; 12APP3139.)

The next day, February 24, Reid met with CFO Reyes and was told there was no position open in his department. (Op.4; 6APP1523-24.) When Reid met with Brown, then age 37, she was even more pointed, telling Reid "**there is no future for you at Google. You are not a cultural fit.**" (Op.4; 6APP1524-26.)

Despite inquiries as to why he was being fired, no one ever mentioned job elimination to Reid at the time of his termination. (6APP1515, 1523-24, 1539-40.) Nothing in Reid's personnel file nor any pre-termination documents say why he was fired. (6APP1438, 1585-86, 1698-719.) Although Google insinuates Reid was terminated for performance reasons (OB5), Schmidt told Reid at the time his termination

was not performance related. (6APP1565-66.) Significantly, Google *admitted* the same in discovery. (Op.23; 7APP1735.) The phony "job elimination angle" was made up to hide Google's discriminatory intent.

During the termination process, Reid's entitlement to stock options featured prominently in the e-mail discussions among the Google executives. (12APP3135, 3138.) Two months after Reid's termination, Google filed papers to initiate the public offering process leading to Google's IPO on August 19, 2004. (1APP37.) By wrongfully terminating Reid, Google stripped him of 131,917 stock options. (*Id.*)[1]

III. PROCEDURAL HISTORY

On July 20, 2004, Reid sued Google. (Op.5; 1APP1.) His complaint asserts causes of action based mainly on age discrimination under the California Fair Employment and Housing Act ("FEHA") (Government Code, §12900 et seq.), as well as violations of California's Unfair Competition Law ("UCL") (Bus. & Prof. Code, § 17200 et seq.) relating to Google's practices of discriminating against older workers. (*Id.*)[2] In response, Google demurred and brought motions to strike as to various causes of action, which were granted in part. (Op.5.)

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[1] Nothing in the record supports Google's statement that Reid is worth $29,000,000. (OB7.) The evidence Google cites indicates only the value of Google stock in 2005. (3APP576, 579-80, 613.)

[2] Reid's first amended complaint asserted the following causes of action: (1) UCL violations; (2) age discrimination under FEHA, including both disparate treatment and disparate impact; (3) disability discrimination under FEHA (subsequently dropped by Reid); (4) wrongful termination in violation of public policy; (5) failure to prevent discrimination; (6) negligent infliction of emotional distress; (7) intentional infliction of emotional distress (Op.5; 1APP29.) (Reid did not raise the remaining causes of action on appeal.) (Op.11, n.2.)

Google attacked Plaintiff's remaining causes of action on motion for summary judgment, which the trial court granted. (Op.5; 2APP523-5APP1220; 11APP2852-58.) Although Google submitted written objections to some of Reid's evidence (11APP2774-2805) and raised the objections at the hearing (RT48-49), the trial court did not rule on the objections. Instead, it stated it was only relying "on competent and admissible evidence pursuant to [*Biljac.*]" (11APP2853.) Reid appealed on November 23, 2005. (Op.5-6; 11APP2867-70.)

In a unanimous decision authored by Justice Rushing, with Justices Premo and Elia concurring, the Sixth District reversed summary judgment, concluding that "Reid produced sufficient evidence that Google's reasons for terminating him were untrue or pretextual, and that Google acted with a discriminatory motive such that a fact finder could conclude Google engaged in age discrimination." (Op.25.)

The Court of Appeal carefully considered and rejected each of Google's arguments supporting summary judgment. It dismissed Google's challenges to the methodology used by Reid's statistical expert, Dr. Norman Matloff, noting Google offered no rebuttal expert of its own. (Op.17.) The Court also rejected Google's argument that certain ageist comments by Google decisionmakers and Reid's co-workers were "stray remarks" and therefore insufficient proof. (Op.19-20.) The Court explained that judgments regarding such discriminatory comments "must be made on a case-by-case basis in light of the entire record." (Op.20.)

The Court further held that Google was not entitled to an inference of "no discrimination." (Op.25.) Google had argued that Rosing made the decision to both hire and fire Reid, and because Rosing was over 50 at the time, Google was entitled to an inference against discrimination. (RB2, 4, 45-46.) But the Court correctly found that Reid had presented evidence showing co-founder Page, director Hoelzle and CEO Schmidt were also

involved in the termination decision, disputing Google's claim Rosing was the sole decisionmaker. (Op.24-25.)

Finally, the Court found that Reid's termination, only four months after being demoted to Google's graduate program, when "coupled with" Reid's other evidence and Google's disputed reasons for Reid's termination, raised a triable issue of fact as to pretext. (Op.23-24.) As the Court concluded, the evidence and inferences of discrimination presented by Reid were the "purview of the jury, and not the decision of the trial court on summary judgment." (Op.22.)

In November 2007, the Court of Appeal modified its judgment to award Reid costs on appeal and changed one word in the decision based on a letter request from Google. Google never sought rehearing.

IV. DISCUSSION

A. The Court of Appeal Correctly Reversed Summary Judgment Based On Numerous Triable Issues of Fact.

In an age discrimination case, once an employee has stated a prima facie case of discrimination, and the employer has articulated an alleged reason for termination, the burden shifts back to the employee to show the proffered reason is not legitimate, but is pretext for unlawful discrimination. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 354-356.) A showing of pretext raises an inference of discriminatory animus. (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 112 n.11.)

Here, the trial court found that while Google's evidence did not defeat Reid's prima facie case of age discrimination, it was "sufficient to prove that [Google] had legitimate nondiscriminatory reasons for...terminating [Plaintiff's] employment in February 2004." (Op.11; 5APP2854.) Thus, the central question on appeal of the summary judgment was whether Reid produced sufficient evidence that Google's purported reasons for terminating him were pretextual or untrue, and that Google

acted with discriminatory motive such that a factfinder could determine Google engaged in age discrimination. (Op.25.)

On appeal from a grant of summary judgment for defendant, the reviewing court "view[s] the evidence in a light most favorable to plaintiff as the losing party [citation omitted], liberally construing [plaintiff's] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) "A material issue of fact may not be resolved based on inferences if contradicted by other inferences or evidence." (*Faust v. Calif. Portland Cement Co.* (2007) 150 Cal.App.4th 864, 877; see also Code Civ. Proc.§ 437c(c).) "'[B]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant.'" (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1386 [*quoting Benson v. Northwest Airlines* (8th Cir. 1995) 62 F.3d 1108, 1111].) As the Ninth Circuit has observed, "because of the inherently factual nature of the inquiry, the plaintiff need produce very little evidence of discriminatory motive to raise a genuine issue of fact." (*Lindahl v. Air France* (9th Cir. 1991) 930 F.2d 1434, 1438.)

Here, summary judgment was improper because, as the Court of Appeal found, Reid raised triable fact issues through "a combination of evidence" showing that Google's purported "reason of job elimination for Reid's termination was pretextual, such that a rational finder of fact could find the reason unworthy of credence." (Op.12.) Reid's proffered evidence included Google's changing rationales for Reid's termination, Reid's demotion to a nonsustainable job position just prior to his termination, age derogatory remarks made by Google decisionmakers and Reid's co-

workers, and expert statistical findings of Google's discriminatory practices impacting Reid. (*Id.*)

Other courts presented with nearly identical fact patterns have found at least a triable issue of fact as to pretext, precluding summary judgment. For example, in *Torre v. Casio, Inc.* (3rd Cir. 1994) 42 F.3d 825, relied on by the Sixth District (Op.21-22), summary judgment for the employer was reversed where an older worker, who had endured ageist comments, was transferred to a dead-end position that was abruptly eliminated. Plaintiff Gabriel Torre was hired, and even re-hired, by Casio when he was over age 50. (42 F.3d at 827.) He worked as a regional sales manager until he was moved into a newly created position (*Id.*) A month later, Casio eliminated the new position and terminated his employment. (*Id.*)

Torre filed a claim for age discrimination, maintaining Casio transferred him to the dead-end newly-created marketing position "as a 'subterfuge'" so they could fire him at a more propitious and seemingly innocent moment. (*Torre*, 42 F.3d at 827.) He also contended a former supervisor at Casio was driven to replace him with a younger worker and had made ageist comments. (*Id.*) In response, Casio argued Torre had been transferred to the newly created position because of performance problems and that the position was later eliminated because of business downturn. (*Id.* at 828.)

The district court granted summary judgment to Casio, but the Tenth Circuit reversed. It found that the district court had improperly "resolved a host of material fact issues" in dismissing Torre's claims and had "essentially accepted Casio's explanations in their entirely and failed to address a significant amount of evidence presented by Torre." (*Torre*, 42 F.3d at 832.) The Tenth Circuit further acknowledged that Casio might even ultimately prevail in the case, but noted that "is not the point" at the summary judgment stage. (*Id.* at 833.) Rather, the court must "look at the

evidence most favorable to [the plaintiff] and draw all reasonable inferences in [the plaintiff's] favor." (*Id.*)

A similar fact-pattern led to the same result in another age discrimination case, *Stratton v. Handy Button Machine, Co.* (N.D. Ill. 1986) 639 F.Supp. 425. Plaintiff Clarence Stratton, like Reid and Torre, was hired at an advanced age. He worked as a maintenance foreman at Handy Button before he was demoted and given the title of "director of special projects" (just like Reid.) (*Id.* at 426, 428.) Though Handy Button claimed the demotion was due to performance problems, Stratton's direct performance evaluations had been positive. (*Id.* at 427.) Just four months after the demotion, Handy Button eliminated the "special projects" position because of Stratton's high rate of pay and alleged continued poor performance. (*Id.* at 428.) The district court held that numerous issues of material fact existed that precluded summary judgment, including issues about Stratton's performance and whether the creation of the new "special projects" position was a sham "created only as a way-station to [Stratton's] layoff." (*Id.* at 433.)

Here, like *Torre* and *Handy Button*, triable issues exist as to whether Reid's new special role was "created only as a way-station" to his age-based termination. And like the trial courts in *Torre* and *Handy Button*, the trial court here improperly weighed that evidence in granting summary judgment.

Ignoring that the issue is whether there are triable issues of fact, Google sets forth a one-sided version of the facts, without regard to the evidence Reid submitted in response.[3] Rather than respond to the complete package of proof presented by Reid, Google focuses on only two aspects of

[3] For example, Google repeatedly cites its own statement of "undisputed" facts, ignoring that Reid disputed Google's version. (OB5-7; 3APP556-62, 5APP1404-23 [Undisputed Material Facts nos. 6, 8, 10, 11, 13].)

the evidence: ageist comments ("stray remarks") by Google employees, and Google's objections to certain evidence, including the expert statistical findings. But neither issue is dispositive because Reid raised triable issues with much more evidence than simply the remarks Google attacks as "stray," and with evidence not subject to the objections Google raised below.

B. Issue No. 1—The "Stray Remarks" Issue.

Google challenges the Court of Appeal's decision for relying, in part, on certain discriminatory statements by Google managers, supervisors and employees as part of Reid's proof of discriminatory animus. (OB10-29.) Google contends this evidence should have been disregarded because Google claims the remarks were made by non-decisionmakers, were ambiguous and were unrelated to the adverse employment decisions Reid suffered. (OB25-29.) Although Google devotes fifteen pages arguing about "stray remarks" (OB10-29), it fails to provide the record citations for the statements it attacks, and fails to explain the context in which they were made. (OB25-26.) The missing testimony is provided below.

1. The Remarks

All Google's alleged "stray remarks" come from Reid's deposition testimony, which Reid submitted in opposition to Google's summary judgment motion. (6APP1434, 1462-1571.) Significantly, Google never objected to *any* of the testimony. (11APP2781-87.)[4]

(1) Ageist Statements by Reid's Co-workers. (OB25, 28.) Reid's initiation to the Google culture began the first day in his new office. (6APP1496-97.) Google's custom was to label offices with empty CD

[4] Reid's deposition testimony was attached as Exhibits 5-7 to the Gabe Declaration. (6APP1434, 1462-1571.) Google's Evidentiary Brief in the trial court did not object to any of these Exhibits. (11APP2783-87.)

jewel cases containing a card showing the employee's name and office number. (6APP1496.) Reid testified:

> And the very first day that I was sitting in my new office with no label on there, somebody walked by, and I don't know who it was, because at the time I was new and didn't know anybody, and looked in at me and looked at the lack of a label and said, "Hah. He doesn't need a CD, he needs an LP." You know ... that really raised my eyebrows. I had never before been in an environment where anybody paid any attention to my age, and I thought, hmmm, interesting. [6APP1496-97.]

He testified being called "an old fuddy-duddy" by a coworker while working at a Google-sponsored evening event for a publication entitled "Web Master World." (6APP1498.) He described another incident while in the men's room:

> I remember very vividly at one point being in the men's room ... when I heard one person behind me in line say to another, "Geez, these old guys are just taking forever on this, aren't they?" And I looked around and I was the only old guy there, and so it was very clear that he was speaking about me. [6APP1494-95.]

While Google may attack the comment as "anonymous" (OB25), Reid had his back to the speaker for obvious reasons. (6APP1494.)

When asked why he felt the brunt of age discrimination at Google, Reid explained:

> Because it was all around me. There were the looks that I get from people. There are the comments that I'm not supposed to overhear that I do. There is [sic] the jokes that you hear in the cafeteria line. There is the "Let me get the door for you, old man." [6APP1527-28.]

(2) Ageist Statements by Supervisor Urs Hoelzle. (OB25-27.)

Reid testified he received constant age-related comments from his supervisor Hoelzle:

> Well, the one that really sticks in my mind the most was Urs Hoelzle referring to me as 'slow," "lethargic," "lacking energy," and "not exhibiting a sense of urgency."...[H]e didn't use all of those terms every time, but it seemed to be part of the way he perceived me. He said it for the first time in a meeting. I think it was even in Wayne Rosing's office.... He was speaking angrily to me and those were part of the words he used....No one in my life had ever referred to me as "lethargic" before. [6APP1492-93.]

Reid also testified Hoelzle "often said to me and of me that I was sluggish and did not display a sense of urgency." (6APP1536.) Hoelzle made these remarks to Reid "every few weeks" in the context of "a meeting, a presentation, my expressing an opinion." (7APP1547.) Reid also testified Hoelzle told him "a few times:" "Your opinion is obsolete. That's too old to matter." (6APP1530-31.) Reid believed Hoelzle's comments were age-related because "he was somehow in his mind expecting me to behave just like the 20-somethings that represented his ideal." (7APP1547-48.)

Fighting the facts, Google argues Hoelzle was merely a "coworker who did not participate in the termination decision" and that Rosing alone made the decision to terminate Reid. (OB25, 27 n.10.) But Reid produced substantial evidence showing Hoelzle both supervised Reid and, along with Page, Schmidt and Rosing, made the termination decision. (Op.2-4; 6APP1409-10.) As the Sixth District concluded: "We do not believe, as Google asserts, that the evidence is undisputed that Rosing was the sole decision maker in Reid's termination." (Op.25.)

(3) Statements by Supervisor Wayne Rosing As To Reid's Lack of "Cultural Fit." (OB26.) When Rosing notified Reid he was terminated in February 2004, he told Reid the reason was he was not a "cultural fit" in Engineering, a comment Reid repeated to Schmidt a few days later. (OB26; 6APP1516, 1566.) The same comment was repeated to Reid by manager Shona Brown when he later met with her seeking a job in her department. (Op.4; 6APP1524-26.)[5]

Comments and warnings about Reid's lack of "cultural fit" appear throughout the record. One of Reid's first job interviewers commented about Reid, "the biggest question for [hiring] someone with such a history behind him is culture fit." (7APP1461, 7APP1771.) In Reid's written performance evaluation, Rosing warned that Reid might not fit with the Google culture. (6APP1579 (["Adapting to the Google culture is the primary task for the first year here....Younger contributors, inexperienced first line managers, and the super fast pace are just a few examples...."].) Reid also submitted a declaration from a recruiter who had worked at Google from May 2002 to May 2004, who explained "the term 'cultural fit' was used often in staffing meetings by Google management to refer to persons who were more senior or aged, who did not fit in with Google's youthful environment." (7APP1789-90.)

2. Google Overstates The Reach of The So-called "Stray Remarks Doctrine."

As precedents of the U.S. Supreme Court and this Court show, it generally is improper for a trial court to weigh the evidence of

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[5] Although Google never challenged on rehearing the Court of Appeal's recitation of the facts, Google now attacks the Court for incorrectly stating Reid was "told twice by Rosing" he was not a "cultural fit." (OB26 n.8; Op.19.) The Court's mistake is inconsequential as Reid *was* twice told lack of cultural fit was the reason for his termination, albeit separately by Rosing and Brown. (6APP1516, 1526.)

discriminatory remarks by co-workers in ruling on a motion for summary judgment. While there may be cases where the evidence of coworker remarks is so isolated and remote that it is disregarded as "stray remarks," it is improper to grant summary judgment even in those cases if there is corroborating evidence of discriminatory remarks or conduct by decision-making supervisors or statistical evidence of a pattern and practice of discrimination.

a. Development in the Federal Courts.

The term "stray remarks" stems back to the analysis of Justice O'Connor in her concurrence in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228. *Price Waterhouse* involved a senior manager at a nationwide professional accounting partnership who sued her employer for sex discrimination for refusing to re-propose her for partnership. (*Id.* at 231.) In her concurrence, Justice O' Connor distinguished the direct evidence of the decisionmakers' comments at issue from mere "stray remarks," which "standing alone" would not have been sufficient to shift the burden of persuasion to the employer. (*Id.* at 235, 277.) As she explained:

> [S]tray remarks in the workplace, while perhaps probative of sexual harassment ... cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy plaintiff's burden in this regard. [*Id.* at 277; internal citation omitted.]

Justice O'Connor went onto explain, however, that by presenting other evidence such as proof of gender-related comments by decisionmakers, plaintiff did show the required direct evidence that the partnership decision was based on gender. (*Id.*) Significantly, O'Connor *never* indicated that

remarks by decisionmakers in the context of an employment decision could not be presented to a jury as circumstantial evidence of discrimination. (See L. Reinsmith, *Proving an Employer's Intent: Disparate Treatment Discrimination and The Stray Remarks Doctrine After Reeves v. Sanderson Plumbing Products* (2002) 55 Vand. L. Rev. 219, 240 [hereinafter "Reinsmith"].)

After *Price Waterhouse*, however, lower federal courts expanded on Justice O'Connor's analysis in disparate treatment cases to create what became known as the "Stray Remarks Doctrine." (See generally Reinsmith at 244-45 [explaining history of "stray remarks doctrine"].) Some of the cases involved truly non-probative comments. (See, e.g., *Standard v. A.B.E.L. Services, Inc.* (11th Cir. 1998) 161 F.3d 1318, 1329-30 [where plaintiff overheard the single statement "older people have more go wrong" but did not know the context of statement and proffered no other circumstantial evidence, comment held not probative of age discrimination]; *Mathews v. Trilogy Commc'ns, Inc.* (8th Cir. 1998) 143 F.3d 1160, 1165-66 [manager's deposition testimony that plaintiff viewed himself as "diabetic poster boy" made two years *after* plaintiff's termination, and plaintiff's impressions from meeting three years before termination held insufficient to raise inference of discriminatory bias].)

But in other cases, courts began to cross the line into weighing evidence and making credibility decisions properly reserved for the jury, discounting discriminatory comments even from direct supervisors. (See generally Reinsmith at 246-49; see, e.g., *Nidds v. Schindler Elevator Corp.* (9th Cir. 1996) 113 F.3d 912, 915, 918-19 [direct supervisor's comment he intended to "get rid of all the 'old timers' because they would not 'kiss my ass'" held "weak" and "not weighty"]; *Cone v. Longmont United Hospital* (10th Cir. 1994) 14 F.3d 526, 531 [CEO's remark that two women over 40 years-old had been fired "*because* the hospital 'needs some new young

blood'" held "not material" as plaintiff failed to demonstrate a "nexus" between the comments and her termination] [emphasis added]; *Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703, 705 [direct supervisor's comment to plaintiff that "we don't necessarily like grey hair" held "at best weak circumstantial evidence"].)

Against this backdrop, the United States Supreme Court issued its decision in *Reeves v. Sanderson Plumbing Prods, Inc.* (2000) 530 U.S. 133, 153 (*Reeves*), holding that a court may not substitute its own judgment for the jury's as to the weight given discriminatory comments. There, a 57 year-old sued his former employer for age discrimination after he was fired for allegedly failing to maintain accurate attendance records for the employees he supervised. (*Id.* at 137-138.) At trial, plaintiff demonstrated the employer's reason for termination was pretext for age discrimination by introducing evidence that he had kept accurate records, and that his manager had demonstrated age-based discriminatory animus in his dealings with him (e.g., by stating that plaintiff "was so old [he] must have come over on the Mayflower" and that he "was too damn old to do [his] job"). (*Id.* at 151.) The jury found in the plaintiff's favor and the trial court denied the defendant's motion for judgment as a matter of law. (*Id.* at 139.) On appeal, however, the Fifth Circuit re-weighed the evidence, concluded the comments were unrelated to the termination as a matter of law, and reversed. (*Id.* at 139-40.)

The Supreme Court reversed. In an opinion delivered by Justice O'Connor, the Court held "the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's." (*Reeves*, 530 U.S. at 153.) The Court explained that in assessing a motion for judgment as a matter of law, like a motion for summary judgment, the record must be "taken as a whole" and the court "may not make credibility

determinations or weigh the evidence." (*Id.* at 150-51 [internal citation omitted].)

Subsequent federal decisions have warned that pre-*Reeves* jurisprudence on "stray remarks" "must be viewed cautiously." (*Russell v. McKinney Hosp. Venture* (5th Cir. 2000) 235 F.3d 219, 229; *Palasota v. Haggar Clothing Co.* (5th Cir. 2003) 342 F.3d 569, 573-74, 578.) As explained in *Russell,* "*Reeves* is the authoritative statement regarding the standard for judgment as a matter of law in discrimination cases." (*Russell,* 235 F.3d at 223 n.4; see also *Palasota,* 342 F.3d at 573-74, 578 [reversing judgment as a matter of law where trial court incorrectly relied on pre-*Reeves* caselaw].) Significantly, most of the federal cases Google relies on in its Opening Brief predate *Reeves.* (OB11-17, 19, 22, 26.)

b. Discussion in California Cases.

Like *Reeves*, California cases also limit a trial court from weighing evidence on summary judgment. (See *Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 856 ["the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact."]; *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840 [trial court may not grant summary judgment "based on the court's evaluation of credibility," nor "weigh the evidence in the manner of a fact finder to determine whose version is more likely true."]; *Faust,* 150 Cal.App.4th at 877 [summary judgment cannot be affirmed unless a contrary view would be unreasonable as a matter of law under the circumstances presented].)

To support its stray remarks analysis, Google argues there is nothing inappropriate in the trial court assessing "the relative strength and nature of the evidence presented on summary judgment." (OB21.) But Google overlooks that essential to that assessment is a review of the *complete* package of proof, not selected remarks in isolation. As this Court explained

in *Guz v. Bechtel Nat'l. Inc.*, 24 Cal.4th at 362: "Whether judgment as a matter of law is appropriate in any particular [age discrimination] case will depend on a number of factors." The factors include "'the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case....'" (*Id.* [*quoting Reeves*, 530 U.S. at 148-49].)

None of the six California appellate decisions cited by Google as allegedly adopting the "stray remarks doctrine" explicitly describes the analysis as a "doctrine" or "rule," let alone suggests it provides a basis to permit a trial court to weigh and assess the remarks in isolation. (OB17-18.) In two decisions, the appellate courts *reversed* summary judgment on discrimination claims, refusing to discount the discriminatory remarks as "stray" when examined in context. (See *Sada v. Robert F. Kennedy Med. Ctr.* (1997) 56 Cal.App.4th 138, 154 n.15 [declining to deem "stray" employer's suggestion during job interview that plaintiff should "go back to Mexico and work there" and finding it raised an inference hiring decision based on plaintiff's ancestry]; *Kelly v. Stamps.com* (2005) 135 Cal.App.4th 1088, 1101 [declining to view CEO's remark that pregnant plaintiff had mentally "checked out" as "unamenable to signifying a discriminatory animus," since comment made during discussion of whether to retain plaintiff].)

As to the three California "stray remarks" cases Google cites affirming summary judgment for the employer, they turn far more on a failure of plaintiff's prima facie proof of discrimination, than on a blanket application of a "rule" or "doctrine" of the sort Google advocates. (See *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 801-3, 809 [affirming summary judgment where plaintiff's age bias evidence consisted of one remark by manager uninvolved in termination

decision that "this is 1994, haven't you ever heard of a fax before?"][6]; *Slatkin v. University Of Redlands* (2001) 88 Cal.App.4th 1147, 1158-59 [affirming summary judgment where "trial court properly disregarded nearly all of [plaintiff's] proffered evidence of anti-Semitic animus as inadmissible" and as a result plaintiff failed to state a prima facie case of discrimination]; *Gibbs v. Consolidated Services* (2003) 111 Cal.App.4th 794, 801 [affirming summary judgment where defendant established plaintiff lacked computer and management skills necessary for restructured company operations and plaintiff "failed to make a prima facie case of age discrimination"].)[7]

In sum, the California "stray remarks" cases Google cites all turn on a close examination of all the evidence in the record and do not view the remarks in isolation, as Google invites. The Sixth District's analysis, entirely consistent with *Guz* and *Reeves,* also looked at the "combination of evidence" Reid presented, not simply the Hoelzle, Rosing and coworker remarks. (Op.12, 20, 24.)

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[6] The *Reid* court criticized the reasoning in *Horn*, because while *Horn* notes that "weighing of the evidence" is "prohibited" on summary judgment, the *Horn* court also inconsistently opined that the "stray" comment was "entitled to virtually no weight." (Op.20 n.5; see *Horn*, 72 Cal.App.4th at 807, 809.)

[7] The final California case Google cites did not turn on "stray remarks" at all. (*Trop v. Sony Pictures Entertainment Inc.* (2005) 129 Cal.App.4th 1133, 1145 [holding plaintiff failed to establish prima facie case of pregnancy discrimination because she failed to show she was visibly pregnant at time of termination and there was no proof her supervisor even knew she was pregnant before she was fired].)

3. As Hoelzle and Rosing Were Decisionmakers and Supervisors of Reid, The Court of Appeal Correctly Declined to Weigh The Evidence And Dismiss Their Ageist Comments As "Stray."

Rather than reject the "stray remarks doctrine" out-of-hand, the Sixth District recognized that there "are certainly cases" where "the remarks at issue provide such weak evidence that a verdict resting on them cannot be sustained." (Op.20.) But the Sixth District properly refused to assume a fact-finding role on summary judgment and determine the weight to be given the discriminatory remarks without evaluating the remarks "in light of the entire record." (Op.20.)

Here, even under Google's most expansive view of the so-called "stray remarks rule," the ageist comments made against Reid do not meet the definition of "stray." Rather than offhand, remote in time, isolated remarks, the discriminatory comments directed against Reid were age-related, repeated, contemporaneous with the decisions to demote and terminate, and include comments made by Reid's supervisors and managers, including Hoelzle and Rosing.

Highlighting the central triable issue in the case, Google argues the statements were "unrelated" to the adverse employment actions against Reid. (OB26-28.) But Rosing and Hoelzle were Reid's supervisors, and their comments were not made years before the adverse employment actions, nor were they unrelated to age. In fact, many were made while Reid was speaking with his supervisors *about his demotion and termination*, or in emails directly addressing these actions. (6APP1509-19, 1566, 12APP3127.) Hoelzle made ageist comments to Reid "every few weeks," Rosing told Reid he was "not a cultural fit" in the termination meeting, and the same statement was repeated by manager Brown the next day. (6APP1509-16, 1524-26, 1536, 1547, 1564-66.) Google's contention that it is "undisputed" that Rosing "never made any derogatory remarks

about Reid's age" (OB27 n.10) is surprisingly incorrect; not only did he tell Reid he was terminated because he was "not a cultural fit," he also authored one of the more blatantly ageist emails in the case, telling co-founder Brin with a textual wink he would replace Reid with "**a senior Director (note I did not capitalize Sr.)** ...." (12APP3127.)[8] Thus, Google's reliance on cases involving comments by non-decisionmakers, removed in time from the adverse employment decisions, are inapt.[9]

Google's further argument that Hoelzle's and Rosing's remarks are "[a]mbiguous" and "open to interpretation" also serves only to highlight the triable issues raised by competing interpretations. (OB26.) Placed in the context of Hoelzle's other comments that Reid's ideas were "obsolete" and "too old to matter," and about hiring cheaper younger workers, and co-founder Page's preference for "younger workers," it's a fair conclusion their comments were age-related. (Op.2-3; 6APP1530-31, 1549-54.) (E.g., *Strauch v. American College of Surgeons* (N.D. Ill. 2004) 301 F.Supp.2d 839, 846 ["ambiguously age oriented" comments were probative; "the task of disambiguating ambiguous utterances is for trial, not for summary judgment"] [*quoting Shager v. Upjohn Co.* (7th Cir. 1990) 913 F.2d 398,

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[8] Google cites Reid's testimony that he did not think Rosing had discriminated against him. (OB27-28 n.10 [*citing* 3APP647].) Of course, until discovery, Reid never saw the emails Rosing sent behind his back.

[9] See, e.g., *Smith v. Leggett Wire Co.* (6th Cir. 2000) 220 F.3d 752, 759-60 [racial comments disregarded where made "long before" termination, even 20 years prior]; *Arraleh v. County of Ramsey* (8th Cir. 2006) 461 F.3d 967, 975 [discriminatory comments disregarded where made by employee with no hiring authority and where unrelated to decisional process]; *Mathews*,143 F.3d at 1165-66 [derogatory comments disregarded where made months before speaker knew of plaintiff's disability, three years before plaintiff's termination, and two years after termination]; *Chiramonte v. Fashion Bed Group, Inc.* (7th Cir. 1997) 129 F.3d 392, 397 [ageist comment disregarded where speakers non-decisionmakers].

402].) California courts and federal courts have found analogous comments probative of pretext and discriminatory animus.[10]

As to the comments by Reid's co-workers, California courts recognize that discriminatory statements by non-decisionmakers creating a discriminatory atmosphere are probative of discriminatory animus. In *Ewing v. Gill Ind., Inc.* (1992) 3 Cal.App.4th 601, 615, for example, the Court of Appeal affirmed a trial judgment in favor of plaintiff based in part on age-related remarks of certain non-decisionmakers that reflected an atmosphere of age bias in the broadcasting company. When these remarks were considered along with other evidence that the company was "phasing out" plaintiff's job, had offered misleading statements about the reasons for plaintiff's termination, and transferred plaintiff's duties to three younger employees, the *Ewing* court concluded there was substantial evidence to support the jury's finding of age discrimination. (*Id.* at 614-15.)

Similarly, Google's contention that the comments directed against Reid simply show nondiscriminatory "awareness of the characteristic" of age is not correct when the comments are considered in context. (OB19.) In fact, Rosing's comments that the "primary task" for Reid was adapting to

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[10] See, e.g., *Kelly*, 135 Cal.App.4th at 1101 [employer's comment that plaintiff had "checked out" probative of discrimination where plaintiff presented evidence that person making remark participated in termination decision and where comment, in context, revealed it was connected with plaintiff's pregnancy]; *Ezell v. Potter* (7th Cir. 2005) 400 F.3d 1041, 1050-51 [reversing summary judgment on age discrimination claim where supervisors made disparaging remarks about older workers, referred to plaintiff's grey hair and beard, commented on his slowness, suggested another line of work for plaintiff, and told a new hire that they planned to replace older workers with "faster, younger workers"]; *Fisher v. Pharmacia & Upjohn* (8th Cir. 2002) 225 F.3d 915, 922-23 [reversing summary judgment where supervisor called employee "the old guy," management members commented "we need to get rid of the old guys" and "bring some of the younger people along faster"].

the Google culture (6APP1579), and Hoelzle's comments that Reid did not display the traits of the younger workers Hoelzle and Page preferred (6APP1492-93, 1535-36, 1549-50) are very similar to the Price Waterhouse partner who remarked that plaintiff's chances for partnership would improve if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." (See *Price Waterhouse,* 490 U.S. at 235.) When considered in context, the remarks Google attacks are simply not "stray."

4. Reid Presented More Evidence of Discrimination Than Simply the Remarks Google Attacks.

Reid also raised triable fact issues based on far more than the handful of allegedly "stray remarks" Google attacks. In other words, even if all the "stray remarks" Google attacks were discounted, the judgment remains reversible. In addition to the ageist remarks, Reid's combination of evidence included: (1) statistical evidence of discrimination at Google which Reid presented through his expert (Op.12-19; 12APP2978-83); (2) evidence of discriminatory comments about or in the presence of Reid or in e-mails by decisionmakers, including Rosing, Hoelzle and Page, which contributed to the discriminatory atmosphere at Google (Op.19-21; 6APP1551-52, 12APP3127, 3135-36); (3) Reid's demotion to a nonviable position before Google terminated him (Op.21-22; 6APP1427, 1628, 1631-32, 1638-42, 12APP3100, 3127); and (4) Google's changing rationales for Reid's termination. (Op.22-24; 6APP1509-19, 1565-67, 7APP1686, 1735, 12APP3138-39).

Federal courts have repeatedly held that similar combinations of proof are sufficient to raise triable issues of fact as to discriminatory animus.[11] As the Sixth Circuit reasoned in *Ercegovich v. Goodyear Tire &*

[11] See, e.g., *Fisher,* 225 F.3d at 922-23 ["even assuming" comments made by plaintiff's supervisor, company vice president and company director

Rubber Co. (6th Cir. 1998) 154 F.3d 344, 355-356, "we do not view each discriminatory remark in isolation, but are mindful that the remarks buttress one another as well as any other pretextual evidence supporting an inference of discriminatory animus."

In particular, where discriminatory comments are combined with statistical proof of discrimination, courts find plaintiff's showing sufficient. (See, e.g., *Greene v. Safeway Stores, Inc.* (10th Cir. 1996) 98 F.3d 554, 561, [evidence company's president told plaintiff "he didn't fit in with the new culture" when discharged held probative of discrimination in context of "backdrop" of statistical evidence that older workers were being replaced with younger ones]; *Hayes v. Compass Group USA, Inc.* (D. Conn. 2004) 343 F.Supp.2d 112, 120 [noting that while plaintiff's statistical evidence or evidence of discriminatory comments alone would not defeat summary judgment, when coupled together the evidence created a triable issue of fact].) (Both *Hayes* and *Greene* were discussed by the Sixth District. (Op.20-21).)

In sum, the Court of Appeal correctly applied the applicable law to all the evidence in the record in reaching its holding that Reid demonstrated the existence of triable issues of fact defeating summary judgment.

"were nothing more than stray remarks, we conclude that these statements, when considered in conjunction with [plaintiff's] prima facie case and showing of pretext, give rise to an inference of intentional discrimination"]; *Bevan v. Honeywell, Inc.* (8th Cir. 1997) 118 F.3d 603, 610-11 [human resource head's statement that placing "the old farts" in new organization was difficult and manager's memo stating company preference for younger workers "constituted proper circumstantial evidence for the jury to consider in combination with all the other evidence"]; *Shager*, 913 F.2d at 402-403 [supervisor's age-related comments "combined with evidence" that employer's stated reason for firing older employee and replacing him with younger one was insincere, enough to defeat summary judgment.]

C. Issue No. 2—The *Biljac* Issue

The second issue on review arises because the trial court declined to rule on Google's objections to Reid's evidence based on *Biljac Associates v. First Interstate Bank of Oregon* (1990) 218 Cal.App.3d 1410. (11APP2853.) On appeal, the Sixth District held that the trial court's failure to rule effects an implied overruling of all objections, preserving them for appeal:

> If a party lodges otherwise proper objections to evidence, and the court does not rule on those objections at the hearing, the court should be viewed as having reserved ruling on the objections. Its later failure to issue an express ruling effects an implied overruling of all objections, which are therefore preserved for appeal. The entire record is thus presumptively before the appellate court, and the burden is on the objecting party to show that evidence presumptively considered by the trial court should instead be disregarded in determining the propriety of the order on the merits. [Op.15-16]

Significantly, the Court of Appeal did not hold that Google's failure to obtain evidentiary rulings from the trial court constituted a waiver of the objections. (Op.14, 17.) Instead, the Court expressly addressed the one material objection Google preserved on appeal—to the declaration of Dr. Matloff—and overruled it on the merits, along with Google's other objections. (Op.12-19.)

Nonetheless, Google argues the Sixth District should have presumed the objections were sustained or, in the alternative, remanded the objections to the trial court for rulings. (OB56-57.) Neither approach is reconcilable with either California law or the circumstances of this case. [12]

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[12] Google's standing to raise the *Biljac* issue is questionable because (1) Google invited the Sixth District to follow *Biljac* (RB28 n.4) and (2) the

Presumably, Google makes these arguments because this Court has twice found objections *waived* where the moving party on summary judgment fails to obtain the trial court's evidentiary rulings. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670 n.1; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186 n.1.) The "waiver" approach has the virtue of allowing the appellate court to review de novo the entire evidentiary record and treat the evidence appropriately. But other courts have applied a "presumed overruled" approach, like the Sixth District here, which has the virtue of allowing parties who preserve properly their objections to renew them on appeal—with the tough burden of persuasion that they should be sustained, though also with the opportunity for relief in situations where the evidence clearly should not have been considered.

It is consistent with California public policy and longstanding practice for trial courts to have the discretion to consider motions for summary judgment without ruling specifically on evidentiary objections. This is a recognition not only of the ability of trial courts to separate the wheat from the chaff on alleged disputed facts, but also because it protects the judicial system from being overwhelmed by voluminous objections. Yet there is a lingering doubt whether it is fair play for a litigant to be barred absolutely from raising an issue on appeal when the preclusion is through no fault of its own.

For the reasons stated below, the trial court's summary judgment should be reversed in this case, whether the objections are deemed "waived" or "presumed overruled." To the extent the Supreme Court is

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Biljac approach clearly benefited Google because the appellate court addressed Google's objections on the merits rather than deeming them waived. (See Cal. Const., art. VI, § 13; *In re Marriage of Moore* (1980) 28 Cal.3d 366, 373; *Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 431.)

looking to the parties for comment, Reid suggests that the "presumed overruled" approach is best. It achieves the goals of maximizing trial court discretion and avoiding administrative burden, while allowing a safety valve for extreme situations.

1. Google's Evidentiary Objections

a. The Only Piece Of Evidence Objected To In The Trial Court, Raised In The Court Of Appeal And Relied On In The Decision Is Dr. Matloff's Declaration.

Instead of pointing to the specific objections it contends should have been sustained by the Court of Appeal, Google's Opening Brief merely incorporates by reference its trial briefing. (OB38-39.) And rather than specify the evidence it contends is inadmissible, Google identifies it simply as "stray remarks that lack personal knowledge and constituted hearsay, irrelevant generalities of Google's 'youthful atmosphere,'... irrelevant statistical evidence....[and] purportedly ageist remarks Reid self-servingly offered at his deposition," all without record citations. (OB37.) Other than the statistical evidence, which Google later clarifies as referencing the Matloff Declaration (OB40), Google is not specific as to the documents or testimony about which it complains.

Google's failings were also present in the Court of Appeal, where it raised specific objections only to six pieces of evidence: (1) the declaration of Dr. Matloff (RB16-20 objecting to 12APP2978-83); (2) several "internet articles" (RB28-29 objecting to 6APP1436, 1626, 1609-16); (3) the Declaration of Rebecca La Belle (the former Google recruiter) (RB31 objecting to 7APP1788-90); (4) Reid's psychiatrist's notes (RB40 objecting to 7APP1723); (5) an e-mail to his executive coach (RB40 objecting to 7APP1725); and (6) a portion of deposition testimony from Reid's wife.

(RB43, n.6 objecting to 7APP1677-78.)[13] As to all Google's other objections, it simply announced in a footnote "Google hereby renews *all* of its objections to Appellant's evidence," citing the thirty-one page statement of objections Google submitted in the trial court three days before the summary judgment hearing. (RB29, n.5 [citing 11APP2774-2805]; hereinafter "Google's Evidentiary Brief".)

Google's mere incorporation by reference of its trial court briefing did not preserve the objections for appeal. (See *Soukup v. Law Offices of Hafif* (2006) 39 Cal.4th 260, 295 n.20 ["It is well settled that the Court of Appeal does not permit incorporation by reference of documents filed in the trial court."]; see, e.g., *Hoover Community Hotel Develop. Corp. v. Thomson* (1985) 167 Cal.App.3d 1130, 1333-34 [party's general attack on trial court's failure to rule on evidentiary objections on summary judgment, without specifying the actual objections on appeal, constituted waiver].)

Google's trial court objections were in the nature of a blunderbuss attack, raising multiple grounds to multiple items of evidence, the kind of objections other courts have called "horrendous" (*Biljac*, 218 Cal.App.3d at 1419, n.3) and "hardly good advocacy." (*Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 578, n.6.) Google asserted more than 175 separate objections to evidence, including objections to sixty-two individual passages from witness declarations. (11APP2774-2805.) At least 50 of the objections were based simply on "relevance." (*Id.* [*citing* Evidence Code, sections 210 and 350].)[14]

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[13] The testimony from Reid's wife (Exhibit 28 to the Gabe Declaration; 6APP1437) was *never objected to* by Google in the trial court. (11APP2787.)

[14] For the first time in this appeal, Google cites also to its Response to Reid's Response to Google's Separate Statement of Facts as a source of further objections. (OB39 [*citing* 8APP2124-68].) Google never relied on this pleading in the Court of Appeal as stating objections. (RB29 n.5.)

Yet despite the sheer volume of evidentiary objections raised by Google in the trial court, nearly all the evidence Google now complains about was *never objected to by Google.*[15] Conversely, the Court of Appeal neither referenced nor gave any indication it was relying upon the evidence Google challenged in its appellate brief, including the internet articles attached to the Gabe Declaration, Reid's psychiatrist's notes, Reid's e-mail to his executive coach, the LaBelle Declaration and the portion of Mrs. Reid's deposition to which Google raised objection. (Op.2-4, 19, 21-25.)

Moreover, Google's trial court Evidentiary Brief stated that it was only objecting to Reid's Response to Google's Separate Statement of Facts "to the extent that [the pleading] relies on the inadmissible evidence and statements of fact set forth in Parts I-IV [of Google's Evidentiary Brief]," i.e. it was not raising any objections not raised in its Evidentiary Brief. (11APP2804.)

[15] None of the "stray remarks" were objected to by Google. (See footnote 4 above.) Nor did Google object to the emails or deposition testimony on which the Court of Appeal primarily relied in finding triable issues. (Op.2-4,19-25.) The e-mails are in Exhibits 26 and 30-32 to the Gabe Declaration. (6APP1437-38, 7APP1685-86, 12APP3126-29, 3134-39.) Google's only objection to these exhibits was to complain that Reid noted Google had redacted substantial portions of the e-mails. (11APP2787.) Google also did not object—with one limited exception—to any of the deposition testimony from the following witnesses attached to the Gabe Declaration (6APP1434-37): Reid (Exhibits 5-7; 6APP1462-1501, 1502-55, 1556-71); Rosing (Exhibits 12-13; 6APP1584-95, 1596-1607); Schmidt (Exhibit 17; 12APP3091-108); Hoelzle (Exhibit 19; 6APP1627-36); Sullivan (Exhibit 23; 6APP1660-63); Ms. Reid (Exhibit 28; 7APP1675-80); and Lesly Higgins (Exhibits 42-43; 7APP1747-51, 1752-1760.) The one exception: Google narrowly objected to Exhibit 13 on the basis that Rosing's deposition excerpts were "misleading" when taken from the context that Rosing said Reid's "performance was sporadic." (11APP2784-87.) Although Google did object to the "'youthful' atmosphere" testimony it references at OB37 from Reid's declaration (11APP2781 objecting to 6APP1427), Google never raised these objections in its brief below. (RB22.)

Google incorrectly assumes that because the Court of Appeal did not expressly mention each and every objection Google raised below, it did not consider them. As this Court explained in *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1263, "an opinion is not a brief in reply to counsel's arguments. [citation omitted.] In order to state the reasons, grounds or principles upon which a decision is based, the court need not discuss every case or fact raised by counsel in support of the parties' positions." In addition, to the extent Google claims the Court should have expressly addressed each of its objections, the contention is waived by Google's failure to bring the alleged omission to the Court's attention in a rehearing petition. (Rules of Court, rule 8.500(c).)

In sum, after all Google's objections are parsed, it was perfectly appropriate for the Court of Appeal to focus its evidentiary discussion on the only material piece of evidence that was (1) objected to in the trial court, (2) raised by Google in the Court of Appeal, and (3) relied upon in the Court of Appeal's decision: the declaration of Dr. Matloff.

b. Dr. Matloff's Declaration Was Clearly Admissible.

While Google contends the Court of Appeal "barely referenced" its objections to the Matloff Declaration (OB40), in fact, the 25-page opinion devotes seven pages to Reid's statistical evidence and Google's related objections. (Op.12-19.) A mathematics and computer science professor at U.C. Davis with thirty years experience in the field of statistics, Dr. Matloff is one of the foremost authorities nationally on statistical analysis of age discrimination in the computer industry. (Op.12; 7APP1793.)

Looking at data provided by Google, Dr. Matloff's report concluded there was a statistically significant negative correlation between age and performance ratings at Google, such that for every 10 year increase in age there was a corresponding decrease in performance rating. (Op.12-13;

7APP1794-95.) And when only director-level employees (like Reid) were considered, the negative correlation was *highly* statistically significant. (*Id.*)[16] Matloff also analyzed Google's bonus statistics for director-level employees and found a statistically significant negative correlation between age and bonus including a 29 percent decrease in bonus for every 10 year increase in age. (Op.13; 7APP1794-96.)[17]

Google's contention that the "Court of Appeal should not have considered the statistics, because courts generally disregard such evidence" (OB39), is completely incorrect. As to Reid's disparate impact claim, statistical evidence is the primary method of proof. (See, e.g., *Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1122.)[18] Statistical evidence of age discrimination also is clearly relevant to Reid's disparate treatment claim.

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[16] Repeating arguments raised and rejected below, Google attacks Dr. Matloff's sample size as "too small," this time citing *Guz*, *supra*, 24 Cal.4th at 367. (OB39 n.14.) But unlike *Guz*, where the plaintiff relied only on "raw age comparisons" made without an expert (*Guz*, 24 Cal.4th at 367), Reid's evidence was from an established expert who analyzed employee data for the years 2002-2004 in which Reid was employed, and who applied accepted statistical analysis to obtain "statistically significant" and "highly statistically significant" results. (Op.12-13, 17-18; 12APP2978-3066.)

[17] Google also objected to the Matloff declaration based on hearsay, lack of foundation and impermissible opinion. (11APP2792-2804.) Such objections were clearly inappropriate as Matloff was providing expert testimony. (Evid. Code § 801(b).)

[18] Google ignores that Reid's complaint presents both disparate treatment and disparate impact claims. (1APP1-62, APP719-23.) Google's contention that Reid's claim is for only "intentional age discrimination" therefore is incorrect. (OB29.) Google's failure to rebut Reid's statistical proof of disparate impact through discriminatory bonus awards and performance ratings provided an independent reason to reverse summary judgment, which the Court did not need to reach. (See Reid's Opening Brief in Court of Appeal ("AOB") at 46-48.)

(*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 805; Op.17.) If an employer assigns older workers lower performance ratings, demotes them based on those ratings, and pays them less, such discriminatory practices are probative of the company's treatment of older workers generally and may be used as evidence of intentional discrimination in other contexts, like termination. (See, e.g., *Barnes v. GenCorp, Inc.* (6th Cir. 1990) 896 F.2d 1457, 1466 ["statistical data showing an employer's pattern of conduct toward a protected class as a group can, if unrebutted, create an inference that a defendant discriminated against individual members of the class."].)[19] Moreover, Matloff's evidence was *directly* relevant to Reid's allegations of discrimination in performance reviews and the award of bonuses. (1APP40-41, 52-55.)

Google had no expert of its own either to rebut these findings or to challenge Matloff's analysis. (Op.17-18.) Instead, Google's only response was its attorney's arguments attacking Matloff's methodology. (RB16-21; see also Reid's Reply Brief in Court of Appeal ("ARB") at 10-21.) The Court of Appeal correctly found that Google's arguments against the Matloff Declaration went only to the weight of the evidence, not to its

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[19] (See also *Obrey v. Johnson* (9th Cir. 2005) 400 F.3d 691, 694.) None of the cases Google cites announce a blanket rule that statistical evidence is "generally disregarded" in employment cases. (OB39-40.) Instead, Google's cases all rely on defective or clearly irrelevant statistical data, unlike Dr. Matloff's declaration. (See *Kier v. Commercial Union Ins. Co.* (7th Cir. 1987) 808 F.2d 1254, 1258 [statistics only compared age of new hires with age of existing employees; "district court did not refuse to admit the statistics because statistics are not generally probative"]; *Smith,* 220 F.3d at 760-61 [statistics inadmissible because only compared relative numbers of minority employees]; *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 663-64 [statistics were unsupported by other evidence of discrimination]; *LeBlanc v. Great American Ins. Co.* (9th Cir. 1993) 6 F.3d 836, 848 ["The flaws in the statistical evidence are itself notable"].)

admissibility. (Op.19; see, e.g., *Maitland v. Univ. of Minn.* (8th Cir. 1998) 155 F.3d 1013, 1017 [arguments that regression analysis omits variables goes only to weight, not admissibility].) As the Court of Appeal concluded, the Matloff Declaration was "clearly admissible." (OP17.)[20]

2. Google's Contention That Its Objections Should Have Been "Presumed *Sustained*" Is Directly Contrary to Code of Civ. Proc. § 437c(c).

Google argues it should be presumed the trial court sustained its objections because it was the prevailing party; but Google's argument is irreconcilable with decisions of this Court and with the summary judgment statute itself. As this Court made clear in *Ann M.*, where the trial court fails to rule on evidentiary objections, "we *must* view the objectionable evidence as having been admitted in evidence and therefore as part of the record." (6 Cal.4th at 670 n.1 [emphasis added]; see also *Sharon P.*, 12 Cal.4th at 1186 n.1; *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 736 ["*Ann M.* teaches that we must take [the trial court's statement that it had considered only admissible evidence] as an implied overruling of any objection not specifically sustained."]; *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 140 [following *Laird*].)

The reason unresolved evidentiary objections cannot be presumed *sustained*, as Google argues, lies in the clear wording of Code of Civil Procedure § 437c(c):

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[20] Google complains the Court of Appeal's ruling "virtually insure[s]" that "all plaintiffs who proffer statistical evidence, no matter how weak or irrelevant, will automatically survive summary judgment,..." (OB39 n.14, 41.) The complaint is unfounded because a litigant may always challenge the expert's declaration, including even deposing a previously undesignated expert who supplies a declaration on summary judgment. (*St. Mary Medical Center v. Superior Court* (1996) 50 Cal.App.4th 1531, 1540.) Google never made such a request here.

> In determining whether the papers show that there is no triable issue of fact as to any material fact *the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained* by the court,...[emphasis added.]

(See also *Guz,* 24 Cal.4th at 334 ["On appeal after a motion for summary judgment has been granted, we 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."].) Because the trial court here did not sustain any of the objections, it was *required* by Section 437c(c) to consider *all* of Reid's evidence. Google's "presumed sustained" rule ignores the "and sustained" language from subsection (c) of 437c. Instead, the rule Google advocates reflects the earlier version of Section 437c(c), which until 1980 required the court only to consider "*admissible* evidence."[21]

Google also never raised its "presumed sustained" argument below. Instead, Google took on the burden—albeit ineffectively—of reasserting its objections in the Court of Appeal. (RB29 n.5.) In fact, Google expressly advocated in its Respondent's Brief the *Biljac* approach followed by the Sixth District. (RB28 n.4.)[22]

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[21] In 1980, the word "admissible" was deleted. (See *Haskell v. Carli* (1987) 195 Cal.App.3d 124, 130 n. 3 [explaining legislative history of 437c(c)]; see also *Selected 1980 California Legislation* (1981) 12 Pacific L.J. 291, 291-92 ["Chapter 57 [of Stats 1980] eliminates the requirement that all the evidence be of admissible quality and instead requires the court to consider *all* the evidence set forth in the papers except that evidence to which objections have been made and sustained."].)

[22] Google's suggestion it was bound to follow the First District's *Biljac* decision at the time its Respondent's Brief was filed in the Sixth District does not ring true. (OB9.) At the time Google filed its Brief, several California appellate courts had declined to follow *Biljac.* (See, e.g., *Sambrano*, 94 Cal.App.4th at 235-36; *Swat-Fame, Inc. v. Goldstein* (2002)

Google seeks support for its "presumed sustained" rule from the Fourth District's decision in *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, which involved an appeal from a grant of summary judgment for defendant in a case involving injuries to a child from a smoldering fire ring at a city park. (OB41-42.) While the trial court in *Sambrano,* like *Reid*, declined to rule on the defendant's evidentiary objections (*Sambrano,* 94 Cal.App.4th at 229), unlike the Sixth District, the Fourth District concluded that defendant's objections *were* meritorious. (*Id.* at 238 ["we believe the City's objection was well taken."].) Thus, *Sambrano* does not turn on application of a "presumed sustained" rule, as Google characterizes the decision, but rather upon an examination of the plaintiff's evidence and the merits of defendants' objections, exactly as the Sixth District did here. (See also *Gatton v. A. P. Green Services, Inc.* (1998) 64 Cal.App.4th 688, 692-93 [affirming summary judgment based on merits of defendant's hearsay objections] cited by Google at OB42-43.) Furthermore, to the extent *Sambrano* and *Gatton* are contrary to Section 437c(c) and this Court's decision in *Ann M.*, the two decisions are of questionable authority.[23]

Finally, Google's Presumed Sustained approach is also fundamentally unfair to the losing party, who would be called upon to

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101 Cal.App.4th 613, 623-24.) *Demps* was also issued over five months before the September 13, 2007 *Reid* appellate hearing. (146 Cal.App.4th at 564.)

[23] The other case Google cites to "support" its presumed sustained rule addresses a different issue. (OB42 [*citing Hayman v. Block* (1986) 176 Cal.App.3d 629, 640].) In *Hayman*, the trial court expressly sustained defendant's objections raised at summary judgment (176 Cal.App.3d at 634); the proposition Google cites from the opinion is merely the well-settled rule that the appellant has the burden to challenge adverse evidentiary rulings on appeal. (176 CalApp.3d at 640.)

"appeal" from a ruling that was never made based on grounds never stated. Surprisingly, Google argues *it* somehow has been deprived of its Due Process rights through the Court of Appeal's "Presumed Overruled" approach. (OB51.) But Google had its day in court on its objections—it was permitted to present them to the trial court, it was permitted to argue them at the hearing, and it was permitted to raise them in the Court of Appeal. No due process violation occurred as to Google.

3. Google's Alternative Approach–Remand to The Trial Court For Evidentiary Rulings–Is Inappropriate, Particularly Where The Court of Appeal Has Already Considered The Objections.

As an alternative remedy, Google asks that the matter be remanded to the trial court for reconsideration of its objections. Google attacks the Sixth District for "improperly seiz[ing] the trial court's duties of determining the parameters of the admissible evidentiary record," and accusing it of "breach[ing] the review limitations placed upon it by the abuse of discretion standard." (OB35, 47-48.) Google cites no authority for its surprising contention that the Court of Appeal may not consider objections on appeal and must instead remand them to the trial court. The argument is clearly incorrect.

The Courts of Appeal address the merits of evidentiary objections all the time. (See, e.g., *Lincoln Fountain Villas v. State Farm* (2006) 136 Cal.App.4th 999, 1010, n.4 [appellate court considered merits of objections to expert declaration]; see also cases cited at footnote 26 below.) As a practical matter, the Court of Appeal is in as good a position as the trial court to rule on the written evidentiary objections submitted in summary judgment proceedings. As the Sixth District explained: "Because summary judgment is decided entirely on the papers, and presents only a question of law, it affords very few occasions, if any, for truly discretionary rulings on

the evidence. Nor is the trial court often, if ever, in a better position than a reviewing court to weigh the discretionary factors." (Op.16.)

Here, Google expressly *invited* the Court of Appeal to address its objections in its Respondent's Brief and never asked that they be remanded to the trial court. (RB29, n.5.) Even when faced with a remand request, however, the decision as to which issues to remand and which to address remains within the sound discretion of the Court of Appeal. (Code of Civil Proc. § 43 ["The Supreme Court, and the courts of appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had"].)[24] In fact, the vast majority of courts of appeal,

[24] Demonstrating the discretionary nature of remand, the three cases cited by Google in which courts remanded for rulings on unresolved evidentiary objections all involved procedural circumstances distinguishable from this case. (OB45-47.) In *Vineyard Springs Estates, LLC v. Superior Court* (2004) 120 Cal.App.4th 633, 643, the matter arose on a writ petition from an order *denying* summary judgment, so the matter was already pending in the trial court. (Cf. *Demps*, 149 Cal.App.4th at 579, n.7 [declining to remand to resolve objections in appeal from *grant* of summary judgment, explaining "we question the efficacy of such an approach here,...as it would threaten to cause undue delay in rendering a final determination on summary judgment motions."].) In *Parkview Villas Assoc., Inc. v. State Farm Fire and Cas. Co.* (2006) 133 Cal.App.4th 1197, the respondent specifically requested a remand for evidentiary rulings, unlike Google. (*Id.* at 1217.) The remand in *Parkview* also was directed at unresolved procedural objections to the form of the motion. (*Id.* at 1218.) And in *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1350, which involved a Code of Civil Procedure § 425.16 anti-SLAPP motion, not a summary judgment, the appellate court remanded for rulings on unresolved evidentiary objections only as part of a broader remand to resolve the trial court's more significant failure to make required findings under the anti-SLAPP statute (as to the plaintiff's probability of prevailing on the merits.)

when faced with a *Biljac* situation, either find waiver[25] or go onto address the objections on the merits, as the Sixth District did here.[26]

Finally, as a practical matter, no purpose is served in returning this matter to the trial court to re-review objections already considered by the Sixth District. As the record will necessarily remain the same, the result in the Court of Appeal also will necessarily remain the same. (See *Harlow v. Carleson* (1976) 16 Cal.3d 731, 739 ["Where the result, were we to remand, is foreordained from the record, we should exercise this power to dispose of the case without further proceedings."].)[27] The judicial wheel-spinning Google invites is inconsistent with California's public policy. (See, .e.g., Code of Civil Proc. § 909 [permitting appellate court to make factual findings where necessary and stating: "This section shall be liberally construed to the end among others that, *where feasible, causes may be finally disposed of by a single appeal and without further proceedings in*

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[25] See, e.g., *Ann M.,* 6 Cal.4th at 670 n.1 [unresolved objections deemed waived]; *Sharon P.,* 21 Cal.4th at 1186 n.1 [same]; *Demps,* 149 Cal.App.4th at 579 [same]; *Alexander,* 104 Cal.App.4th at 140-41 [same]; *Swat-Fame,* 101 Cal.App.4th at 623-24 [same] overruled in part on other grounds, *Zamos v. Stroud* (2004) 32 Cal.4th 958, 973; *Laird,* 68 Cal.App.4th at 736 [same].

[26] See, e.g., *Tilley v. CZ Mater Assn.* (2005) 131 Cal.App.4th 464, 479 [merits of objections considered despite lack of trial court ruling]; *Sambrano,* 94 Cal.App.4th at 238 [same]; *Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 864 [same]; *City of Long Beach v. Farmers and Merchants Bank* (2000) 81 Cal.App.4th 780, 784-85 [same]; *Lincoln Fountain Villas*, 136 Cal.App.4th at 1010, n.4 [same]; *Cheviot Vista Homeowners Ass'n* (2006) 143 Cal.App.4th 1486, 1500, n.9 [same].

[27] Google cites caselaw that evidentiary objections on summary judgment are subject to abuse of discretion review. (OB35-36.) But here, there were no evidentiary rulings subject to review.

the trial court except where in the interests of justice a new trial is required on some or all of the issues."] [emphasis added].)[28]

4. Google Overlooks The Distinction Between Waived And Presumptively Overruled Objections.

Although the Court of Appeal did not find that Google had waived its objections by failing to obtain rulings in the trial court (Op.14), Google spends seven pages addressing waiver. (OB49-55.) The waiver rule was first articulated by this Court in the summary judgment context in *Ann M.*: "Because counsel failed to obtain rulings, the objections are waived and not preserved for appeal." (6 Cal.4th at 670 n.1) The rule in *Ann M.* appears to trace back to the rule that failure to pursue an objection at trial constitutes waiver.[29] *Ann M.* has been followed in many decisions since. (See footnote 25 above.)

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[28] Google seeks to support its remand argument with the U.S. Supreme Court's recent decision in *Sprint/United Mgmt. v. Mendelsohn* (2008) 128 S.Ct. 1140, which involved a claim for age discrimination. According to Google, because the Supreme Court reversed the lower court and remanded the evidentiary issues back to the District Court, this Court should do the same. (OB43-45.) Although Google claims the *Sprint* case involved "a similar procedural posture" as this case (OB43), in fact, it did not arise from a summary judgment (much less a summary judgment where the trial court had not resolved objections.) Instead, it arose from an *in limine* ruling that was further clarified by the District Court after live witness testimony during the course of an *eight day jury trial.* (See *Sprint*, 128 S.Ct. at 1144; see also *Mendelsohn v. Sprint/United Mgmt. Co.* (10th Cir. 2006) 466 F.3d 1223, 1225, 1232 [lower court decision providing additional background] *rev'd* 128 S.Ct. 1140.) Given the procedural posture, deference in *Sprint* to the trial court to clarify its prior rulings was understandable. Google also incorrectly contends that Reid raised the same type of "me too" evidence at issue in *Sprint*. (OB44.) But all the discriminatory statements and conduct Reid relied on were made directly to or about him.

[29] *Ann M.* relied on three cases for its rule, all involving trial court failures to rule on objections at summary judgment: *Golden West Baseball Co. v. Talley* (1991) 232 Cal.App.3d 1294, 1301 n.4; *Ramsey v. City of Lake*

Like several Courts of Appeal, the Sixth District was critical of the waiver rule, noting the unfairness to Google where it had both filed written objections and raised them at the hearing. (Op.14.)[30] Rather than waiver, the Sixth District held that Google's objections were presumptively overruled, but—importantly—preserved for appeal. (Op.15-16.) Google's contention that there is no distinction between waived objections and those presumptively overruled (OB51) overlooks that waived objections will not be considered on appeal (*Ann M.*, 6 Cal.4th at 670 n.1), while presumptively overruled objections can still be raised by respondent. (Op.16.)

Google makes the surprisingly incorrect argument that under the "presumed overruled" approach "every time a summary judgment is granted, *both* parties will be forced to appeal" because the "prevailing party must appeal its own evidentiary objections" to preserve them. (OB43 (original emphasis).) Google's contention is incorrect for two reasons: (1) the prevailing party lacks standing to appeal (Code of Civil Proc. § 902); and (2) under the presumptively overruled approach, the respondent is always free to raise its objections on appeal, exactly as Google did here and as many others have done in similar situations. (See footnote 26 above.)

Elsinore (1990) 220 Cal.App.3d 1530, 1540; and *Haskell,* 195 Cal.App.3d at 129. *Golden West* and *Ramsey* both rely on *Haskell*, which relies for its rule on a case involving counsel's failure to pursue objections at trial. (See *Haskell,* 195 Cal.App.3d at 129 [*citing Fibreboard Paper Products Corp. v. East Bay Union of Machinists, etc.* (1964) 227 Cal.App.2d 675, 698].)

[30] See, e.g., *City of Long Beach*, 81 Cal.App.4th at 784-85 [declining to find waiver where defense counsel twice raised objections orally]; *Sambrano*, 94 Cal.App.4th at 234, 237-38 [declining to find waiver]. *Compare Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710 [merits of objections not preserved where defendant did not pursue them at hearing].

In short, Google benefited from the Court's decision to apply a "presumptively overruled" approach, rather than waiver. To the extent that Google preserved properly its evidentiary objections, it had a full opportunity to address them on appeal. And there are many cases where the appellate court considered respondent's unresolved objections on the merits and *affirmed* summary judgment. (See footnote 26 above.) The distinction between these cases and *Reid* lies not in approach but in the merits of the objections.

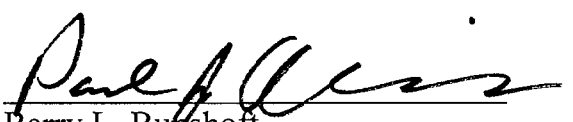
V. CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal, reversing the trial court's grant of summary judgment, should be affirmed in favor of plaintiff Brian Reid and this matter remanded for trial.

Dated: May 27, 2008

Respectfully submitted,

DUANE MORRIS LLP

By: 

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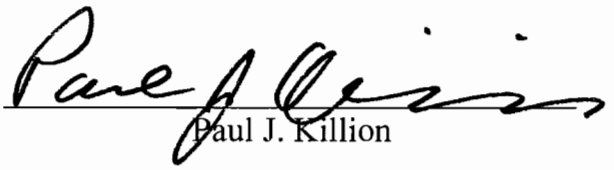
CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 14(c), I certify that this Response Brief on Merit contains 13,994 words, not including the Tables of Contents and Authorities, the caption page, signature blocks, attachments or this certification page.

Dated: May 27, 2008



Paul J. Killion

DECLARATION OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is One Market, Spear Tower, Suite 2000, San Francisco, California 94105. I am a citizen of the United States and am employed in the City and County of San Francisco. On May 27, 2008, I caused to be served the following documents:

ANSWER BRIEF ON THE MERITS

Upon the parties as listed on the most recent service list in this action by placing true and correct copies thereof in sealed envelopes as follows:

FOR COLLECTION VIA HAND DELIVERY:

Clerk of the Court California Supreme Court 350 McAllister Street, Room 1295 San Francisco, CA 94102	Original + 14 Copies -Appellant's Answer Brief

FOR COLLECTION VIA FEDERAL EXPRESS:

Marvin Dunson III, Esq. Marina C. Tsatalis, Esq. Gary M. Gansle, Esq. Fred W. Alvarez, Esq. Wilson Sonsini Goodrich & Rosati 650 Page Mill Road Palo Alto, CA 94304-1050	*Attorneys for Plaintiff and Appellant* Google, Inc. 1 Copy Appellant's Answer Brief

FOR COLLECTION VIA U.S. MAIL:

Clerk of the Court California Court of Appeal Sixth Appellate District 333 West Santa Clara Street, #1060 San Jose, CA 95113	1 Copy Appellant's Answer Brief

Hon. William J. Elfving
Santa Clara Superior Court
Department 2
191 North First Street
San Jose, CA 95113

1 Courtesy Copy
Appellant's Answer Brief

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 May 27, 2008, at San Francisco, California.

Vikki Domantay