IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of	)	Case No. S283172
THOMAS JOHN SPIELBAUER,	)	State Bar Case No.: SBC-19-O-30700
State Bar No. 78281.	)	

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

ELLIN DAVTYAN, No. 238608
General Counsel
ROBERT G. RETANA, No. 148677
Deputy General Counsel
BRADY R. DEWAR, No. 252776
Assistant General Counsel
STATE BAR OF CALIFORNIA
OFFICE OF GENERAL COUNSEL
brady.dewar@calbar.ca.gov
180 Howard Street
San Francisco, California 94105
Telephone: (415) 538-2012
Facsimile: (415) 538-2321

GEORGE S. CARDONA, No. 135439
Chief Trial Counsel
CHRISTOPHER G. JAGARD, No. 191147
Deputy Chief Trial Counsel
RACHEL S. GRUNBERG, No. 197080
STATE BAR OF CALIFORNIA OFFICE OF CHIEF COUNSEL
Assistant Chief Trial Counsel
rachel.grunberg@calbar.ca.gov
845 South Figueroa Street
Los Angeles, California 90017-2515
Telephone: (213) 765-1000

Attorneys for Petitioner,
Chief Trial Counsel of The State Bar of California

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I. INTRODUCTION

The State Bar's petition for review involves the availability of restitution in this case and in future attorney disciplinary proceedings to those who have incurred specific out-of-pocket losses directly resulting from attorney misconduct. The State Bar maintains that an order of restitution in such cases (regardless of whether the victim is a client or not) is appropriate and serves to accomplish the vital public protection and rehabilitative principles of discipline, including the professional responsibility of lawyers to account for their misconduct.

In his Responsive Brief, however, respondent Thomas Spielbauer ("respondent") shifts the focus away from this important issue and instead attempts to impermissibly relitigate the underlying civil court findings of fraud against him and recast the State Bar's petition as a civil debt collection action. His arguments lack merit and in many instance are inaccurate and unsupported by the record.

A restitution order in this case would require respondent—who has shown no remorse for his fraudulent and deceitful acts, and has yet to pay a single cent in redress—to confront, in concrete terms, the harm he has caused. It would also serve to

deter future similar misconduct and emphasize accountability for serious unethical acts of this nature. That the victim of respondent's misconduct was a non-client should not render restitution unavailable. Attorneys owe duties not only to clients, but also to the general public, the courts, the legal system, and the administration of justice. When an attorney violates those duties and causes someone (a client or otherwise) to incur specific out-of-pocket financial costs, restitution should be permitted and ordered when it furthers the purposes of discipline (protection of the public, maintenance of the highest ethical standards for legal practitioners, preservation of public confidence in the profession, and rehabilitation of errant attorneys)—as it does is here.

II. ARGUMENT

A. As an Attorney, Respondent Has a Moral Obligation to Pay Restitution

For over ten years, respondent failed to pay any portion of the $869,276.55 civil judgment against him and now claims that the judgment lapsed without renewal on February 20, 2024, and is therefore unenforceable under California Code of Civil Procedure section 683.020. As a result, he contends it is

improper for the State Bar to attempt to resurrect the tort judgment as restitution. (Responsive Brief, pp. 5–6.)

Respondent's assertion about the expiration of the judgment is outside of the record in this case and made without any supporting evidence.[1] However, even if correct, it is of no consequence here as this is a State Bar disciplinary proceeding, not a civil enforcement action, and expiration of a judgment does not affect this Court's ability to impose restitution. It is the obligation underlying the judgment rather than the judgment itself that forms the basis of restitution in a disciplinary case. (*Lipson v. State Bar* (1991) 53 Cal. 3d 1010, 1023; see also *Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1008–1009 [restitution in attorney disciplinary matter permissible and appropriate even when debt is discharged in bankruptcy and cannot be collected through civil enforcement mechanisms].)

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[1] The judgment was in place throughout the course of these disciplinary proceedings and a review of the record shows that there was significant post-judgment activity in the underlying civil matter, including respondent's civil appeal and bankruptcy action, that may have bearing on the expiration period of the judgment and/or the time period for bringing an enforcement action. (See e.g., State Bar Exhibits 37, 39, 41, 44, 46, 47, 51, 52, 55, 61 [Court of Appeal, Bankruptcy, and Ninth Circuit filings].)

Restitution in an attorney disciplinary proceeding ***is not*** a form of civil debt collection, nor is it used solely as a means of compensating a victim of wrongdoing; rather, restitution is imposed to rehabilitate an errant attorney and to protect the public by forcing the attorney to confront in concrete terms the consequences of his or her misconduct. (See *Brookman, supra,* 46 Cal.3d at p. 1009; *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044.) These important state interests are not extinguished simply because the underlying civil judgment may have expired. Because the responsibilities of an attorney differ from those of a layman, an attorney may be required to make restitution as a moral obligation even when there is no legal obligation to do so. (*In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 674.)

Here, respondent's failure to understand these important principles and to honor his financial obligations, along with his attitude toward payment, show a clear disregard for the rights of others and demonstrate a risk to the public of future similar transgressions. In fact, the absence of any accountability for his misconduct only reinforces the need for a restitution requirement in this case. (See e.g., *In the Matter of Taggart* (Review Dept.

2001) 4 Cal. State Bar Ct. Rptr. 302, 312–313 [where attorney claimed "restitution issue" was "moot" because debt was "forgiven," court found his conduct demonstrated indifference, caused increased concern over recidivism, and warranted requirement that restitution be paid prior to resumption of active law practice]; see also *In re Menna* (1995) 11 Cal.4th 975, 990 [relative absence of any serious effort to make even partial restitution is indicative of lack of rehabilitation]; *Resner v. State Bar* (1967) 67 Cal.2d 799, 802, 810 [attitude, as evidenced by spirit of willingness, earnestness, and sincerity is relevant to issue of rehabilitation]; *Hippard v. State Bar* (1989) 49 Cal.3d 1084 [restitution efforts relevant to rehabilitation]; accord *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 429.)

B. *Sorensen V. State Bar* Provides a General Framework for the Availability of Restitution to a Non-Client in Attorney Disciplinary Matters

Respondent takes an overly restrictive view of *Sorensen v. State Bar*—the seminal authority on restitution to non-clients in State Bar disciplinary proceedings—and reads it as applying only to cases where an attorney violates Business and Professions Code section 6068, subdivisions (c) and (g) (maintaining unjust

action/commencing action from corrupt motive.)[2] (Responsive Brief, pp. 7–8.) The State Bar disagrees. *Sorenson* sets forth a general framework for when restitution to non-clients is permitted. The specific charges at issue in that case are but one example, not the universe, of situations where restitution is appropriate.

Sorensen involved an attorney who filed a frivolous and unjust lawsuit against a court reporter over a $45 billing dispute. (*Sorensen, supra,* 52 Cal.3d 1036.) The court reporter was forced to incur over $4,000 in unnecessary legal fees and expenses in defending the litigation, or as respondent aptly characterizes it—dealing with Sorensen's "antics."[3] (Responsive Brief, p. 7.) Sorensen was found culpable of violating section 6068, subdivisions (c) and (g). Although the Review Department

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[2] All further references to sections are to the Business and Professions Code unless otherwise indicated.

[3] In discussing and affirming that Sorensen acted unjustly and with corrupt motive, this Court highlighted, among other things, that "[a] reasonable attorney who was truly interested in simply resolving a billing dispute could and would have taken a number of lesser measures that petitioner apparently either failed to consider, or worse, considered and rejected." (*Sorensen, supra,* 52 Cal.3d at p. 1043.)

declined to recommend restitution as a condition of discipline, this Court ordered it, explaining:

> Unlike the review department, we do not view restitution in this context as a 'damage award.' Nor do we approve imposition of restitution as a means of compensating the victim of wrongdoing. Rather, we consider restitution a necessary condition of probation designed to effectuate petitioner's rehabilitation and to protect the public from similar future misconduct.

(*Sorensen, supra,* 52 Cal.3d at p. 1044.)

While recognizing that prior cases authorizing restitution involved misuse of client funds, this Court found that:

> [T]he same protective and rehabilitative principles [that apply in cases involving misuse of client funds] apply in the case of a party who has been forced to incur legal fees as a result of an attorney's violation of section 6068, subdivisions (c) and (g). ***In both instances, private persons have incurred specific out-of-pocket losses directly resulting from attorney misconduct. Restitution of these amounts emphasizes the professional responsibility of lawyers to account for their misconduct, and thereby serves to both protect the public and instill public confidence in the bar.***

(*Sorensen, supra,* 52 Cal.3d at pp. 1044–1045 [emphasis added].)

An order of restitution here falls squarely within the general criteria established by *Sorensen*. Like the court reporter

in *Sorensen*, William LLC[4] was forced to incur legal fees and expenses to clear title to its property, as a result of respondent's gamesmanship and fraudulent "antics." As in *Sorensen*, had respondent been "[a] reasonable attorney who was truly interested in simply resolving [the matter,] [he] could and would have taken a number of lesser measures that apparently either [he] failed to consider, or worse, considered and rejected." (*Sorensen, supra,* 52 Cal.3d at p. 1043.) Instead, even after litigation ensued, respondent continued with his charade that the inflated payoff demand was accurate and lied to the superior court in a declaration submitted under penalty of perjury.

Contrary to respondent's contention, *Sorensen* cannot and should not be read to apply only to the duties found in section 6068 subdivision (c) and (g). Respondent's violations are just as serious, if not more so—he violated the law with his false payoff demand and breached his duties to the public and to the judiciary

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[4] The State Bar refers to the victim in this case as William LLC, while respondent refers to it as 167 LLC. It is the same entity, however. After the Yazdani Trust foreclosed on the sale of 167 E. William Street in San Jose, California ("167 Property"), it then transferred title to a newly formed company—167 E. William, LLC ("William LLC"), which was forced to initiate litigation to clear title to the property caused by respondent's fraudulent and inflated payoff demand. (See Review Dept. Opinion, pp. 9–11.)

by intentionally and fraudulently slandering William LLC's property and then falsely asserting to the superior court that the payoff demand was accurate.

C. The State Bar Has Valid Regulatory Purposes for Seeking Restitution

Respondent claims that "[the State Bar] has articulated no proper primary regulatory purpose" in seeking restitution in this case. (Responsive Brief, p. 9.) To the contrary, the State Bar has consistently maintained that a restitution order here would serve the critically important goals of discipline, including both specific and general deterrence of future misconduct, protection of the public, maintenance of the highest professional standards for practitioners, and preservation of public confidence in the legal profession.

D. Restitution Is Routinely Ordered in Attorney Disciplinary Cases and Is Not Ambiguous; Respondent Had Notice and Opportunity to be Heard on this Issue

Respondent cites to cases dealing with statutory ambiguity and claims that he was deprived of fair warning that he could be subject to a restitution order in these disciplinary proceedings. (Responsive Brief, pp. 10–12.) Restitution, however, is routinely

ordered in attorney disciplinary cases and respondent had ample notice and opportunity to be heard on this issue.

E. The Cases Cited by the State Bar in Its Opening Brief Are Examples of Where Restitution Is Permitted, Not an Exclusive List

Respondent takes issue with each case cited by the State Bar its Opening Brief, and attempts to distinguish the facts of those cases from the instant case. (Responsive Brief, pp. 12–18.)[5] In doing so, respondent overlooks the fact that these cases are examples, not an exclusive or exhaustive list, of situations warranting restitution, and that *Sorensen* squarely provides authority for the availability of restitution to non-clients who have incurred specific out-of-pocket losses directly resulting from the attorney misconduct.

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[5] While the cases cited by the State Bar differ from respondent's case in terms of the at-issue violations and acts of misconduct (e.g. *Brookman, supra,* 46 Cal.3d 1004 involved breaches of duties owed to clients; *Coppock, supra,* 44 Cal.3d 665 involved improper relinquishment and misuse of a client trust account; *Galardi v. State Bar* (1987) 43 Cal.3d 683 involved breaches of fiduciary duties owed to business partners; and *In re Morse, supra,* 11 Cal.4th 184 involved violation of statutory duties resulting in cy pres restitution that the attorney voluntarily agreed to pay), this does not in any way diminish the appropriateness of a restitution order here, where respondent engaged in serious acts of fraud and deceit and committed violations of duties owed to the public (to obey the law) and to the courts (to be honest, candid and forthright).

Indeed, in *Coppock v. State Bar* (1988) 44 Cal.3d 665, this Court made clear that case law discussing restitution should not be read in a vacuum, but instead should be read to provide examples of when restitution is permitted:

> Restitution is routinely required, usually without discussion, in cases of misappropriation of client funds. [Citations omitted.] It does not follow, however, that restitution is appropriate ***only*** in such cases, or that, because petitioner in this case did not misappropriate client funds, he should not be required to pay restitution to the victims of his culpable acts.

(*Coppock, supra,* 44 Cal.3d at pp. 684–685 [emphasis added].)

Moreover, in *In re Morse* (1995) 11 Cal.4th 184, this Court indicated that discipline, including any restitution condition, should be based on consideration of the goals of discipline in a given case: "What is the discipline most likely to protect the public, the courts, and the profession, or stated conversely, to deter [the errant attorney] from future wrongdoing?" (*Id.* at p. 210.)

The case law, when read holistically, and in concert with *Sorensen*, supports restitution orders to non-clients who have incurred specific out-of-pocket losses directly resulting from the attorney misconduct, particularly where, as here, the misconduct is fraudulent and dishonest and respondent demonstrates

substantial indifference and lack of insight. (See Review Dept. Opinion, pp. 20–21 [discussing respondent's indifference.)

Indeed, throughout these disciplinary proceedings, and even now on review, respondent continues to maintain that he was justified in submitting the inflated payoff demand. (Responsive Brief, pp. 15, 22.) While respondent is entitled to defend himself, his conduct goes beyond this, revealing a complete failure to understand and acknowledge the wrongfulness of his actions. Particularly troubling is his continued attempt to relitigate the fraud findings of the superior court, which were affirmed by the Court of Appeal, and which were given appropriate collateral estoppel effect in these proceedings. (See Review Dept. Opinion, pp. 7–9 [discussing application of collateral estoppel]; see also *In re Morse, supra,* 11 Cal.4th at p. 209 [unwillingness to consider appropriateness of legal challenge or acknowledge its lack of merit goes beyond tenacity to truculence].)

F. Respondent's Claim He Did Not and Does Not Have the Ability to Pay the Judgement Is Unavailing

Respondent claims he did not and does not have the ability to pay the judgment. (Responsive Brief, p. 18.) Notably, the

superior court determined that respondent was evasive during the punitive damages phase of the trial regarding his assets and income and the court did not find him credible. The court further concluded that it believed respondent and his corporation Devine Blessings had withheld complete information and documentation of their finances and had more assets that they claimed. (See State Bar Exhibit 32, pp. 17–22; State Bar Exhibit 37, pp. 40–41.)

For years now, respondent has made no effort whatsoever to pay the judgement, even after the bankruptcy court found the debt nondischargeable. (See State Bar Exhibit 61 [Ninth Circuit Memorandum Opinion upholding nondischargeable of money award to William LLC].)

Respondent has a moral obligation to pay his financial obligations, and, as indicated above, his attitude, evasiveness, and lack of earnestness in his efforts to even make partial payment toward satisfaction of the judgment only reinforce the need for a restitution order here.

G. Respondent's Allegation of Unjust Enrichment Is Speculative and Ignores that his Misconduct Resulted in Significant Out-Of-Pocket Losses by the Victim

Respondent attempts to relitigate the foreclosure sale and justify his fraudulent and inflated payoff demand. He argues that William LLC suffered no damages and in fact may have "gained a huge windfall." (Responsive Brief, pp. 19–20.) Not only is this speculative, but it ignores the civil court fraud findings against respondent and the significant out-of-pocket losses suffered by William LLC because of respondent's misconduct—totaling $536,726.49 (comprised of: (1) compensatory damages of $332,547; (2) attorney fees of $163,597.12; and (4) costs of $40,582.37). (See State Bar Exhibit 32, pp. 15:13–16:2 [demonstrating that the overwhelming majority of the compensatory damages were fees (including legal fees) and costs incurred by William LLC in its attempt to clear title from the false payoff demand submitted by respondent]; see also State Bar Exhibit 37 pp. 26, 36 [William LLC suffered pecuniary losses].)

Moreover, respondent's "windfall" argument misses the point that disciplinary restitution orders are not principally concerned with equity—but rather with public protection.

"Although restitution in disciplinary proceedings may be consistent with equity, doing equity is not its principal purpose. Rather, the purpose of requiring disciplined attorneys to pay restitution is to force them to confront the consequences of their misconduct in a concrete way, thus serving the goals of rehabilitation and public protection." (*In the Matter of Klein* (1994) 3 Cal. State Bar Ct. Rptr. 1, 15; see also *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092.)

In *Dudugjian*, the attorneys were ordered to make restitution to their clients even though this Court accepted the finding that the attorneys had taken the clients' funds in order to apply them to legal fees which the clients legitimately owed. (*Id.* at pp. 1096, 1100–1101.) Thus, despite any potential benefit to the clients, restitution was still imposed.

In *In the Matter of Klein*, following the lead of *Dudugjian,* the Review Department held that: "It would not be consistent with the purposes of attorney discipline for us to decline to order respondent to make restitution of funds which were clearly wrongfully taken, simply on the basis of speculation that the victim of his misconduct might be unjustly enriched by our order.

[Footnote omitted.]" (*In the Matter of Klein, supra,* 3 Cal. State Bar Ct. Rptr. 1, 15.)

H. The State Bar's Recitation Of Facts Is Accurate

Respondent takes issue with various factual statements made by the State Bar in its Opening Brief. (See Responsive Brief, pp. 21–28.) His attempt to relitigate the civil court findings and parse the State Bar's statements to make them appear false is reflective of his overall behavior and why discipline, including restitution, is necessary here.

1. William LLC was an "innocent victim"

Respondent takes issue with the State Bar's characterization of William LLC as an "innocent victim." (Responsive Brief, p. 22.) But William LLC has not been found to have committed wrongdoing, while respondent has been found to have committed fraud.

2. William LLC sustained "a tangible pecuniary loss"

Respondent claims that William LLC suffered no tangible pecuniary loss and instead benefited from the failed sale of the 167 Property. (Responsive Brief, p. 22.) However, the record amply demonstrates that William LLC expended significant out-of-pocket attorney fees and costs to clear the slander of title to

the 167 Property caused by respondent's fraudulent payoff demand. (See State Bar Exhibit 32, pp. 15:13–16:2.) Respondent made this same argument to the Court of Appeal, which rejected it. The Court of Appeal found there was evidence of actual pecuniary harm in that William LLC suffered monetary losses from the cancellation of the sale of the 167 Property and was required to engage in litigation because of respondent's false payoff demand:

> [Respondent and his corporation] claim that LLC failed to establish that it suffered pecuniary loss from the offensive statement is also without merit. 'The law is … clear that the expense of legal proceedings necessary to remove the doubt cast by the disparagement and to clear title is a recognized form of pecuniary damages in such cases [citations]. Since California law expressly recognized that attorney fees and costs are a form of pecuniary damages in slander of title cases, it would seem that in the absence of legal authority to the contrary, such damages are presumptively sufficient to satisfy the pecuniary damage element of the cause of action.' [citation omitted.] Accordingly, LLC sufficiently demonstrated that it suffered a pecuniary loss from the payoff demand.

(State Bar Exhibit 37, p. 26; see also p. 36.)

3. "Respondent dragged out the litigation"

Respondent takes issue with the State Bar's characterization that he dragged out the litigation. (Responsive Brief, p. 22.) But that is what he did. He refused to provide an

accurate payoff demand, fraudulently inflated it, and William LLC had to engage in litigation to determine the actual amount due on the note. Throughout the civil proceedings, respondent presented shifting and unmeritorious theories to justify the inflated demand that caused additional time and expensive. As detailed by the superior court:

> Defendants have presented shifting theories throughout this case to justify why the excessive demand was made. Before trial, Defendants maintained that the deed of trust between Mitchell and Dennis Spielbauer […] contained a "dragnet clause": i.e., a clause that would secure additional future advances by the deed of trust. Thus, the argument went, the additional sums advanced from Thomas Spielbauer to Dennis Spielbauer were therefore legitimately secured by the deed of trust. Plaintiff was put to the expense of retaining an expert on real estate transactions, Charles Hansen, who was deposed before trial and testified that there was no "dragnet clause" – or anything resembling such a clause – in the trust deed.
>
> After Mr. Hansen's deposition, Defendants changed their theory for trial: that after Thomas Spielbauer bought the Mitchell note, he and Dennis Spielbauer entered into an agreement modifying the note to include additional sums advanced by Thomas Spielbauer ("the Spielbauer Agreement").
>
> Thomas Spielbauer testified that he believed he had entered into a modification of the note. This testimony was, of course, nothing but a legal conclusion – coming from a witness with the legal training and trial experience to appreciate the difference between explaining facts and stating a legal conclusion. Certainly, Thomas Spielbauer had the opportunity to present the written document itself, which would have been "stronger and more satisfactory

> evidence" (Evid. Code section 412) – but he failed to do so. Moreover, Thomas Spielbauer did not provide any explanation at all as to how the note was supposedly modified. Accordingly, his self-serving legal conclusion is entitled to very little weight indeed.
>
> Defendants withheld the Spielbauer Agreement during discovery, but at trial admitted that it was not privileged. After receiving permission to reopen Thomas Spielbauer's direct examination, Defendants later made a second motion to reopen after all the evidence was closed, both sides had completed extensive closing argument, and counsel were discussing with the Court possible dates for a hearing on the amount of punitive damages if such a hearing became necessary. The purpose of the second motion to reopen, as stated by Defendants' counsel, was "to supply the bare document" (i.e., the Spielbauer Agreement supposedly modifying the note) – but Defendants' counsel conceded there was no basis for the motion and withdrew it. Defendants did not call Dennis Spielbauer who could have testified on this subject. There was simply no evidence which would give the Court a factual basis to conclude that the note had been modified in a way that expanded liability on the deed of trust. Such a modification would have been inconsistent, in any event, with the language of ["the Spielbauer Agreement"], drafted by Thomas Spielbauer, that the indebtedness on the Property was "satisfied in full" by Thomas Spielbauer's payment to Mitchell.

(Ex. 32, pp. 10–11.)

Respondent claim that it was William LLC's pleading choices that resulted in the lengthy litigation. (Responsive Brief, p. 22.) His attempt, however, to shift the blame to William LLC is belied by the superior court findings above and shows that he is not taking responsibility for his actions. (See also State Bar

Exhibit 37, pp. 11–14 [Court of Appeal rejected respondent's claim that prejudice resulted from amendment to add cause of action for slander of title].)[6]

4. Slander of title was litigated and adjudicated in civil court proceedings

Respondent states that William LLC did not plead slander of title in any of its operative pleadings, as indicated by the State Bar. (Responsive Brief, pp. 22, 25.) While the slander of title claim was not included in any of William LLC's original complaints, it was added as an amendment and was part of the basis for the superior court's decision. (See State Bar Exhibit 37, pp. 7–11 [trial court did not abuse its discretion in allowing amendment for slander of title claim; facts underlying this claim were subsumed within LLC's second amended complaint; and respondent was not prejudiced].)

5. Existence of 167 LLC

Respondent argues over precisely when the Yazdani Trust formed William LLC and claims Yazdani, not William LLC, was the actual purchaser of the 167 Property. (Responsive Brief, pp. 23–24.) This argument, however, was rejected by both the

[6] Respondent did not raise the issue of prejudice to the superior court (see State Bar Exhibit 32, p. 2:20), but did on appeal.

superior court and the Court of Appeal, as even respondent concedes. (Responsive Brief, p. 24.)

6. $7,152.03 versus $4,389.16

Respondent claims the State Bar failed to mention in its Opening Brief that William LLC initially asked for $4,389.16 and claims the State Bar was "attempting to leave the impression that 167 LLC acknowledged that $7,152.03 was due to Devine Blessings." (Responsive Brief, p. 24.) But William LLC did acknowledge that $7,152.03 was the proper payoff amount, and there is a simple explanation for the difference in the initial payoff amounts. As explained by the Court of Appeal on the first page of its Opinion, William LLC possessed a third deed of trust on the 167 Property and acquired it after a trustee's sale. Subsequently, William LLC entered into an Agreement to sell the Property to a third party and requested a payoff demand statement from Devine Blessings under Civil Code section 2943. William LLC did not know the amount of the note held by respondent and estimated that it was $4,389.16. To its surprise, however, respondent submitted a payoff demand of $269,500. William LLC sought clarification, but after unsuccessfully trying to obtain an honest and accurate payoff amount from respondent,

William LLC filed suit where the parties conducted discovery and it was determined that the actual amount due on the note was $7,152.03. (See State Bar Exhibit 37, p. 1 including fn. 2.) There is no dispute whatsoever by William LLC that $7,152.03 is the appropriate amount.

7. No Time to Investigate

In its Opening Brief, the State Bar stated that after receiving respondent's $269,500 payoff demand:

> William LLC contacted respondent to inquire why the payoff demand was so high and requested an accounting, but respondent did not respond. William LLC then attempted to contact respondent through counsel and warned that it would pursue a civil action for tortious interference, because the payoff demand was inflated and was jeopardizing the sale of the 167 Property. ***In response to this second communication, respondent asserted that he did not have time to investigate the accuracy of the payoff demand submitted.*** Ultimately, respondent never produced an accounting or explanation of the payoff demand. As a result, William LLC canceled the sale, refunded the third-party buyer's deposit, and reimbursed the buyer for additional costs incurred.

(State Bar's Opening Brief, p. 15, citing Review Dept. Opinion, pp. 4–5 [emphasis added].)

Respondent contends that he "does not know where [the highlighted language] came from." (Responsive Brief, p. 25.) It comes directly from the civil court findings, and again

emphasizes respondent's lack of insight and appreciation for his acts of wrongdoing. The superior court specifically found:

> On May 20, 2010, William LLC requested an explanation or revision of the payoff demand from respondent. A week later, William LLC, through counsel, contacted Devine Blessings second time seeking clarification of the payoff demand. LLC warned Devine Blessings that it was risking civil action for tortious interference, because the payoff demand was jeopardizing the sale of the Property. Thomas responded to the second communication but asserted that he did not have time to adequately investigate the accuracy of the payoff demand he had submitted. Subsequently, LLC canceled the agreement to sell the Property.

(State Bar Exhibit 32, p. 4.)

8. Refund to purchasers

Respondent claims the perspective buyers to the 167 Property made improvements to the property that inured to the benefit of William LLC when the sale was cancelled. (Responsive Brief, p. 26.) Again, this is outside of the record and detracts from the important point that William LLC had to reimburse the buyer for these costs because of the failed sale.

9. "Following a two-day bench trial in April 2013"

Respondent contends the State Bar mistakenly stated in its Opening Brief that the civil trial was two days long, when it was actually four days. (Responsive Brief, p. 26.) The State Bar does

not dispute the length of the trial (which is irrelevant to the issues raised in this petition), but it never said the trial was two days longs. What the State Bar said in its Opening Brief was "Following a two-day bench trial in April 2013, ***and a separate trial phase*** on the issue of punitive damages in May 2013…" (State Bar's Opening Brief, p. 16 [emphasis added].)

10. Respondent lied to the superior court

Respondent claims he did not lie to the superior court. (Responsive Brief, pp. 26–27.) But the superior court unequivocally found that respondent ***knew*** the $269,500 payoff demand he was false and inflated when he submitted it to William LLC, and the Court of Appeal found that this finding was supported by substantial evidence in the record. (State Bar Exhibit 35, p.13; State Bar Exhibit 37, p. 29.) Accordingly, because respondent knew the payoff demand was fraudulent, he lied to the superior court in his September 14, 2010 declaration, signed under penalty of perjury, when he stated:

> The payoff demand is an accurate payoff demand to the best of my knowledge, information and belief. This payoff demand reflects the principal amounts due on the package purchase of the notes and security instruments which occurred on or about March 12, 2010 and which payoff demand includes attorney's fees and costs incurred in the protection of the securities . . . .

(State Bar Exhibit, 25, p. 1.)

The phrase "to the best of my knowledge, information and belief" does not save him since respondent was found to have engaged in fraud under Civil Code section 3294, subdivision (c)(3). This section defines fraud as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." Since respondent intentionally attempted to deceive William LLC about the amount of the payoff demand, he cannot turn around and argue that the false and inflated demand was the product of a mistaken belief.

The State Bar Court appropriately applied collateral estoppel to the civil fraud finding (decided under a clear and convincing standard) and excluded evidence proffered by respondent in an attempt to relitigate the findings. (Review Dept. Opinion, pp. 7–10; see also *Wright v. Ripley* (1998) 65 Cal.App.4th 1189, 1193 [discussing doctrine of collateral estoppel]; *In the Matter of Kittrell* (Review Dept. 2000) 4 Cal.

State Bar Ct. Rptr. 195, 205 [collateral estoppel may be applied to State Bar Court proceedings in order to prevent an attorney from relitigating an issue resolved adversely to the attorney in a prior civil proceeding]; see also *Roos v. Red* (2005) 130 Cal.App.4th 870, 888 [claim of new evidence will not defeat collateral estoppel where evidence available at first hearing].)

III. CONCLUSION

The fundamental goals of attorney discipline are to protect the public and the public's confidence in the legal profession, as well as to effect rehabilitation and general and specific deterrence of future violations. There is no question that restitution serves those goals here, where respondent engaged in intentional and fraudulent acts, including lies to the court, and has yet to show any remorse, acknowledgment of wrongdoing, or any effort whatsoever to pay the significant out-of-pocket expenses incurred by the victim as a direct result of his misconduct. The public and the profession, and in fact, respondent, will best be served through the rehabilitative steps of requiring him, in no uncertain terms, to confront, in concrete terms, the harm he has caused before he is able to return to the active practice of law. The State Bar requests that this Court grant its petition, impose the six-

month disciplinary suspension recommended by the Review Department, and order that respondent remain suspended until he pays restitution for specific, out-of-pocket losses (compensatory damages, attorney fees and costs) to William LLC in the amount of $536,726.49, plus interest.

This case, however, has broader implications for restitution in all future cases involving non-clients. In its Opinion, which it designated for publication, the Review Department broadly opined on the "limitations to ordering restitution, particularly to non-clients, as a condition of probation," and concluded that "a civil judgment in tort … cannot serve as the basis for restitution." (Review Dept. Opinion, pp. 1, 32.) In doing so, the Review Department took an overly restrictive view of Supreme Court precedent on this topic, including *Sorensen, supra,* 52 Cal.3d 1036, and imposed inappropriate categorical limits on the availability of restitution in attorney discipline cases.

As discussed in its Opening Brief and in this Reply Brief, when an attorney violates duties (whether to the public, the courts, or the profession) and causes someone (whether a client or otherwise) to incur specific out-of-pocket financial costs as a direct result of the misconduct, restitution should be permitted

and ordered whenever it furthers the purposes of discipline. The State Bar therefore requests that its petition also be granted to address this boarder and very important principle.

Dated: March 29, 2024

Respectfully submitted,

ELLIN DAVTYAN
BRADY R. DEWAR

GEORGE S. CARDONA
RACHEL S. GRUNBERG

By: */s/RACHEL S. GRUNBERG*
RACHEL S. GRUNBERG

By: */s/BRADY R. DEWAR*
BRADY R. DEWAR

Attorneys for Petitioner
Chief Trial Counsel of
The State Bar of California

WORD COUNT CERTIFICATE PURSUANT TO CALIFORNIA RULE OF COURT 8.520(C)(1)

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I hereby certify that this brief contains 5,673 words. I have relied on the word count of the computer program used to prepare the brief.

Dated: March 29, 2024

/S/ BRADY R. DEWAR
BRADY R. DEWAR

PROOF OF SERVICE

I, Joan Randolph, hereby declare: that I am over the age of eighteen years and am not a party to the within above-entitled action, that I am employed in San Francisco, that my business address is The State Bar of California, 180 Howard Street, San Francisco, California 94105.

On March 29, 2024, following ordinary business practice, I served a copy of the

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

via email via the Court's Truefiling system, and by U.S. Mail on the party listed as follows:

Thomas Spielbauer, Esq.
Spielbauer Law Office,
3130 Balfour Road D #231
Brentwood, CA 94513

I also served copies of this document electronically (with permission) upon the Clerk of the State Bar Court (michelle.cramton@statebarcourt.ca.gov).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Oakland, California this 29th day of March, 2024.

/s/Joan Randolph
Joan Randolph

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **SPIELBAUER (THOMAS JOHN), IN RE**
Case Number: **S283172**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **brady.dewar@calbar.ca.gov**

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3/29/2024
Date

/s/Joan Randolph
Signature

Dewar, Brady (252776)
Last Name, First Name (PNum)

State Bar of California
Law Firm