S280752

IN THE SUPREME COURT OF CALIFORNIA

NORTH AMERICAN TITLE COMPANY, et al.,
Petitioner,
v.

SUPERIOR COURT OF FRESNO COUNTY,
Respondent,

CAROLYN CORTINA, *et al.,*
Real Parties in Interest.

REVIEW OF A DECISION BY THE COURT OF APPEAL
FIFTH APPELLATE DISTRICT, CASE NO. F084913
FRESNO SUPERIOR COURT CASE NO. 07CECG01169

REAL PARTIES IN INTEREST'S REPLY BRIEF

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Plaintiffs/Real Parties in Interest, Carolyn Cortina, et al.[1], reply to Petitioner's[2] Answer Brief on the Merits[3] as follows:

I. Petitioner's Initial Discussion of the Judicial Disqualification Statutes Merely States Petitioner's Opinion, with No Citation to Any Substantive Authority.

Petitioner's Answer Brief begins with a section-by-section review of the Judicial Disqualification Statutes, as interpreted by Petitioner, without any supporting analysis or policy from any other source. The sole citation in this portion of the brief is to *People v. Canty* (2004) 32 Cal.4th 1266, 1276, for the general proposition that interpretation of a statute requires construction in the context of the statute as a whole. Ultimately, Petitioner's purpose in offering this review is to state that it agrees with the erroneous conclusion of the Court of Appeal that the requirement of Code of Civil Procedure section 170.3(c)[4] that a complaining party must file statement of disqualification "at the earliest practicable opportunity" does not apply where the complaint is based on alleged judicial bias. As addressed below, Petitioner makes an erroneous conclusion.

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[1] In this brief, plaintiffs/real parties in interest are referred to as "Real Parties," or "Plaintiffs/Real Parties."
[2] In this brief, Petitioner Lennar Title is referred to as "Petitioner" or "Lennar Title."
[3] Hereinafter "Answer Brief," and cited as "AB."
[4] Statutory references are to the Code of Civil Procedure unless otherwise noted.

II. Petitioner's Statement of Disqualification Was Properly Stricken as Untimely.

Code of Civil Procedure Section 170.3 sub. (c) requires a party's verified statement seeking disqualification of a judge to be filed "at the earliest practicable opportunity after discovery of the facts constitution the ground for disqualification." Petitioner's Answer Brief attempts, unsuccessfully, to avoid this rule in two ways. First, Petitioner argues that case law recognizes a kind of "straw that broke the camel's back" theory, under which accumulated inferences of bias can finally reach a point at which a party first realizes bias exists, with the result that the "earliest practicable opportunity" is measured by time that begins to run from the moment of realization. Petitioner contends that it did indeed file its verified statement at the earliest practicable opportunity, promptly after Petitioner first realized it was the object of Judge Hamilton's alleged bias.

Petitioner's second argument is that the Court of Appeal was correct in holding that a party's claim of bias against a trial judge can never be waived. To that end, Petitioner argues that the ample case authority Real Parties have cited to the contrary is all distinguishable, and that the "never waived" rule is not contradicted by the substantial body of statutory and case law holding a party's right to pursue such a claim is waived at the appellate level if not raised by a timely writ petition. The many authorities

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that conflict with the Court of Appeal's Opinion herein are not distinguishable.

A. Petitioner's Time To File a Statement of Disqualification Was Not Extended by a "Cumulative Effect" Theory or Other Circumstances.

Petitioner's argument concerning the "cumulative" grounds theory relies entirely on an incorrect statement of the holding in *Jolie v. Superior Court* (2021) 65 Cal.App.5th 1025, a marital dissolution and custody proceeding in which real party Pitt challenged the timeliness of Jolie's verified statement seeking to disqualify for bias a temporary judge who had been appointed by the Superior Court upon the earlier stipulation of the parties. (*Id.* at p. 1032.) The temporary judge had acted in the same capacity in prior cases involving counsel for both parties and, pursuant to the applicable rules of ethics, he and his alternative dispute resolution provider disclosed all of those cases to the parties prior to the confirmation of the judge's appointment. (*Id.*) Later, during the pendency of the proceedings, the temporary judge accepted two new cases with the firm or its co-counsel representing real party Pitt, and one of the earlier-disclosed cases the judge had believed to be settled became active again. (*Id.* at p. 1034.) The judge made no disclosure at the time of these developments to either Jolie or her counsel. Instead, Jolie learned of the additional cases only when her counsel wrote to the judge's alternative dispute resolution

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provider requesting an update in July 2020, some two years after the judge's previous disclosure. (*Id.*)

After learning of the new cases, Jolie's counsel filed a verified statement seeking disqualification of the judge. (*Id.* at p. 1035.) The Superior Court judge who was appointed to rule on disqualification held that the statement of disqualification was untimely because it was not filed at the outset of the case when the judge and provider's initial disclosures were made. (*Id.* at p. 1036.) Jolie sought review in the Second District Court of Appeal. (*Id.* at p. 1037.)

The Court of Appeal reversed the lower court's finding of timeliness, but in so doing did not, as suggested by Petitioner herein, attribute its holding to an accumulation of information that eventually reached a tipping point finally allowing Jolie to recognize inferences of impropriety. To the contrary, the Court of Appeal emphasized that there were significant differences between the judge's prior cases and the new cases involving Pitt's attorneys. The fact that suggested impropriety was not the cumulative number of such cases, but rather the judge's failure to disclose the new and revived cases. The court said:

> Jolie's challenge to Judge Ouderkirk, as she has explained, is not predicated on his past professional relationships with Pitt's counsel—as repeatedly pointed out, Judge Ouderkirk also had been retained in matters in which Jolie's original counsel represented a party—but on the expansion of that relationship while this case was before him, as well as his failure to disclose those additional matters. Upon receiving

> this new information, Jolie promptly sought disqualification of Judge Ouderkirk, first asking him to recuse himself pursuant to [California Code of Judicial Ethics] canon 6D(3)(a)(vii)(C) and then filing her verified statement of disqualification in superior court. Jolie properly sought to disqualify Judge Ouderkirk based on information first learned in late July 2020; she was entitled to have her challenge decided on its merits.

(*Id.* at p. 1043.)

In the instant case, Petitioner incorrectly emphasizes the phrase, "the cumulative effect of potentially disqualifying events sometimes will matter," purportedly explaining the theory justifying the long-delayed filing of its own statement of disqualification. But the quoted language does not appear as part of the holding in *Jolie* on the page cited in Petitioner's Answer Brief, nor does it accurately reflect the court's opinion that Jolie's ground for disqualification was based on *newly discovered* events rather than an aggregation of events accumulated over time. ["However, as this court held in the closely related context of the disclosure obligations of privately compensated neutrals, "[a] party cannot waive a right she does not know she has." (*Jolie, supra,* at pp. 1043-1044, citing *Honeycutt v. JPMorgan Chase Bank NA (2018) 25 Cal.App.5th 909, 931 [236 Cal.Rptr.3d 255]*).] The language quoted by Petitioner actually appears near the end of the opinion, in a discussion rejecting real party Pitt's argument that the grounds for disqualifying the judge represented an impermissible "numerosity analysis," whereunder the aggregate number of

disclosed and otherwise acceptable relationships between the judge and Pitt's counsel reached a point that made them unacceptable. But the court disagreed that this was the case, noting that the judge's disqualification "was not predicated on an inaccurate description of his history of working together with Pitt's counsel, but on just-acquired information that he continued to be compensated in newly disclosed cases involving Pitt's counsel while the Jolie/Pitt matter was pending. That is not simply the difference between 10 or 12, as Pitt would have it, but between a history of past relationships and an inventory of current ones." (*Jolie, supra,* at p. 1052.) The sense in which the court used the phrase "the cumulative effect of potentially disqualifying events" was to emphasize that a single, initial disclosure of relevant information does not necessarily satisfy the disclosing party's obligations – additional events during the course of a lengthy proceeding can require periodic and ongoing disclosures. (*Id.* at p. 1052.) This is not consistent with Petitioner's suggestion that new disqualifying events somehow extend the time to complain of old ones.

But assuming, *arguendo,* that a party plausibly could first realize possible bias only by combining information concerning a new potentially disqualifying event with previously known information, the facts of the instant case still do not show Petitioner's statement of disqualification to be timely. The relevant timeline is as follows:

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June 24, 2020 Petitioner avers and alleges in its Statement of Disqualification that at a hearing on June 24, 2020, Judge Hamilton demonstrated bias by stating it was apparent that Defendant (Petitioner) Lennar Title was playing a corporate shell game, attempting to avoid liability in the instant suit.

June 18, 2021 Petitioner avers and alleges in its Statement of Disqualification that at a hearing on June 18, 2021, Judge Hamilton demonstrated bias by questioning *Lennar Title's attorney,* Michael Brewer, as to the identity of Mr. Brewer's client, and by stating that defendant Lennar Title appeared to be playing a game of "Three Card Monte" to avoid liability.

November 10, 2021 Judge Hamilton's Answer, in response to former defendant Doma Title of California's section 170.1 disqualification statement, states that his remarks on June 24, 2020 and June 18, 2021 were directed at Lennar Title, not at Doma. Petitioner now argues that this statement in November 2021 demonstrated bias against Lennar Title.

In its briefing for the Court of Appeal and for this Court, Petitioner has repeatedly pointed to Judge Hamilton's comments, arguing that such comments, *on their face*, are *clear* indications of bias against Petitioner. Yet, in almost the next breath, Petitioner solemnly declares that its earliest practicable opportunity to file a statement of disqualification did not come until shortly before that statement was filed on **August 18, 2022,** because it

was not until then that Petitioner finally realized Judge Hamilton's alleged bias.

Petitioner's excuses for not filing sooner simply do not add up. Petitioner suggests it had to wait for the outcome of Doma's disqualification attempt before filing its own statement of disqualification. Yet, Petitioner repeatedly insists Doma is a separate corporate entity[5], and admits it knew, based on Judge Hamilton's November 10, 2021 Answer, that the court's comments were directed at Lennar Title, rather than at Doma. Petitioner offers no law or theory that would explain why the running of Petitioner's time to file at the earliest practicable opportunity would have been tolled during the time that the challenge raised by Doma, a separate legal entity, was being resolved. Petitioner argues that it filed its

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[5] Confusingly, Petitioner asserts opposite facts in its Statement of the Case which are central to the disqualification issue. For example, Petitioner uses the term "entity" and "party" interchangeably stating on the same page, "...Lennar Title's assets were sold in the ordinary course of business and transferred to a separate entity now called Doma Title of California, Inc..., and claiming Doma as "a new party to this case" when Real Parties amended the complaint (Answer, p. 12; Emphasis added). Petitioner next states that "Lennar Title ... was not a party to this Doma transaction, ..." but "somehow, Real Parties "took jobs with Doma – as a result of the Doma transaction." (Answer, p. 13.) Even more confusing, Petitioner claims that Lennar Title and Doma Title are separate, but acknowledges the "... Doma transaction was undertaken by a different corporation in the Lennar corporate family." (Answer, p. 14.) Moreover, Petitioner claims it could not produce any knowledgeable person for deposition "... because no one at Lennar Title was involved in the actual transaction..." (Answer, p. 15.) It is unfathomable how a supposed separate entity or party could sell assets and transfer employees without being a signatory to any contract, or literally, have "no one" involved in the transaction.

statement of disqualification "less than three weeks after the court of appeal lifted its stay resulting from Doma's section 170.6 writ proceedings" but cannot explain why Doma's writ proceedings could have served as a proxy for Petitioner's claims or would have excused Petitioner from filing its own challenge at an earlier date.[6] In fact, the Fifth District Court of Appeal, rejected this exact argument in its earlier decision in *Tri Counties Bank v. Superior Court* (2008) 17 Cal.App.4th 1332. The court stated:

> It is true that petitioner sought appellate review of the class certification order by a petition for writ of mandate and, in connection therewith, we issued a *stay* of trial court proceedings pending such review. Petitioner argues the stay excused it from filing the statement of objection until after appellate review was concluded. We disagree. The issuance of the stay does not support petitioner's position for at least two reasons. First, the stay was not issued until December 6, 2007. Petitioner therefore had ample opportunity to pursue disqualification long before the stay was imposed. Second, although unnecessary to our conclusion that the statement of objection was untimely, it is our view that petitioner could have filed a statement of objection even while the stay was in effect. Our general stay of proceedings was obviously directed to the *underlying proceedings between the parties to the action (i.e., to the litigation itself)*, not to questions of the judge's qualification to preside over those proceedings.

(*Id.* at p. 1338.)

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[6] Petitioner carefully implies that Judge Hamilton somehow exceeded his authority by dismissing Doma Title of California. In fact, Judge Kimberley Gaab of the Fresno County Superior Court granted Plaintiffs/Real Parties' *ex parte* request for dismissal. The request was for dismissal without prejudice, to reserve the possibility of bringing Doma Title back, in the event Petitioner failed to post an appeal bond. The dismissal by Judge Gaab is stated as a fact in Petitioner's Statement of Disqualification, filed August 18, 2022 and included in the record herein.

In addition, Petitioner cannot explain why it did not file a statement of disqualification promptly after Judge Hamilton's comments on June 24, 2020, given that in the verified statement Petitioner filed over two years later, Petitioner asserted that those comments "demonstrated bias and prejudice" specifically against Lennar Title. Petitioner cannot explain why it did not file a statement of disqualification promptly after Judge Hamilton's comments on June 18, 2021, when the matters complained of revolved around the court's questioning *of Lennar's attorney* as to the identity of his client, and the court's comment that defendant had been causing delay and obfuscation since the conclusion of trial in 2016. Surely Lennar Title knew the identity of its own attorney, and realized that Doma, the only other defendant, had not come into the case until some five years after the conclusion of the trial to which the court referred.

Finally, even if one were inclined to believe Petitioner simply didn't put the pieces together until August 2022 to form its purported belief that the court was biased, it would still be necessary to identify the final, crowning event (among the "cumulative" events) from which Petitioner's realization blossomed. But Petitioner has never identified an event or fact that caused it to realize for the first time, in August 2022, that it had a claim of bias against Judge Hamilton. Petitioner points to Judge Hamilton's remark that Lennar Title and Doma were "inextricably intertwined" (a fact supported by compelling evidence from Doma's and its investor's own

SEC filings)[7]. But even if that comment could be construed as an indication of bias rather than a statement of obvious fact, it could not serve as the

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[7] The distinction between "entity" and "party" is not academic. Though not addressed by the Court of Appeal or Petitioner, the Trial Court articulated a third ground in its order striking the disqualification application:

> "A party may file no more than one statement of disqualification against a judge unless facts suggesting new grounds for disqualification are first learned of or arise after the first statement of disqualification was filed." (Code Civ. Proc. §170.4(c) (3) .) In a different context, but illuminating here, "'[p]arty' includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding." (Code Civ. Proc. §170.1 (a) (8) (B) (ii).)
>
> As discovered by the Fifth District Court of Appeal and included in its Orders filed May 4 and 23, 2022 (Exhibits B & C):
>
> > 1) Lennar Corporation owned (or owns) approximately 25% of Doma Holdings, Inc.;
> >
> > 2) Stuart Miller sat (or currently sits) on the Board of Directors of the parent company of LENNAR and of Doma Title;
> >
> > 3) Page 37 of Doma Holdings, Inc. Form 10-K describes the uncertainty of litigation in the insurance industry and then proceeds to describe only one matter of litigation for three additional paragraphs - the "Cortina Litigation."
> >
> > > a. "At the time Doma Holdings, Inc. and LENNAR entered into the "North American acquisition," it was agreed between the two entities that LENNAR would retain all the liabilities resulting from the Cortina Litigation. "Consistent therewith, since the acquisition,

event that prompted Lennar Title to file its statement of disqualification because it came as part of Judge Hamilton's order *striking* the statement as untimely, *after it already had been filed.*

In sum, it is simply not credible that it was not until shortly before August 18, 2022 that Petitioner first realized it had a claim of bias based on

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> Lennar Title has continued to control the defense, without our involvement, of the Cortina Litigation." (Doma Holdings, Inc. 10-K filing *314122* p.37)
>
> b. "On March 13, 2 0 21, Lennar Title, a wholly owned subsidiary of Lennar Corporation, delivered notice confirming that it would indemnify us for damages incurred by our indemnified parties arising out of the Cortina Litigation and stating that it elected to control the defense, at its expense, for such matter, and, on March 18, 2021, we entered into a Joint Defense Agreement with Lennar Title with respect to such litigation." (Id.)
>
> Based on the statements in the 10-K, as identified by the Fifth District, at the time of Mr. Gilmore's filing, on behalf of DOMA, an unsuccessful 170.6 and subsequent 170.1, LENNAR represented by Barbara Miller was "controlling the defense, without [Doma' s] involvement, of the Cortina Litigation." As a legal affiliate of DOMA, the indemnifier of any liability of DOMA, and the party in "control of the defense for indemnified parties, LENNAR TITLE is legally foreclosed from bringing this second, and untimely, challenge pursuant to Code of Civil Procedure section 170.1 and it should be stricken as improper. (Code Civ. Proc. §170.4(b).)

While Petitioner argues the term "waiver" in section 170.3(b)(2) "contains no limiting language" and should be applied across multiple sections (Answer, p. 28), it ignores the definition and trial court application of "party" in section 170.1(a)(8)(B)(ii).

events that occurred in June 2020, June 2021, and November 2021. Petitioner's statement of disqualification was untimely, as a matter of law, and the trial court acted properly in striking it for that reason.

B. The Court of Appeal's Opinion Conflicts with California Case Law.

Petitioner's Answer Brief ineffectively attempts to distinguish case law with which the Court of Appeal's opinion conflicts. First, Petitioner wrongly asserts that *Tri Counties Bank v. Superior Court* (2008) 167 Cal.App.4th 1332 is inapplicable because it did not involve a claim of bias. In fact, the contention in *Tri Counties Bank* was that the trial judge allegedly conducted an independent factual investigation of an issue, "thereby creating the impression of partiality." (*Id.* at p. 1334.) The trial judge struck the petitioner's statement of disqualification as untimely, and the Fifth District Court of Appeal affirmed. (*Id.*) The *Tri Counties* court's further discussion specifically characterizes the petitioner's alleged ground for disqualification as "judicial bias." (*Id.* at p. 1339.)

Next, Petitioner attempts to distinguish *Alhusainy v. Superior Court* (2006) 143 Cal.App.4th 385 by pointing out that after holding that the trial court properly struck a criminal defendant's statement of disqualification because it was not filed at the earliest practicable opportunity, the Court of Appeal exercised statutory discretion under Section 170.1(c) to direct a Superior Court review of the defendant's bias claim, in the interest of

justice. But the issue here is whether a disqualification statement based on judicial bias is subject to the "earliest practicable opportunity" filing requirement, and *Alhusainy* states unequivocally that it is. ["Here, petitioner knew all of the facts on which he relies by the time he filed his motion to withdraw the guilty plea on May 9, 2006. However, it was not until after he lost that motion, at a hearing on May 25, that he filed his application to disqualify the judge. That does not comport with the statutory requirement of acting at the earliest practicable opportunity. ... The court did not err in striking the motion as untimely." (*Id.* at p. 394.)]

In the instant case, there is no issue concerning a court's discretion, on its own motion and in the interests of justice, to permit adjudication of a late-filed bias claim. Here, the question is whether the trial court erred in striking as untimely Petitioner's application to disqualify on alleged grounds of bias. Petitioner filed its Statement of Disqualification on August 18, 2022, over two years after the trial court's allegedly biased comments. The trial court in *Alhusainy* said 16 days was too long a delay, and the Court of Appeal agreed. But the Opinion in the instant case says a claim of judicial bias is never waived. That directly conflicts with *Alhusainy.*

Petitioner argues that *People v. Seaton* (2001) 26 Cal.4th 598 is distinguishable, but then offers nothing that would actually distinguish it. The discussion of judicial bias in *Seaton* is very brief. A criminal defendant

argued on appeal that the trial judge was biased. This Court held simply that "[d]efendant has not preserved his claim for review because he failed to object to the improper acts and never asked the judge to recuse himself." (*Id.* at p. 698, citing *People v. Hines* (1997) 15 Cal.4th 997, 1040-1041.)

Petitioner suggests the Opinion in the instant case does not conflict with *Seaton* because in *Seaton*, after holding that the petitioner had failed to preserve his claim, this Court continued on to note that it had reviewed the record and found no indication of bias on the part of the trial judge. But Petitioner's apparent argument goes too far. *Seaton* does not hold that despite the petitioner's failure to preserve his claim, he was still entitled to have it considered on appeal, with the possibility that the Supreme Court would find it meritorious and disqualify the trial judge. The Court's comment in *Seaton* clearly was intended to negate any inference that it agreed the trial judge was actually guilty of misconduct. The Court of Appeal's Opinion in the instant case says a claim of judicial bias cannot be waived by failure to make a prompt objection, and *Seaton* reaches the opposite result. (*Id.* at p. 1041.)

Finally, Petitioner simply dismisses the body of statutory and case law holding that appellate review of a claim of judicial bias may not be obtained on appeal, and is forfeited if not raised by a writ petition. (See *People v. Hines* (1997) 15 Cal.4th 997, 1041-1042; *People v. Scott* (1997) 15 Cal.4th 1188, 1207.) Petitioner argues that such decisions are not in

conflict with the Court of Appeal's Opinion herein because "the question of whether a party may wait until appeal to raise a question of bias is an entirely different issue given the statutory writ mechanism providing for appellate review and Section 170.3(c) laying out the process for neutral evaluation of facially sufficient bias allegations."

This argument makes no sense. First, without further explanation, it cites to *People v. Bryant* (1987) 190 Cal.App.3d 1569, 1572. But *Bryant* squarely holds that a party who fails to seek disqualification of an allegedly biased trial judge by filing a timely statement of disqualification pursuant to Section 170.3(c) waives the objection and may not raise it on appeal. This does not explain Petitioner's contention that such a waiver raises "an entirely different issue." If, as Petitioner contends, the preservation of public confidence in the judiciary would be undermined unless a party's claim of judicial bias is exempt from prompt filing requirements for purposes of review before a Superior Court judge pursuant to Section 170.3(c), the same concern should prevent a party's loss of appellate rights, due to a failure to act promptly. But *Bryant* makes clear that, in addition to Section 170.3(d)'s requirement that appellate rights to challenge alleged bias are waived if not raised promptly by petition for writ of mandate in the Court of Appeal, such rights are also waived by failure to file a timely written statement pursuant to Section 170.3(c).

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The Opinion of the Court of Appeal herein conflicts with and fails to address the cases and statutes that uniformly require prompt action by a party who seeks to disqualify a trial judge for any reason, whether by process before an appointed Superior Court Judge or before an appellate court. Despite its reliance on *People v. Barrera* (1999) 70 Cal.App.4th 541, the court below failed to heed *Barrera's* clear admonition that the policy goal of keeping even "the shadow of bias" out of our courts does not outweigh the public policy considerations requiring prompt review of the question of disqualification of a judge. (*Id.* at p. 551.) The logic of this principle does not differ according to the level of the court at which a claim of disqualification is to be adjudicated. Hence, there is no instance in which the law does, or should, permit a party to hold such a claim in reserve rather than asserting it promptly, at the earliest practicable opportunity.

C. *Jolie* Confirms that the "Earliest Practicable Opportunity" Requirement Applies to a Statement of Disqualification based on Bias or the Appearance of Bias.

Ironically, Petitioner relies on *Jolie* to create an excuse for its own decision not to file a disqualification statement until immediately before the entry of judgment, when *Jolie* itself confirms Real Parties' central argument. The focus of the dispute in *Jolie* was that *Jolie's* statement of disqualification against the temporary judge was subject to the "earliest practicable opportunity" requirement of section 170.3(c), and real party Pitt

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contended that *Jolie's* challenge could not be heard because it was not timely filed.

First, it is undisputed that Jolie's asserted ground for disqualification was bias, or the appearance of bias. Jolie contended that, based on the judge's failure to disclose new associations with Pitt's counsel made while presiding over the Jolie-Pitt matter, a reasonable person could conclude the judge was no longer able to remain impartial. The court explained that "'Impartiality' entails the 'absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind.' [Citation.]" (*Jolie, supra,* at p. 1040.) Citing Section 170.3(c), the court added that Jolie's challenge was subject to the timeliness requirements of Section 170.3(c):

> "The statement shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." A delay in seeking to disqualify a judge "constitutes forfeiture or an implied waiver of the disqualification." (*Tri Counties Bank v. Superior Court (2008) 17 Cal.App.4th 1332,1337 [84 Cal.Rptr.3d 835]* [motion to disqualify judge for improperly undertaking independent investigation of facts denied when party was aware of misconduct but only raised issue after adverse ruling in case]; see *Hayward v. Superior Court, supra, 2 Cal.App.5th [10,] at p. 49* ["parties can waive disqualification by their conduct where they are aware of grounds for disqualification but continue to participate in the proceedings without raising the objection"].)

In the instant case, it is telling that Petitioner chose to resort to *Jolie* to attempt to construct a survivable version of the facts, because there

simply is no actual authority available to justify Petitioner's last-minute effort to obstruct the entry of judgment by disqualifying the trial judge in a fifteen-year-old case. Accordingly, it is not surprising that the Answer Brief barely mentions Petitioner's "cumulative effect of potentially disqualifying events" excuse, misstates the holding in *Jolie,* and tiptoes around the fact that, but for the "earliest practicable opportunity" requirement, there would have been no timeliness dispute to resolve in *Jolie.*

III. Petitioner's Answer Brief Fails to Address Relevant Policy or Authority Concerning the Protections Afforded a Trial Judge Under Code of Civil Procedure Section 170.2(b).

Petitioner contends that the narrow purpose of Section 170.2(b) is "to prevent a judicial officer from having to disqualify himself based on prior rulings." (AB p.47.) Petitioner argues that the phrase, "has in any capacity expressed a view on a legal or factual issue presented in the proceeding" is "best interpreted in context" to exclude "more general terms like "arising during the proceeding" or "relating to the proceeding." (AB at p.48.) Instead, Petitioner doubles down on the Fifth District Court of Appeal's error by continuing to argue that the word "presented" means "properly presented," with the result, according to Petitioner, that Section 170.2(b) does *not* bar disqualification when a judge has expressed a view on a legal or factual issue that was not *properly* presented.

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In support, Petitioner offers only a single, irrelevant case, *County of San Diego v. Alcoholic Beverage Control Appeals Board* (2010) 184 Cal.App.4th 396 ("*County of San Diego*"). In that case, the Court of Appeal held that an administrative law judge had applied the wrong standard in approving a liquor license application, and remanded to the same ALJ for further proceedings under the correct standard. The petitioner argued that the ALJ was required to recuse himself because, by analogy, he should be subjected to the same kind of peremptory challenge permitted under Code of Civil Procedure section 170.6 (a)(2) when a Superior Court judge is assigned to conduct the new trial of a case in which his or her decision was reversed on appeal. (*Id.* at 406.) The Fourth District Court of Appeal rejected this argument, pointing out that the Administrative Procedure Act has its own provision that bars disqualification where an ALJ "has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding" unless there is further evidence of bias, prejudice, or interest. (*Id.* at 406, citing Gov. Code §11425.40, subd. (b)(2).)

Contrary to Petitioner's contention, *County of San Diego* contains no analysis or discussion concerning the proper interpretation of the foregoing language in the Government Code. It may be true that the ALJ in that particular case could not be disqualified simply because he had made a ruling prior to the appeal and remand, but nothing in the case suggests, as

Petitioner now contends, that the ruling (a) was intended to limit the applicability of Government Code section 11425.40(b)(2) *solely* to claims of presumed bias following a reversal and remand, or (b) has any relevance to an interpretation to Code of Civil Procedure section 170.2(b) concerning Superior Court judges.

Curiously, Petitioner argues in a footnote that Real Parties "admit" they were unable to find case law interpreting section 170.2(b) (AB p. 49, fn. 18) and then counters with a single case concerning a purportedly analogous statute, in which the opinion specifically states that the ALJ disqualification provisions in the Administrative Procedure Act are *not* analogous to judicial disqualification statutes in the Code of Civil Procedure. (*County of San Diego, supra,* at 406.)

On the other hand, the recusal rules and policies discussed in the United States Supreme Court and Court of Appeals cases reviewed in Real Parties' Opening Brief are directly relevant to an understanding of Code of Civil Procedure section 170.2(b) because the policies applicable to federal judges are very similar in substance to the judicial disqualification statutes in California's Code of Civil Procedure. The federal cases discussed in Real Parties' Opening Brief distinguish between intra-judicial and extra-judicial influences on views expressed by a judge, and that distinction helps to identify the difference between prejudice (grounds for recusal), and judging (a judge's job). Real Parties submit that the policy rationale stated in the

federal literature is important and compelling. It is and should be equally applicable to section 170.2(b) in California. Ultimately, the *County of San Diego* holding, concerning the possible recusal of an ALJ in a liquor license dispute, is not relevant to the matter at hand.

IV. Whether the Trial Court's Comments Constituted Bias or the Appearance of Bias is Disputed, But is Beyond the Scope of the Matter Under Review.

A portion of Petitioner's Answer Brief argues that Judge Hamilton's comments constitute grounds for disqualification under standards recognized by case law. Those assertions are by no means uncontested; however any such discussion is inappropriate here, as the Opinion under review expressly disavows any intent to make a finding as to whether or not bias exists or justifies disqualification in this case. (See Modified Op. at p. 44, fn. 10 ["It was necessary to discuss the merits of petitioner's arguments of bias to determine the facial sufficiency of the statement of disqualification. To note, this holding is focused solely on the determination of whether the statement for disqualification was facially sufficient. It is not, nor was it intended to be, an ultimate finding if disqualification is required under section 170.1, subdivision (a)(6)(A)(iii)."]

It bears noting here that the applicable objective standard under which a claim of disqualification is evaluated invokes a reasonable person apprised of all relevant facts, in context, as opposed to a person who is

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aware only of information selected by the complaining party. As noted in *Jolie v. Superior Court, supra,* 65 Cal.App.5th at pp. 1039-1040:

> While this objective standard clearly indicates that the decision on disqualification not be based on the judge's personal view of his own impartiality, it also suggests that the litigants' necessarily partisan views not provide the applicable frame of reference. [Citations.] Rather, 'a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street.'" (*United Farm Workers of America v. Superior Court (1985) 170 Cal.App.3d 97, 104 [216 Cal.Rptr. 4],* fn. omitted; accord, *Wechsler v. Superior Court,* [(2014)] *supra, 224 Cal.App.4th* [384] *at p.391* ["[t]he applicable disqualification standard is an objective one: if a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial, the judge should be disqualified"]...

By focusing on the reversible errors in the subject Opinion of the Court of Appeal, Plaintiffs/Real Parties do not mean to imply that they concede Judge Hamilton's comments constituted bias. If a reasonable person were fully informed of the deception, misinformation, stonewalling, defiance of discovery orders, and intransigence of the defendant in this matter, and of the SEC disclosures by parties dealing with Petitioner and its affiliated entities as well as the evidence and briefing presented by the parties, Real Parties are confident a reasonable person would agree that the court's comments were accurate assessments of the evidence placed before it over a period of many months.

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V. Petitioner's Statement of Disqualification Must Not Be Referred to a Judicial Officer for Determination Because the Statement Was Properly Stricken and Has No Further Force or Effect.

Hoping to salvage an otherwise meritless situation, Petitioner asks this Court at least to hold that Petitioner's unjustifiably tardy statement of disqualification be referred to an appointed Superior Court Judge for an evaluation on its merits. But such a holding is not an appropriate consolation prize in this matter. The entire point of the dispute is that a proper application to disqualify a trial judge simply cannot be initiated without complying with the "earliest practicable opportunity" requirement of section 170.3(c), and even with such compliance, the application cannot be based on matters that are excluded under section 170.2(b). Petitioner's statement of disqualification fails on both counts, and therefore, Petitioner's request for further proceedings below is meritless and unreasonable.

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VI. Conclusion

For all the foregoing reasons, Plaintiffs/Real Parties request this Court to reverse the holdings of the Court of Appeal and vacate the Opinion, as described in Plaintiffs/Real Parties' Opening Brief.

Dated: December 6, 2023

WAGNER, JONES, KOPFMAN & ARTENIAN LLP

CORNWELL & SAMPLE, LLP

WANGER JONES HELSLEY PC

By: */s/ Lawrence M. Artenian*
Lawrence M. Artenian

By: */s/ Patrick D. Toole*
Patrick D. Toole

CERTIFICATE OF WORD COUNT
(California Rules of Court, rule 8.504(d)(1).)

The text of this Petition consists of 6,020 Words, as counted by the Microsoft Word word-processing program used to generate the Petition.

December 6, 2023

/s/ Lawrence M. Artenian
Lawrence M. Artenian

PROOF OF SERVICE

I declare that I am a resident of the State of California. I am over the age of eighteen years and not a party to the within action. My business address is 265 E. River Park Circle, Suite 310, Fresno, California 93720.

On the date indicated below, I caused the following document to be served **REAL PARTIES IN INTEREST'S REPLY BRIEF** on all interested parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows or emailed as listed:

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EXECUTED ON **December 6, 2023**, at Fresno, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Kimberly R. Noble
Kimberly R. Noble (knoble@wjhattorneys.com)

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S280752**
Lower Court Case Number: **F084913**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

12/6/2023

Date

/s/Kimberly Noble

Signature

Toole, Patrick D. (190118)

Last Name, First Name (PNum)

Wanger Jones Helsley PC

Law Firm