# In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

**Plaintiff and Appellant,**

**v.**

**PAUL BIANE, et al.,**

**Defendants and Respondents.**

Case No. S207250

Fourth Appellate District, Division Two, Case No. E054422
San Bernardino County Superior Court, Case No. FSB1102102
The Honorable Brian McCarville, Judge

## OPENING BRIEF ON THE MERITS



KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
MELISSA MANDEL
Supervising Deputy Attorney General
State Bar No. 159141
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2211
Fax: (619) 645-2044
Email: Melissa.Mandel@doj.ca.gov
*Attorneys for Plaintiff and Appellant*

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## ISSUES PRESENTED

a. Can a bribe offer or be charged with conspiracy to commit bribery, and aiding and abetting the receipt of a bribe, where his conduct satisfies the elements of those crimes?

b. Can a private person be charged with aiding and abetting a criminal conflict of interest violation?

## INTRODUCTION

As alleged in a 29-count indictment, defendant Jeffrey Burum, a wealthy developer and managing partner of Colonies Partners ("Colonies"), conspired with San Bernardino County public officials, using the guise of a lawsuit settlement to transfer $102 million of San Bernardino county funds to Colonies. Colonies - the plaintiff, and the San Bernardino County Flood Control District ("FCD") – the defendant, portrayed themselves to the public as adversaries in the lawsuit, but secretly, San Bernardino County Supervisors William Postmus, Paul Biane, and Chief of Staff Mark Kirk worked together with Burum. Using James Erwin as an intermediary, they marginalized the county's lawyers and forced San Bernardino into an unlawful settlement on terms dictated by Burum in exchange for Burum's promises of financial and political support. Burum followed through on those promises by making four payments of $100,000 each to sham political action committees which were secretly controlled by Postmus, Biane, Kirk and Erwin.[1]

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[1] The indictment includes charges against Biane, Kirk, Erwin and Burum. The issues covered by the grant of review affect only those counts in which Burum and Erwin are charged with aiding and abetting bribery and conflict of interest. Postmus pleaded guilty to all charges in a related case for his role in the settlement. He has agreed to cooperate with the prosecution.

The comprehensive indictment details conduct which spanned four years and occurred on two continents. The 31 overt acts alleged in furtherance of the conspiracy detail a number of crimes committed by each of the defendants, some of which are separately charged, and some of which are uncharged. For example, the overt acts make it clear that Burum offered and paid bribes, but he is not separately charged with violating Penal Code section 85.[2]

Burum and Erwin are, however, charged together with aiding and abetting the acceptance of bribes by Postmus and Biane. The indictment explains that Burum enlisted the assistance of Erwin to engage in coercive conduct to insure there would be the necessary three votes in favor of the $102 million settlement to Colonies. The indictment sets forth the use of threats, extortion and other tactics by Burum and Erwin to wear down Postmus and Biane's resistance and compel them to accept the bribes and pressure each other to accept as well.

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[2] All further statutory references are to the Penal Code unless otherwise indicated. Section 85 provides:

> Every person who gives or offers to give a bribe to any Member of the Legislature, any member of the legislative body of a city, county, city and county, school district, or other special district, or to another person for the member, or attempts by menace, deceit, suppression of truth, or any corrupt means, to influence a member in giving or withholding his or her vote, or in not attending the house or any committee of which he or she is a member, is punishable by imprisonment in the state prison for two, three or four years.

Burum claims the statute of limitations had expired with respect to section 85, and that was the reason the crime was not charged. (Answer, p. 5.) This assertion is speculative, as the record is silent as to the prosecution's reasons, and in any event the matter has no apparent relevance.

Burum's demurrer to these charges was sustained, as was his demurrer to the conspiracy charge to the extent it was predicated on the bribery crimes. Relying on *People v. Wolden* (1967) 255 Cal.App.2d 798 ("*Wolden*"), which applied the rule from *People v. Clapp* (1944) 24 Cal.2d 835 ("*Clapp*"), the Court of Appeal affirmed, holding that as matter of law, a person who offered a bribe could not be charged with aiding and abetting the receipt of a bribe. As to Erwin, however, the Court of Appeal agreed with the trial court that there was no legal impediment to charging an intermediary with aiding and abetting the acceptance of a bribe.[3]

This Court should overrule *Clapp*. Its faulty analysis has muddied the law, and its viability is questionable based on subsequent opinions by this Court. The absurd results foreshadowed by the dissent in *Clapp* become a reality here, where the mastermind of a massive bribery scheme is given a free pass while his underling is held criminally liable for the same conduct. Alternatively, *Clapp* should be limited to the context in which it arose - to those cases involving accomplice testimony under section 1111. In any event, the Court of Appeal's holding on the bribery charges should be reversed, because *Wolden* misapplied the *Clapp* rule to bribery charges, and the rule is expressly inapplicable under the circumstances presented here. Thus, the bribery charges against Burum and Erwin should be reinstated.

The conspiracy charge should also be reinstated. The Court of Appeal applied a narrow principle of federal common law (Wharton's rule) in a manner that conflicts with United States Supreme Court and Federal authority, and is inconsistent with this Court's decisions. Applying Wharton's Rule here violates public policy because it cloaks bribe offerers

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[3] The Court of Appeal nonetheless invalidated counts 5 and 8 against Erwin, finding the indictment failed to allege sufficient facts that Erwin acted as Biane's agent. (Slip Opn. at 23-24.) As set forth below, that ruling is also improper.

in a blanket of case law historically used to protect vulnerable, victim-like individuals.

Finally, this Court should reinstate the conflict of interest charges against Burum and Erwin and hold that private persons who aid and abet a criminal conflict of interest under Government Code section 1090 may be charged as principals under section 31. Case law and public policy support holding private persons accountable for aiding and abetting public officials committing crimes, and nothing in the statutory language or legislative history weighs against it. The Court of Appeal's superficial interpretation of *D'Amato v. Superior Court* (2008) 167 Cal.App.4th 861, led it to the erroneous conclusion that Government Code section 1090 reveals a legislative intent to exclude all aiding and abetting liability, but *D'Amato* supports such liability under the circumstances presented here.

In the century that has passed since this Court's decision in *People v. Coffey* (1911) 161 Cal. 433, legal developments have abrogated its holding and altered its definition of accomplice, but nothing has called into question *Coffey's* fundamental premise that, whatever the definition of accomplice, whether a person meets that definition depends on the facts. The Court of Appeal's holding unfairly deprived the People of the right to present proof that Burum and Erwin conspired to and did aid and abet the receipt of bribes, and commit a criminal conflict of interest. This Court should reverse the decision of the Court of Appeal, clarify that there are no exceptions to aiding and abetting liability for those who offer bribes or for private persons who commit a criminal conflict of interest, and reinstate the charges in counts 1, 4, 5, 7, 8 and 11.

## STATEMENT OF THE CASE AND FACTS[4]

A 29-count indictment filed against Jeffrey Burum, Paul Biane, Mark Kirk and James Erwin on May 9, 2011 alleges the following:

Defendant Jeffrey Burum offered bribes to San Bernardino County public officials to settle a lawsuit in favor of his company, Colonies Partners, on whatever terms he dictated. For his criminal plan to succeed, Burum needed the collective cooperation of three San Bernardino County supervisors to vote in favor of the lawsuit, so in addition to offering bribes to public officials to secure their individual cooperation, Burum enlisted the assistance of defendant James Erwin to put intense pressure on two supervisors to coerce each other to get the settlement done. Specifically, Burum and Erwin used a combination of threats, extortion, and inducements to wear down their resistance and secure the votes of Supervisors Bill Postmus and Paul Biane, and Burum bribed Chief of Staff Mark Kirk to influence Supervisor Gary Ovitt to vote in favor of the settlement. Ultimately, against the advice of all county attorneys and all private attorneys hired to represent the county, Postmus, Biane and Ovitt voted to settle the case for $102 million on November 28, 2006. (CT 1-28.)

Between March and July 2007, Burum began paying the bribes by giving $100,000 each to Postmus, Biane, Kirk and Erwin through phony political action committees which each of them secretly controlled. He also took Erwin on an extravagant jet trip and provided him with expensive gifts, which Erwin failed to disclose on his Fair Political Practices form. Biane, Kirk and Erwin failed to disclose the $100,000 bribes on their Fair

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[4] The issues on review address the Court of Appeals' holdings that defendants' demurrers were properly sustained as to some counts, and improperly overruled as to others. (See § 1004.) Accordingly, the relevant facts are taken from the indictment.

Political Practices forms or on their income tax returns, all of which were filed under penalty of perjury. (CT 1-28.)

Among other charges, Burum and Erwin were indicted in counts charging them together with conspiracy (count 1, § 182); aiding and abetting the acceptance of bribes by Postmus and Biane (counts 4 and 5; § 165; counts 7 and 8; § 86); and aiding and abetting a criminal conflict of interest (count 11; Gov. Code, §1090). (CT 1-28.)

On August 19, 2011, the trial court partially sustained the defendants' demurrers. As pertinent here, the court sustained Burum's demurrer to counts 4, 5, 7 and 8 (and count 1, to the extent it was predicated on those crimes), on the grounds that, as a matter of law, a person who offers a bribe cannot be charged with aiding and abetting the receipt of a bribe. It overruled Erwin's demurrer on the same charges, finding that as the intermediary rather than the bribe offerer, there was no legal impediment to charging Erwin with aiding and abetting the receipt of bribes. The trial court overruled both demurrers as to count 11, holding that private persons can be charged with aiding and abetting a criminal conflict of interest. (CT 261-281.)

The People appealed the trial court's ruling sustaining Burum's demurrer in part. Burum and Erwin filed petitions for writ of mandate/ prohibition, wherein Erwin challenged the court's overruling of his demurrer on the bribery charges, and both challenged the court's overruling of their demurrers on the conflict of interest charge. The matters were consolidated. The Court of Appeal affirmed the trial court's ruling sustaining Burum's demurrer as to counts 4, 5, 7 and 8; reversed the trial court's order overruling Erwin's demurrer as to counts 5 and 8; and reversed the trial court's ruling overruling both defendants' demurrers as to count 11. The Court of Appeal also sustained the demurrer as to count 1 to

the extent it relied on charges for which demurrers had been sustained. (Slip Opn. at 38-40.)

On February 13, 2013, this Court granted the People's Petition for Review.

## ARGUMENT

### I. ANY PERSON, INCLUDING A BRIBE OFFEROR, CAN BE LIABLE FOR CONSPIRACY AND AIDING AND ABETTING THE RECEIPT OF A BRIBE IF HIS CONDUCT SATISFIES THE ELEMENTS OF AIDING AND ABETTING LIABILITY

Section 31[5] authorizes aiding and abetting liability in clear and expansive terms. Nonetheless, the Court of Appeal carved out an exception for bribe offerors, concluding that, as a matter of law, such persons could not be charged with aiding and abetting the acceptance of a bribe. (Slip Opn. at 19.) It, in turn, extended its reasoning to conspiracy charges, holding that as the bribe offeror, Burum could not be charged with conspiracy to commit bribery. (*Ibid.*)

To reach that holding, the Court of Appeal relied upon *People v. Wolden, supra*, 255 Cal.App.2d 798, which was substantially based upon language from *People v. Clapp, supra,* 24 Cal.2d 835. *Clapp* should be overruled, because its flawed legal analysis has created confusion in the law, and its application violates public policy. Alternatively, its holding

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[5] Section 31, entitled "Principals defined," provides, in pertinent part:

> All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

should be limited to situations involving corroboration of accomplice testimony, the context in which it was decided. In any event, the bribery charges should be reinstated because the *Clapp* doctrine by its express terms does not apply to the circumstances here. The conspiracy charge should also be reinstated, because the court's analysis invalidating the charge conflicts with controlling legal authority.

The indictment alleges Burum and Erwin conspired to, and did, aid and abet the receipt of bribes by Postmus and Biane. Law, logic and public policy compel the conclusion that the prosecution should not be foreclosed from charging and proving that Burum conspired to and did aid and abet the receipt of bribes simply because he also offered the bribes.

### A. *Coffey, Clapp, Wolden* and the 1915 Amendment to Penal Code Section 1111[6]

Prior to 1915, California courts used the broad definition of aiding and abetting liability in section 31 to determine what persons were accomplices whose testimony required corroboration under the law. In 1915, the Legislature rejected the use of that definition for that purpose, and adopted a much narrower definition of accomplice, thereby expanding the class of witnesses whose testimony would support a conviction without corroboration. In this case, for the first time, the Court of Appeal applied

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[6] Penal Code section 1111 provides:

> A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.
>
> An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

the body of law pertaining to accomplice testimony to restrict the reach of aiding and abetting liability. The court relied on *People v. Coffey, supra*, 161 Cal. 433 ("*Coffey*"), *People v. Clapp, supra,* 24 Cal.2d 835, *People v. Wolden, supra,* 255 Cal.App.2d 798, and the 1915 Amendment to Penal Code section 1111 in reaching this result.

In 1915, the Legislature added the second paragraph to section 1111, defining accomplices for the express purpose of abrogating the rule of *People v. Coffey*. (*Wolden, supra*, at p. 803.) In *Coffey*, the defendant was a supervisor convicted of agreeing to receive and receiving a bribe in violation of section 165. He appealed his conviction on grounds that it rested on the uncorroborated testimony of a self-confessed accomplice. (*Coffey, supra*, 161 Cal. at p. 436.) The evidence in *Coffey* was "uncontroverted"; it established that witness Gallagher was another supervisor testifying under a grant of immunity; he acted as an intermediary on behalf of an individual named Ruef, and negotiated the exchange of money for votes between Ruef and board members, which took place as agreed. Based on those facts, this Court was called upon to determine the "legal question" as to whether Gallagher was an accomplice of Coffey whose testimony required corroboration. (*Id.* at p. 437.)

*Coffey* explained that as a general rule, juries were instructed on the law of accomplices and it was left to them to decide whether or not the witness was an accomplice as a matter of fact. However, where the facts were not in dispute, it was a question of law whether those "acts and facts" made the witness an accomplice. (*Id.* at p. 436) *Coffey* explained that in determining what acts or facts make one an accomplice, "the single, sole determinative consideration is the part which the witness has borne in the crime perpetrated." (*Id.* at p. 440.)

*Coffey* discussed the development of the law requiring corroboration of accomplice testimony. It explained that originally only convicted felons

were considered accomplices, and common law judges instructed juries to view their testimony with caution both because the accomplice was tainted by his own confession of guilt, and because he was testifying with a hope of immunity. (*Coffey, supra*, 161 Cal. at p. 438.) These accomplice instructions did not embody any rule of positive law but expressed considerations of the value and weight to be given to such evidence. In 1851, these cautionary principles were incorporated into the positive law with the enactment of section 1111, but the Legislature failed to define the term accomplice. (*Ibid.*) It did, however, "lay down certain rules from which an acceptable definition of accomplice may readily be derived." This included the broad language in section 31 setting forth aiding and abetting liability. "Certainly, since the law has said that all such persons are so tainted with guilt that they may be indicted as principals, it cannot be denied that they are also accomplices." (*Id.* at p. 439.)

Accordingly, *Coffey* applied the broad definition of aiding and abetting liability from section 31 to determine whether a person was an accomplice whose testimony required corroboration under section 1111. *Coffey* expressly rejected the notion that a person's designation as an accomplice turned on whether he could be prosecuted for any particular crime.

> The declaration that one is an accomplice if he can be indicted for the same crime charged against the defendant on trial is perfectly sound, but the converse of the declaration, --namely, that if he cannot be indicted for the same crime, he is not an accomplice, is the merest sophistry which, ignoring the true test and meaning of the word, seeks to turn shadow into substance.

(*Coffey, supra*, 161 Cal. at pp. 441-442.)

Applying this broad definition of accomplice, *Coffey* held that in every case, as a matter of law, the giver and receiver of bribes were accomplices. (*Id.* at pp. 449-451.) *Coffey* reasoned that since the law has

denounced as separate crimes the "separate acts" of bribe giving and taking, holding parties accomplices to each other for the commission of these acts would make them principals in one crime and accomplices in the other at the same time for the same act. But *Coffey* saw no problem with this consequence because for the "given acts" only one punishment could be meted under section 654.[7] (*Id.* at p. 442.)

The 1915 amendment to section 1111 abrogated *Coffey's* broad definition of accomplices for purposes of the corroboration requirement. It defined accomplice in the limited manner rejected by *Coffey* as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Notably, there was no concurrent change in the law with respect to the definition of aiding and abetting liability in section 31 from which *Coffey* had derived the meaning of accomplice. Thus, the amendment narrowed the definition of "accomplice" for purposes of determining those witnesses whose testimony required corroboration, but left untouched the Legislative designation of "all persons involved in the commission of a crime" as principals in any crime so committed. (§ 31.)

In *People v. Clapp, supra*, the defendants were convicted of the crime of abortion. The defendants performed an abortion on a woman in the presence of her mother-in-law and sister-in-law. The defendants challenged their convictions on the ground that all three women were accomplices whose testimony required corroboration. (*People v. Clapp, supra,* 24 Cal.2d at p. 836.) This Court held no corroboration was required.

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[7] Section 654 provides, in pertinent part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision . . ."

Relying on the definition of accomplice in the amended section 1111, in contrast to the broader language in section 31, the court held, "[t]he mere fact that the witness is punishable for his cooperation with the defendant in the illegal transaction does not make him an accomplice." (*Clapp, supra,* 24 Cal.2d at p. 838.) Rather,

> [I]t is necessary to determine whether section 31 and 971 of the Penal Code or other provisions of the criminal law subject the witness to prosecution under the provisions that the defendant is accused of violating, or whether the acts of the witness participating in the transaction constitute a separate and distinct offense. If a statutory provision so defines a crime that the participation of two or more persons is necessary for its commission, but prescribes punishment for the acts of certain participants only, and another statutory provision proscribes punishment for the acts of participants not subject to the first provision, it is clear that the latter are criminally liable only under the specific provision relating to their participation in the criminal transaction. The specific provision making the acts of participation in the transaction a separate offense supersedes the general provision in section 31 of the Penal Code that such acts subject the participant in the crime of the accused to prosecution for its commission.

(*Clapp, supra,* 24 Cal.2d at p. 838; citations omitted.)

Thus, this Court held the woman submitting to an abortion was not punishable as a principal under section 31 because her conduct was proscribed by another statute, section 275. Accordingly, she was not an accomplice whose testimony required corroboration. (*Clapp, supra,* 24 Cal.2d at p. 838.)

In *People v. Wolden, supra,* the defendant, a tax assessor, was convicted of one count of conspiracy, and multiple counts of accepting bribes, based on allegations that he lowered assessments on personal property in exchange for bribes. The court instructed the jury that a number of witnesses who testified at the defendant's trial were not accomplices, which was relevant to the jury's evaluation of their credibility under section

1111. The appellate court found no error in instructing the jury that the witnesses were not accomplices. The court reasoned that prior to 1915, the giver and taker of bribes were accomplices of one another based on *Coffey*; the 1915 amendment to section 1111 was designed to abrogate the rule of *Coffey*; therefore, it concluded, the giver and takers of bribes were no longer accomplices of one another. (*Wolden, supra*, 255 Cal.App.2d at pp. 803-804.)

As set forth below, the analytical problems with the *Clapp* rule and the manner in which it was misinterpreted by *Wolden* led the Court of Appeal to erroneously conclude that a person who offers a bribe cannot, as a matter of law, be charged with aiding and abetting the receipt of a bribe or conspiracy to commit such a crime. There is no such limitation on aiding and abetting liability; whether a person can be so charged depends on the facts.

### B. *Clapp* Should Be Overruled; Alternatively, *Clapp's* Exclusion of Certain Persons from the Definition of Accomplice Should Apply Only For Purposes of Section 1111

*Clapp* should be overruled, because it erroneously holds that a person cannot be an accomplice to one crime if his or her conduct with respect to a transaction violates another provision of criminal law. *Clapp's* faulty reasoning was spelled out in a lengthy dissent, and it has since been substantially limited and largely discredited. Alternatively, *Clapp's* holding should be limited to the determination of whether a witness's testimony requires corroboration under section 1111 and not used to decide liability under section 31.

#### 1. *Clapp* should be overruled because its analysis is flawed and its viability is questionable

The dissenting opinion in *Clapp*, authored by Justice Schauer, took issue with the majority's statutory approach to determining whether a

witness was an accomplice, and said the answer to whether a person is an accomplice within the meaning of section 1111 depends on the facts of the case. The dissent explained that the majority's use of the disjunctive "or" in holding that it is necessary to determine whether the witness's acts subject the witness to prosecution pursuant to section 31 under the same provision the defendant is accused of violating, *or* whether the witness's acts constitute a separate and distinct offense, was analytically flawed, because the concepts were not mutually exclusive. The dissent disagreed with the majority's conclusion that "[t]he specific provision making the acts of participation in the transaction a separate offense supersedes the general provision in section 31 of the Penal Code that such acts subject the participant in the crime of the accused to prosecution for its commission." (*Clapp, supra*, 24 Cal.2d at p. 841, Schauer, J., dissenting.)

According to the dissent, the mere fact that the law created an additional offense as to the witness, overlapping or not, for which he might or might not be prosecuted, did not change the legal character of the witness's relationship to the defendant and the defendant's crime, which was the critical analysis in determining whether the witness was an accomplice. Section 654 lent support to that interpretation because it contemplated a situation where the same act violated more than one statute, and offered protection against double punishment in such cases. (*Clapp, supra*, 24 Cal.2d at p. 841.)

As anticipated by Justice Schauer, the application of *Clapp* became problematic. Nine years after *Clapp*, Justice Schauer dissented again in *People v. Buffum* (1953) 40 Cal.2d 709. In *Buffum*, the defendant was convicted of conspiracy to perform abortions based on the testimony of four women upon whom abortions were performed. Applying *Clapp*, the court held the women were not accomplices whose testimony required corroboration. (*Id.* at p. 723.) Justice Schauer recounted the confusion that

had resulted from this Court's repeated efforts to avoid *Clapp* without expressly overruling it.

> I had thought that the *Clapp* and *Wilson* [(1944) 25 Cal. 3d 341] cases had been substantially overruled, albeit not avowedly, by *People* v. *Lima* (1944) 25 Cal.2d 573, 579 ; *People* v. *Harper* (1945) 25 Cal.2d 862, 877; and *People* v. *Wallin* (1948) 32 Cal.2d 803, 808. Certainly the three latter cases are substantially inconsistent with the former. In one of the three, *People* v. *Harper*, the court refused to apply the doctrine where its application would have necessitated acquittal of a convicted murderer; in the other two cases the doctrine was so limited by the "distinguishing" process as to reduce it substantially to the plane of so-called oriental justice, according to which, it is said, the merits of the individual case alone determine the result. Part of the reasoning in the instant case is inconsistent with the *Clapp* and *Wilson* cases and that part is also inconsistent with that portion of the majority opinion in this same case which apparently again gives some effect to the *Clapp* doctrine. Such, I fear, will ever be our bemusement until the *Clapp* doctrine -- however attractive it may have originally appeared -- is finally abandoned.

(*People v. Buffum, supra*, 40 Cal.2d 709, overruled on other grounds in *People v. Morante*, 20 Cal.4th 403, 414, Schauer, J., dissenting.)

The *Clapp* rule does, in fact, conflict with this Court's decisions. In other cases, this Court has made it clear that even where the law specifies separate crimes for participants in a criminal transaction that does not preclude aiding and abetting liability where the facts support it. In *People v. Lima* (1944) 25 Cal.2d 573, the defendant was convicted of receiving stolen olives based on conflicting and uncorroborated testimony of two witnesses who admitted stealing the olives, and only one who claimed to have sold them to the defendant. The court cited *People v. Clapp, supra*, and acknowledged the general rule that thieves and those who receive stolen property are not accomplices, because they are not liable to prosecution for the identical crime as the other. Nonetheless, it found the witness was an accomplice under a "well established" exception to the

general rule, which applies where there has been a conspiracy or a pre-arranged agreement between the thief and the receiver of property. Under those circumstances, an accomplice is one "who knowingly, voluntarily and with common intent with the principal offender unites in the commission of the crime." (*People v. Lima, supra*, 25 Cal.2d at p. 578, citing *People* v. *Shaw* (1941) 17 Cal.2d 778, 798, 799.)

In *People v. Wallin, supra*, this Court found that a murderer was an accomplice to an individual charged with being an accessory after the fact to the murder. While her commission of the murder alone would not subject her to liability as an accessory after the fact, it did not follow that she could not become liable if she encouraged another to aid her to avoid arrest and punishment. (*People v. Wallin* (1948) 32 Cal.2d 803, 806.) In *People v. Wayne* (1953) 41 Cal.2d 814, this Court held that a person who solicits may, by his subsequent conduct, encourage, aid and abet another's solicitation and become a principal in the crime under section 31.

The analyses in the foregoing cases and Justice Schauer's dissenting opinions are sound. The existence of a specific statute that directly addresses a witness's act should not immunize that witness from liability from additional acts for which he would otherwise be liable.

A Michigan court succinctly explained why the decision whether to charge one party to a bribe with aiding and abetting the other is rightfully a fact-driven inquiry. Although the decision is not binding, its reasoning is persuasive and applies with equal force to the court's holding here.

> In the present case, the prosecutor should have been permitted to produce evidence at trial that defendant aided and abetted the giving of a bribe in violation of MCL 750.121; MSA 28.316. The crimes of accepting a bribe and giving a bribe are separate offenses. The recipient of a bribe may act passively and simply accept the gratuity without having participated actively in the conspiracy to give the bribe or in the crime of arranging for the giving of the bribe. However, where the

> recipient actively participates with those who give the bribe, he is chargeable as an aider and abettor in the crime of giving the bribe. We are aware of no Michigan authority which would per se preclude prosecution for aiding and abetting the giving of a bribe merely because the accused is the recipient of the bribe. Nor has defendant presented any persuasive reason for fashioning such a rule.

(*People v. White* (1985) 147 Mich.App. 31, 39.)

The converse is equally true – there is no persuasive reason to fashion a rule which would per se preclude prosecution for aiding and abetting the receipt of a bribe merely because the accused is the offeror of a bribe.

Here, the application of such a rule violates public policy by giving the bribe offeror a free pass to engage in coercive and threatening conduct to compel the recipient to accept his offer. The indictment describes defendant Burum's active participation with the recipients of the bribes, which was so pervasive it extended as far as invading the integrity of closed session board meetings, infringing on the attorney client relationship between the board and its lawyers, and assisting in concealing the receipt of the bribes by contributing to sham political action committees. In addition, Burum's conduct involved threats, intimidation and coercion, which fell squarely within section 31. Burum's conduct as set forth in the indictment extends far beyond his role in offering/giving the bribes. That conduct alone could subject him to accomplice liability independent of his conduct in offering/giving the bribes, as it did with Erwin. Nothing in the law allows Burum a free pass just because he also offered and paid the bribes, as his corrupting influence far exceeded simple monetary inducements. Indeed, the constellation of his misconduct had the effect of softening up the officeholders to being susceptible to taking bribes.

While this case involves a demurrer and therefore has nothing to do with accomplice testimony, the Court of Appeal's holding directly subverts the legislative policy underlying the rule governing such testimony, section

1111. The legislative intent in enacting that section was to prevent convictions based solely upon the self-serving and inherently suspect statements of accomplices. (*People v. Belton* (1979) 23 Cal 3d 516.) Section 1111 is a clear statement that the testimony of an accomplice is to be regarded as untrustworthy. (*People v. Guiuan* (1998) 18 Cal.4th 558, 566.) Yet the court's holding here authorizes the prosecution to prove bribery charges against the other defendants based solely on Burum's uncorroborated testimony that he bribed them.

> If exemptions in such laws (as to the corroboration of accomplices) are to be created, they should come from the Legislature and not be innovated by the courts. This court should be ever vigilant to protect, rather than to whittle away, the safeguards which the people through the Legislature have thrown around their liberty.

(*Clapp, supra*, 24 Cal.2d at p. 847, Schauer, J., dissenting.)

For the totality of his conduct, the People alleged Burum aided and abetted the acceptance of bribes by Postmus and Biane. If *Clapp* prevents the people from presenting evidence of such crimes against Burum, it should be overruled.

### 2. If not overruled, C*lapp* should be limited to section 1111

Alternatively, *Clapp* should be limited to the context in which it arose; defining accomplice for purposes of section 1111. Expanding the *Clapp* rule to operate as a limitation on aiding and abetting liability under section 31 violates basic rules of statutory construction and clear public policy.

The Court of Appeal mistakenly stated, "*Wolden* is not limited to section 1111 . . . ." (Slip Opn. at 16.) In fact, in the 45 years since it was decided, *Wolden* has only been cited as legal authority in five California

cases[8], which all arise under section 1111. Even the two out-of-state cases discussing *Wolden* deal with corroboration of accomplice testimony.[9] With the exception of the dissenting opinion in *State v. Murphy*, *supra*, 499 P.2d at p. 552, all cases citing *Wolden* discuss only general principles of law and engage in no critical analysis or discussion.[10]

The discussion in *Clapp* centered entirely around the issue of accomplice testimony under section 1111. Applying basic rules of statutory construction, it is clear the Legislature did not intend the definition of accomplice in section 1111 to apply outside the range of that statute.

In any case involving statutory construction, this Court's fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose. (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265, citing *People v. Murphy* (2001) 25 Cal.4th 136, 142.) "We begin with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent." (*People v. Cornett, supra*, 53 Cal.4th at p. 1265, citing *People v. Watson* (2007) 42 Cal.4th 822, 828, and *Catlin v. Superior Court* (2011) 51 Cal.4th 300, 304.) If there is no ambiguity in the statutory language, the plain meaning controls, but if the statutory language

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[8] *Wolden* is also cited as a related case in *Knoff v. City etc. of San Francisco* (1969) 1 Cal.App.3d 184, 191, fn. 4; *Lilli Ann Corp. v. City and County of San Francisco* (1977) 70 Cal.App.3d 162, 165, fn. 2; and *Skelly v. State Bar of California* (1973) 9 Cal.3d 502, 505.

[9] *State v. Murphy* (1972) 94 Idaho 849, 499 P.2d 548; *Commonwealth v. Jones* (1980) 490 Pa. 599, 417 A.2d 201.

[10] As discussed *infra*, the discussion in *Murphy* weighs against the court's conclusion that "*Wolden* is not limited to section 1111 . . ."

may reasonably have more than one interpretation, courts may consider extrinsic aids, such as the purpose of the statute, the evils to be remedied, the legislative history, public policy and the statutory scheme surrounding the statute. (*People v. Cornett, supra*, 53 Cal.4th at p. 1265, citing *People v. King* (2006) 38 Cal.4th 617, 622.)

In reviewing the text of a statute, a fundamental rule of statutory construction requires that every part of a statute be presumed to have some effect and not be treated as meaningless unless absolutely necessary. Every word of an act should be given significance, and conversely, any construction that renders a word surplusage should be avoided. (*People v. Arias* (2008) 45 Cal.4th 169, 180.) Applying the definition of accomplice in section 1111 to issues of aiding and abetting liability under section 31 renders most of section 1111 meaningless. For example, one can aid and abet a crime with no "defendant on trial" or "cause in which the testimony of the accomplice is given," yet that language is part of section 1111's definition of accomplice.

Conflating the two provisions is problematic, because one can be an accomplice under section 1111 without being an aider and abettor under section 31, and vice versa. For example, in *People v. Felton* (2004) 122 Cal.App.4th 260, the defendant was convicted of felony child endangerment along with an enhancement for personal infliction of great bodily injury on a child under five. The victim's mother had pleaded guilty to child endangerment for leaving the baby with the defendant, who had previously been convicted of abusing the same child. (*Id.* at p. 267.) The mother testified against the defendant. The trial court refused to give accomplice instructions, finding as a matter of law the mother was not an accomplice, because she lacked the specific intent that defendant injure the child as required by section 31. The Court of Appeal reversed, and stated that the term accomplice under section 1111 was not synonymous with

aider and abettor, and since the mother committed child endangerment, she was an accomplice "for instructional purposes" even though she lacked the specific intent to aid and abet the crime. (*Id.* at p. 270.) The problem here is the mirror image of the problem in *Felton*. To the extent *Clapp* takes Burum outside the definition of accomplice in section 1111, it should not affect his liability for aiding and abetting the acceptance of bribes by Postmus and Biane as alleged in the indictment.

An Idaho case discussing *Wolden* explained why cases interpreting section 1111 are not helpful in interpreting statutes which use a broader definition of accomplice. In *State v. Murphy, supra,* 499 P.2d at page 552, (Bakes, J., dissenting) the dissenting Justice explained that the voluminous California authority on the question of accomplices under section 1111 was not helpful in interpreting Idaho law, which used language much more similar to California's section 31. The dissent observed that the definition of accomplice in section 1111 "deviates greatly from and is much narrower than the definition of accomplice developed by the Idaho judiciary," which defined accomplice as "a person concerned in the commission of a crime, whether he directly participates in the commission of the act constituting the offense or aids and abets in its commission . . ." (*Ibid.*, citations omitted.) Therefore, "much of the voluminous California authority is unpersuasive on the question of accomplices in similar situations to that in the case at bar." (*Ibid.*) The court went on to explain, "In construing an already narrow statute defining accomplice, the California courts have manifested their apparent disdain for the accomplice corroboration rule by giving as restricted a definition to the term "accomplice" as the legislature's words in Cal. Pen. Code, sec. 1111 will literally and logically allow." (*Id.*, citing as examples *People v. DePaula* (1954) 43 Cal.2d 643, and *People v. Galli* (1924) 68 Cal.App. 682) This restricted definition contrasted with the broad definition of accomplice in Idaho, which parallels the definition of

principals in section 31 in California. Thus, cases such as *Clapp* interpreting section 1111 are unpersuasive in determining the boundaries of aiding and abetting liability under section 31.

The term "accomplice" is used in other California statutes to mean something other than "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given," which lends support to the claim that the section 1111 definition was intended to apply only in the context of that provision. In most cases, California statutes use the term "accomplice" in setting forth an exception to the rights or penalties provided by the statute where the defendant inflicts death or great bodily injury on a person, such that the rights or penalties set forth in the statute apply only when the defendant inflicts death or great bodily injury on a person "other than an accomplice."[11] In none of these cases is the exception limited to a person who is a witness in a trial, as contemplated by section 1111.

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[11] See, e.g., Civil Code section 847, subdivision (b)(8) [Property owner exempt from liability for injuries inflicted on a person who inflicts great bodily injury on a person other than an accomplice]; Health and Safety Code § 11379.9 [Enhancement for manufacturing controlled substance which causes the death or great bodily injury of another person other than an accomplice]; § 593a, subd. (b) [Additional punishment for maliciously driving nails into a tree when the act causes bodily injury to a person other than an accomplice]; § 600, subd. (d) [Additional punishment for a person who interferes with a horse or dog being used by a police officer who causes great bodily injury to a person not an accomplice]; § 667.5, subds. (8) and (21) [Enhances prison terms for new offenses where defendant inflicts great bodily injury on a person other than an accomplice, or commits first degree burglary when another person other than an accomplice is present in the residence]; § 1174.4, subd. (a)(2)(I) [Excludes from eligibility for alternative sentencing any individual who has served a prior prison term for any felony in which he inflicted great bodily injury on one other than an accomplice]; § 1192.7 [Plea bargaining not permitted where defendant inflicted great bodily injury on a person other than an

(continued...)

In other cases, a defendant's role as an "accomplice" is deemed an appropriate consideration in determining the penalty.[12] And the remaining few include or exclude accomplices from their reach.[13] These provisions too use accomplice to mean something other than a witness at the trial of a defendant, further reinforcing section 1111's limited application.

Just as the language of section 1111 is self-limiting to issues of accomplice testimony, section 31 clearly addresses issues of liability. "It is difficult to conceive of clearer language than that used in section 31." (*Clapp, supra*, 24 Cal.2d at p. 843, Schauer, J., dissenting.) Section 31 quite simply defines principals as "all persons concerned in the commission of a crime."

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(...continued)
accomplice]; § 1192.8 [Serious felony includes enumerated offenses when they involve the personal infliction of great bodily injury on an individual other than an accomplice]; § 1203.055 [Required confinement of persons convicted of crimes on public transit vehicles in which the defendant inflicts great bodily injury on a person other than an accomplice]; § 29905, subd. (8) [Violent felony includes crimes where defendant inflicts great bodily injury on a person other than an accomplice]; § 3003 [Parolee shall not be released within 35 miles of victim where defendant inflicted great bodily injury on a person other than an accomplice]; § 3420, subd. (e)(1)(f) [Presumption of fitness proceeding where applicant convicted of felony where he or she inflicted great bodily injury on a person not an accomplice]; § 12022.53 [Enhancement for use of a firearm causing death or great bodily injury to a person other than an accomplice]; § 12022.7 [Enhancement for personally inflicting great bodily injury to a person other than an accomplice].

[12] See, e.g., §§ 190.05, subd. (10), 190.2, 190.3, subd. (j).

[13] See, e.g., § 243.4 [Including acts of restraint by an accomplice within the definition of sexual battery]; § 882 [Excepting accomplices from the provision authorizing conditional examinations]; § 1127a [Excepting accomplices from the definition of "in-custody informant"]; and Veh. Code, §§ 10851 and 10851.5 [Including accomplices within the definition of those liable for auto theft or theft of binder chains].

> Sections 1111 and 31 of the Penal Code, being parts of the same code dealing with related subject matter, must be read together. Section 1111 defines an accomplice "as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Section 31 specifies the persons who are "liable to prosecution for the identical offense charged against the defendant" . . . I do not perceive that the language of the definition of accomplice as set forth in section 1111 of the Penal Code repeals or modifies in any way the provisions of section 31 of the same code.

(*Clapp, supra*, 24 Cal.2d at p. 843, Schauer, J., dissenting.)

Thus, the plain meaning of both statutes compels the conclusion that section 1111 applies for purposes of determining whether a witness's testimony requires corroboration, and section 31 applies for purposes of determining liability.

In addition to rules of statutory interpretation, public policy weighs strongly against applying *Clapp* to limit the parameters of aiding and abetting liability (or, as the Court of Appeal did, applying *Wolden* outside of section 1111). The concerns foreshadowed by Justice Schauer's dissent in *Clapp* become a reality here, where the mastermind of a massive conspiracy is given a free pass, while his underling remains criminally liable for the same conduct.

The *Clapp* dissent offered an example of the potential for mischief in the broad doctrine enunciated by the majority that a specific provision criminalizing the conduct of an involved person supersedes liability under section 31 for other crimes. In the example, the leader of an organized gang of criminals who directed and solicited others to commit crimes might be only fined or given a county jail sentence because his conduct falls within a separate provision, section 653f. According to the majority, since his conduct was criminalized by a more specific statute, he would avoid liability under section 31 for aiding and abetting much more serious crimes

for which others would be held accountable. (*Clapp*, *supra*, 24 Cal.2d at p. 847, Schauer, J., dissenting.)

That is exactly what happened here. Since Burum was alleged to have offered bribes, the Court of Appeal held a more specific statute covered his conduct, which created an exception to section 31 preventing him from being charged with aiding and abetting the acceptance of bribes. Erwin, however, could be so charged, because as the intermediary his conduct did not fall within any other statutory provision.

The *Wolden* court acknowledged it had difficulty reconciling the rule that the giver and receiver do not have the same motive, but a single intermediary could simultaneously entertain both motives. (*Wolden, supra*, 255 Cal.App2d at p. 804.) *Wolden*, however, was bound by principles of *stare decisis* to accept this rule from *People v. Davis* (1930) 210 Cal. 540, 557 (*Wolden, supra,* at p. 804, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) The Court of Appeal here acknowledged the same difficulty, and cited the same principle of *stare decisis* in support of its decision to follow *Davis*. But here, unlike in *Wolden*, principles of *stare decisis* did not require the court to follow *Davis*. While both *Davis* and *Wolden* addressed issues of accomplice testimony under section 1111, this case raised issues of accomplice liability under section 31. The Court of Appeal should have reached a different result.

### C. If the *Clapp* Rule Remains Viable And Applies to Questions of Aiding And Abetting Liability, It Was Nonetheless Improperly Applied Here

Even if *Clapp* remains good law and applies generally to questions of aiding and abetting liability, it was improperly applied here. *Wolden's* holding that the *Clapp* rule applies to bribery cannot stand in light of other decisions by this Court. Moreover, the *Clapp* rule expressly applies only

where separate statutes penalize each party's conduct to a transaction, but here, section 165 applies to both the offeror and acceptor of bribes.

Burum was charged in counts 4 and 5 along with Erwin, with aiding and abetting a violation of section 165. That section provides, in pertinent part,

> Every person who gives or offers a bribe to any member of any common council, board of supervisors, or board of trustees of any county, city and county, city, or public corporation, with intent to corruptly influence such member in his action on any matter or subject pending before, or which is afterward to be considered by, the body of which he is amember, and every member of any of the bodies mentioned in this section who receives, or offers or agrees to receive any bribe upon any understanding that his official vote, opinion, judgment, or action shall be influenced thereby, or shall be given in any particular manner or upon any particular side of any question or matter, upon which he may be required to act in his official capacity, is punishable by imprisonment in the state prison for two, three or four years, and upon conviction thereof shall, in addition to said punishment, forfeit his office, and forever be disfranchised and disqualifed from holding any public office or trust.

Burum was also charged along with Erwin in counts 7 and 8, with aiding and abetting a violation of section 86. That section provides:

> Every Member of either house of the Legislature, or any member of the legislative body of a city, county, city and county, school district, or other special district, who asks, receives, or agrees to receive, any bribe, upon any understanding that his or her official vote, opinion, judgment, or action shall be influenced thereby, or shall give, in any particular manner, or upon any particular side of any question or matter upon which he or she may be required to act in his or her official capacity, or gives, or offers or promises to give, any official vote in consideration that another Member of the Legislature, or another member of the legislative body of a city, county, city and county, school district, or other special district shall give this vote either upon the same or another question, is punishable by imprisonment in the state prison for two, three, or four years and, in cases in which no bribe has been actually received, by a restitution fine of not less than two thousand dollars ($2,000) or

> not more than ten thousand dollars ($10,000) or, in cases in which a bribe was actually received, by a restitution fine of at least the actual amount of the bribe received or two thousand dollars ($2,000), whichever is greater, or any larger amount of not more than double the amount of any bribe received or ten thousand dollars ($10,000), whichever is greater.

*Clapp* held:

> If a statutory provision so defines a crime that the participation of two or more persons is necessary for its commission, but prescribes punishment for the acts of certain participants only, and another statutory provision proscribes punishment for the acts of participants not subject to the first provision, it is clear that the latter are criminally liable only under the specific provision relating to their participation in the criminal transaction.

(*Clapp*, *supra*, 24 Cal.2d at p. 838.)

*Wolden* held, "Bribery is such a crime." (*Wolden*, supra, 255 Cal.App.2d at p. 804.) *Wolden* was wrong. The crime of bribery does not require the participation of two or more persons. Participation of the offeror is not an element of the charge of accepting a bribe, and participation of the recipient is not an element of offering a bribe.

In *People v. Diedrich* (1982) 31 Cal.3d 263, 273, this Court held the crime of receiving a bribe does not require a bilateral agreement, but is committed when the individual bribe receiver agrees in his own mind to receive a bribe. In *People v. Pic'l* (1982) 31 Cal.3d 731, 739, this Court held that a bilateral agreement was not a necessary element of the crime of offering a bribe to a witness to prevent his testimony at trial.

Moreover, with respect to section 165 (as alleged in counts 4 and 5), there is no separate statutory provision prescribing the act of the other party, as the same statute applies to both acts. Even under sections 85 and 86, the Legislature has demonstrated an intent to treat both the offeror and

receiver of a bribe the same by proscribing the same punishment for each, so *Wolden/Clapp* was improperly applied.

Finally, while *Wolden* correctly cited *Clapp* for the proposition that the 1915 amendment to section 1111 abrogated the rule from *Coffey*, it overstated the significance of the change. *Coffey* held that bribe offerors and receivers were accomplices as a matter of law. (*Coffey*, *supra*, 161 Cal. at p. 451.) Abrogation of the rule meant nothing more than the unremarkable proposition that they were no longer accomplices as a matter of law. *Wolden's* conclusion - - that they can *never* be accomplices - - does not follow from *Clapp*. Whether a bribe offeror and a bribe receiver are accomplices of one another depends on the facts.

Here, the allegations were sufficient to allow the People to present facts supporting the charges that Burum and Erwin aided and abetted Postmus and Biane in accepting bribes. Section 31 provides that all persons "who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed." The indictment alleges "[o]n or between January 1, 2005, and November 29, 2006, BURUM corruptly influenced members of the Board of Supervisors through a combination of threats, extortion, inducements and bribery in order to secure their vote in favor of a settlement." (CT 5.) It further alleges that "ERWIN joined the conspiracy, and conveyed various threats and/or inducements from BURUM to Postmus, BIANE and KIRK. ERWIN agreed to accept money in exchange for influencing the votes of POSTMUS and Biane. (CT 5.) The indictment alleges Burum offered a monetary benefit to Erwin to assist Burum in getting a favorable settlement amount, and it sets forth the acts that were committed by Erwin in furtherance of that agreement including telling Postmus that private investigators were going through his trash, threatening to expose Postmus's drug use as a way to get him to convince Biane to vote for the settlement,

and threatening to expose Biane's indebtedness; (CT 6-7, Overt Acts 5, 7, 8, 9); conducting a campaign against Measure P, a proposal in which Biane had a strong financial interest, to obtain influence over Biane to obtain a settlement of the Colonies lawsuit (CT 6-7, Overt Act 6); engaging in secret shuttle negotiations at a hotel using Erwin and O'reilly as intermediaries, and having a courier deliver "hit piece" mailers to force a settlement (CT 8, Overt Acts 13 and 14.) These allegations sufficiently allege aiding and abetting on the theory that Burum and Erwin used threats, menaces, command or coercion to compel Postmus and Biane to accept the bribes.

In sum, *Clapp* should be overruled, or limited to section 1111. In any event it was improperly applied here. Counts 1, 4, 5, 7 and 8 should be reinstated, because section 31 expansively defines aiding and abetting liability, and there is no bribery exception. Whether an individual can be charged with aiding and abetting depends on the facts.

### D. The Indictment Was Sufficient to Charge Erwin With Aiding and Abetting the Acceptance of Bribes by Biane

Since Erwin was not alleged to have offered bribes, the Court of Appeal found no legal impediment to charges that he aided and abetted the receipt of bribes by Postmus as alleged in counts 4 and 7. However, the court held that while the allegations were sufficient "to align defendant Erwin with Postmus, and thus make him an alleged agent of a bribe receiver," the same was not true with respect to Biane. Rather, the court found, "there are no factual allegations that suggest defendant Erwin acted on behalf of defendant Biane. As a result, we must conclude the indictment is insufficient as a matter of law to state a public offense against defendant Erwin on counts 5 and 8 because it appears on the face of the pleading that he acted only as an agent of the bribe giver, defendant Burum, in persuading defendant Biane to accept a bribe." (Slip Opn. at pp. 23-24.)

The court was wrong, because Burum's status as the offeror of bribes did not foreclose his liability for aiding and abetting the acceptance of bribes, as set forth above. Moreover, the law does not require the indictment to set forth facts in support of the charges, nor does it require aiding and abetting liability to be premised on an agency theory. The indictment here went further than it had to by alleging facts which revealed that the prosecutor's theory that Burum and Erwin used threats, menaces, command and coercion to compel another to commit a crime within the meaning of section 31.

An accusatory pleading must contain the title of the action, the name of the parties, and a statement of the public offense or offenses charged (§ 950), and it is sufficient if it contains in substance a statement that the accused has committed some public offense specified therein. (§ 952.)

> Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.

(§ 952.)

As set forth above, Burum's status as the "bribe giver" does not preclude his liability for aiding and abetting the receipt of bribes, so the court was wrong to invalidate those charges against Erwin on the theory that he was the agent of the bribe giver only. In any event, however, the indictment need not allege facts or reveal the People's theory, (see § 952), but in this case, it did. Accordingly, even assuming "there are no factual allegations that suggest defendant Erwin acted on behalf of defendant Biane" (Slip Opn. at 24), there are facts alleged revealing that Erwin used threats, menaces, command or coercion to compel Biane to commit the

crime of accepting a bribe within the meaning of section 31. Counts 5 and 8 should be reinstated.

### E. The Court of Appeal's Decision Invalidating the Conspiracy Charge Conflicts With United States Supreme Court And Federal Circuit Court Authority And Conflicts With Decisions of this Court

The Court of Appeal mistakenly believed that *Wolden* relied upon Wharton's Rule.[14] (Slip Opn. at pp. 16-17.) *Wolden* did not apply Wharton's Rule. Wharton's Rule is a doctrine of federal common law which provides, "[a]n agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission. *(Ianelli v. United States* (1975) 420 U.S. 770, 775 [95 S.Ct. 1284, 43 L.Ed.2d616].)

The United States Supreme Court has made it clear that Wharton's Rule has current vitality only as a judicial presumption, which applies only in the absence of a legislative intent to the contrary. (*Ibid.*) Classic Wharton's Rule offenses such as adultery, incest, bigamy and dueling are characterized by a congruence between the agreement and the substantive offense. The parties to the agreement are the only persons involved in the substantive offense, the immediate consequences of the crime rest on the parties themselves and not on society at large, and the substantive offense is

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[14] The Court of Appeal correctly noted that *Wolden* relied on *People v. Keyes* (1930) 103 Cal.App. 624 [opinion of Supreme Court denying rehearing] (Slip Opn. at p. 19). *Keyes* is of little value and has been effectively overruled. *Keyes* cites no authority for its withholding of approval of the opinion to the extent it held that an unlawful agreement between two parties, one to give and the other to receive a bribe, may constitute a conspiracy. *Keyes'* conclusion that bribery requires the unlawful concert of action between two people is no longer valid in light of *Diedrich, supra.*

not likely to pose the kind of threat to society the law of conspiracy seeks to avert. *(Ianelli v. United States, supra,* 420 U.S. at pp. 782-783.)

The Court of Appeal cited *Ianelli* but failed to apply the above three-pronged test. (Slip Opn. at p. 16.) Had it done so, it would have concluded that Wharton's Rule did not apply. This is not a case where there is a congruence between the agreement and the substantive offense. Even Burum's successful commission of each bribery charge would not have been enough to accomplish the goal of the conspiracy, which included an agreement by the bribed parties to influence Supervisor Gary Ovitt to vote in favor of the settlement, since Ovitt is not alleged to have received a bribe. The immediate consequences of the crime rested not on the parties themselves but on society at large, which suffered a loss of $102 million. This collaborative scheme wherein a wealthy developer secretly agreed with public officials to transfer public money to his company under the guise of a lawsuit settlement posed exactly the kind of threat to society the law of conspiracy seeks to avert.

Additionally, Wharton's Rule does not apply where the conspiracy involves more persons than the substantive offense. *(Ianelli v. United States, supra,* 420 U.S. at p. 782, fn. 15.) Here, the conspiracy charged four defendants and additional uncharged coconspirators. (See count 1, CT 3.) While each bribery charge named the specific individual Burum aided and abetted in receiving the bribe, the alleged conspiracy was far broader than any individual bribery charge, as it named multiple parties not alleged to be bribe recipients, and involved a more complex goal than any individual bribery count. While the bribery charges involved Burum's efforts to coerce each specific board member, the conspiracy charge involved Burum's agreement with Erwin, Postmus, Biane and Kirk to obtain a favorable lawsuit settlement by securing three votes in Burum's favor.

Moreover, every federal circuit court that has considered the issue has concluded that Wharton's Rule does not apply to bribery. (See, e.g., *United States v. McNair* (11th Cir. 2010) 605 F.3d 1152, 1215; *United States v. Bornman* (3rd Cir. 2009) 559 F.3d 150, 156; *United States v. Hines* (8th Cir. 2008) 541 F.3d 833, 838; *United States v. Morris* (7th Cir. 1992) 957 F.2d 1391, 1403.) And the Ninth Circuit has held that Wharton's Rule does not apply to aiding and abetting. *(United States v. Castro* (9th Cir. 1989) 887 F.2d 988, 996; *United States v. Huber* (9th Cir. 1985) 772 F.2d 585, 591-592.)

Finally, while the United States Supreme Court has said Wharton's Rule applies only where it is impossible under any circumstances to commit the substantive offense without cooperative action *(Ianelli v. United States, supra,* 420 U.S. at pp. 782-783), the Court of Appeal applied the rule to charges of receiving a bribe, although this Court has made it clear that crime does not require cooperative action. (*People v. Diedrich, supra,* 31 Cal.3d at pp. 273-274.)

In *People v. Lee* (2006) 136 Cal.App.4th 522, the appellate court rejected the notion that Wharton's Rule and other exceptions to the general rules regarding coconspirator liability applied to prevent the defendant, a prison inmate, from being convicted of conspiracy to furnish a controlled substance to a prison inmate. (*Id.* at p. 530.)

In analyzing the defendant's liability in *Lee*, the court surveyed the jurisprudence and noted that particular features of joint participation were present when the rule was applied to preclude prosecution against one party. The court discussed *People v. Clapp, supra,* 24 Cal.2d 835 [abortion], as well as *Gebardi v. United States* (1932) 287 U.S. 112 [53 S.Ct. 35, 77 L.Ed. 206] [criminal transportation]; *In re Cooper* (1912) 162 Cal. 81 [adultery]; *People v. Buffum, supra,* 40 Cal.2d 709 [conspiring to induce miscarriages]; *Williams v. Superior Court* (1973) 30 Cal.App.3d 8

[prostitution]; *People v. Mayers* (1980) 110 Cal.App.3d 809 [three-card monte]; *People v. Pangelina* (1981) 117 Cal.App.3d 414 [keeping a house of prostitution]; *People v. Roberts* (1983) 139 Cal.App.3d 290 [conspiracy by a life prisoner to commit murder], and *In re Meagan R.* (1996) 42 Cal.App.4th 17 [aiding and abetting one's own statutory rape]. (*People v. Lee, supra*, 136 Cal.App.4th at pp. 531-536.) With respect to each of these cases, the court held:

> None of the foregoing authorities persuade us that Lee cannot be liable for conspiring to violate section 4573.9. In each, the overriding consideration is the Legislature's intent - whether divined from statutory language or from application of principles, such as Wharton's Rule or the rule that a specific statute controls over a general one, which are, fundamentally, aids to discerning legislative intent [Citations] – that one party escape punishment, or be punished less severely, for participation in the conduct at issue. We discern no such intent here.

(*Lee, supra*, 136 Cal.App.4th at p. 536.)

The court held that nothing in the legislative history suggested the Legislature intended to exempt those inmates who actively join with non-inmates in a criminal conspiracy, and that doing so would lead to the "absurd result" of an incarcerated drug kingpin using mules to smuggle contraband yet escaping increased penalties to which the mules who operate at his direction are subject. (*Ibid.*)

That is exactly the case here. Unlike statutory rape, abortion and prostitution, the bribery statutes reveal no legislative intent that a bribe offeror escape punishment, or be punished less severely than the person who receives a bribe; to the contrary, the Legislature has clearly taken a "prophylactic approach to the evil" of bribery, expressly including both offerors/givers and recipients/acceptors of a bribe within the same statute, and subjecting both to the same punishment. (See § 165, § 85 and § 86.) The Court of Appeal's contrary holding led to the absurd result that the

kingpin (Burum) escaped the increased penalties to which his mule (Erwin) who operated at his direction remained liable.

Finally, under no circumstances does Wharton's Rule authorize a court to grant a demurrer as to both the conspiracy and bribery charges. Wharton's Rule is a merger doctrine which, when it applies, prevents convictions for *both* the conspiracy and the underlying substantive charge, an election which could be made by the prosecutor or by appropriate jury instructions, but which need not be made at the charging stage and is an improper basis for demurrer. (See *Ianelli v. U.S., supra,* 420 U.S. at p. 775.) The conspiracy charge for aiding and abetting the acceptance of bribes should be reinstated.

## II. PRIVATE PERSONS CAN BE CHARGED WITH AIDING AND ABETTING A CRIMINAL CONFLICT OF INTEREST

There is a very narrow exception to aiding and abetting liability under Government Code section 1090 which is constitutionally based, but applies only to public officials in limited circumstances and does not extend to private persons. The Separation of Powers doctrine prevents judicial inquiry into the motivations of public officials engaged in legislative activity. When it applies, this principle of legislative immunity precludes aiding and abetting liability against public officials engaged in protected legislative activity, because aiding and abetting requires proof of the defendant's specific intent. (*D'Amato v Superior Court, supra*, 167 Cal.App.4th 861 ("*D'Amato*").)The Separation of Powers doctrine, however, is not triggered by inquiry into the state of mind of private persons not engaged in legislative activity. The Court of Appeal improperly extended the limited *D'Amato* exception to private parties Burum and Erwin, cloaking them in protections intended to encourage public officials to act in the best interests of the public even though they were adversaries of the county in a lawsuit.

Count 11 alleged that,

> [o]n or about November 28, 2006, in the above named judicial district, the crime of CONFLICT OF INTEREST, in violation of GOVERNMENT CODE SECTIONS 1090 and 1097,[15] a felony, was committed by BURUM and ERWIN, who on or about November 28, 2006, did aid and abet Postmus, BIANE and KIRK, who, while a member of the San Bernardino County Board of Supervisors, or a San Bernardino County officer or employee, did knowingly and willingly become financially interested in a contract made by him in his official capacity, and by a body and board of which the defendant was a member.

(CT 17.) The conspiracy charged in count 1 also included the target crime of violating Government Code section 1090.

The Court of Appeal reversed the trial court's order overruling Burum and Erwin's demurrers as to those charges. (Slip Opn. at p. 38.) Citing *D'Amato*, *supra,* the court held, "We share our colleagues' view that the Legislature intended Government Code section 1090 to exclude criminal liability on either a conspiracy or an aiding and abetting theory for anyone other than public officials and public employees with a financial interest in

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[15] Government Code section 1090 provides, in pertinent part: "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." Government Code section 1097 provides:

> Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, including any member of the governing board of a school district, who willfully violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state.

the underlying contract." (Slip Opn. at p. 38.) But that is not what *D'Amato* said.

In *D'Amato*, the defendant was a city administrator who supervised his codefendant, the city's director of public works. In order to obtain federal funding for a project, the defendant recommended the formation of a joint powers committee, and then as a member of that committee, voted to contract with his codefendant's consulting firm to serve as the project manager. (*D'Amato, supra*, 167 Cal.App.4th at p. 866.)

The codefendant was indicted for violating Government Code section 1090, and the defendant, a public official, was indicted for two counts of aiding and abetting the codefendant by forming the joint powers agreement, and contracting with the codefendant's consulting firm for professional services. Defendant's demurrer was overruled, and he filed a petition for writ of prohibition. (*D'Amato, supra*, 167 Cal.App.4th at p. 867-868.)

The petition was granted. The court held that the Separation of Powers doctrine precluded the criminal prosecution of a public official for aiding and abetting a violation of section 1090 where the defendant public official lacked a personal financial interest, and the prosecution was based on the official's legislative acts.

Three factors led to this conclusion: the defendant's status as a public official, the defendant's lack of a financial interest in the contract, and the fact that the defendant was engaged in protected legislative activity. None of those factors are present where the defendant is a private party with a financial interest who is engaged in self-serving activity negotiating against public officials.

The *D'Amato* court explained that Government Code section 1090 was a strict liability crime, so direct liability prosecutions against public

officials under that provision did not require delving into the official's motivations. (*D'Amato, supra*, 167 Cal.App.4th at p. 869.)[16] However, when liability against the public official was based on the theory that he aided and abetted a 1090 violation, the knowledge and intent requirements of section 31 required inquiry into the subjective motivations, which violated the separation of powers doctrine if the defendant was a public official performing a legislative function. (*D'Amato, supra*, 167 Cal.App.4th at p. 870.) The *D'Amato* court explained that principles of legislative immunity extend to criminal prosecutions, with important exceptions. Specifically, the Legislature is not prohibited from criminalizing specific legislative acts of a legislative body, but the separation of powers doctrine prohibits prosecutors from using generally applicable criminal statutes to oversee legislators in the performance of their duties. (*Id.* at p. 872.) With respect to Government Code section 1090, the court found the Legislature had evidenced an intent to limit executive interference with legislative acts by focusing its prohibition on officials having a financial interest in the contract. The defendant's absence of a financial interest was a critical factor in the court's decision. (*Id.* at p. 873.)

These three factors (public officials charged with derivative liability, the absence of a financial interest, and the performance of protected legislative activity) triggered the application of the Separation of Powers

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[16] The conclusion in *D'Amato* that Government Code section 1090 prosecutions against public officials do not require judicial and executive officers to delve into the motives of public officials performing their legislative duties, is questionable in light of the willfullness requirement in Government Code section 1097. The People submit the willfulness requirement reveals a legislative intent to permit such inquiry as an exception to the Separation of Powers doctrine.

doctrine, so the *D'Amato* court created a narrow exception to section 31 when those factors were present.

Applying section 31 to determine whether Burum and Erwin, private citizens, aided and abetted a violation of Government Code section 1090 does not implicate the separation of powers doctrine. While the charge requires inquiry into Burum and Erwin's state of mind, it maintains the integrity of the legislative process because it does nothing to undermine the conclusive presumption which obviates the need for inquiry into the state of mind of Postmus and Biane, the public officials who were involved in the transaction. All four defendants had a financial interest in the contract - - Burum stood to receive $102 million, and the others were each paid $100,000. The limited exception to aiding and abetting liability set forth in *D'Amato* does not apply to private parties with a financial interest who knowingly aid and abet a public official's violation of Government Code section 1090.

The Court of Appeal misread *D'Amato's* statement that "the Legislature's wording of [Government Code] section 1090 evinces the intent to exclude aider and abettor liability" (Slip Opn. at p. 37) as a wholesale prohibition against aiding and abetting liability rather than a limited, fact-based exception under the narrow circumstances of the *D'Amato* case. In fact, *D'Amato* itself makes it clear that aiding and abetting liability under Government Code section 1090 is sometimes permissible.

*D'Amato* expressly distinguished and reaffirmed *People ex rel State of California v. Drinkhouse* (1970) 4 Cal.App.3d 931. In *Drinkhouse*, a county officer was convicted of conspiring with, and aiding and abetting, a tax collector's violation of Government Code section 1090. *D'Amato* distinguished *Drinkhouse* on the basis that the defendant was personally interested in the transactions, and not engaged in legislative activity.

(*D'Amato, supra*, 167 Cal.App.4th at p. 875.) In doing so, *D'Amato* impliedly acknowledged that aiding and abetting liability is permissible under Government Code section 1090, undermining the Court of Appeal's interpretation of *D'Amato* as a wholesale prohibition on such liability.

Such an interpretation is consistent with that given to other statutes proscribing acts against public officials. For example, while the prohibition against misappropriating public funds applies expressly to public officers and those charged with the receipt and safekeeping of public money (§ 424), private persons may be liable under that provision on an aiding and abetting theory. (*People v. Little* (1940) 41 Cal.App.2d 797, 805.) Similarly, a private person who acts as an intermediary can be liable for aiding and abetting a public official's acceptance of a bribe. (*See People v. Davis, supra*, 210 Cal. at p. 549.) In *People v. Anderson* (1925) 75 Cal.App.365, 374 (overruled on other grounds as stated in *In re Wright* (1967) 65 Cal.2d 650, 654 (superceded by statute as stated in *People v. Burns* (1984) 157 Cal.App.3d 185), the court held that the crime of bribery as defined in Penal Code section 68 could be committed by a private person acting as an accomplice to a public official, even though the private person could not be a direct perpetrator of the crime.

This interpretation is also consistent with the legislative purpose of Government Code section 1090 and public policy.

> It has long been the law of California that public officers "must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." (Pol. Code, sec. 920; *Berka v. Woodward*, 125 Cal. 119 [57 Pac. 777, 73 Am. St. Rep. 31, 45 L.R.A. 420]; *Stockton P. & S. Co. v. Wheeler*, 68 Cal.App. 592 [229 Pac. 1020]; *Moody v. Shuffleton*, 203 Cal. 100 [262 Pac. 1095].) Contracts in violation of this rule are held void as against public policy, both upon the ground that the interest of the officer interferes with the unbiased discharge of his duty to the public (*Nielsen v. Richards*, 75 Cal.App.680 [243 Pac. 697]; *Stockton P. & S. Co.*

> *v. Wheeler, supra*), and also that a contract in violation of an express statutory provision is void. (*Smith v. Bach*, 183 Cal. 259 [191 Pac. 14]; *Duntley v. Kagarise*, 10 Cal.App. (2d) 394 [52 Pac. (2d) 560].)

*Oakland v. California Constr. Co.* (1940) 15 Cal.2d 573, 576-577.

There are no countervailing public policy concerns. As set forth above, a violation of Government Code section 1090 on an aiding and abetting theory requires proof of specific intent and knowledge. Accordingly, the rule deters only intentional unlawful conduct, and therefore poses no risk of having a chilling effect on the willingness of private citizens to enter legitimate and lawful contracts with government agencies.

Aiding and abetting liability as set forth in section 31 is expansive, and authorizes liability as principals against "all persons" concerned in the commission of a crime. The limited exception to such liability under Government Code section 1090 applies only in the narrow circumstances where proving the crime would necessitate judicial inquiry into the state of mind of a public official performing a protected legislative act. Those concerns are not implicated when private persons are charged. The Court of Appeal improperly reversed the trial court's decision overruling Burum's and Erwin's demurrers to charges they aided and abetted public officials in committing a criminal conflict of interest. Counts 1 and 11 should be reinstated.

## III. THE COURT OF APPEAL'S RULING UNFAIRLY DEPRIVED THE PEOPLE OF THEIR RIGHT TO PROVE THAT BURUM AND ERWIN COMMITTED CONSPIRACY, BRIBERY AND CRIMINAL CONFLICT OF INTEREST

In the context of demurrer proceedings, the Court of Appeal ruled that a person who offers a bribe cannot be charged with aiding and abetting the receipt of a bribe, and that private persons cannot be charged with aiding

and abetting a conflict of interest. These rulings invalidated six charges against two defendants, and prevented the People from presenting proof in support of those charges notwithstanding a grand jury's indictment.

Subject to the provision against cruel and unusual punishment, the power to define crimes and set punishment is vested exclusively in the Legislative Branch. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552.) And prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. (*Ibid.*)

Section 31 expansively defines aiding and abetting liability. The Court of Appeal infringed on the Legislature's right to define crime by carving out two judicial exceptions to section 31 for bribe offerors and private persons who commit a criminal conflict of interest.

Moreover, by holding the charges were improperly filed against the defendants, the court violated the prosecutor's right to select the appropriate charges. The discretion to choose what charges, and how many, from among all of those potentially available arises from the "complex considerations necessary for the effective and efficient administration of law enforcement." (*People v. Birks* (1998) 19 Cal.4th 108, 134, citing *People v. Keenan* (1988) 46 Cal.3d 478, 506, quoting *People v. Heskett* (1982) 30 Cal.3d 841, 860.) The prosecutor's authority in this regard is founded in part on the principle of separation of powers, and is generally not subject to the supervision of the judicial branch. (*Ibid.*)

California citizens are entitled to local prosecutors fully equipped with all available charging tools to fight against the theft of their tax dollars. Whether a bribe offeror is liable for aiding and abetting the receipt of a bribe, and whether a private person is liable for aiding and abetting a criminal conflict of interest, depends on the facts. The People are entitled to prove these facts at trial.

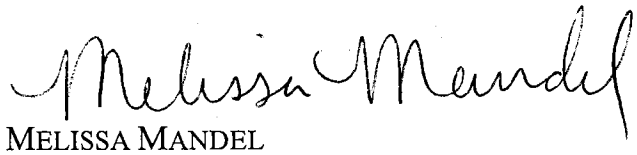
## CONCLUSION

The People respectfully request this Court to reverse the Court of Appeal's holding sustaining the demurrers to counts 1, 4, 5, 7, 8 and 11.

Dated: March 13, 2013

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General



MELISSA MANDEL
Supervising Deputy Attorney General
*Attorneys for Plaintiff and Appellant*

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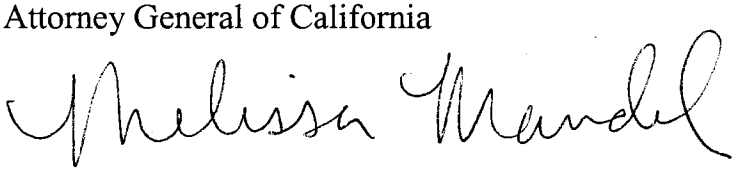
## CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 13,541 words.

Dated: March 13, 2013

KAMALA D. HARRIS
Attorney General of California



MELISSA MANDEL
Supervising Deputy Attorney General
*Attorneys for Plaintiff and Appellant*

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I declare:

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Stephen G. Larson (2 copies)
Attorney at Law
Arent Fox LLP
555 West Fifth Street, 48th Floor
Los Angeles, CA 90013

Mary Carter Andrues (2 copies)
Attorney at Law
Arent Fox LLP
555 West Fifth Street, 48th Floor
Los Angeles, CA 90013

David M. Goldstein (2 copies)
Attorney at Law
10535 Foothill Blvd., Suite 300
Rancho Cucamonga, CA 91730

Rajan R. Maline (2 copies)
Attorney at Law
The Law Offices of Rajan R. Maline
3750 University Avenue, #680
Riverside, CA 92501

Steven L. Harmon (2 copies)
Law Offices of Grech & Firetag
7095 Indiana Avenue, Suite 200
Riverside, CA 92506

Paul Grech, Jr. (2 copies)
Law Offices of Grech & Firetag
7095 Indiana Avenue, Suite 200
Riverside, CA 92506

Chad W. Firetag (2 copies)
Attorney at Law
Law Offices of Grech & Firetag
7095 Indiana Avenue, Suite 200
Riverside, CA 92506

R. Lewis Cope
Deputy District Attorney
San Bernardino District Attorney's Office
Public Integrity Unit
303 W. 3rd Street, 5th Floor
San Bernardino, CA 92415

Clerk of the Court
Attn: Hon. Brian McCarville
San Bernardino County Superior Court
401 N. Arrowhead Avenue
San Bernardino, CA 92415-0063

Clerk of the Court
California Court of Appeal
Fourth Appellate District
Division Two
3389 Twelfth Street
Riverside, CA 92501

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 13, 2013, at San Diego, California.

| Bonnie Peak | Bonnie Peak |
| --- | --- |
| Declarant | Signature |

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