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No. S210804

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

EVEN ZOHAR CONSTRUCTION & REMODELING, INC.,
Plaintiff and Appellant,

vs.

BELLAIRE TOWNHOUSES, LLC, et al.,

Defendants and Respondents,

ANSWER BRIEF ON THE MERITS

After A Decision By the Court of Appeal,
Second Appellate District, Division Four, No. B239928
Los Angeles County Superior Court, No. BC458347
(Hon. Ralph W. Dau, Judge)

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ISSUE PRESENTED

Section 1008 of the Code of Civil Procedure specifies the trial courts' jurisdiction with regard to "all applications to reconsider any order of a judge or court, or for the renewal of a previous motion," and provides that "[n]o application to reconsider any motion or for the renewal of a previous motion may be considered by any judge or court unless made according to this section." It requires that a renewed motion for the same order must be based upon "new or different facts, circumstances, or law." The issue presented by this case is whether a renewed motion for relief from default under Code of Civil Procedure Section 473(b) is subject to these mandatory jurisdictional requirements, including the requirement that the moving party show new or different facts or circumstances.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Even Zohar Construction & Remodeling, Inc. sued defendants Bellaire Townhouses and Samuel N. Fersht in a dispute regarding development and construction of a condominium project. After the trial court denied defendants' motion to compel arbitration, defendants

[1] Unless otherwise indicated, all statutory citations in this brief are to the Code of Civil Procedure.

failed to file a responsive pleading to plaintiff's complaint, despite numerous communications to defendants' counsel informing him of the default. The trial court ultimately entered a $1.7 million default judgment against defendants.

Defendants filed a motion under Section 473(b) of the Code of Civil Procedure for mandatory relief from default, relying upon an affidavit of fault executed by their attorney. The trial court denied the motion, finding the attorney affidavit "not credible" and "too general."

Several weeks later, defendants filed a renewed motion for relief from default. Defendants' second attorney affidavit of fault presented a different explanation for defendants' default. Although that explanation was based on purported facts that were available to defendants when they filed their first motion, defendants failed to explain why they had not presented that evidence in their first motion for relief.

The trial court did not find the attorney's second affidavit credible. It also found that defendants had failed to meet the foundational requirements for a renewed motion found in Section 1008(b), including the requirements that such a motion be based upon "new or different facts [or] circumstances" and that the moving party provide a satisfactory explanation for its failure to produce the evidence at an earlier time. Nonetheless, the trial court felt bound by *Standard Microsystems Corp. v. Winbond Elecs.*

Corp., 179 Cal. App. 4th 868 (2009) to grant defendants' renewed motion for relief from default.

The Court of Appeal, disagreeing with *Standard Microsystems*, held that renewed motions for relief from default under Section 473(b) are subject to the requirements of Section 1008. That conclusion is consistent with the plain language of Section 1008, which unambiguously applies to "all" renewed motions, and which deprives lower courts of jurisdiction to consider renewed motions that do not meet its requirements. *See* Part I(A), *infra*. Section 473(b) merely prescribes the conditions on which a motion for relief from default must be made; it does not confer any right on parties to renew such motions or to ignore generally applicable statutory requirements, such as those prescribed by Section 1008. *See* Part I(B), *infra*.

Defendants urge this Court to hold that a trial court must grant a renewed motion for relief from default under Section 473(b) even if the moving party concededly fails to comply with Section 1008's jurisdictional mandate that such a renewed motion may be made only "upon new or different facts [or] circumstances" that were unavailable to it when it filed its first motion. That argument rests on the erroneous contention that there is an irreconcilable "conflict" between the two statutes. There is not. Rather, a fundamental principle of statutory construction that defendants ignore instructs that the two statutes must be harmonized to give full effect

to both. *See* Part I(C)(1). The unqualified and unambiguous statutory language of Section 1008 governs "all" renewed motions, which necessarily includes motions for relief from default under Section 473(b). *See* Part I(C)(2). Indeed, at the time the Legislature amended Section 1008 to render it exclusive and jurisdictional, it was urged to except motions for relief from default from the requirements of the statute, but did not do so. *See* Part I(C)(3), *infra*. Contrary to defendants' arguments, Section 473(b) can be given full effect without doing violence to the plain language of Section 1008. *See* Part I(C)(4), *infra*.

The Court should reject defendants' contention that "public policy" warrants creating a judicial exception to Section 1008 for renewed motions for relief from default. Courts lack authority to rewrite statutes to add exceptions that the Legislature could have enacted, but chose not to. Further, defendants' rationale for creating such an exception—that Section 473(b) is a "remedial" statute—would swallow the rule and effectively negate Section 1008 altogether, given the large number of statutes in this State that have been deemed remedial. *See* Part I(D)(1), *infra*. Further, the proposed exception is entirely unnecessary because, as defendants themselves acknowledge, it should rarely if ever be necessary for parties that act with diligence and candor toward the courts to file renewed motions for relief from default. *See* Part I(D)(2), *infra*.

Defendants briefly argue that the trial court erred in denying their *first* motion for relief from default. However, the validity of that order is not before the Court, which granted review to decide the legal issue whether Section 1008 applies to renewed motions under Section 473(b), not the fact-bound question whether the trial court's ruling on a single motion was supported by substantial evidence. In any event, that ruling is amply supported by the trial court's factual findings as to both credibility and causation. *See* Part II, *infra*.

FACTUAL AND PROCEDURAL BACKGROUND[2]

A. The Trial Court Enters A Default Judgment Against Defendants After They Fail To File A Responsive Pleading.

Plaintiff Even Zohar Construction & Remodeling, Inc. ("EZ"), a licensed contractor, filed this lawsuit in March 2011, alleging that defendants had failed to pay EZ what it was owed for having constructed a condominium project in Southern California. (1AA-1-40.) At the request of defendant Bellaire Townhouses LLC ("Bellaire") and its president and 50% owner, Samuel N. Fersht ("Fersht"), EZ had performed substantial

[2] Record citations in this section are to the three-volume Appellant's Appendix ("AA") and to the Reporter's Transcript on Appeal of the three hearings held by the trial court ("RT").

additional work beyond that provided for by the original construction contract. (1AA-2 ¶2; 1AA-6-8 ¶¶21-25; 1AA-22-40; AA-126-149 ¶¶5-12.) EZ claimed it was entitled to receive about $1.3 million (beyond the original $4.1 million contract) for such additional work. (1AA-22-40; AA-149-150 ¶¶12-14.) Defendants repeatedly promised EZ that it would be paid for all the additional work once the project was completed. (1AA-2 ¶2, 6-9 ¶¶21-28, 149 ¶13.) Defendants, however, reneged on their promises and refused to compensate EZ for *any* such additional work. (*Id.*)

After they were served with EZ's complaint, defendants responded by appearing through attorney Daniel Gibalevich and petitioning to compel arbitration. (*See* 1AA-44-45, 68.) On August 29, 2011, the lower court denied defendants' petition. (1AA-44-45.)

On August 31, 2011, EZ served defendants' counsel Gibalevich by mail with notice of entry of the trial court's order denying the arbitration petition, and on September 1, 2011, also sent a copy of that notice to Gibalevich by email. (1AA-70-73; 2AA-209-10 ¶ 8; 2AA-233-388, 240-41.) As a result, defendants had until September 20, 2011 to respond to the complaint. Code Civ. Proc. §§ 1281.7, 1013(a).[3]

[3] Defendants' counsel had no misimpression as to that deadline. Gibalevich understood defendants' responsive pleadings would be due fifteen days after service of notice of entry of the court's order denying defendants' petition to compel arbitration. (2AA-210 ¶8.)

Despite such notices, defendants did not file any responsive pleading. (2AA-210 ¶ 9.) On September 23, 2011, EZ's counsel warned Gibalevich both by email and facsimile that Bellaire and Fersht were in default, and that EZ would request entry of default the following week unless they immediately filed responsive pleadings. (2AA-208 ¶3, 210 ¶9, 218-19, 243-245; *see also* 1AA-55 [item #18], 57.) Gibalevich indisputably received those warnings. He later responded directly to the email, which he admitted having received. (2AA-289-90, 352:9-10 ("I . . . did not respond to Mr. Harris's emails notifying me of the default").) Yet, defendants still failed to file responsive pleadings. On September 29 and October 4, 2011, at EZ's requests, the clerk of the superior court entered defendants' defaults. (1AA-58-83, 85-109.)

More than six weeks later, on November 18, 2011, Gibalevich requested that EZ stipulate to vacate the defaults. (2AA-289.) EZ's counsel replied: "Please provide me with a copy of the declaration of fault you intend to submit so I can meaningfully evaluate your request." (2AA-288 [11/19/11, 21:45 email].) Gibalevich, however, refused to explain the reason for defendants' default or the content of his intended declaration of fault, which he said "has not been drafted yet," and instead asserted "that the court *will* vacate the default." (*Id.* [11/19/11, 4:01 email] (emphasis added).) In response, EZ explained that the defendants would have to show that the default or dismissal was "in fact caused by the attorney's mistake,

inadvertence, surprise, or neglect," (§ 473(b)), and again requested that counsel specify the basis for defendants' intended motion to set aside the default. (*Id.* [11/21/11, 19:00 email].) Gibalevich again refused to do so. (2AA-287-88 [11/21/11, 11:06 a.m. email].)

On November 22, 2011, EZ moved for entry of a default judgment against defendants. (1AA-115-57.) At a prove up hearing, EZ presented substantial supporting evidence, including a detailed factual declaration by EZ's principal, Zohar, and two volumes of documentary exhibits (which are not included in the record on appeal). (1AA124-54.) At the trial court's request, EZ filed supplemental documentation further substantiating certain elements of the damages it sought. (1AA158-73.) On December 8, 2011, the trial court entered a $1,701,116.70 default judgment (including interest) against defendants. (1AA174-79.)

B. The Trial Court Denies Defendants' First Motion for Relief From Default As "Not Credible."

On December 16, 2011, defendants filed their first motion to vacate the defaults and the default judgment. The motion was entitled "Notice of Motion for Mandatory Relief Under C.C.P. § 473 to Vacate Defaults and Default Judgments," and the notice of motion similarly recited that it

sought an order "for mandatory relief under C.C.P. § 473." (1AA-180-81.)[4] Despite these references to mandatory relief, defendants contended in the supporting memorandum that Gibalevich had committed both "excusable neglect" and inexcusable neglect. (1AA-183-85, 186 ¶ 6 ("It is clear that my mistake and excusable neglect resulted in the entry of defaults and default judgements [sic] against the Defendants").)

In this first motion, Gibalevich blamed defendants' failure to file responsive pleadings on his staff's purported failure to calendar the deadline and to alert him to that deadline. Thus, defendants argued,

> The signed order was received at Defense Counsel's office but was not properly filed or calendared. Consequently, none of the applicable dates or filing deadlines were entered onto the firm's calendar in accordance with the firm's policies and procedures. Since the firm's calendar did not contain any dates by which a responsive pleading was to be entered, Defendant's [sic] answer was never filed or served.

(1AA-182.) Similarly, Gibalevich asserted in his declaration,

> I believed that I had sufficient staff to assure competent handling of client files. My associates were instructed to notify me immediately of issues that would require my

[4] The motion was procedurally defective because defendants failed to submit a copy of their proposed answer or other pleading with the motion, as expressly required by the statute. § 473(b) ("Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted").

> personal attention. It appears that my staff failed to maintain this file in accordance with this firm's policies and procedures.

(1AA-186 ¶ 3.) Defendants also contended without explanation that Gibalevich had been frequently absent from his office due to unspecified "personal problems." (1AA182, 184, 186 ¶¶ 3, 4.)

EZ opposed defendants' motion, contending that Gibalevich's claim not to have been aware of the pleading deadline because of failings by his staff was not credible and that any such failures had not, in fact, caused the defaults. (1AA-189-206; 2AA207-306.) In supporting declarations, EZ showed that its counsel had warned Gibalevich *directly* in an email to Gibalevich's *own account—not* through his staff—as well as by facsimile and in pleadings that his clients were in default and that EZ would request the entry of their defaults if they did not respond to the complaint. (2AA-208 ¶3, 210 ¶9, 218-19, 243-45; 2AA-211, ¶12; 2AA-274 [at item 18], 276.; *see* slip op. 5.)

EZ's evidence also "impeached Gibalevich's claim that, during the relevant time period, he had spent substantial time away from his law practice." (Slip op. 5.) Zohar, EZ's principal, averred in his declaration that he had "numerous communications" with defendant Fersht in the fall of 2011, and that Fersht "repeatedly told me during this period that Mr. Gibalevich was very successful, busy in his law practice and frequently in court." (2AA-292-93 ¶3.) A real estate broker who served as the listing

agent for the condominium project and frequently communicated in the fall of 2011 with Fersht and his wife provided closely similar testimony. (2AA-303 ¶5 ("Mr. Fersht and his wife repeatedly told me during this period that Mr. Gibalevich was very successful and busy in his law practice, frequently in court and also able to spend substantial time on the golf course").

In their late-filed reply,[5] defendants again asserted that they did not answer because the order denying the petition to compel arbitration "was not properly filed or calendared." (2AA-307-15.) Significantly, they presented *no* declaration addressing, let alone refuting, the factual showing EZ had made in its opposition to defendants' motion. (*Id.*)

Likewise, at the hearing on defendants' first Section 473(b) motion, Gibalevich did not contest any of the evidence that EZ had proffered in opposition to defendants' motion. (RT A-1-6.) Nor did he offer *any* other information or explanation for defendants' failure to file responsive pleadings beyond what he had provided in his declaration of fault. (*Id.*) In particular, Gibalevich made no mention of the "search warrant" story (discussed below) on which he would later rely. (*Id.*)

[5] Defendants falsely claimed that they had not been timely served with EZ's opposition papers, which in fact were served on them by overnight mail. (*Compare* 2-AA-309:9-27 *with* 2-AA-322, 325-34, 451-52.) The trial court found that the filing was tardy. (RT-A-4.)

The trial court denied defendants' motion. (2AA-340.) It found that Gibalevich's declaration of fault was "not credible" and did not establish that his mistake or neglect had caused the defaults:

> The motion is denied. The Gibalevich declaration is not credible, in light of the showing made by plaintiff, and it is entirely too general. It does not show attorney Gibalevich is solely at fault in not filing a timely responsive pleading. Moreover, attorney Gibalevich tries to have it both ways: see paragraph 4 of his declaration, which claims he has demonstrated "excusable neglect." He has not demonstrated excusable neglect.

(*Id.*)[6]

C. Defendants File A Renewed Motion For Relief From Default Based On A Different Explanation That They Could Have Presented Earlier.

On January 18, 2012, Bellaire and Fersht filed a renewed motion for relief under the "attorney fault" provisions of section 473(b). (2AA-342-357.) The motion bore the same title as the earlier motion, and sought identical relief. (*Compare* AA-180 *with* 2-AA-342.) As defendants admit (Op. Br. 12), the motion contained no reference to Section 1008(b), the statutory provision governing renewals of previously denied motions. Nor did defendants make any attempt to comply with the statute's mandate that "it *shall* be shown by affidavit . . . *what new or different facts,*

[6] The trial court denied Gibalevich's request for leave to file an additional declaration. (RT-A-3:9-10.)

circumstances, or law *are claimed to be shown.*" § 473(b) (emphases added).

According to the "declaration of fault" Gibalevich submitted with the renewed motion, the reason defendants purportedly failed to file responsive pleadings was *not* because Gibalevich's office had failed to calendar the deadlines, as he had originally declared.[7] Instead, Gibalevich claimed for the first time that defendants had failed to file responsive pleadings because he purportedly was focused for almost three months *exclusively* on a search warrant that had been executed at his office and had resulted in the seizure of certain client files. (2AA-346-47, 350-52 ¶¶4-11, 354-55, 356-57.) As the Court of Appeal observed (slip op. 8-9), the supporting declarations contained "contradictory" assertions, claiming on the one hand that Gibalevich had worked *only* on the search warrant issue, and on the other that he and an associate had been required during the same period of time to make numerous court appearances. (2AA-351 ¶¶6, 9, 355 ¶¶6, 7, 356 ¶6.)

Gibalevich claimed he was too "embarrassed" to tell the trial court this story on defendants' original Section 473(b) motion. (2AA-351 ¶10.) He also expressly admitted that the first story he had told the trial court

[7] Although defendants repeated this claim in their brief (2AA-344), Gibalevich's second declaration contained no such averment.

regarding the supposed calendaring errors was false, acknowledging that he had received EZ's counsel's communications notifying him of the defaults and warning him of the consequences of failing to file responsive pleadings: "I failed to enter a responsive pleading and did not respond to Mr. Harris's emails notifying me of the default." (2AA-352 ¶12.)

On January 30, 2012, defendants filed an ex parte application seeking an order to stay plaintiff's execution on its $1.7 million default judgment pending a ruling on their renewed motion for relief from stay. (2AA-358-443.) In that application, defendants acknowledged, for the first time, that their second motion for relief was a renewed motion subject to Section 1008(b). Thus, the motion was titled, "*Ex Parte* Application for an Order On a Renewed Motion (C.C.P. 1008(b)) For Mandatory Relief Under C.C.P. 473(b) Vacating Defaults and Default Judgments." (2AA-358.) Likewise, in the body of the motion, defendants referred to their second motion as "a renewed motion for mandatory relief under C.C.P. section 473(b)" (2AA-361; *see also* 3AA540-41), and Gibalevich's supporting declaration referred briefly to Section 1008(b). (2AA-368 ¶2.) Other than repeating Gibalevich's claim of "embarrassment," however, defendants made no effort to explain why they had not presented the search warrant story to the trial court in their first motion, nor did they assert that the "new" or "different" information was unavailable to them at the time.

On January 31, 2012, the trial court conducted a hearing on the *ex parte* application. (RT-B-1-12.) It granted the application to stay execution on the judgment and continued the matter for a hearing on the merits of the renewed motion for relief. (RT-B-10-11.) In the course of the hearing, the court stated that the facts contained in Gibalevich's second declaration "are not new facts," and could have been presented with defendants' first motion. (RT-B-2:22-23.) The trial court stated that it did not find Gibalevich's new declaration credible:

> THE COURT: Mr. Gibalevich, you are presenting an entirely different story with this application than you have presented to the court originally.
>
> MR. GIBALEVICH: Actually, it's not an entirely different story, Your Honor–
>
> THE COURT: Will you wait until I finish?
>
> MR. GIBALEVICH: I apologize, Your Honor.
>
> THE COURT: I think it is. [In your first declaration], [y]ou tried to blame [the defaults] on a miscalendaring when the evidence is that your office received multiple, multiple notices before the defaults were entered in all different kinds of ways.
>
> *And frankly, your story about being obsessed with this search warrant for the entire period of time is just not credible.* You originally told the court you had to be out of the office for substantial periods of time. Now you say you're conducting all kinds of research on your computer in your office.
>
> *You're not credible, Mr. Gibalevich.*

(RT-B-1:16-2:5 (emphasis added).) Gibalevich denied that the stories were different, asserting, "during the original hearing, Your Honor, I did not blame it on a miscalendaring. . . . At no time am I placing blame on anybody else." (RT-B-3:12-13, B-4:6-8.) The court replied: "That's directly contrary to your [first] declaration." (RT-B-4:18-19.)

The trial court held a further hearing on defendants' renewed motion several weeks later. (RT-C-1-C-22.) At the hearing, the trial court again questioned Gibalevich's credibility. Gibalevich asserted that "my story has always been very consistent," and that "the only difference between [his first and second] declarations . . . was that [he] provided additional facts to [the court] setting the background as to why I was unavailable and why I did not file it. The story never changed." (RT-C-8:4-9.) The trial court responded: "It changed every time you presented it, Mr. Gibalevich." (RT-C-8:10-11.) When Gibalevich denied this, the lower court responded, "You do not have a footing in reality, sir." (RT-C-8:12-15). Gibalevich also argued that even if the trial court did not find his declaration credible, the only credibility issue properly before the court was "whether [his] client was guilty of any kind of misconduct in not filing." (RT-C-8:21-4.) The trial court observed that the basis for defendants' motion "should have been made at the very first instance by [Gibalevich] in the first declaration. It wasn't." (RT-C-21:8-10.)

D. The Trial Court Finds That Defendants' Renewed Motion Does Not Comply With Section 1008, But Grants The Motion.

In its order, the trial court found that Gibalevich "first blamed the default and default judgment entered against defendants Bellaire and Fersht on the lawyers he employed in his office," but that that the associate in Gibalevich's office did not support that claim in her declaration. (3AA-554.) The trial court found that in defendants' second motion, Gibalevich "changed his story." (*Id.*) It explicitly found that defendants' "second motion fails to comply with the requirements of section 1008(b)." (*Id.*) Nevertheless, considering *Standard Microsystems* binding, the court granted defendants' motion. (3AA-555.) Consequently, it vacated the defaults and default judgment that had been entered against Bellaire and Fersht, directed the clerk to file defendants' proposed answer, and ordered Gibalevich to pay the attorney's fees and expenses plaintiff had incurred "in connection with the default and default judgment and defendants' attempts to have their defaults and default judgment vacated." (*Id.*)

E. The Court of Appeal Reverses, Finding No Conflict Between The Two Statutes.

The Court of Appeal reversed the trial court's ruling and directed the lower court to reinstate the defaults and default judgment, holding that the trial court lacked jurisdiction under Section 1008(e) to consider defendants' renewed motion. (Slip op. 13, 22.) The Court of Appeal found first that

the trial court did not abuse its discretion in concluding that defendants did not satisfactorily explain their failure to present earlier the evidence in Gibalevich's second affidavit of fault. (*Id.* at 3, 13-16.) The Court of Appeal declined to follow *Standard Microsystems*, opining that its conclusion that Section 1008's requirements do not apply to a renewed motion for mandatory relief from default "ignores section 1008's clear and unambiguous language that it applies to *all* renewal motions and undermines the Legislature's goal to limit repetitive motions based upon facts that, with the exercise of due diligence, could have been but were not presented at the first hearing." (*Id.* at 3, 17-21.) In particular, the Court of Appeal disagreed with *Standard Microsystem*'s conclusion that Sections 473(b) and 1008 are in conflict. (*Id.* at 19.) Rather, it found that the two statutes are complementary, and that the denial of a renewed motion for relief from default for failure to meet Section 1008's requirements "does not mean that the statutes are in fatal conflict. This is simply the result of the statutes working together as the Legislature intended." (*Id.*) The court reasoned that the mandatory conditions of Section 1008 "do not work a forfeiture for parties who bring second or successive motions, but rather simply state the conditions under which second or successive motions can be granted . . . ." (*Id.* at 20.) This Court granted review.

ARGUMENT

I. CODE OF CIVIL PROCEDURE SECTION 1008 GOVERNS ALL RENEWED MOTIONS, INCLUDING RENEWED MOTIONS FOR RELIEF FROM DEFAULT UNDER CODE OF CIVIL PROCEDURE SECTION 473(b).

Defendants' argument rests on the central premise that when a party files a renewed motion for relief from default under Section 473(b) without showing "new or different facts, circumstances, or law," as Section 1008 requires for all renewed motions, the two statutes "conflict" with one another. (Op. Br. 2.) Starting from that premise, defendants invoke maxims of statutory construction and considerations of public policy to argue that "in case of conflict, section 473(b) prevails over section 1008(b)." (*Id.* at 49; *see also id.* at 3, 25, 34-43, 52.) However, defendants' argument fails at the threshold because its premise is erroneous. As the Court of Appeal correctly concluded, there is in fact no "conflict" between the two statutes, which are entirely consistent and complementary.[8] Defendants omit to mention the principle of statutory interpretation that requires courts to harmonize two different statutes in a way that allows both to be given effect. That fundamental principle, not the secondary maxims of statutory construction upon which defendants rely, requires the Court to give effect to the plain language of Section 1008,

[8] Defendants' repeated assertion that the Court of Appeal held that Section 1008 "prevails over" Section 473(b) (Op. Br. 23, 26, 43) is incorrect.

which applies to "all" motions for reconsideration and renewed motions, including motions for relief from default under Section 473(b).

A. Section 1008 Unambiguously Applies To "All" Renewed Motions, And Prohibits Trial Courts From Considering Renewed Motions That Do Not Meet Its Requirements.

Defendants' contention that renewed motions for relief from default under Section 473(b) should be exempted from the requirements of Section 1008 contradicts the unambiguous language of the statute, the Legislature's undisputed intent in amending it in 1992 to render it exclusive and jurisdictional, and this Court's rulings interpreting it.

Section 1008 governs applications to reconsider any previous court order, or to renew any order that was previously denied. By its plain language, it applies to "*all* applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final." § 1008(e) (emphasis added). In particular, Section 1008(b) provides that a renewed motion, like a motion for reconsideration, must be based "upon new or different facts, circumstances, or law" set forth in a supporting affidavit. § 1008(b). Facts of which the party seeking reconsideration or renewing a motion was aware at the time of the original ruling are not "new or different." *In re Marriage of Herr*, 174 Cal. App. 4th 1463, 1468 (2009). The moving party must show that it could not, with reasonable diligence, have presented the

evidence sooner, and must provide a satisfactory explanation for failing to offer the evidence in the first instance.[9]

By its terms, Section 1008 "specifies the court's jurisdiction" with regard to all motions for reconsideration and renewed motions. § 1008(e). Further, it expressly prohibits trial courts from considering any motion for reconsideration or renewed motion that is not made according to its requirements:

> No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section.

Id.

Thus, as defendants explicitly admit, Section 1008 is both "jurisdictional and exclusive." Op. Br. 32. "Subdivisions (c) and (e) of section 1008 were added in 1992, effective January 1, 1993. (Stats.1992, ch. 460, § 4, pp. 1832-1833.) Legislative findings state that the 1992

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[9] *See Hennigan v. White*, 199 Cal. App. 4th 395, 405-06 (2011) (motion for reconsideration properly denied where based on evidence that could have been presented in connection with original motion); *Cal. Corr. Peace Officers Ass'n v. Virga*, 181 Cal. App. 4th 30, 47 & n.15 (2010) (trial court properly denied renewed motion for attorneys' fees in absence of sufficient explanation why moving parties did not rely on federal statute in their original motion); *New York Times Co. v. Super. Ct.*, 135 Cal. App. 4th 206, 212-13 (2005) (motion for reconsideration improperly granted where evidence was known or available to moving party before hearing on first motion); *Garcia v. Hejmadi*, 58 Cal. App. 4th 674, 689-90 (1997) (motion for reconsideration improperly granted where evidence reflected knowledge plaintiff had from outset of litigation).

amendment was intended to clarify that no motion to reconsider may be heard unless it is based on new or different facts, circumstances, or law, and that the Legislature found it desirable to reduce the number of motions to reconsider and renewals of previous motions heard by judges in this state. (Stats.1992, ch. 460, § 1, p. 1831 [citations]. Before these changes, section 1008 purported to be neither jurisdictional nor exclusive.)" *Le Francois v. Goel*, 35 Cal. 4th 1094, 1098-99 (2005) (citations and internal quotation marks omitted); *accord, Garcia v. Hejmadi*, 58 Cal. App. 4th 674, 685, 688 (1997) ("Section 1008 was amended to specify its exclusive and jurisdictional effect in 1992"); *Morite of Cal. v. Super. Ct.*, 19 Cal. App. 4th 485, 490-9 (1993) (Section 1008(e) is "expressly jurisdictional"). As this Court stated in *Le Francois*, "section 1008 prohibit[s] a *party* from making renewed motions not based on new facts or law." 35 Cal. 4th at 1096 (emphasis original). "[A] party may not file a written *motion* to reconsider that has procedural significance if it does not satisfy the requirements of section . . . 1008." *Id.* at 1108 (emphasis original).[10]

[10] In *Le Francois*, the Court held that while Section 1008 prohibits a *party* from making a renewed motion not based on new facts or new law, it does not limit a *court's* ability to reconsider its previous interim orders on its own motion. That holding does not help defendants here, since it is undisputed that they filed a renewed motion that was not based on new or different facts that could not have been presented with their original motion.

The legislative findings in the 1992 amendments leave no room for doubt that the Legislature intended these requirements to apply to *all* motions, without exception:

> The Legislature finds and declares the following:
>
> (a) Since the enactment of Section 1008 of the Code of Civil Procedure, some California courts have found that the section does not apply to interim orders.
>
> (b) In enacting Section 4 of this act, it is the intent of the Legislature to clarify that *no motions to reconsider any order made by a judge or a court, whether that order is interim or final, may be heard* unless the motion is filed within 10 days after service of written notice of entry of the order, and unless based on new or different facts, circumstances, or law.
>
> (c) In enacting Section 4 of this act, it is the further intent of the Legislature to clarify that *no renewal of a previous motion, whether the order deciding the previous motion is interim or final, may be heard* unless the motion is based on new or different facts, circumstances, or law.
>
> (d) Inclusion of interim orders within the application of Section 1008 is desirable in order to reduce the number of motions to reconsider and renewals of previous motions heard by judges in this state.

Stats. 1992, ch. 460, § 1 p. 1831, quoted in *In re Marriage of Barthold*, 158 Cal. App. 4th 1301, 1312-13 (2008) (emphases added).

As the findings also make clear, Section 1008 furthers an important policy. The statute "is designed to conserve the court's resources by constraining litigants who would attempt to bring the same motion over and over." *Le Francois*, 35 Cal. 4th at 1100. "[A]bsent section 1008, trial

courts might find themselves inundated with reconsideration motions requiring that they rehash issues upon which they have already ruled and about which they have no doubt. Section 1008, properly construed, protects trial courts from being forced to squander judicial time in this fashion." *Id.* at 1106; *accord, Garcia*, 58 Cal. App. 4th at 688-89 (referring to "the Legislature's stated goal of reducing the number of reconsideration motions").

In short, as defendants explicitly concede, the statute is "comprehensive in scope, as it governs all renewed motions." Op. Br. 30. Indeed, since Section 1008 was amended in 1992, there has not been a single reported case in which a court has found that a given motion or application in a civil case is not subject to its terms.[11]

[11] In *In re Marriage of Hobdy*, 123 Cal. App. 4th 360 (2004), the court found that Family Code § 2030, rather than § 1008, governs reconsideration of attorneys' fees orders in family law cases, reasoning that "courts have been cautious in applying section 1008 outside of civil actions and that not all provisions of the Code of Civil Procedure apply to family law matters." *Id.* at 367. That narrow exception and similar exceptions for criminal cases and dependency proceedings (*id.* at 370) are inapplicable here.

B. Unlike Section 1008, Section 473(b) Is Limited, Contains No Jurisdictional Language, And Merely Prescribes The Conditions On Which A Motion For Relief From Default Must Be Made.

In contrast to Section 1008, Section 473(b) is considerably more limited in its terms and application. Unlike Section 1008, it contains no jurisdictional language, nor is it phrased in broad, unqualified terms. Instead, it prescribes the narrow conditions under which a court may (or, in the case of an attorney "affidavit of fault," must) grant a motion for relief from a default, default judgment, or dismissal.

Section 473(b) authorizes both discretionary and mandatory relief from entry of default, default judgment, or dismissal. The discretionary provision of the statute authorizes a court, "upon any terms as may be just," to "relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." § 473(b). The "mandatory" or "attorney affidavit of fault" provision requires that the court vacate the entry of default and default judgment whenever three conditions are met: "[1] an application for relief is made no more than six months after entry of judgment, [2] is in proper form, and [3] is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect." *Id.* Relief is mandated "unless

the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." *Id.*

As this Court has recognized, the mandatory relief provision of Section 473(b) is a "narrow exception to the discretionary relief provision for default judgments and dismissals." *Zamora v. Clayborn Contracting Grp., Inc.*, 28 Cal. 4th 249, 257 (2002). Its purpose "was to alleviate the hardship on parties who lose their day in court due solely to an inexcusable failure to act on the parties of their attorneys." *Id.* (citation, internal quotation marks, and emphasis omitted). "Section 473, subdivision (b) was never intended to be a catch-all remedy for every case of poor judgment on the part of counsel which results in dismissal." *Gotschall v. Daley*, 96 Cal. App. 4th 479, 483 (2002) (citation and internal quotation marks omitted).

The mandatory relief provisions of Section 473(b) are not unlimited, but rather are subject to a number of significant restrictions. The statute applies only to defaults and default judgments; it does not apply to dismissals for delay in prosecution (§ 473(b)), nor is relief available after a summary judgment or judgment after trial, which involve litigation and adjudication on the merits.[12] Further, the motion must state that it seeks

[12] Some courts have construed Section 473 to reach other circumstances deemed to be the procedural equivalents of defaults, default judgments, and dismissals. *See, e.g., Avila v. Chua*, 57 Cal. App. 4th 860, 868 (1997) (summary judgment). However, the weight of authority in the Courts of Appeal holds that consistent with its express terms, the mandatory provision of Section 473(b) applies only to defaults, default

(continued...)

mandatory relief; if it refers only to discretionary relief, the court need not set aside the default even if it is accompanied by an affidavit indicating the attorney was at fault. *Luri v. Greenwald*, 107 Cal. App. 4th 1119, 1125 (2003).

In addition to the express conditions set forth in the statute, even when an attorney files an affidavit of fault, a court may deny relief if it finds that "the default or dismissal was *not in fact* caused by the attorney's mistake, inadvertence, surprise or neglect." § 473(b) (emphasis added). This provision tests *both* the credibility of the declaration and the causation of the default. *Milton v. Perceptual Corp.*, 53 Cal. App. 4th 861, 867 (1997); *Cisneros v. Vueve*, 37 Cal. App. 4th 906, 912 (1995) ("unless" clause of statute is "a causation testing device"). Further, an attorney's "*straightforward* admission of fault" is required for Section 473(b) mandatory relief. *State Farm Fire & Cas. Co. v. Pietak*, 90 Cal. App. 4th 600, 609-10 (2001) (emphasis added).

Courts properly deny relief under the "mandatory" provision of Section 473(b) where counsel's affidavit of fault fails to measure up to these standards. *E.g., Todd v. Thrifty Corp.*, 34 Cal. App. 4th 986, 992

(continued...)

judgments, or dismissals. *See, e.g., Henderson v. Pacific Gas & Electric Co.*, 187 Cal. App. 4th 215, 226 (2010); *Huh v. Wang*, 158 Cal. App. 4th 1406, 1414-17 (2007). While plaintiff believes that the majority view is the better-reasoned one, that issue is not presented here.

(1995) (reversing order vacating dismissal where, "[h]aving attributed the dismissal to plaintiff's personal problems at the first hearing, counsel could not thereafter attempt to change the facts and blame himself"); *see also, e.g., Lang v. Hochman*, 77 Cal. App. 4th 1225, 1247-52 (2000) (trial court properly denied mandatory relief from default judgment based on discovery violations where attorney was not sole cause of default).[13]

C. There Is No "Conflict" Between The Two Statutes, Which Are Readily Harmonized.

"As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose. If the statute's text evinces an unmistakable plain meaning, we need go no further." *Pacific Palisades Bowl Mobile Estates, LLC v. City of L.A.*, 55 Cal. 4th 783, 803 (2012) (citation and internal quotation marks omitted). Only if a statute's terms are unclear or ambiguous may a court "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedies, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of

[13] Plaintiff agrees with defendants (Op. Br. 55) that this Court need not resolve in this case the split of authority among the Courts of Appeal regarding whether a party seeking mandatory relief under Section 473(b) must show that the party (as distinct from its counsel) was "totally innocent" of any wrongdoing. Because defendants admittedly failed to comply with Section 1008's requirement that they show new facts or circumstances in support of their renewed motion, the trial court lacked jurisdiction to grant that motion.

which the statute is a part." *Id.* (citation and internal quotation marks omitted).

Here, the controlling principle of statutory interpretation requires the Court to harmonize the two statutes so as to give effect to both. Contrary to defendants' central contention, there is no "conflict" between the two statutes, as they can be readily harmonized based on their plain language. Even if the Court were inclined to look beyond that language, neither the legislative history of Section 1008 nor considerations of public policy supports defendants' request that the Court carve out a judicial exception to Section 1008 for renewed motions for relief from default.

1. The Two Statutes Must Be Harmonized To Give Effect to Both.

"A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. This rule applies although one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject." *Pacific Palisades Bowl Mobile Estates, LLC*, 55 Cal. 4th at 805, quoting *Hough v. McCarthy*, 54 Cal. 2d 273, 279 (1960). "Thus, when two codes are to be construed, they must be regarded as blending into each other and forming a single statute. Accordingly, they must be read together and so construed as to give effect, when possible, to all the provisions thereof." *Id.*, quoting *Mejia v. Reed*, 31

Cal. 4th 657, 663 (2003) (internal quotation marks omitted); *accord, Chavez v. City of L.A*, 47 Cal. 4th 970, 986 (2010) ("When construing the interaction of two potentially conflicting statutes, we strive to effectuate the purpose of each by harmonizing them, if possible, in a way that allows both to be given effect") (citations omitted); *Schatz v. Allen Matkins Leck Gamble & Mallory LLP*, 45 Cal. 4th 557, 574 (2009) ("The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together") (citation and internal quotation marks omitted).

This Court has repeatedly recognized and applied this principle, rejecting arguments that, like defendants' here, depended on the incorrect premise that two statutes irreconcilably conflicted with each other. *See, e.g., Pacific Palisades Bowl Mobile Estates, LLC*, 55 Cal. 4th at 805-07 (harmonizing Government Code Section 66427.5, part of the Subdivision Map Act, with California Coastal Act and Mello Act); *Chavez*, 47 Cal. 4th at 986-89 (harmonizing Code of Civil Procedure Section 1033(a) and Government Code Section 12965(b), attorneys' fees provision of Fair Employment and Housing Act); *Schatz*, 45 Cal. 4th at 573-75 (harmonizing Mandatory Fee Arbitration Act and California Arbitration Act); *Garcia v. McCutchen*, 16 Cal. 4th 469, 478 (1997) (harmonizing Government Code Section 68608(b), part of Trial Court Delay Reduction Act, and Code of Civil Procedure Section 575.2(b)).

In light of this fundamental rule of statutory construction, defendants' reliance on the principle that "a more specific statute prevails over a more general one" (Op. Br. 38) is misplaced. As an initial matter, because Sections 473(b) and 1008 address different subject areas, "[n]either statute appears to be significantly more specific than the other." *Mejia*, 31 Cal. 4th at 666. Indeed, defendants concede that "[a]though the two statutes can overlap in their application, on their face they do not deal with the 'same subject matter.'" (Op. Br. 47.)

But even if Section 473(b) could be deemed more specific than Section 1008, the principle that a more specific statute prevails over a more general one "only applies when an irreconcilable conflict exists between the general and specific provisions . . . ." *Pacific Lumber Co. v. State Water Ress. Control Bd.*, 37 Cal. 4th 921, 942-43 (2006) (citations omitted); *accord, People v. Wheeler*, 4 Cal. 4th 284, 293 (1992) ("The principle that a specific statute prevails over a general one applies only when the two sections cannot be reconciled" (citations omitted)); *Medical Bd. v. Super. Ct.*, 88 Cal. App. 4th 1001, 1005-06 (2001). Thus, if the Court can reasonably harmonize "two statutes dealing with the same subject," then it must give "concurrent effect" to both, "even though one is specific and the other general." *People v. Price*, 1 Cal. 4th 324, 385 (1991) (citations omitted), *superseded by statute on a different ground as stated in People v. Hinks*, 58 Cal. App. 4th 1157, 1161 (1997). As shown below, because

there is no irreconcilable conflict between Sections 1008 and 473(b), these principles require that the Court harmonize the two statutes to give concurrent effect to both.

2. The Unqualified And Unambiguous Statutory Language Of Section 1008 Admits Of No Exception; "All" Means "All."

Defendants' position that renewed motions under Section 473(b) are not subject to the requirements of Section 1008 runs headlong into the Legislature's unambiguous direction that those requirements specify the trial courts' jurisdiction over "all" motions for reconsideration and renewed motions, and that "[n]o application . . . for the renewal of a previous motion may be considered by any court" unless it is made according to those requirements. As the Court of Appeal correctly concluded, "the language of Section 1008 is clear and unambiguous" (slip op. 17), and leaves no room for judicial rewriting of the statute to create any such exception.

By its plain language, "the word 'all' means 'all' and not 'some.' The Legislature's chosen term leaves no room for judicial construction." *Joshua D. v. Super. Ct.*, 157 Cal. App. 4th 549, 558 (2007); *see also, e.g., Jefferson v. Cal. Dept. of Youth Authority*, 28 Cal. 4th 299, 301 (2002) (language releasing "all claims and causes of action" must be given a "comprehensive scope"); *Cal. School Boards Ass'n v. State of Cal.*, 192 Cal. App. 4th 770, 789 (2001) (statement that "all" costs must be

reimbursed by the State is "a clear statutory directive"; an interpretation of the statute that would allow partial payments "would render the word 'all' superfluous"); *White v. Cridlebaugh*, 178 Cal. App. 4th 506, 520-21 (2009) (the "plain and usual meaning of the word 'all'" "signifies the whole number and does not admit of an exception or exclusion not specified"); *Rubin v. W. Mut. Ins. Co.*, 71 Cal. App. 4th 1539, 1547 (1999) ("In this context, all means all"); *Stewart Title Co. v. Herbert*, 6 Cal. App. 3d 957, 962 (1970) ("'All' means everyone or the whole number, and it does not 'admit of an exception or exclusion not specified'") (citations omitted).[14]

"If the words themselves are not ambiguous, [courts] presume the Legislature meant what it said, and the statute's plain meaning governs." *Martinez v. Combs*, 49 Cal. 4th 35, 51 (2010); *accord, Miklosy v. Regents of Univ. of Cal.*, 44 Cal. 4th 876, 888 (2008) (same); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1103 (2007) ("If the statutory language is clear and unambiguous our inquiry ends"). The courts "are not authorized to insert qualifying provisions not included, and may not rewrite the statute to conform to an assumed intention which does not appear from

[14] Federal courts have reached the same conclusion. *See, e.g., Sander v. Alexander Richardson Invs.*, 334 F.3d 712, 716 (8th Cir. 2003) ("In short, 'all' means all") (citations and internal quotation marks omitted); *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067 (9th Cir. 1998) (same); *Trs. of Iron Workers Local 473 Pension Trust v. Allied Prods.*, 872 F.2d 208, 213 (7th Cir. 1989) ("Congress knew the difference between all, substantially all, and virtually all; and it opted for the unqualified all [when drafting the statute]").

its language." *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 573 (1998) (citations omitted); *accord, Doe v. City of L.A.*, 42 Cal. 4th 531, 545 (2007) ("in construing this, or any statute, we may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does"); *Cornette v. Dep't of Transp.*, 26 Cal. 4th 63, 73-74 (2001); *Cal. Teachers Ass'n v. Governing Bd. of Rialto Unified Sch. Dist.*, 14 Cal. 4th 627, 633 (1997); *see also Sec. Pac. Nat'l Bank v. Wozab*, 51 Cal. 3d 991, 998 (1990) (referring to the "cardinal rule of statutory construction that courts must not add provisions to statutes"); Code Civ. Proc. § 1858 (a court must not "insert what has been omitted" from a statute).

The unambiguous and unqualified language of Section 1008 precludes courts from reading into that statute an exception it does not contain. A court may not, "under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." *Cal. Fed. Sav. & Loan v. City of L.A.*, 11 Cal. 4th 342, 349 (1995). Had the Legislature intended to except renewed motions for relief from default from the provisions of Section 1008, "it could readily have done so. It is our task to construe, not to amend the statute." *See id.* "We must assume that the Legislature knew how to create an exception if it wished to do so." *Id.* (citation and internal quotation marks omitted);

accord, Dicampli-Mintz v. Cty. of Santa Clara, 55 Cal. 4th 983, 992 (2012).[15]

In view of these principles, the Court of Appeal correctly concluded that "the use of 'all' and 'no' in section 1008 conveys the clear meaning that every renewal motion, without exception and not excluding one for mandatory relief from default based upon an affidavit of attorney fault, is governed by section 1008's requirements." Slip op. 18. Section 1008's requirements apply to renewed motions for relief from default under Section 473(b), just as they apply to all other renewed motions, because the Legislature used the inclusive adjective "all," evidencing an unmistakable intent to permit no exceptions.

3. The Legislature Was Urged To Except Motions For Relief From Default From The Requirements Of Section 1008, But Did Not Do So.

Because the plain language of Section 1008 is unambiguous, there is no need for the Court to resort to legislative history to divine its meeting. *Day v. Fontana*, 25 Cal. 4th 268, 272 (2001) (Court considers extrinsic sources, such as legislative history, only if "the statutory terms are ambiguous"). In any event, defendants explicitly concede that there is

[15]For this reason, defendants' reliance on the principle that a statute that results in procedural forfeiture must be strictly construed (Op. Br. 37-38) is misplaced. Plaintiff is not asking the Court to "construe" Section 1008 liberally, but only to enforce its plain language.

nothing in the legislative history of the 1992 amendments to Section 1008(b) that supports their attempt to read an exception into the unqualified language of the statute (Op. Br. 46), which on its face applies to "all" applications for the renewal of a previous motion.

But even if the Court deemed it appropriate to consider the statute's legislative history, it supports plaintiff's position, not defendants'. Defendants assert that the extensive legislative history of the 1992 amendment of Section 1008(b) "fills hundreds of pages and does not once refer to section 473(b)." Op. Br. 46; *see also id.* at 40. That is not accurate.

In fact, the complete legislative history defendants have filed with the Court reflects that after the Legislature had enacted Senate Bill 1805 (one of the two bills in the 1991-92 legislative session by which it amended Section 1008), but just days before the Governor signed that measure, the Committee on Administration of Justice of the State Bar of California recommended that the statute be amended to exempt motions for relief under Section 473(b) from the requirements of Section 1008. Def. Mot. for Jud'cl Not., Second Raymond Decl., at 160-61. Senator Kopp's bill file contains a note conveying the message that despite that concern, the State Bar's lobbyist, Larry Doyle, would not ask the Governor to veto SB 1805, but instead would work on possible amendments to another bill. *Id.* at

162.[16] Finally, it contains an undated draft bill containing such a proposed exception. *Id.* at 163-64 ("This section shall not prevent the making or granting of a motion for relief pursuant to Section 473"). However, that language was never enacted or, so far as plaintiff is aware, introduced.[17]

For this reason, defendants' "implied repeal" argument (Op. Br. 45-46) lacks merit. The legislative history establishes that the Legislature was urged to exempt Section 473 motions from the requirements of Section 1008, but decided not to do so. That history squarely contradicts defendants' unsupported inference that "the Legislature intended section 473(b) to prevail over section 1008(b) in the event of the kind of a conflict that presents here." Op. Br. 45.[18]

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[16] The note evidently referred to Assembly Bill 2616 (Peace), which was referenced in the State Bar memorandum. That legislation amended Code of Civil Procedure 437c, relating to summary judgment, but did not amend Section 1008. Stats. 1992, c. 1348 (A.B. 2616), §1; *see* Historical and Statutory Notes foll. Code Civ. Proc. § 437c; *Union Bank v. Super. Ct.*, 31 Cal. App. 4th 573, 590 & n.9 (1995).

[17] To be sure, the Legislature's failure to enact legislation in accordance with the State Bar's suggestion is not conclusive as to its intent in enacting the 1992 amendments to Section 1008; this Court is properly reluctant "to draw conclusions concerning legislative intent from legislative silence or inaction." *People v. Farley*, 46 Cal. 4th 1053, 1120 (2009) (citation and internal quotations marks omitted). The materials from Senator Kopp's bill file are relevant for the limited purpose of establishing that the Legislature considered, but ultimately rejected, carving out an exception to Section 1008's requirements for motions for relief from default under Section 473, which contradicts defendants' argument that the Legislature somehow intended the 1992 amendments silently to create such an exception.

[18] At most, even disregarding the history discussed in text, Sections 473 and 1008 "govern discrete subject areas, and the Legislature's failure to legislate expressly with respect to the rare instance in which they overlap

(continued...)

4. Section 473(b) Can Be Given Full Effect Without Doing Violence To The Plain Language Of Section 1008.

Thus, defendants' contention that the Court should read an exception into the requirements of Section 1008 for renewed motions for relief from default under Section 473(b) is inconsistent with the plain language of Section 1008, with the Legislature's expressed intent in amending that statute to render it exclusive and jurisdictional, and with time-honored canons of statutory construction that prohibit courts from rewriting statutes. In contrast, Section 473(b) can be given full effect without violating even one of those fundamental principles, as the Court of Appeal and other courts have correctly concluded.

As discussed above, Section 473(b) provides a narrow right to relief from default, default judgments, and dismissals when, within six months after entry of judgment, the defaulted party files an application for relief in proper form accompanied by an attorney's sworn affidavit credibly establishing that the default or dismissal was caused by the attorney's mistake, inadvertence, surprise, or neglect. So long as a party complies with Section 1008's jurisdictional requirements, there is no obstacle to its filing a second or renewed motion for relief under the attorney fault

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(continued...)

does not suggest any legislative intent as to which should prevail." *Mejia*, 31 Cal. 4th at 667.

provision of Section 473(b). Thus, as the Court of Appeal succinctly observed, the need for a party filing such a motion to comply with the requirements of Section 1008 "does not mean that the statutes are in fatal conflict. That is simply the result of the statutes working together as the Legislature intended." Slip op. 19.

As the Court of Appeal also observed, the plain language of Section 473(b), which is phrased in the singular ("an application for relief"), does not address second or renewed motions seeking such relief. Certainly, nothing in the statute suggests that the Legislature intended to mandate that parties seeking such relief would be entitled to file a second such motion. To the contrary, that the Legislature made such relief *mandatory* so long as the statutory conditions are met strongly supports the conclusion that the Legislature contemplated that only a single such motion should be necessary.

Defendants' reliance on Section 473(b)'s use of the term "whenever" (Op. Br. 2, 35, 38, 44) to create a purported conflict between the two statutes is misplaced. In the context of the surrounding language,[19] it merely means that relief is mandatory "in any case" where the application

[19] "The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." *Catlin v. Super. Ct.*, 51 Cal. 4th 300, 304 (2011) (internal quotation marks and citations omitted).

is timely filed in compliance with the statutory conditions.[20] It does not, as defendants imply, somehow exempt motions for relief from default from complying with the generally applicable provisions of the Code of Civil Procedure that govern all motions. To the contrary, the legislative command that such an application must be "in proper form" makes it clear that Section 473(b) motions are equally subject to all such provisions, including provisions found in the same chapter of the Code of Civil Procedure (Chapter 4, "Motions and Orders," §§ 1003-1008) that contains Section 1008. Thus, Section 473(b) motions, like all other motions, must be made in the court in which the action is pending (§ 1004); must be brought on adequate statutory notice (§ 1005); and must be noticed, served and filed in compliance with the Code (§§ 1010-20). Likewise, the supporting attorney affidavit of fault must be made on personal knowledge and sworn under penalty of perjury (§ 2015.5).[21] Section 1008 is just one of many such procedural requirements of general applicability, and it applies

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[20] The penalty provisions in Section 473(c)(1) employ the same term. § 473(c)(1) ("*Whenever* the court grants relief from a default, default judgment, or dismissal based on any of the provisions of this section, the court may do any of the following . . . .").

[21] *Cf. Kendall v. Barker*, 197 Cal. App. 3d 619, 624 (1988) (conclusory declaration by counsel stating on information and belief that previous attorney "excusably neglected" to answer the complaint was hearsay and was not competent to meet moving party's burden to obtain discretionary relief under Section 473).

to Section 473(b) motions just as it does to "all" other renewed motions and motions for reconsideration.

The Courts of Appeal have agreed with this plain-language and common sense reading of the two statutes, holding that Section 1008's jurisdictional requirements apply equally to renewed motions for relief from default under Section 473(b) as they do to all other renewed motions. Thus, in *Gilberd v. AC Transit*, 32 Cal. App. 4th 1494 (1995), after the trial court granted the plaintiff's petition for relief from the claim filing requirements of the Government Code and a motion for leave to file an amended complaint, and then dismissed the defendant's motion for summary judgment as moot, defendant filed a motion for reconsideration of the rulings and, in the alternative, sought relief from those rulings under Section 473(b) on the ground that counsel's error in failing to schedule a hearing on the trial court's tentative rulings was due to mistake, inadvertence, and excusable neglect. *Id.* at 1498. The trial court granted reconsideration, vacated its earlier orders, and sustained defendant's demurrer to the amended complaint without leave to amend. On appeal, the Court of Appeal vacated the trial court's order granting reconsideration and the resulting judgment of dismissal on the ground that defendant's motion for reconsideration did not meet the jurisdictional prerequisites for relief under Section 1008. The court rejected defendant's argument that the trial

court appropriately ordered relief under Section 473(b), finding it "easily refuted":

> To hold, under the circumstances presented in this case, that the general relief mechanism provided in section 473 could be used to circumvent the jurisdictional requirements for reconsideration found in section 1008 would undermine the intent of the Legislature as specifically expressed in section 1008, subdivision (e): "No application to reconsider any order . . . may be considered by any judge or court unless made according to this section."

Id. at 1501. Other courts agree. *Garcia*, 58 Cal. App. 4th at 680 (following *Gilberd*'s holding that "a court has jurisdiction to reconsider its orders only under section 1008 and cannot do so by resort to section 473"); *cf. Pazderka v. Caballeros Dimas Alang, Inc.*, 62 Cal. App. 4th 658, 664 (1998) (trial court lacked jurisdiction to grant reconsideration under Section 1008 where moving party did not present any new facts or law in motion for reconsideration or, in the alternative, for relief from judgment pursuant to Section 473).[22]

Like the trial court, defendants rely heavily on a single Court of Appeal decision, *Standard Microsystems Corp. v. Winbond Elecs. Corp.*, 179 Cal. App. 4th 868 (2009). Op. Br. 26, 40-41, 48. However, that case is

[22] Defendants do not mention these cases in their opening brief.

distinguishable on its facts, and addressed the issue presented here only in dicta. In any event, its reasoning is flawed and should be rejected.

In *Standard Microsystems*, two foreign defendants were advised by their California attorney that plaintiff's attempt to serve them by mail was ineffective, and that they were under no obligation to answer the complaint. When plaintiff took their default, defendants sought relief from default under the *discretionary* provisions of Section 473(b). In their motion, defendants argued they reasonably believed that service on them had been defective. *Id.* at 877-78. The motion did not "suggest that the default was the product of neglect or mistake by counsel," nor was it based on attorney fault or accompanied by an attorney affidavit of fault. *Id.* at 878. In additional briefing, defendants argued that if the service on them had not been defective, then they were entitled to relief under Section 473(b) because the defaults were the result of their mistake, surprise, or excusable neglect. *Id.* at 879. Defendants did not mention the fact that their attorney had told them the service was defective, that they had no obligation to respond, and that they should not do so. *Id.*

The trial court denied defendants' motion, finding that they had been validly served and that there was no factual support for their assertion that their default was entered due to mistake, inadvertence, surprise, or excusable neglect. *Id.* The court did not find credible defendants' assertion that they lacked familiarity with court procedures, and noted that absent an

attorney affidavit of fault, an attorney's mistake of law is chargeable to the client and did not constitute excusable neglect. *Id.*

Following entry of a default judgment, defendants engaged new counsel, who filed a motion for *mandatory* relief from the default judgment and the underlying default on the ground that both were the results of the fault of defendants' first attorney. *Id.* at 873, 880. The motion was accompanied by a declaration in which the first attorney acknowledged that he had advised defendants they were not required to answer the complaint, and that they were relying upon and following his advice in failing to respond to the complaint. *Id.* at 880. The trial court denied the motion, finding that defendants' counsel "engaged in a deliberate tactical decision not to file a responsive pleading." *Id.* at 884. It also denied defendants' alternative motion for discretionary relief from entry of default and default judgment as an improper motion for reconsideration. *Id.*

The Court of Appeal reversed the trial court's denial of the motion for mandatory relief, holding that "the undisputed facts plainly established the attorney fault necessary to trigger a right to mandatory relief." *Id.* at 873. The court also rejected plaintiff's argument that relief was barred by Section 1008 because the second motion was an improper motion for reconsideration of the trial court's earlier order denying defendants' motion for discretionary relief. The primary basis for its ruling was that the two

motions were brought under different provisions of Section 473(b) and sought different relief:

> Although the later motion may have been, in part, a renewal of the first motion within the terms of section 1008, the relief that made it so was ancillary to, and necessary to effectuate, the greater object of the second motion, which neither sought reconsideration nor the issuance of an order the court had previously declined to grant.

Id. Thus, the court observed that to the extent defendants' second motion relied upon the mandatory provisions of Section 473(b), "it did not ask the court to reconsider its previous order." *Id.* at 891. "The second motion rested on an entirely different legal theory, invoked a different statutory ground, and relied in very substantial part on markedly different facts." *Id.* The court therefore found that Section 1008(a), governing motions for reconsideration, did not apply to the second motion. *Id.*

Likewise, while the court observed that to the extent it asked the trial court to set aside the underlying default, the second motion "arguably" constituted a renewal of the first, nevertheless "the two motions rested on entirely distinct factual and legal predicates." *Id.* The court therefore did not decide whether the second motion was in part a renewed motion subject to Section 1008(b), but instead *assumed "without deciding"* (*id.* at 892 (emphasis added)) that it was:

> We conclude that *assuming* the second motion was a renewal of the first motion insofar as it

> sought relief from the underlying default, it was not barred by that fact, in whole or part, because the relief thus sought was ancillary to, and would be necessary to carry into effect, the order vacating the judgment, which was subject to no such constraint.

Id. at 893 (emphasis added).[23]

Proceeding from that assumption, the court went on to address whether, *if* Section 1008(b) applied to defendants' second motion, it should bar mandatory relief under Section 473(b). *Id.* at 893. The court stated, without explanation or analysis, that "[b]y contending that section 1008 barred such relief, plaintiff brings the two statutes into direct conflict." Id. at 894. In a single paragraph, the court then suggested that "[i]nsofar as" there is a conflict between the two statutes, "it must be resolved in favor of allowing relief under section 473(b), not denying it under section 1008." *Id.* It offered two reasons for that conclusion. First, it observed that in contrast to Section 1008, which results in a procedural forfeiture, Section 473 is a remedial statute that is to be construed liberally. *Id.* at 894. Second, it invoked the principle that in the event of conflict, specific statutory provisions must prevail over more general ones. *Id.* at 895.

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[23] The *Standard Microsystems* court pointed out that it would be "absurd" if a party could seek and obtain relief from a default *judgment* because it had not previously filed a motion for *that* relief, but it could not at the same time obtain relief from the underlying default because that relief *had* been sought before. 179 Cal. App. 4th at 893.

However, the court did not explain its starting assumption that the two statutes "conflict," nor did it address the propriety of a judicially-created exception to Section 1008's unambiguous jurisdictional language rendering it applicable to "all" renewed motions. Finally, the court again expressly distinguished the situation before it from the one presented in the instant case:

> We observe that this is not a case where a party invokes the mandatory provisions of section 473(b) unsuccessfully, and then seeks to invoke them again.

Id. at 895.

Thus, as the authoring court itself acknowledged, *Standard Microsystems* posed issues distinct from those in the instant case. Its discussion of those issues therefore is mere dicta entitled to little if any weight. *See Areso v. CarMax, Inc.*, 195 Cal. App. 4th 996, 1006 (2011) ("Mere observations by an appellate court are dicta and not precedent, unless a statement of law was necessary to the decision, and therefore binding precedent") (internal quotation marks and citation omitted). Moreover, *Standard Microsystems*' cursory reasoning is flawed. Accordingly, this Court should disapprove that case to the extent it is inconsistent with the Court's decision in this case.

D. There Is No Compelling "Public Policy" Reason For This Court To Carve Out A Judicial Exception To Section 1008 For Renewed Motions for Relief From Default.

Defendants urge this Court to carve out an exception to the requirements of Section 1008 for renewed motions for relief from default under Section 473(b). Although defendants acknowledge that such an exception would be inconsistent with the "comprehensive" language of Section 1008, which they concede "governs all renewed motions" (Op. Br. 30), defendants nevertheless insist that this Court would be justified in creating such an exception by considerations of "public policy." *Id.* at 40-43. That argument is badly flawed, for several reasons.

First, as we have already shown, courts are not free to rewrite statutes to conform to their own views of "public policy." To the contrary, decisions in this State appropriately reflect a "profound judicial reluctance to second-guess policy decisions made by the political branches." *Serv. Emps. Int'l. Union, Local 1000 v. Brown*, 197 Cal. App. 4th 252, 273 (2011) ("In reviewing statutes enacted by the Legislature, courts may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function") (internal quotation marks and citations omitted); *accord, People v. Carter*, 58 Cal. App. 4th 128, 134 (1997) ("The role of the judiciary is not to rewrite

legislation to satisfy the court's, rather than the Legislature's, sense of balance and order").

But even if this Court had the authority to rewrite Section 1008 as defendants propose, and even if Sections 473(b) and 1008 were in "irreconcilable conflict"—and, as we have shown, they are not—defendants have not offered any compelling reason for this Court to create the exception they propose.

1. Defendants' Proposed Exception For "Remedial" Statutes Would Swallow The Rule And Frustrate The Legislative Intent Behind The 1992 Amendments To Section 1008.

The rationale defendants offer for the novel judicial exception to Section 1008 they propose sweeps so broadly that it would effectively nullify Section 1008 altogether. Defendants argue that Section 473(b) should trump Section 1008 because the former is a "remedial" statute that is to be liberally construed. Op. Br. 30, 38-39. But that argument proves far too much. As the Court of Appeal observed, acceptance of defendants' position "would create a proverbial 'slippery slope' and foment even more litigation concerning what is in fact 'remedial.'" Slip op. 20. Indeed, because Section 473 is only one of numerous remedial statutes in California, exempting motions brought under such statutes from the requirements of Section 1008 would riddle Section 1008 with more holes than Swiss cheese.

Remedial statutes in California are legion, and encompass a vast array of substantive and procedural topics. Thus, the following statutes, among a host of others, have been held to be "remedial":

- California's general automobile financial responsibility law, Vehicle Code Sections 410-418.5 (*Cont'l Cas. Co. v. Phx. Constr. Co.*, 46 Cal. 2d 423, 434-35 (1956));
- Labor Code provisions governing wages, hours and working conditions (*Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1026-27 (2012));
- Code of Civil Procedure Section 170.6, governing peremptory challenges to judges (*Pickett v. Super. Ct.*, 203 Cal. App. 4th 887, 892 (2012));
- Health and Safety Code Section 1424, which applies to long-term health care facility licensees cited for regulatory violations (*Cal. Ass'n of Health Facilities v. Dept. of Health Services*, 16 Cal. 4th 284, 295 (1997));
- Code of Civil Procedure Section 526a, California's taxpayer standing statute (*Blair v. Pitchess*, 5 Cal. 3d 258 (1971));
- Proposition 65 (*People ex rel. Lungren v. Super. Ct.*, 14 Cal. 4th 294, 314 (1996));

- The mechanics' lien laws (*Connolly Dev., Inc. v. Super. Ct.*, 17 Cal. 3d 803, 826-27 (1976));
- The Eminent Domain Law (*People ex rel. Dept. of Transp. v. Muller*, 36 Cal. 3d 263, 269-70 (1984)); and
- The Song-Beverly Credit Card Act of 1971 (*Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524, 532-33 (2011)).

We could go on, but the point is made: The logical implication of defendants' position that renewed motions under Section 473(b) should be excepted from the requirements of Section 1008 because Section 473 is a "remedial" statute is that renewed motions under every one of those statutory schemes, and many more, likewise should be exempt from those requirements. Such a result would eviscerate the plain language of Section 1008 and the undisputed legislative intent underlying it.

2. The Proposed Exception Is Unnecessary Because It Should Rarely If Ever Be Necessary For A Defendant To File A Renewed Motion For Relief From Default.

Finally, even if defendants' proposed exception to the requirements of Section 1008 could somehow be squared with the unqualified statutory language, and even if such an exception could be limited solely to renewed motions under Section 473(b) and no other "remedial" statute, defendants offer no compelling reason for the Court to rewrite the statute to

accommodate such an exception. That is because, as defendants acknowledge (Op. Br. 4, 50-52), it should rarely if ever be necessary for a party to file a renewed motion for relief from default in the first place.

As defendants observe, the six-month period in which a motion for relief from default makes it unlikely that a party could make many renewed motions for relief under Section 473(b). Op. Br. 50. Moreover, and more to the point here, a party that comports itself diligently and honestly rarely if ever should need to file a renewed motion at all. Section 473(b) provides a party with a mandatory right to relief from default, provided only that it files its motion in proper form accompanied by the required attorney "affidavit of fault" credibly establishing that the default was caused by the attorney's mistake, inadvertence, surprise, or neglect. "If the prerequisites for the application of the mandatory relief provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief." *Henderson*, 187 Cal. App. 4th at 226 (internal quotation marks and citation omitted).

A party that finds itself in default and takes its predicament seriously should be able to obtain relief on the first attempt by following the statute's simple, clear guidelines. Only in rare cases, such as this one, will a defendant fail to obtain relief, either because its counsel fails to provide the trial court with a credible factual showing that the attorney's mistake actually caused the default or because it ill-advisedly seeks discretionary

rather than mandatory relief. Thus, a party's inability to obtain relief from default under the mandatory provision on the first attempt can only be due to two reasons: because it is not entitled to such relief under the statute, or because the party or its counsel have failed to act with diligence or candor.[24] While the courts undoubtedly need not encourage the filing or prosecution of unnecessary legal malpractice actions,[25] neither is there any compelling public policy that requires courts to rewrite statutes solely in order to shield parties or counsel from the foreseeable consequences of their own misconduct or negligence. *Cf. Garcia*, 58 Cal. App. 4th at 682 ("The Legislature did not intend to eliminate attorney malpractice claims by providing an opportunity to correct all the professional mistakes an attorney might make in the course of litigating a case").

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[24] It is hard to conceive of a circumstance in which a renewed section 473(b) motion would be necessary. An attorney invoking the mandatory provisions of section 473(b) and thereby claiming responsibility for the default necessarily would know upon filing a first section 473(b) motion how his or her conduct caused the default. Put another way, there should only be one "story" that explains a default, not two "entirely different" (and incredible) stories advanced in successive motions, as was the case here.

[25] *E.g., Adams v. Paul*, 11 Cal. 4th 583, 593 (1995) (trial courts have inherent authority to stay malpractice suits, holding them in abeyance pending resolution of underlying litigation).

II. THE TRIAL COURT'S ORDER DENYING DEFENDANTS' FIRST MOTION FOR RELIEF FROM DEFAULT IS NOT PROPERLY BEFORE THE COURT; IN ANY EVENT, THAT ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Finally, defendants argue briefly that even if the Court of Appeal correctly held that their second motion for relief from default was barred by their admitted inability to comply with Section 1008's requirement that they show "new or different facts, circumstances, or law," this Court nevertheless should reverse on the ground that the Court of Appeal erred in affirming the trial court's order denying their *first* motion for relief from default. Op. Br. 56-58. For at least three reasons, that argument lacks merit.

First, the validity of the trial court's order denying defendants' first motion for relief from default is not properly before this Court. In their petition for review, defendants did not ask this Court to review the Court of Appeal's affirmance of that order,[26] nor did this Court agree to do so in its order granting review. This Court, of course, decides only those issues raised in a petition for review or "fairly included" therein. Cal. R. Ct. 8.516(b)(1). Where, as here, a party belatedly attempts to raise an additional issue that it did not include in its petition for review, this Court

[26] Although defendants "question[ed]" the Court of Appeal's affirmance of the trial court's first order in their petition for review, they ultimately asserted that "it does not matter" and did not ask this Court to review it or any issue it posed. Pet. for Review 30 (filed May 17, 2013).

routinely declines to reach such issues. *See Le Francois*, 35 Cal. 4th at 1099 ("We did not grant review on this question and, accordingly, we accept the Court of Appeal's finding in this regard") (citation omitted).

Second, the trial court's ruling on defendants' first motion was limited to the specific and unusual facts before it. It therefore is not worthy of consideration by this Court, which "limits its review to issues of statewide importance." *S. Cal. Ch. of Associated Builders etc. Comm. v. Cal. Apprenticeship Council*, 4 Cal. 4th 422, 431 n.3 (1992) (substantial evidence question did not warrant review under standard); Cal. R. Ct. 8.500(b)(1).

Third, even if the Court were to reach the propriety of the trial court's ruling, it should be readily affirmed. A ruling on a motion for mandatory relief under Section 473(b) is reviewed for substantial evidence to support the trial court's factual determinations. *See, e.g., Huh*, 158 Cal. App. 4th at 1418 ("Where an appeal involves factual determinations that affect entitlement to mandatory relief, such as whether attorney fault caused the default, we examine the record for substantial evidence in support of the trial court's exercise of discretion"), citing *Todd*, 34 Cal. App. 4th at 991-92. Defendants' contention that an order denying a motion for mandatory

relief under Section 473(b) is "generally" subject to de novo review (Op. Br. 57) is erroneous.[27]

The trial court's ruling denying defendants' first motion for relief finds ample support in the record. In denying defendants' first motion, the trial court expressly found that Gibalevich's affidavit of fault was "not credible" and was "entirely too general" to meet defendants' burden to establish that the defaults were caused by his mistake or neglect. The trial court's adverse credibility finding is corroborated not only by the record on the first motion showing that Gibalevich's "miscalendaring" claim was false, but also by Gibalevich's later admission in connection with defendants' renewed motion that his first affidavit of fault was false. The trial court's adverse credibility finding is "conclusive on appeal." *Cowan v. Krayzman*, 196 Cal. App. 4th 907, 915 (2011) (quoting *Johnson v. Pratt & Whiteney Canada, Inc.*, 28 Cal. App. 4th 613, 622-23 (1994)); *see also Jerry's Shell v. Equilon Enters., LLC*, 134 Cal. App. 4th 1058, 1074 (2005) (trial court found that counsel's declaration "lacks credibility"); *Todd*, 34

[27] The sole case defendants cite for that proposition stated only that "to the extent that the applicability of the mandatory relief provision does not turn on disputed facts, but rather, presents a pure question of law, it is subject to de novo review." *Carmel, Ltd. v. Tavoussi*, 175 Cal. App. 4th 393, 399 (2009). As that case recognized, however, "[w]here the facts are in dispute as to whether or not the prerequisites of the mandatory relief provision of section 473, subdivision (b), have been met, we review the record to determine whether substantial evidence supports the trial court's findings." *Id.* (citation omitted). Here, the trial court denied defendants' first motion based on its factual findings regarding credibility and causation, which are subject to review for substantial evidence.

Cal. App. 4th at 992 ("Having attributed the dismissal to plaintiff's personal problems at the first hearing, counsel could not thereafter attempt to change the facts and blame himself"). Indeed, as discussed above, the trial court found that *neither* of defendants' counsel's declarations of fault was credible. As the Court of Appeal observed (slip op. 16), defendants did not contest those findings on appeal, and they are binding on defendants. *Johnson*, 28 Cal. App. 4th at 622-23.

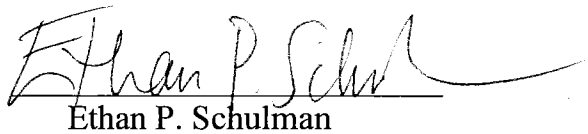
The trial court's additional finding on defendants' first motion that the declaration was too conclusory is consistent with the rule that an "attorney's straightforward admission of fault is required for Section 473(b) mandatory relief." *State Farm Fire & Cas. Co.*, 90 Cal. App. 4th at 609-10; *see also Cowan*, 196 Cal. App. 4th at 916 (counsel's declaration "did not unequivocally admit error"). That finding, by itself, separately warranted affirmance of the trial court's ruling denying defendants' first motion.

CONCLUSION

The Court of Appeal properly held that a renewed motion to set aside a default, like all other renewed motions, is subject to the mandatory jurisdictional requirements of Code of Civil Procedure Section 1008. Creating an exception from those requirements for renewed motions for relief from default would contradict the unambiguous plain language of Section 1008 and frustrate the Legislature's intent in amending that statute in 1992. Accordingly, this Court should affirm the judgment of the Court of Appeal, and should disapprove the decision in *Standard Microsystems* to the extent it is inconsistent with the Court's opinion.

Dated: December 16, 2013 CROWELL & MORING LLP

Respectfully submitted,

By 

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520(c) of the California Rules of Court, I hereby certify that this Answer Brief on the Merits contains 13,546 words, including footnotes. In preparing this Certificate, I relied on the word count generated by the word processing program used to create this brief.

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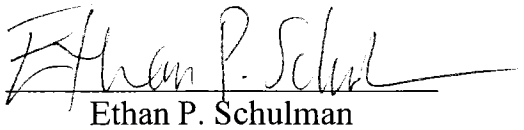

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