No. S233526

IN THE

SUPREME COURT OF CALIFORNIA

SWEETWATER UNION HIGH SCHOOL DISTRICT,

Plaintiff and Respondent,

v.

GILBANE BUILDING COMPANY et al.

Defendants and Appellants.

On Petition for Review from a Decision of the Court of Appeal, Fourth Appellate District, Division One, No. D067383, on Appeal from an Order of the Superior Court, County of San Diego, No. 37-2014-00025070-CU-MC-CTL Hon. Eddie C. Sturgeon, Judge

REPLY BRIEF ON THE MERITS

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1. The District Failed To Diminish—and Often Conceded—Controlling Statutory Construction.

Statutes cited in petitioners' opening merits brief answer the question on review. Those statutes impose an insuperable barrier to the District's attempt to make testimony from a prior case admissible other than by complying with Evidence Code section 1290 et seq. The District's Answering Brief on the Merits (Answer) fails to break—or even strain—this chain of reasoning from the statutes:

• *An affidavit is testimony.* (Code Civ. Proc., § 2002 ["The testimony of witnesses is taken in three modes: [¶] 1. By affidavit. . ."]; see Civ. Code, § 14 ["every mode of oral statement, under oath or affirmation, is embraced by the term 'testify' "].) A declaration is an unsworn affidavit signed under penalty of perjury. (Code Civ. Proc., § 2015.5.) The District cannot argue otherwise, but it repeatedly implies that a witness's testimony recorded on paper subject to penalty of perjury is some other kind of evidence not subject to rules for testimony. (See, e.g., Answer 24, 29, 35–35.) Yet elsewhere, the District admits that statements under oath made to the grand jury or as plea narratives are testimony as defined by statute. (Answer 33 [an " 'affidavit' [is] a manner in which testimony may be taken"]; see *id.* at p. 24.) And more conclusively: "The sole issue here is whether this testimony given under oath can be admissible evidence used to oppose an anti-SLAPP motion because such testimony is equivalent to an affidavit." (Answer 5.)

• *The content of an affidavit is hearsay.* (Evid. Code, § 1200, subd. (a) [hearsay is any "statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated"].)

• *"Except as provided by law, hearsay evidence is inadmissible."* (Evid. Code, § 1200, subd. (b).)

• *Evidence Code sections 1290 et. seq. provide the law by which testimony given in a prior case can be received at a hearing over hearsay objection.* (Evid. Code, §§ 145, 1200, 1292, subd. (a).) The District claims petitioners "confuse a trial with a motion." (Answer 28, see *id.* at pp. 29, 33–35.) But petitioners established that the hearsay rule and former testimony exception apply at any hearing, not just at a trial. (See Opening Brief 15–19.) And the District admits that a motion under Code of Civil Procedure section 425.16 results in an "anti-SLAPP hearing." (Answer 35.)

• *The plea narratives and grand jury testimony did not qualify under the former testimony exception.* (See Answer 10–11, citing Evid. Code, §§ 1291, 1292; 6 AA 1464-1468.) The District touts in a caption that the criminal-case materials "were not offered or admitted as former testimony." (Answer 34, capital letters made lower case.) Agreed, and they could not have been offered or admitted as anything else.

Petitioners bolstered the plain-meaning analysis of the statutes with both general code history and specific history of the Evidence Code sections. (Opening Brief 20–23.) The District did not respond.

The statutory analysis could conclude the case. But out of respect, petitioners address the remainder of the District's arguments, refuting all that might matter.

2. The Evidence Code Applies to Motions.

The Evidence Code applies to every action in superior court and higher courts. (Evid. Code, § 300.) It does not apply to grand jury proceedings. (*Ibid.*)

2.1. No "former affidavits" exception.

Code of Civil Procedure section 2009 (section 2009) creates an exception to the hearsay rule for affidavits to be used to support or oppose motions. Code of Civil Procedure section 2015.5 makes a declaration under penalty of perjury the equivalent of an affidavit. The District and the Court of Appeal claim those statutes also create an exception for former affidavits, former declarations, and all other kinds of former testimony given under penalty of perjury. Nothing in the language of either statute—or any other statute—says anything to support the argument.

The District and the Court of Appeal found only one sentence and footnote in one appellate decision supporting their statutory construction. That is the discredited, authority-less *Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142, 149, & fn. 3. The Answer neither makes *Williams* stronger nor weakens *Gatton v. A.P. Green Services, Inc.* (1998) 64 Cal.App.4th 688, 690, 693–697 and *L&B Real Estate v. Superior Court* (1998) 67 Cal.App.4th 1342, 1347–1348, which reject *Williams*. (Answer 35–37.) Petitioners therefore do not repeat the discussion from their opening brief, pages 23–25.)

Neither the District nor the Court of Appeal found secondary authority to support grafting a former affidavits exception onto section 2009. The only useful authority known to petitioners is rule 3.1115 of the California Rules of Court, which provides: "The caption of a declaration must state the name of the declarant and must specifically identify the motion or other proceeding that it supports or opposes." This rule states the practice in trial courts that a declaration is a document original to the case in which it is offered.

The District attempts to escape the statutory analysis by assigning to the former testimony structure the sole purpose of preferring live testimony at trial. (Answer 34–35, 37–38 [relating the purpose and unavailability].) The case it cites was decided in 1951, more than a decade before the Law Revision Commission recommended and the Legislature adopted an Evidence Code applying the hearsay rule and former testimony regime to all hearings. (Compare *Blache v. Blache* (1951) 37 Cal.2d 531, 535, with Tentative Recommendation and a Study Relating to the Uniform Rules of Evid. Article VIII. Hearsay Evidence (Aug. 1962), 4 Cal. Law Revision Com. Rep. (1963) 301, 307, 314–315, discussed at Opening Brief 21–23.) No authority supports the District's theory of exclusive purpose. There are many good reasons not to have a blanket former affidavit exception; petitioners discussed these policies at pages 26 through 28 of the Opening Brief, and the District did not respond.

2.2. Games in the Answer.

In seeming to argue there should be a former affidavits exception in section 2009, the Answer is less than candid about both the record and authority. To begin, the Answer conflates the potentially admissible pleas with the hearsay statements that accompanied them. Petitioners showed that the Court of Appeal did not rely on the pleas themselves, and the admissible pleas do not even relate to petitioners' contracts with the District. (Opening Brief 7–10.) The District did not disagree. Petitioners showed Flores's plea is categorically inadmissible under Penal Code section 1016, subdivision (3). (*Id.* at p. 9.) The District did not disagree.[1] Yet the District lumps the pleas with hearsay statements made in connection with the pleas as if both were not testimony, when only the admissions of guilt to precise crimes are non-testimonial. (Answer 2, 22, 31–32.) There is no law behind the District's illogic. Hearsay is not made admissible because the declarant uttered it in connection with a criminal plea.

The authority the District cites in connection with its conflation is off point. *People v. Lee* (2011) 51 Cal.4th 620, 650–651, involves using the defendant's own plea document against him as a party admission, not as former testimony. The District does not contend—it could not do so—that a petitioner made a party admission. *People v. Miles* (2008) 43 Cal.4th 1074, 1082–1083, concerns authentication of official records showing the

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[1] The Answer refers to "the guilty pleas of the contractors. . . ." (Answer 3.) No petitioner pled guilty or was even a party to the criminal case.

defendant's own conviction, not admissibility of hearsay testimony against third parties; the only Evidence Code section it cites is 1280, which is not involved here. *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1350–1351, allows an official record (Evid. Code, § 1280) of the defendant's prior sentencing to be used against him as a party admission (*id.*, § 1220) for sentence enhancement on conviction of another crime.

The District suggests that the criminal-case materials—including reported oral testimony—should be favored for admissibility because they are likely to be credible. (See, e.g., Answer 31:1–3, arguing by rhetorical question.) This is error. Any defendant may be thrilled to untruthfully, in the vernacular, throw a non-party company under the bus as part of pleading dozens of felony counts down to a no-jail-time judgment. The record suggests exactly that here: the counts to which the defendants pled lack connection to the hearsay narratives accompanying the pleas. (Opening Brief 7–10.) The District found no connection.

Although it admits that judicial notice could not be used for any purpose except to authenticate the criminal-case materials, the District seems to suggest the mode of authentication makes a difference to admissibility of the hearsay. (Answer 28.) That is not so. The District correctly cites *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564–1569, for its holding that judicial notice of a court record does not allow receiving the content of the record—even a court's findings of fact—for the truth of what it states. Cases by the legion say the same. (*Steed v. Department of*

Consumer Affairs (2012) 204 Cal.App.4th 112, 121 [statements in court order]; *People v. Munoz* (2005) 129 Cal.App.4th 421, 430–431 [finding in sexually violent predator hearing]; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 [facts in affidavits and declarations]; *Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 21-22 [deposition transcript filed as a court record]; *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864-866 [statements in a declaration].)

2.3. No anti-SLAPP exception.

The District flirts with arguing for special evidence rules for anti-SLAPP motions. If the District means to do so, it errs from foundation to conclusion.

Beginning with a point of agreement, an anti-SLAPP proceeding is much like a summary judgment motion; on the second stage of analysis, a plaintiff must show a probability of success with " 'competent admissible evidence.' " (Answer 27, citing *Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347–1348 [omitted from table of authorities]; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1010; see Answer 21, 26, citing *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th

728, 739, and *Soukup v. Law Office of Herbert Hafif* (2006) 39 Cal.4th 260, 278–279.[2])

The Answer begins to go astray in the first line of its first page by claiming that the anti-SLAPP law is abused. There, the District offers no authority. When it repeats that claim, it begins by citing dissents more than 14 years old. (Answer 21, citing *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1129 (dis. opn. of Baxter, J.); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 96 (dis. opn. of Brown, J.). Then the District cites *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409 for the same supposed concern, but the District fails to disclose that it is citing the dissent in *City of Montebello*. (Answer 21, citing "1 Cal.5th at p. 427, 431," without the required notation: dis. opn. of Liu, J.)

Contrary to the District's insinuation, the anti-SLAPP law is as strong and useful as ever. Since the early dissents, the Legislature has amended the law only to strengthen it (Stats. 2005, ch. 535, § 1) or to improve it technically (Stats. 2009, ch. 65, § 1; Stats. 2010, ch. 328, § 34; Stats. 2014, ch. 71, §17). And in

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[2] Additional authorities support this point. (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1147; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497; *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 824, disapproved on unrelated point, *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) At page 36, the Answer oddly cites *Arceo v. City of Junction City* (D. Kan. 2002) 182 F.Supp.2d 1062, 1081, to support using grand jury testimony to oppose summary judgment, but that case relied on a federal standard that conflicts with the California statutory requirement to oppose with competent, admissible evidence.

City of Montebello v. Vasquez, supra, 1 Cal.4th at pp. 419–420, the Supreme Court reconfirmed "expansive interpretation of exemptions from the anti-SLAPP statute is inconsistent with the Legislature's express intent that the statute's core provisions 'shall be construed broadly.' (§ 425.16, subd. (a).) We have repeatedly emphasized that the exemptions are to be ' "narrowly construed." ' " The court held that protected activity under the anti-SLAPP law is not limited to constitutionally protected activity but includes " 'any act ... *in furtherance* of' those rights." (Supreme Court's italics.) Specifically, the court held that an elected public official's vote is statutorily protected because of its relationship to First Amendment rights, although the United States Supreme Court has held the vote is not constitutionally protected. (*Id.* at p. 423.) This is the holding the court pressed against two dissenting justices who claimed that the decision would make it harder to combat public corruption. (*Id.* at pp. 427, 431 (dis. opn. of Liu, J.)

The District complains that a plaintiff may not have time to assemble the evidence to oppose an anti-SLAPP motion. (See Answer 39–40.) Code of Civil Procedure section 425.16, subdivision (g), granting trial judges discretion to permit discovery during anti-SLAPP proceedings, provides a satisfactory answer.

The District does not fairly present the discovery record of this case. Against a summary judgment motion in a parallel case, Gilbane moved to continue to take discovery. (RA 73.) The District opposed Gilbane's motion, claiming no discovery was

needed, and the criminal-case materials would be dispositive. (RA 62–65, 79–83.) The superior court denied Gilbane's motion. (RA 69.) Then, after Gilbane made its anti-SLAPP motion in this case, the District moved ex parte to take depositions of employees of the district attorney. (RA 10.) Gilbane opposed the District's motion, arguing that it was hypocritical, and if Gilbane did not need discovery to oppose summary judgment, the District did not need it to oppose the motion to strike. (RA 61–64.) The superior court set the District's motion on notice and then denied it. (RA 100, 105.) At most, the District's proposed discovery might have improved its authentication of some documents. It would not have affected the prior testimony under review. The District has never argued that the superior court abused its discretion under Code of Civil Procedure section 425.16, subdivision (g).

The District's dogged strategy to rely on the criminal-case materials exposes no fault in the anti-SLAPP law. Rather, it justifies an inference that the hearsay declarants would testify adversely to the District on whether any quid pro quo was involved in the lobbying activities alleged by the District. (See *City of Montebello v. Vasquez, supra,* 1 Cal.5th at p. 424 [parties clash on whether an inference of quid pro quo could be drawn from campaign contributions].)

3. Irrelevant Matter Not Discussed.

At pages 6 through 18, the Answer states what the District believes the criminal-case evidence would show if it were admissible. Because the sole issue on review is whether the proffered evidence was admissible, petitioners do not reply to the

factual argument. Building on its factual argument, the District argues at pages 40 through 44 that if the criminal-case evidence is received, the District meets its second-stage burden to show a probability of success. No such issue is on review. (See, e.g., Reply Supporting Petition for Review 2–3.) All the following cases were cited only in that part of the Answer, so they require no discussion: *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1330; *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1127–1128; *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1073, 1075; *People v. Deysher* (1934) 2 Cal.2d 141, 149–150; *Thomson v. Call* (1985) 38 Cal.3d 633, 648, 652; *United States v. Blagojevich* (7th Cir. 2015) 794 F.3d 729, 738 [omitted from table of authorities].

At page 19, the Answer discusses the standard of review. This is undisputed. The following cases, cited only there, require no discussion: *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1171–1176; *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329; *San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 622.

The Answer correctly cites *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384, to state that artful pleading may not be used to avoid the anti-SLAPP law, but otherwise the District does not rely on *Baral*. (Answer 20.) It cites *Flatley v. Mauro* (2006) 39 Cal.4th 299, 316, in explaining that the Court of Appeal found the District could not avoid reaching the second stage of anti-SLAPP analysis by an argument that petitioners' conduct was illegal.

(Answer 22.) But the District does not argue the Court of Appeal erred.

The Answer cites a string of historical anti-SLAPP cases stating that at the second stage, a plaintiff need show only minimal merit. (Answer 23, citing *Navellier v. Sletten, supra*, 29 Cal.4th at pp. 94, 96 [also cited p. 1]; *Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 741; *Briggs v. Eden Council for Hope & Opportunity, supra*, 19 Cal.4th at p. 1123; *Soukup v. Law Office of Herbert Hafif, supra*, 39 Cal.4th at p. 291; *Varian Medical Systems, Inc. v. Delfino, supra*, 35 Cal.4th at p. 192; and *Equilon Enterprises v. Consumer Cause, Inc., supra*, 29 Cal.4th at p. 65 [also cited p. 2].) But the issue here does not ask the Supreme Court to decide whether the District can show a probability of success; it only asks whether the District can use the criminal-case materials in attempting to do so. (Petn. for Review, pp. 1, 18; Opening Brief, pp. 1, 29.) On page 1, the Answer cites *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 89, which discusses hospital peer review committees, for general, nonsubstantive history.

At pages 29, 30, and 39 the Answer discusses whether the hearsay declarants would be competent to testify as they did, if they had provided declarations in this case. The competence of the declarants has never been an issue.

4. Conclusion.

The Supreme Court should reverse the decision of the Court of Appeal with a clear holding that Code of Civil Procedure section 2009 does not authorize receiving in evidence documents

that are not declarations in the matter before the court but instead contain former testimony from other cases. It should then remand the case to the Court of Appeal to perform the second-prong anti-SLAPP analysis under the evidence principles elucidated in the Supreme Court's opinion.

Respectfully submitted,

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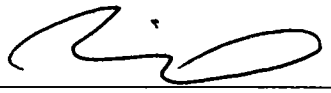
By Charles A. Bird

Attorneys for Gilbane Building Company and Gilbane/SGI a joint venture

Certificate of Compliance

I, Charles A. Bird, appellate counsel to Gilbane Building Company and Gilbane/SGI a joint venture, certify that the foregoing brief is prepared in proportionally spaced Century Schoolbook 13 point type and, based on the word count of the word processing system used to prepare the brief, the brief is 3,131 words long.



Charles A. Bird

PROOF OF SERVICE

Sweetwater Union High School District v. Gilbane Building Company, et al.,
Supreme Court Case No. S233526
Court of Appeal, Fourth Appellate District, Division One, Case No. D067383
San Diego Superior Court Case No. 37-2014-00025070-CU-MC-CTL

I, Renee M. Evans, declare as follows: I am employed with the law firm of Dentons US LLP, whose address is 4655 Executive Drive, Suite 700, San Diego, California 92121. I am over the age of eighteen years, and am not a party to this action. On December 1, 2016, I served the foregoing document described as:

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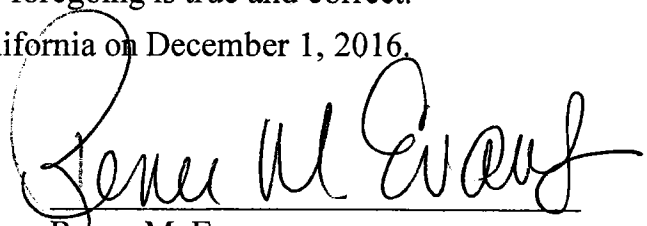

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