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FILED
San Francisco County Superior Court

MAY 7 - 1998

ALAN CARLSON, Clerk
BY: Deputy Clerk

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO

CERIDIAN CORP., a Delaware corporation,

Plaintiff,

vs.

FRANCHISE TAX BOARD, an agency of
the State of California,

Defendant.

NO. 983377

TENTATIVE DECISION

Upon the stipulations of the parties and briefs, this matter proceeded to trial. The matter was submitted February 9, 1998.

At the time in question, plaintiff Ceridian Corporation ("Ceridian") owned several insurance companies which paid it dividends. It seeks a refund of corporate franchise taxes upon such dividends, for the years 1978 through 1982. Ceridian was incorporated in Delaware; its principal place of business is in Minnesota. Its subsidiary insurance companies were not domiciled in California, but did derive some premium income from California sources.

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1 Because of its non-California domicile, Ceridian was not allowed to deduct such insurance
2 company dividends from its corporate Franchise Tax. Section 24410(a) Rev. & Tax.¹ Ceridian
3 claims the restriction of dividend deductions received from insurance company subsidiaries to
4 California-domiciled corporations unconstitutionally discriminates against interstate commerce.
5 Defendant Franchise Tax Board ("FTB") cannot and does not seriously contest this claim. Section
6 24410(a) imposed a higher tax burden on out of state corporations than on similarly situated in-state
7 corporations. In doing so, California provided a direct commercial advantage to local enterprises in
8 violation of Article I, Section 8, Clause 3 of the Federal Constitution, which preserves to the
9 United States the power to regulate commerce between the several States. That clause imposes a
10 duty on the States: **not** unjustifiably to burden interstate commerce. *Oregon Waste Systems, Inc. v.*
11 *Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, 98 (1994).

12 Further, because the insurance companies had relatively little in the way of California
13 property or payroll, Ceridian was allowed a proportionately smaller amount of deductions from its
14 said dividend income. The amount of its deductions were based on three factors, only one of which
15 involved where the insurance premiums (gross income to the insurance company) arose, the other
16 two based on the location of property and payroll generation. Section 24410(b). On its face, this
17 taxing scheme discriminates against the owner of insurance companies which do business in
18 California, but retain their property and payroll in other states, on no basis other than their refusal to
19 relocate their property and payroll to California.

20 FTB attempts to justify this patently discriminatory statute on the grounds that it is patterned
21 to avoid double taxation. So long as it roughly apportions taxes to the business done in the state,
22 FTB claims the statute passes constitutional muster. *Container Corp. v. Franchise Tax Board*,
23 (1983) 463 U.S. 159, 169-170.

24 Where FTB fails is in its refusal to recognize that its taxation of corporate insurance gross
25 premiums is quite unlike taxation of other corporations' net income, and that such difference, when
26

27 ¹Unless otherwise indicated, all statutory references refer to the California Revenue and
28 Taxation Code as it existed during the income years at issue in this case.

1 combined with Section 24410(b) *effects* rather than *avoids* double taxation. Premium gross income
2 derived from California sources is taxed once at source, and then again when delivered to the parent
3 company in the form of a dividend, UNLESS the insurance company has all its property and payroll
4 located in California.²

5 Even were Section 24410(b) to fit the rough allocation boundaries mentioned in *Container*
6 *Products, supra*, FTB has not proved the elements of the required compensating tax defense. *Fulton*
7 *v. Faulkner*, (1996) 516 U.S. 325. It has not identified the intrastate tax burden suffered by
8 California domiciled parent corporations, which own dividend-paying insurance company
9 subsidiaries, and which the added tax on plaintiff is meant to compensate. Having failed so to
10 identify, it understandably has not attempted to show this added tax approximates, but does not
11 exceed, the intrastate tax. Lastly, it also does not attempt to show the events on which the interstate
12 and intrastate tax are imposed are substantially -- or indeed at all -- equivalent.

13 For these reasons, Section 24410(b) must be, and is, found to be facially discriminatory
14 against interstate commerce and as applied to plaintiff here, violative of the Commerce Clause of the
15 Federal Constitution.

16 The proper remedy for correction of the exaction of impermissibly discriminatory taxes
17 would seem to be a refund of such amount. However, FTB argues that Section 19390 requires that
18 rather than make plaintiff whole, the FTB can correct the situation by retroactively increasing taxes
19 on plaintiff's competitors.³

21 ²This is illustrated by defendant's example, turned against it by plaintiff, at pages 3-6,
22 Plaintiff's Reply Brief. Defendant attempts to justify its limitations on deductibility of dividends by
23 arguing that since premium income is tied to the location of property and payroll generation, a
24 constitutionally permitted result is obtained. "In the real world, there is a close correlation between
25 gross premiums on the one hand, and on the other hand, property and payroll." Reply Trial Brief of
26 Defendant Franchise Tax Board, 4:2-5. There is not only a dearth of evidence of any such "close
27 correlation", but observable facts are quite to the contrary. One doubts whether anyone would claim
28 that most of The Hartford's gross premiums are generated amongst Connecticut's comparatively
small population, yet that is where the company's principal buildings and headquarter's employees
are located.

³This solution assumes a static marketplace where plaintiff's competitors in the tax years
1978-1982 are still around today and will be around tomorrow, in substantially the same corporate
shape at all times relevant. There is no evidence this is the case. The stipulations do not so
(continued...)

1 The fact that statutes of limitations intervene to protect the competitors is brushed off by the
2 FTB as a ubiquitous condition which ought not to change the result. But it does. If the further taxes
3 suggested by the FTB cannot be collected from plaintiff's competitors because of the statutes of
4 limitations, the suggested remedy rings hollow: the competitive disadvantage to which plaintiff has
5 been subjected will hardly be corrected.

6 Besides FTB's such suggestion being an inadequate remedy for plaintiff, to the extent that
7 Section 19390 suggests it, plaintiff has persuasively shown that section has to do with banks, not
8 insurance companies nor holding companies which hold insurance companies.

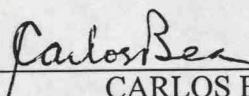
9 For the foregoing reasons, the Court finds that a refund is the proper and meaningful
10 "backward-looking" relief to be afforded to the plaintiff. *McKesson v. Division of Alcoholic*
11 *Beverages & Tobacco*. 496 U.S. 18 (1990).

12 The stipulated amount of tax refund to be found based on determination that both Section
13 24410(a) and Section 24410(b) were facially discriminatory and violative of the Commerce Clause's
14 protection was \$556,442.⁴ Return of this money by FTB to plaintiff is the appropriate remedy here.

15 As the prevailing party, and in accord with Rules of Court 232 and Section 632 Code of Civil
16 Procedure, this Tentative Decision shall become the Statement of Decision of the Court, unless the
17 parties otherwise move within the time provided. Plaintiff to prepare the appropriate judgment.

18 SO ORDERED.

19 Dated: May 4, 1998

20
21 
22 CARLOS BEA
23 Judge of the Superior Court

24 ³(...continued)
25 establish. Even the plaintiff has undergone corporate change from Control Data to Ceridian.

26 ⁴ This was the amount stipulated to by plaintiff and FTB. Reply Trial Brief of Defendant
27 Franchise Tax Board, 8:12. FTB's attempts to change that figure to a lower one because of
28 "excusable mistake" (Sec.473 Code Civ. Proc.) was rejected by this court's earlier ruling that failure
to read a stipulation before signing it was not "excusable neglect".

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO

0241

CERIDIAN CORP., a Delaware
corporation,

Plaintiff,

FRANCHISE TAX BOARD, an agency
of the State of California,

Defendant.

NO. 983377

CERTIFICATE OF SERVICE BY MAIL
(Code Civ.Proc. 1013a(4))

MANUELITA ECHEVERRIA

I, _____, a deputy clerk of the Superior Court for the City and
County of San Francisco, certify that:

1) I am not a party to this action;

2) On **MAY 7 - 1998**, I served the attached:

TENTATIVE DECISION

by placing a copy thereof in a sealed envelope, addressed as follows:

Julian O. Standen
Deputy Attorney General
50 Fremont St., Ste. 300
San Francisco, CA 94105-2239

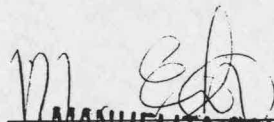
James P. Kleier, Esq.
Graham & James LLP
One Maritime Plaza, Third Flr.
San Francisco, CA 94111

and,

3) I then placed the sealed envelope in the outgoing mail at 400 McAllister Street,
San Francisco, CA 94102-4514 on the date indicated above for collection, attachment of required
prepaid postage, and mailing on that date following standard court practices.

DATED: **MAY 7 - 1998**

ALAN CARLSON, Clerk

By:  Deputy
MANUELITA ECHEVERRIA

85 Cal.App.4th 875

86 Cal.App.4th 383G, 102 Cal.Rptr.2d 611, 00 Cal. Daily Op. Serv. 10,156, 2000 Daily Journal D.A.R. 13,563

(Cite as: 85 Cal.App.4th 875)

H

CERIDIAN CORPORATION, Plaintiff and
Respondent,

v.

FRANCHISE TAX BOARD, Defendant and
Appellant.

Court of Appeal, First District, Division 3,
California.

Dec. 21, 2000.

[Modification [FN*] of opinion (85 Cal.App.4th 875;
102 Cal.Rptr.2d 611) on
denial of petition for rehearing.]

FN* This modification requires changing the word
"premiums" to "dividends" on line 3 of the second
paragraph of the summary, page 875 and line 10 of
headnote (4a-4d), page 876 of the advance report.

No. A084298.

Court of Appeal, First District, Division 3,
California.

Jan. 18, 2001.

THE COURT.

The petition for rehearing is denied. It is ordered that
the opinion filed herein on December 21, 2000, be
modified in the following particular:

On page 15 [85 Cal.App.4th 890, advance report],
the disposition paragraph (part III, Conclusion and
Disposition) should read:

"We hold that Revenue and Taxation Code section
24410 is an unconstitutional enactment in that it
violates the commerce clause both by allowing a
deduction for insurance subsidiary dividends only to
corporations domiciled in California, and in limiting
the amount of the deduction according to a formula
based on the subsidiary's gross receipts, payroll and
property within the state. The trial court's judgment
invalidating the statute and awarding Ceridian the
stipulated amount of tax refund is affirmed."

CERIDIAN CORPORATION, Plaintiff and
Respondent,

v.

FRANCHISE TAX BOARD, Defendant and
Appellant.

No. A084298.

SUMMARY

In a foreign corporation's action against the
Franchise Tax Board for a refund of taxes paid for
income from dividends received from its insurance
subsidiary, which had also paid California taxes, the
trial court entered a judgment awarding a refund,
finding that Rev. & Tax. Code, 24410, which
governs taxation of insurance company dividends paid
to major corporate stockholders, is unconstitutional.
(Superior Court of the City and County of San
Francisco, No. 983-377, Carlos Bea, Judge.)

The Court of Appeal affirmed. It held that Rev. &
Tax. Code, 24410, violates the commerce clause of
the United States Constitution both by allowing a
deduction for insurance subsidiary premiums only to
corporations domiciled in California (Rev. & Tax.
Code, 24410, subd. (a)) and by limiting the amount
of the deduction according to a formula based on the
subsidiary's gross receipts, payroll, and property
within the state (Rev. & Tax. Code, 24410, subd.
(b)). This subdivision is discriminatory on its face. It
disallows a deduction based on the amount of property
and employees that the dividend-declaring insurer has
in another state, favors domestic corporations over
their foreign competitors in raising capital among
California corporations, and tends to discourage
domestic corporations from plying their trade in
interstate commerce. The court further held that a
refund to the corporation was the proper remedy in
this case. (Opinion by Parrilli, J., with McGuiness, P.
J., and Walker, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Corporations § 58--Taxation--Franchise Tax--
Computation--Deduction of Dividends.

Rev. & Tax. Code, 24401 and 24402, allow a
corporation, in computing its taxable income, to
deduct dividends declared from income under
franchise, alternative minimum, or income *876
taxes. The purpose of this dividend deduction is to

avoid double taxation at the corporate level of income that has already been subjected to California taxation in the hands of the dividend-declaring corporation.

(2) Commerce § 3--State Regulation of Interstate Commerce--Commerce Clause.

U.S. Const., art. I, § 8, cl. 3, gives Congress the power to regulate commerce between the states. Though phrased as a grant of regulatory power to Congress, the commerce clause has a negative aspect that denies the states the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. This negative aspect of the commerce clause prohibits economic protectionism, that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. A state may justify a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. However, the standards for such justification are high.

(3) Commerce § 3--State Taxation of Interstate Commerce--Commerce Clause.

Under the commerce clause (U.S. Const., art. I, § 8, cl. 3), a state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the state.

(4a, 4b, 4c, 4d) Corporations § 55--Taxation--Statute Governing Taxation of Insurance Company Dividends Paid to Major Corporate Stockholders--Constitutionality.

In a foreign corporation's action for a refund of taxes paid for income from dividends received from its insurance subsidiary, the trial court properly found that Rev. & Tax. Code, 24410, which governs taxation of insurance company dividends paid to major corporate stockholders, is unconstitutional. Rev. & Tax. Code, 24410, subd. (a), violates the commerce clause of the federal Constitution by allowing a deduction for insurance subsidiary premiums only to corporations domiciled in California. Rev. & Tax. Code, 24410, subd. (b), also violates the commerce clause by limiting the amount of the deduction according to a formula based on the subsidiary's gross receipts, payroll, and property within the state. This

subdivision is discriminatory on its face. It disallows a deduction based on the amount of property and employees that the dividend-declaring insurer has in another state, favors domestic corporations over their *877 foreign competitors in raising capital among California corporations, and tends to discourage domestic corporations from plying their trade in interstate commerce, from purchasing property or hiring employees in other states, and from purchasing subsidiary insurance corporations that do so. Even if the statute serves the laudable purpose of preventing double taxation, it does not survive a challenge based on the commerce clause.

[See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, 288 et seq.]

(5) Commerce § 3--State Taxation of Interstate Commerce--Facial Discrimination.

A state tax may violate the commerce clause of the federal Constitution (U.S. Const., art. I, § 8, cl. 3) even if it has no discriminatory goal or intent, if it is facially discriminatory or has the effect of unduly burdening interstate commerce. Absent a compelling justification, a state may not advance its legitimate goals by means that facially discriminate against interstate commerce.

(6a, 6b) Commerce § 3--State Taxation of Interstate Commerce--Nexus with Taxing State.

A state's tax scheme may survive an attack under the commerce clause of the federal Constitution (U.S. Const., art. I, § 8, cl. 3) only when the tax scheme is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. If a restriction on commerce is discriminatory, it is virtually per se invalid. Nevertheless, a facially discriminatory tax scheme may be saved from constitutional infirmity if it is a valid compensatory tax designed simply to make interstate commerce bear a burden already borne by intrastate commerce. First, to justify a tax scheme as compensatory, the state has the responsibility to identify the intrastate tax burden for which the state is attempting to compensate. Second, to invoke the compensatory tax defense the state must show that the tax on interstate commerce roughly approximates, but does not exceed, the amount of the tax on intrastate commerce. Third, the state must show that the compensating taxes fall on substantially equivalent events, which means that they

must be sufficiently similar in substance to serve as mutually exclusive proxies for each other.

(7) Taxpayers' Remedies § 1--Constitutional Violations.

If a state places a taxpayer under duress promptly to pay a tax when due and relegates him or her to a postpayment refund action in which the *878 taxpayer can challenge the tax's legality, the due process clause of U.S. Const., 14th Amend., obligates the state to provide meaningful, backward-looking relief to rectify any unconstitutional deprivation.

(8a, 8b) Taxpayers' Remedies § 6--Recovery of Taxes Paid--Statute Found to Be Unconstitutional--Proper Remedy.

In a corporate taxpayer's action for a refund of taxes paid, in which the trial court found that Rev. & Tax. Code, 24410 (taxation of insurance company dividends paid to major corporate stockholders), is unconstitutional, the trial court properly ordered the Franchise Tax Board to refund the taxes paid under Rev. & Tax. Code, 24410. In similar situations, the available remedies are (1) to refund to the corporation the difference between the tax it paid and the tax it would have been assessed were it allowed the same deductions its competitors actually received, (2) to assess and collect back taxes from the corporation's competitors who benefited from the deductions during the contested tax period, or (3) to fashion a combination of a partial refund to the corporation and a partial retroactive assessment of tax increases on its favored competitors. Retroactive remedies are codified in Rev. & Tax. Code, 19393, but in this case, the statute of limitations had expired for the relevant tax years. Rev. & Tax. Code, 19393, violates a taxpayer's right to due process, where the retroactive assessment it provides cannot lawfully be collected. Furthermore, the court could not reform Rev. & Tax. Code, 24410, to make it constitutional, since the commerce clause violation was clear and unambiguous, precluding the court's attempt to divine legislative intent.

(9) Statutes § 20--Construction--Judicial Function--Reformation of Statute.

A court may reform a statute in order to preserve it against invalidation under the Constitution, when the court can say with confidence that (1) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (2) the enacting body would have preferred

the reformed construction to invalidation of the statute.

COUNSEL

Bill Lockyer, Attorney General, Randall P. Borcharding and Julian O. Standen, Deputy Attorneys General, for Defendant and Appellant.

Preston, Gate & Ellis, James P. Kleier and Julie A. Aguilar for Plaintiff and Respondent. *879

Morrison & Foerster, Thomas H. Steele, Amy L. Silverstein and Mariah A. Panza for Wells Fargo & Company as Amicus Curiae on behalf of Plaintiff and Respondent.

Wm. Gregory Turner for California Taxpayers' Association as Amicus Curiae on behalf of Plaintiff and Respondent.

PARRILLI, J.

In this case we hold that Revenue and Taxation Code section 24410 violates the commerce clause of the United States Constitution.

The Franchise Tax Board of the State of California (Board) appeals from a judgment awarding a refund to Ceridian Corporation (Ceridian). The trial court ruled that the statute governing taxation of insurance company dividends paid to major corporate stockholders is unconstitutional. The Board claims this ruling was erroneous, and also contends that even if the statute is invalid, a tax refund is not the proper remedy. We agree with the trial court on both issues and affirm the judgment.

I. Facts

Ceridian, formerly Control Data Corp. (Control Data), sought a refund of corporate franchise taxes imposed upon Control Data for the income years 1978 through 1982, and upon Commercial Credit Company (Commercial Credit) for the income years 1978 and 1979. Ceridian is the successor to all causes of action and rights asserted herein on behalf of Control Data and Commercial Credit. Ceridian is a Delaware corporation, with its commercial domicile in Minnesota. Commercial Credit is a Delaware corporation with its commercial domicile in Maryland. During the income years at issue,

Commercial Credit was a wholly owned subsidiary of Control Data.

During the income years 1978 through 1982, Control Data was engaged in the business of manufacturing and selling computers, computer systems and peripheral equipment, and in providing computer-related services. Commercial Credit was engaged, through its subsidiaries, in the business of providing financial services and insurance to businesses and individual customers.

Control Data and Commercial Credit filed separate California Bank and Corporation Tax returns for themselves and their wholly owned groups for 1978 and 1979. Thus, each entity calculated its own business income and *880 apportioned income to California based upon the averages of its California property, payroll and sales as a percentage of total property, payroll and sales. For the tax years 1980 through 1982, Control Data and Commercial Credit filed California corporate franchise tax returns on the combined report method. Under this method, the taxable business income for Control Data and Commercial Credit was combined, and then apportioned to California based upon the averages of their combined California property, payroll and sales as a percentage of total combined property, payroll and sales.

In 1985, the Board recomputed the California tax liabilities of Control Data and Commercial Credit for the income years 1978 and 1979 on the basis that a combined report should have been filed, rather than separate returns. Additionally, the Board determined that business income included on these combined returns, as well as the combined returns filed for the 1980 through 1982 years, should have included approximately \$78 million in dividends received from the insurance company subsidiaries. Ceridian paid the disputed amount and exhausted its administrative remedies.

On December 19, 1996, Ceridian filed a complaint for refund of taxes, alleging that taxation of Commercial Credit's insurance subsidiary dividends violated due process and the commerce clause of the federal Constitution. The case came before the trial court on stipulated facts. On May 7, 1998, the court issued its tentative decision, finding that Revenue and Taxation Code section 24410 is facially discriminatory and violates the commerce clause. The court awarded

Ceridian a tax refund in the stipulated amount of \$556,442. Judgment was entered accordingly (Code Civ. Proc., 632; Cal. Rules of Court, rule 232), and the Board filed a timely notice of appeal.

II. Discussion

A. Constitutional Validity of Section 24410

1. The Revenue and Taxation Code [FN1]

With certain exceptions, every corporation doing business in California pays an annual franchise tax measured by its net income. (23151.) When that income is derived from or attributable to sources both within and outside the state, it is apportioned in accordance with the Uniform Division of Income for Tax Purposes Act (25120 et seq.). (25101, 25121.) The act's allocation formula is based on the proportion of a corporation's total property, payroll and sales which are located in the state. (25128-25136.) In *881 computing its taxable income, a corporation may deduct "[d]ividends declared from income under franchise, alternative minimum, or income taxes." (24401, 24402.) (1) The purpose of this dividend deduction is "to avoid double taxation at the corporate level of income which has already been subjected to California taxation in the hands of the dividend-declaring corporation. [Citations.]" (Safeway Stores, Inc. v. Franchise Tax Board (1970) 3 Cal.3d 745, 749-750 [91 Cal.Rptr. 616, 478 P.2d 48], italics in original (Safeway Stores).)

FN1 Unless otherwise indicated, all further statutory references are to the Revenue and Taxation Code.

In lieu of the corporate franchise tax, insurance companies pay an annual tax based on the amount of gross premiums, less return premiums, received upon business done in this state. (12221; Cal. Const., art. XIII, 28.) The statute at issue in this case allows a deduction in computing taxable income (24401) for "Dividends received by a corporation commercially domiciled in California, during the income year from an insurance company subject to tax imposed by [the 'Insurance Taxation' part] of this division at the time of the payment of the dividends and at least 80 percent of each class of its stock then being owned by the corporation receiving the dividend." (24410, subd. (a).) The deduction is "limited to that portion of the dividends received which are determined to be paid from income from California sources determined pursuant to subdivision (c)." (24410, subd. (b).) The apportionment formula set out in subdivision (c) uses

the average of three factors-gross receipts, payroll, and property-to determine an insurance company dividend payor's gross income from California sources, which is then used to determine the amount of dividends paid from California sources. [FN2] The parties herein stipulated that for purposes of subdivision (b), "for each of the *882 years at issue, the average percentage of the payroll, property and gross receipts in California of each insurance company paying dividends" to Ceridian is 1.77 percent.

FN2 In pertinent part, section 24410 establishes a deduction for: "(a) Dividends received by a corporation commercially domiciled in California, during the income year from an insurance company subject to tax imposed by Part 7 (commencing with Section 12001) of this division at the time of the payment of the dividends and at least 80 percent of each class of its stock then being owned by the corporation receiving the dividend. [] (b) The deduction under this section shall be limited to that portion of the dividends received which are determined to be paid from income from California sources determined pursuant to subdivision (c). [] (c) Dividends paid from California sources shall be determined by multiplying the amount of the dividends by an apportionment factor equal to the ratio of gross income from California sources to all gross income of the company. Gross income from California sources equals total gross income less dividends from other insurance companies multiplied by the average of the following three factors: [] (1) A gross receipts factor, the denominator of which shall include all receipts, other than dividends from another insurance company, regardless of the nature or source from which derived. The numerator of which shall include all gross receipts, other than dividends from another insurance company, derived from or attributable to this state. With respect to premiums, only receipts which were subject to tax under Part 7 (commencing with Section 12001) of this division, shall be included in the numerator, and with respect to income from intangibles they shall be attributable to the commercial domicile of the insurance company. [] (2) A payroll factor determined under the provisions of the Uniform Division of Income for Tax Purposes Act, Chapter 17, Article 2 of this part. [] (3) A property factor, determined under the provisions of the Uniform Division of Income for Tax Purposes Act provided for in Article 2 (commencing with Section 25120) of Chapter 17 of this part, provided that for the purposes of this paragraph the property factor shall include all intangible investment property, which intangible property shall be allocated to the

commercial domicile of that insurance company. [] (4) Plus the portion of the dividends received from another insurance company determined to be paid from California source income pursuant to the formula set forth in paragraphs (1) through (3) based upon the receipts, payroll and property of that other insurance company."

2. The Commerce Clause

(2) The Constitution gives Congress the power to regulate commerce between the states. (U.S. Const., art. I, § 8, cl. 3.) "Though phrased as a grant of regulatory power to Congress, the [Commerce] Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. [Citations.]" (Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore. (1994) 511 U.S. 93, 98 [114 S.Ct. 1345, 1349, 128 L.Ed.2d 13] (Oregon Waste).) "This 'negative' aspect of the Commerce Clause prohibits economic protectionism-that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. [Citations.] Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down [citations], unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism [citation]." (New Energy Co. of Indiana v. Limbach (1988) 486 U.S. 269, 273-274 [108 S.Ct. 1803, 1807-1808, 100 L.Ed.2d 302].) Supreme Court cases "leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. [Citations.] This is perhaps just another way of saying that what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense-that is, a protectionist enactment-may on closer analysis not be so. However it be put, the standards for such justification are high. [Citations.]" (Id. at pp. 278-279 [108 S.Ct. at p. 1810]; see also Hughes v. Oklahoma (1979) 441 U.S. 322, 337 [99 S.Ct. 1727, 1737, 60 L.Ed.2d 250] [facial discrimination invokes "strictest scrutiny."])

3. Discriminatory Taxation

(3) Under the commerce clause, "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." (Armco Inc. v. Hardesty (1984) 467 U.S. 638, 642 [104 *883 S.Ct. 2620, 2622, 81 L.Ed.2d 540].) (4a) As it did below, the Board essentially concedes that subdivision (a) of section 24410, which allows

only corporations "commercially domiciled" in California to deduct certain insurance company dividends from their taxable income, violates the commerce clause. [FN3] We agree that subdivision (a) violates the commerce clause because it limits the pertinent deduction to those corporations "commercially domiciled" in California. Thus, the only disputed issue in this case is whether subdivision (b), which limits the deduction to dividends "paid from income from California sources" also violates the commerce clause. We conclude that it does.

FN3 However, the Board is constitutionally compelled to enforce the provision until it is judicially invalidated: "An administrative agency, ... has no power: [] (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; [] (b) To declare a statute unconstitutional" (Cal. Const., art. III, 3.5, subds. (a) & (b).)

The trial court found section 24410, subdivision (b) "patently discriminatory," because "[o]n its face, this taxing scheme discriminates against the owner of insurance companies which do business in California, but retain their property and payroll in other states, on no basis other than their refusal to relocate their property and payroll to California." The Board contends, on the contrary, that subdivision (b) is a constitutionally valid means of avoiding double taxation, analogous to that provided for non-insurance subsidiaries by section 24402 (ante, p. 881). The Board claims subdivision (b) does not discriminate against or burden interstate commerce, but levels the playing field between corporate taxpayers receiving dividends from insurance companies doing business in California, which are subject to the gross premiums tax, and those receiving dividends from insurance companies doing business elsewhere, which are not. Were it not for subdivision (b), the Board argues, California would tax the former's income twice, and the latter's only once.

Both Ceridian and amici curiae Wells Fargo and California Taxpayers' Association (hereafter amici) vigorously assert that section 24410, subdivision (b) does not prevent double taxation. However, the parties' debate about whether subdivision (b) does or does not prevent double taxation misses the mark. The issue is not whether subdivision (b) serves some legitimate purpose, but whether it survives a

commerce clause challenge. Significantly, the Board's authorities do not stand for the proposition that a commerce clause challenge would be overcome even if subdivision (b) prevented double taxation.

For example, the case of *United States v. Woodmansee* (N.D.Cal. 1975) 388 F.Supp. 36 (rev'd in *United States v. Woodmansee* (9th Cir. 1978) 578 *884 F.2d 1302), cited for the proposition that "the protection of competition has been recognized as a legitimate goal of tax laws intended to avoid double taxation," concerns a federal statute and thus does not present a negative commerce clause problem. (5) Moreover, a tax may violate the commerce clause even if it has no discriminatory goal or intent, if it is facially discriminatory, or has the effect of unduly burdening interstate commerce. (*Amerada Hess Corp. v. N.J. Taxation Div.* (1989) 490 U.S. 66, 75 [109 S.Ct. 1617, 1622-1623, 104 L.Ed.2d 58].) "Absent a compelling justification ... a State may not advance its legitimate goals by means that facially discriminate against [interstate] commerce. [Citations.]" (*Kraft Gen. Goods, Inc. v. Iowa Dept. of Revenue and Finance* (1992) 505 U.S. 71, 81 [112 S.Ct. 2365, 2371, 120 L.Ed.2d 59].)

(4b) The Board asserts that section 24402 (the general dividend deduction statute) "has been recognized as a valid means of avoiding double taxation." Accepting *arguendo* the Board's characterization of section 24402 as the "counterpart" of section 24410 (see ante, pp. 881-882, fn. 2), none of the cases cited by the Board concerned a commerce clause challenge, nor did they hold that section 24402 is a constitutionally valid means of avoiding double taxation. (See *Safeway Stores*, supra, 3 Cal.3d at pp. 749-750; *Great Western Financial Corp. v. Franchise Tax Bd.* (1971) 4 Cal.3d 1, 6 [92 Cal.Rptr. 489, 479 P.2d 993]; *Max Factor & Co. v. Franchise Tax Bd.* (1973) 35 Cal.App.3d 7, 11 [110 Cal.Rptr. 536].)

The Board relies primarily on a footnote in a 65-year-old Supreme Court case. In *Colgate v. Harvey* (1935) 296 U.S. 404 [56 S.Ct. 252, 80 L.Ed. 299, 102 A.L.R. 54] (*Colgate*), the court looked at a Vermont statute that "impose[d] a tax upon dividends earned outside the State of Vermont, while exempting from the tax dividends earned within the state," and also "discriminate[d] in favor of money loaned within the state as against money loaned outside the state [.]". (Id. at pp. 418-419 [56 S.Ct. at p. 254].) The court considered challenges to the statute under both the

equal protection and privileges and immunities clauses of the fourteenth amendment. (Id. at p. 419 [56 S.Ct. at p. 254].) In a footnote, the court remarked, "The further point is made that the discrimination in respect of dividends and interest upon loans is a regulation of interstate commerce and therefore void under the commerce clause of the federal Constitution. But we mention this latter claim only to reject it as without merit, since clearly a tax upon income is not an interference with interstate commerce simply because the income is derived from a source within another state; and moreover, if there be any tendency to interfere with such commerce it is purely collateral and incidental. [Citations.]" (Ibid., fn. 2 [56 S.Ct. at p. 254].) The court went on to uphold the dividends provision, but invalidate the interest provision (id. at p. *885 436 [56 S.Ct. at pp. 261-262]); it later overruled *Colgate* insofar as it had found therein a violation of the privileges and immunities clause (*Madden v. Kentucky* (1940) 309 U.S. 83, 93 [60 S.Ct. 406, 410-411, 84 L.Ed. 590, 125 A.L.R. 1383]).

Later still, a federal appeals court rejected the appellants' reliance on footnote 2. The appeals court noted that Supreme Court decisions in the half-century after *Colgate* was decided confirmed the district court's finding that *Colgate's* "collateral" or "direct-indirect" test had been replaced by "the more realistic inquiry of whether a law 'substantially affects' interstate commerce." (*Dominion Nat. Bank v. Olsen* (6th Cir. 1985) 771 F.2d 108, 111.) A concurring judge went further, asserting that the *Colgate* commerce clause analysis, emphasizing whether a state directly taxed interstate commerce rather than whether it created a competitive advantage for local business, "has been overruled sub silentio" and "no longer is good law." (Id. at pp. 118, 119 (conc. opn. of Contie, J.).)

4. Subdivision (b) violates the Commerce Clause

(6a) Under modern Supreme Court jurisprudence, a tax scheme may survive a commerce clause attack only when it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." (*Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, 279 [97 S.Ct. 1076, 1079, 51 L.Ed.2d 326], italics added.) "If a restriction on commerce is discriminatory, it is

virtually per se invalid. [Citations.]" (*Oregon Waste, supra*, 511 U.S. at p. 99 [114 S.Ct. at p. 1350].) Nevertheless, a facially discriminatory tax scheme "may be saved from constitutional infirmity if it is a valid 'compensatory tax' designed simply to make interstate commerce bear a burden already borne by intrastate commerce." (*Associated Industries of Mo. v. Lohman* (1994) 511 U.S. 641, 647 [114 S.Ct. 1815, 1821, 128 L.Ed.2d 639].) [FN4] "To justify a charge on interstate commerce as a compensatory tax, a State must, as a threshold matter, 'identify the intrastate tax burden for which the state is attempting to compensate.' [Citation.] Once that burden has been identified, the tax on interstate commerce must be shown roughly to approximate-but not exceed-the amount of the tax on intrastate commerce. [Citation.] Finally, the events on which the interstate and intrastate taxes are imposed must be 'substantially equivalent'; that is, they must be sufficiently similar in substance to serve as mutually exclusive 'proxies' for each other. [Citation.]" *886 (*Oregon Waste, supra*, 511 U.S. at p. 103 [114 S.Ct. at p. 1352], internal brackets and ellipses omitted; see also *Fulton Corp. v. Faulkner* (1996) 516 U.S. 325, 332 [116 S.Ct. 848, 854, 133 L.Ed.2d 796] (*Fulton*).)

FN4 The Board thus misspeaks when it cites *United States v. Salerno* (1987) 481 U.S. 739, 745 [107 S.Ct. 2095, 2100, 95 L.Ed.2d 697] for the proposition that a "facially discriminatory law" is one which cannot under any circumstances be applied constitutionally. It is, of course, a facially unconstitutional law which, by definition, cannot be constitutionally applied.

(4c) Significantly, the Board is not contending that the tax scheme under consideration here can be justified as a "compensatory tax." Indeed, the Board has gone so far as to disclaim this position in its reply brief, stating that "*Fulton* is distinguishable because this appeal does not involve a tax on interstate commerce intended to compensate for the burden on intrastate commerce imposed by a different tax." (6b) (See fn. 5) This concession is well taken, since the tax scheme at issue does not meet the three requirements for a "compensatory tax." [FN5]

FN5 First, to justify a tax scheme as "compensatory," the state has the responsibility to identify the intrastate tax burden for which the state is attempting to compensate. (*Fulton, supra*, 516 U.S. at p. 334 [116 S.Ct. at p. 855].) Here, the state has not only failed to identify such a tax burden, it

has explicitly disclaimed that the tax scheme at issue in this case was designed "to compensate for the burden on intrastate commerce imposed by a different tax."

Second, to invoke the "compensatory tax defense" the state must show that the tax on interstate commerce roughly approximates, but does not exceed, the amount of the tax on intrastate commerce. (Fulton, supra, 516 U.S. at pp. 334, 335 [116 S.Ct. at pp. 855, 855-856].) The Board produced no proof whatsoever on this subject at trial or on appeal.

Finally, the state must show that the "compensating taxes" fall on substantially equivalent events, meaning they must be sufficiently similar in substance to serve as mutually exclusive "proxies" for each other. (Fulton, supra, 516 U.S. at pp. 332, 338 [116 S.Ct. at pp. 854, 857].) The state does contend that the California insurance premium tax scheme is a "proxy" for the California franchise tax. But even if this were true, the insurance premium tax scheme cannot qualify as a "compensatory" tax since the state has utterly failed to establish the other elements of the "compensatory tax defense" to a facially discriminatory tax statute.

(4d) Instead, the Board's contention is that section 24410, subdivision (b) "does not discriminate against interstate commerce" and thus it is not even necessary to reach the "compensatory tax defense" issue. In other words, the Board is contending that the statute is not discriminatory because it avoids double taxation. This is a nonsequitur. If subdivision (b) discriminates against interstate commerce, as we conclude it does, then it is virtually per se invalid unless it is a component of a valid "compensatory tax." The fact that the tax scheme may serve some other laudatory purpose does not save it from a commerce clause challenge.

Both Ceridian and amici rely heavily on Fulton, supra, 516 U.S. 325. In that case, the United States Supreme Court considered a North Carolina statute that imposed a one quarter of 1 percent "intangibles" tax on the fair market value of corporate stock owned by North Carolina residents. However, North Carolina residents were allowed to calculate their tax liability under this provision by "taking a taxable percentage deduction equal to the fraction of the issuing corporation's income subject to tax in North Carolina." (Id. at p. 327-328 [116 S.Ct. at p. 852]) This figure was determined by *887 looking at the proportion of the issuing corporation's sales, payroll and property located in North Carolina. The net effect

of the tax scheme was that a corporation doing all of its business within North Carolina would pay corporate income taxes on 100 percent of its income, meaning that a North Carolina resident who owned stock in that company would avoid the "intangibles" tax entirely. At the other extreme, a North Carolina resident who owned shares in a corporation that conducted no business within North Carolina would have to pay the .25 percent tax on the full (100 percent) market value of the stock. Similarly, the share values of corporations that conducted some (but not all) of their business within North Carolina would be subject to a sliding scale deduction. (Id. at p. 328 [116 S.Ct. at p. 852].)

The Fulton court determined that this tax scheme facially discriminated against interstate commerce. The court reasoned: "A regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce." [FN6] (Fulton, supra, 516 U.S. at p. 333 [116 S.Ct. at p. 855].) Similarly, a statutory scheme, such as the one before us, that disallows a deduction based on the amount of property and employees that the dividend-declaring insurer has in another state, favors domestic corporations over their foreign competitors in raising capital among California corporations, and tends, at least, to discourage domestic corporations from plying their trade in interstate commerce, from purchasing property or hiring employees in other states, and from purchasing subsidiary insurance corporations that do so. Thus, section 24410, subdivision (b) is unquestionably discriminatory on its face.

FN6 The Supreme Court also went on to hold that the North Carolina intangibles tax scheme was not a valid "compensatory" tax. However, since the Board has disclaimed a similar justification for the tax scheme in this case, we do not address that portion of Fulton in detail.

In sum, the tax and deduction scheme at issue fits within Fulton's analytical framework. Just as in Fulton, here the state imposes a tax based on value derived from ownership of a corporation. Just as North Carolina reduced its intangibles tax in direct proportion to the amount of business the owned corporation did within the state's borders, so too

California reduces the dividend tax to the extent such dividends are "paid from income from California sources," (24410, subd. (b)), which is calculated based on the proportionate amount of property, payroll and gross receipts the owned corporation has within California. Fulton prohibits such discriminatory treatment. *888

Our analysis leads us to the same conclusion the trial court reached: both subdivision (a) and subdivision (b) of section 24410 place an unjustifiable burden on interstate commerce and are therefore unconstitutional. [FN7]

FN7 Since it is not at issue here, we express no opinion as to the constitutionality of section 24402.

B. Remedies

1. Ceridian: Refund or Retroactive Assessment

(7) "If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." (McKesson Corp. v. Florida Alcohol & Tobacco Div. (1990) 496 U.S. 18, 31 [110 S.Ct. 2238, 2247, 110 L.Ed.2d 17], *fn.* omitted (McKesson).) The McKesson court specified three ways in which a state may provide the requisite "clear and certain remedy" (*id.* at p. 40 [110 S.Ct. at p. 2252]) for its erroneous or unlawful tax collection. (8a) Under these guidelines, the Board in this case may 1) refund to Ceridian the difference between the tax it paid and the tax it would have been assessed were it allowed the same deductions its competitors actually received, 2) assess and collect back taxes from Ceridian's competitors who benefited from the deductions during the contested tax period, or 3) fashion a combination of partial refund to Ceridian and partial retroactive assessment of tax increases on its favored competitors. (*Id.* at pp. 40-41 [110 S.Ct. at pp. 2252-2253].)

A retroactive assessment remedy is codified in section 19393, which provides, in relevant part, that for franchise tax purposes, if any deduction provided for by the Bank and Corporation Tax Law (23001 *et seq.*) "is finally adjudged discriminatory against a national banking association contrary to Section 548 of Title 12 of the United States Code, [FN8] or is for

any reason finally adjudged invalid, or discriminatory under the California Constitution, or the laws or the Constitution of the United States, the tax of the favored taxpayer shall be recomputed by the Franchise Tax Board for the taxable year in question, ... by disallowing the deduction" The trial court was persuaded that section 19393 "has to do with banks, not insurance companies nor holding companies which hold insurance companies," and ordered a refund instead.

FN8 "For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." (12 U.S.C. 548.)

On appeal, the Board challenges the court's interpretation of the scope of section 19393, arguing it is not limited to banks. We need not resolve this *889 issue. That is because the parties agree that retroactive tax collection in this case is impossible, since the tax years in question are 1978-1982, and the statute of limitations for assessment or collection of a tax deficiency is four years (19057). Thus, even if section 19393 is broad enough to cover Ceridian, it cannot provide the constitutionally required relief in this case. The Board seems to recognize as much when it reminds us again that it cannot refuse to enforce the provision unless and until it has been adjudged unconstitutional (Cal. Const., art. III, 3.5). We therefore hold that section 19393 violates a taxpayer's right to due process, where, as here, the retroactive assessment it provides cannot lawfully be collected. Accordingly, the trial court did not err by awarding Ceridian the stipulated refund. [FN9]

FN9 The Board maintains that even if Ceridian cannot be denied a refund, section 19393 should be applied to taxpayers that benefited from the deduction and as to whom readjustment of tax liability is not time-barred. On the other hand, not surprisingly, amici repeatedly refer to refunds due to "Ceridian and similarly situated taxpayers." This is not a class action suit; only Ceridian's refund claim is before us. Accordingly, we express no general opinion regarding the appropriate remedy in other cases, nor do we address the breadth of section 19393.

2. Section 24410: Reform or Invalidation

(9) "[A] court may reform-i.e., 'rewrite'-a statute in order to preserve it against invalidation under the Constitution, when we can say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute." (Kopp v. Fair Pol. Practices Com. (1995) 11 Cal.4th 607, 660-661 [47 Cal.Rptr.2d 108, 905 P.2d 1248] (Kopp).) (8b) The Board suggests reformation of section 24410 might be appropriate if only subdivision (a), granting a dividend deduction solely to California corporations, were invalid. However, subdivision (a), which plainly applies only to corporations "commercially domiciled" in California, is clear and unambiguous on its face. Thus, we may not divine the legislative intent from other sources. (Pacific Gas & Electric Co. v. Public Utilities Com. (2000) 85 Cal.App.4th 86, 91-92, 95-96 [102 Cal.Rptr.2d 20].) It follows that section 24410, subdivision (a) is not subject to reformation. (85 Cal.App.4th at pp. 91-92, 95-96.) Moreover, even if we could reform subdivision (a) it would not save the statutory scheme. The deductions thus more broadly allowed would still be calculated in accordance with a formula that we have determined violates the commerce clause. As the Board recognizes, attempting to rewrite subdivision (b) would involve us in precisely the type of judicial policymaking and encroachment on the legislative

function in violation of the separation of powers doctrine, against which the Kopp court warned. (Kopp, supra, 11 Cal.4th at p. 661.) Thus, reformation is not possible in this case. *890

III. Conclusion and Disposition

We hold that Revenue and Taxation Code section 24410 is an unconstitutional enactment in that it violates the commerce clause both by allowing a deduction for insurance subsidiary premiums only to corporations domiciled in California, and in limiting the amount of the deduction according to a formula based on the subsidiary's gross receipts, payroll and property within the state. The trial court's judgment invalidating the statute and awarding Ceridian the stipulated amount of tax refund is affirmed.

McGuiness, P. J., and Walker, J., concurred. *891

Cal.App.1.Dist.,2000.

CERIDIAN CORPORATION, Plaintiff and Respondent, v. FRANCHISE TAX BOARD, Defendant and Appellant. CERIDIAN CORPORATION, Plaintiff and Respondent, v. FRANCHISE TAX BOARD, Defendant and Appellant.

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CALIFORNIA SUPERIOR COURT

COUNTY OF SAN FRANCISCO

LAW & MOTION DEPARTMENT, ROOM 301

JOEL VENTRESCA, SAN FRANCISCANS)
FOR SUNSHINE,)

Petitioners,)

v.)

THE CITY AND COUNTY OF SAN)
FRANCISCO BOARD OF SUPERVISORS,)

Respondent.)

COUNTY OF SAN MATEO, CITY OF)
BRISBANE,)

Real Parties In)
Interest.)

NO. 313931

ORDER DENYING PETITION FOR
ALTERNATIVE WRIT OF
MANDATE

The petition for alternative writ of mandate to order the Board of Supervisors of the City and County of San Francisco to hold an election for the establishment of a municipal utility district consisting of the City and County of San Francisco and the City of Brisbane (San Mateo County) came on regularly for hearing August 7, 2000. Neil D. Eisenberg and Angela Alioto

1 appeared and argued for the petitioners. Wayne Snodgrass and
2 Randy Riddle appeared and argued for respondent City and County
3 of San Francisco. Robert Booth, Jr. appeared and argued for real
4 party in interest City of Brisbane. Pursuant to an *ex parte*
5 motion to intervene, Thomas Willis was allowed to argue on behalf
6 of purported intervenors Coalition for Affordable Public Service,
7 in opposition to the petition.

8 Before the hearing, the Court made available to the parties
9 copies of a tentative decision (Attachment 1 hereto) which stated
10 the reasons for the court's tentative decision to deny the
11 petition. Following a brief recess for purposes of considering
12 whether the petitioners wished to exercise a peremptory challenge
13 (Code of Civ. Proc. § 170.6), the hearing proceeded.

14 At the hearing, petitioners urged that, without conceding
15 the point, even if the court were correct that no complete
16 district formation election should be held until after Local
17 Agency Formation Commission ("LAFCO") action, the petitioners had
18 a right, based on the First Amendment of the Federal
19 Constitution, to have this Court order the Board of Supervisors
20 to hold an election at least as to the question printed in Public
21 Utilities Code section 11645: Whether there should be a
22 Municipal Utility district.

23 Petitioners point to *Matossian v. Fahmie* (1980) 101
24 Cal.App.3d 128 (hereafter *Matossian*) as authority that no
25 governmental body, including this Court, can condition the right
26 of the people to petition the government for redress.

27 *Matossian* involved an appeal from trial court orders
28 dismissing a complaint after demurrers were sustained and summary

1 judgment was granted defendants. Defendants had opposed
2 Matossian's request to the Alcohol Control Board to relocate a
3 liquor license into Berkeley on grounds, among others, that
4 Matossian's business would overly concentrate liquor
5 establishments within the neighborhood, with the consequent
6 social ills attributable to such over-concentration.
7 Understandably, Matossian took the view that the defendants were
8 merely special pleading: his business would predictably
9 constitute greater competition and probably reduce their profits.

10 Plaintiff contended defendants acted with illegal anti-
11 competitive motive in opposing Matossian's request, improperly
12 embroiling him in local and state hearings before the Alcoholic
13 Beverage Control Board, all of which hearings Matossian won.

14 In affirming the trial court's dismissal of Matossian's
15 claims, the court repeated some language from cases which
16 prohibited a "pre-determined condition," or penalty, to the
17 exercise of the right to petition government for redress. (*Id.*
18 at p. 136, quoting *In re Allen* (1980) 71 Cal.2d 388, 391.)
19 Further,

20 "The right to have one's voice heard and one's view
21 considered by the appropriate governmental authority may not be
22 conditioned upon the exaction of a price." (*Id.* at p. 137,
23 quoting *Williams v. Rhodes* (1968) 393 U.S. 23, 41.)

24 Therefore, the Court reasoned, the defendants' protest of
25 the plaintiff's application for license relocation, done in the
26 proper administrative tribunal, even if unsuccessful, was merely
27 the exercise of the constitutionally guaranteed right to initiate
28 the proceedings envisioned by the questioned process.

1 (Matossian, *supra*, 101 Cal.App.3d at p. 138.) Even if the
2 motives for engaging in protest were in violation of the
3 Cartwright Act (regarding monopoly practices), its legality was
4 not affected by its anti-competitive purpose. *Id.* at p. 139.

5 Nowhere in *Matossian* is there any basis for the principle
6 the petitioner would have this Court adopt: that the right of
7 petition to redress grievances includes the right to have the
8 respondent grant the relief sought. The defendants in *Matossian*
9 did not contend their petition of protest had to be granted.
10 They simply asserted that the act of petitioning for redress
11 cannot be the basis of a tort action by their opponents after the
12 petition was rejected.

13 Here, petitioners urge that the petition for an election
14 must be granted by the respondent Board of Supervisors because
15 only the electors of the proposed district, in an election, can
16 deny their petition to form a Municipal Utility District.
17 Petitioners maintain that any condition to an election -- such as
18 whether state laws prohibit the holding of an election until
19 LAFCO has approved the petitioners' proposal -- is an invalid
20 restraint on their right to petition for redress.

21 There is no authority cited for the petitioners' proposed
22 principle. The law is replete with statutory pre-conditions for
23 elections, whether they be for office or for initiative
24 proposals. (See, e.g., Elec. Code § 33 [setting forth
25 prerequisites before a person may be considered a "legally
26 qualified candidate" for any office or party nomination for a
27 partisan office]; Elec. Code § 9002 [draft of a proposed state
28 measure shall be submitted to the Attorney General, to be titled

1 and summarized, prior to the circulation of any initiative or
2 referendum petition for signatures].) Further, the language
3 quoted in Matossian from the U.S. Supreme Court describes the
4 right of petition for redress to be to have "one's voice heard
5 and one's views considered" by government. Here, petitioners
6 have had their petition heard and considered by the Board of
7 Supervisors, which is the institution of government to which they
8 have the right to petition for redress. There is no authority
9 for the proposition that petitioners have the right to "petition"
10 the electors through an election.

11 The requirement that the formation of a Municipal Utility
12 District be previously approved in an administrative proceeding
13 has not restrained the petitioners' right to petition for redress
14 to the Board of Supervisors; nor will it restrain the
15 petitioners' right to petition for redress to LAFCO.

16 There is a further reason to deny the application by
17 petitioners. An election asking solely the question posed by
18 Public Utilities Code section 11645, without also submitting to
19 the electors the names of possible directors who could form the
20 district, would be an election for an impermissible purpose. The
21 Municipal Utility District Act (Pub. Util. Code § 11600, et seq.)
22 provides for an election to form a district, not elections, to
23 "let the people's voice be heard,"¹ to be followed by a second
24

25 ¹"Real party in interest argues that we should 'let the people's voice be heard.' Even if
26 the initiative is invalid, he implies, the election will give the voters the opportunity to express
27 their views on the desirability of a balanced budget, and the legislators may respond to the
28 outcome of the election. This argument misunderstands the purpose of the initiative in
California. It is not a public opinion poll. It is a method of enacting legislation, and if the
proposed measure does not enact legislation, . . . it should not be on the ballot." *American*

1 election for directors of the district, should the vote be
2 favorable to the formation of the district. By parallel
3 reasoning to that used in *AFL-CIO*, *supra*, 36 Cal.3d at p. 695,
4 the Municipal Utility District Act can no more be used for a
5 policy plebescite than can the California Constitution to gauge
6 sentiments regarding a Federal Balanced Budget. In *AFL-CIO*, the
7 petitioning unions could not compel the California Legislature to
8 adopt a *resolution*², rather than a statute. Here, the Municipal
9 Utility District Act cannot be used to compel an election for the
10 expression of views as to whether a district should be formed, as
11 opposed to the actual formation of a district.

12 For the reasons stated in Attachment 1 to this Decision and
13 the further reasons stated herein, the petition for alternative
14 writ of mandate should be, and the same is, hereby DENIED.

15 Respondents, as prevailing parties, will prepare any
16 required formal judgment.

17
18 Dated: AUG 9 2000

19 By: Carlos Bea
20 CB ~~Honorable~~ Carlos Bea

21
22
23
24
25 *Federation of Labor v. Eu*, (1984) 36 Cal.3d 687, 695 (hereinafter *AFL-CIO*).

26 ² "They adopt, and mandate the Legislature to adopt, a *resolution* which does not change
27 California law and constitutes only one step in a process which might eventually amend the
28 federal Constitution. Such a resolution is not an exercise of legislative power reserved to the
people under the California Constitution." *AFL-CIO*, *supra*, at p. 694.

Ventresca v. City and County of San Francisco

Petition for Alternative Writ (order to show cause why writ should not issue); Writ of mandate to Compel the Board of Supervisors to hold an election November 7, 2000 for the formation of a Municipal Utility District for the provision of electricity and gas.

1. Formation of a Municipal Utility District is governed by Municipal Utilities District Act of 1951, as amended.
2. However, the Cortese-Knox Act of 1985, a consolidation of the Knox-Nisbet Act of 1963, governs the formation of all local agencies.
3. The Cortese-Knox Act of 1985 recognized that proper municipal planning required the creation of local agency formation commissions (LAFCOs) to approve or disapprove the formation of local district within larger governmental units, such as cities or counties. (Gov. Code §§ 56001, 56301.)
4. California counties are permitted to appoint the members of LAFCOs (Gov. Code §§56325, 56330.) Petitioners allege San Francisco will have time to do so before the next election. (Memorandum of points and authorities in support of petition, p. 5: 9-10.)
5. There is no provision of the Municipal Utility District Act that exempts the formation of a utility district from the operation of the Cortese-Knox Act. In this, it is quite different from the Geological Hazard Abatement Act, Public Resources Code §26525 (GHAD). Indeed, Section 26560 of the Public Resources Code specifically provides for the exclusive district formation process, and was the basis for the court's decision in Las Tunas Beach Geological Hazard Abatement Dist. v. Superior Court (1995) 38 Cal.App.4th 1002, 1010-11.
6. Plaintiff's citation of the provisions of the Municipal Utility District Act, § 11643.1 provides only a procedure for a LAFCO to approve or amend the ballot analysis that a district formation election requires.
7. The Cortese-Knox Act, sec. 56375 (a) gives LAFCOs the power to disapprove of the proposal for the change of organization of a district.

"Change of organization" includes the formation of a district. Sec. 56021, Gov., Code.

8. The effect of a disapproval by a LAFCO of a proposal for a change of organization (formation) of a district is simply to require all that "no further proceedings shall be taken on that proposal". And, that no similar proposal involving the same or substantially the same territory shall be initiated for one year after the date of adoption of the resolution terminating proceedings"

It seems clear that a LAFCO disapproval of a proposal to form a district prohibits the holding of an election pursuant to the Municipal Utility Code.

Here, there is no dispute that a San Francisco LAFCO has neither approved nor disapproved the proposal laid out in plaintiff's petition.

A writ of mandate (Sec. 1085(a) Code Civ. Proc) can issue only "to compel the performance of any act which the law specially enjoins, as a duty resulting from an office..."

It is proposed that the election could first be held and then the proposal be submitted to the local LAFCO. This suggestion does not seem practical. The election might result in the adoption of the proposal only to find that the local LAFCO disapproves of the proposal. Then San Francisco would be required to stop all action on the proposal, notwithstanding the election, under Gov Code Sec. 56855.

The LAFCOs were created by the Cortese-Knox Act as an administrative commission to pass on whether proposals are consistent with "orderly growth and development which are essential to the social, fiscal and economic well-being of the state". Sec. 56001, Gov. Code. Further, the Legislature found that "a single governmental agency[a LAFCO]....is the best mechanism for establishing community service priorities". Sec. 56001.

This is the type of finding which the Legislature, rather than a court, is peculiarly able to make. It requires the balancing of political interests not the

proper province of a court.

The issuance of an extraordinary writ such as mandamus is commended to the "sound" or "wise" discretion of the court. 8 Witkin on Procedure, Sec. 138, p. 779. Exercised here, that discretion requires that the tax-payers of San Francisco be saved the expenses and uncertainties of an election which could be nullified by administrative action. It would seem better management of such an important public issue to allow the local LAFCO first to make its determination. That determination might even provide grounds for the electorate to exercise its suffrage.

For the foregoing reasons the court respectfully DENIES plaintiff's petition. The respondent will prepare the formal order.

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ENDORSED
FILED
San Francisco County Superior Court

FEB 5 - 2001

GORDON PARK-LI, Clerk
BY: RANI EDWARDS
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT 514

FRED ROBERTSON

PLAINTIFF

VS

ASBESTOS DEFENDANTS (BHC)

DEFENDANT

CASE NO: 304714
~~315418~~

DECISION ON DEFENDANTS'
MOTION FOR JUDGMENT BASED UPON THE
STATUTE OF LIMITATIONS (§340.2 CCP)

Attached please find the Court's Decision on Defendants' Motion for Judgment based upon the Statue of Limitations (§340.2 CCP)

DATED: FEBRUARY 5, 2001

By: Rani Edwards
RANI EDWARDS
DEPUTY CLERK

DECISION ON DEFENDANTS'
MOTION FOR JUDGMENT BASED
UPON THE STATUTE OF
LIMITATIONS (Sec.340.2 Code Civ.
Proc.)

The parties have submitted the trial of the affirmative defense based upon the Statute of Limitations¹ upon a stipulation of facts.² The trial of the matter has taken less than one day or eight hours; neither party has requested a Statement of Decision before submission.³

The issue framed by the pleadings is whether the above-entitled action⁴, commenced in July, 1999, is barred as untimely by the provisions of Sec. 340.2 Code Civ. Proc.

Civil actions for injury or illness caused by exposure to asbestos must be

¹. Sec. 340.2, Code Civ. Proc.

². "Stipulated Facts Re: Bifurcated Statute of Limitations Issue", attached hereto as Attachment 1. ("Stipulated Facts")

³. See Sec. 632, Code Civ. Proc.

⁴. The timeliness of San Francisco Superior Court Action No. 952638, commenced in June 1993 (Stipulated Facts #8) is not before the court.

commenced within one year of (1) the plaintiff's discovery⁵ that he⁶ has first suffered disability and (2) that such disability was caused or contributed to by such asbestos exposure. (*Hamilton v. Asbestos Corporation*, 22 Cal. 4th 112, 1138 (2000).

Both elements must be present to commence the running of the statute of limitations applicable to asbestos actions. If the plaintiff is neither diagnosed with cancer, nor is capable of diagnosis through reasonable diligence, the first element ("discovery") is not made out; the statute of limitation is not triggered. Similarly, if the plaintiff were retired from his regular occupation before he discovered his injury or disease, the period of limitations would not commence to run; the plaintiff's action would never be untimely. (See *Hamilton*, supra.)

However, if the plaintiff knows or should have known through the exercise of reasonable diligence that he has a "disability" caused or contributed to by exposure to asbestos, the statute is triggered, and the time in which to commence an action for injury or illness because of asbestos exposure

⁵. Either through actual knowledge of the presence of injury or disease or knowledge imputed by what plaintiff would have learned through exercise of reasonable diligence.

⁶. Rather than repeat the personal pronouns throughout this decision, which causes difficulties in its reading, the writer means "he/she" each time "he" is written. The writer does not intend to violate the court's rules regarding gender equity by this prose technique.

commences then to run.

Here, plaintiff Robertson first noticed symptoms of shortness of breath in 1989/1990. (Stipulated Facts, #3). That alone did not trigger the statute. Neither did the fact that he lost time from his regular occupation in 1990 due to shortness of breath (Stipulated Facts, #4). When he "associated shortness of breath with asbestos in 1990" (Stipulated Facts, #5), he may or may not have "known" or "should have known"⁷ that his lost time from his regular occupation as a plasterer constituted a "disability" within the meaning of the cited statute. But certainly by June, 1993, when he commenced his action in San Francisco Superior Court action No. 952638 "for asbestosis"⁸ he knew that he had first suffered a disability from exposure to asbestos either in 1990 or by 1993. Further, if those first losses of time from work were considered temporary, plaintiff's permanent loss of time from work because of shortness of breath in 1995 (Stipulated Facts, #9) clearly established his "disability" caused by exposure to asbestos, within the meaning of Sec. 340.2 Code Civ. Proc., as of 1995.

Does the establishment of that knowledge of disability caused or

⁷. Sec. 340.2 (a)(2) Code Civ. Proc.

⁸. Stipulated Facts, #7.

contributed to by the exposure to asbestos trigger the commencement of the one-year statute of limitations for purposes of the action commenced in July 1999, for damages solely for cancer?

The Stipulated Facts establish that plaintiff's first symptoms from cancer occurred in 1998, within one year of the commencement of the above-entitled case.(Stipulated Facts, #10). Plaintiff was first diagnosed with cancer in November, 1998. (Ibid., #11). Plaintiff commenced the above-entitled action in July, 1999 "for cancer", and seeks no damages other than for cancer. (Ibid., #12,13.). The defendants do not assert that plaintiff's cancer progressed from, or is related to his asbestosis or pleural disease. (Ibid #15). The parties stipulate that asbestosis, pleural plaques and cancer are separate and distinct diseases. (Ibid., #14).

Plaintiff urges the applicable statute of limitations cannot possibly commence to run on an asbestos plaintiff's cancer cause of action when he is first disabled by asbestosis, and at a time when he neither knows nor can, through the exercise of reasonable diligence, determine that he has cancer caused by exposure to asbestos. That position makes a great deal of sense to this court.

But it also does violence to the clear and unmistakable language of the

applicable statute of limitations.

The statute does not start the running of the one-year period on when the plaintiff knows that the first disability he suffered was caused by the *injury or illness* that he claims to have suffered by exposure to asbestos. It starts running when he knows that the first disability he suffered was caused by "such exposure". That is, "exposure to asbestos".

The statute was enacted for the purpose of enlarging the time in which a plaintiff could bring an action for injury or illness caused by exposure to asbestos. Social policy was served in encouraging workers to continue working although they had symptoms of asbestos related disease, without having to risk the running of the statute of limitations. The statute would not start running out on them until they suffered "disability", a specially defined term which required a loss of work time from the worker's regular occupation. Sec. 340.2 (b) Code Civ. Proc. *Hamilton, supra*.

But once the worker suffered such disability, the statute does not differentiate between one disability caused by one type of asbestos related disease, and another disability related to another disease. The statute refers only to the "first" disability (Sec. 340.2 (a)(1)) and "such" disability (Sec. 340.2(a)(1)).

Read this way, the statute does extend the period in which an action can

be commenced after discovery of the asbestos related disease until disability has occurred. But, in what may be an unintended result, its language commences the running of the statute of limitations when that first disability is known to be caused by exposure to asbestos.

Here, it means that plaintiff Robertson must have commenced his action for damages for cancer no later than 1996, one year from the latest date when he knew that he had first suffered disability from exposure to asbestos.

But It also means that although plaintiff did not know, nor through the exercise of reasonable diligence could he have known, that he had cancer, he was required to commence an action for cancer damages by June 1996, whether he had cancer or not.

It is said that where the language of a statute is clear and unmistakable, a court must apply it to the facts of the case, regardless of its result. That rule of statutory application is subject to the exception that when the literal reading of a statute renders an absurd result, the court will not so interpret it. (7, Witkin, *Summary of California Law*, 9th ed., Sec. 94, p. 147 and cases cited therein.) "Absurd" means "...ridiculously inconsistent with reason or the plain dictates of common sense; logically contradictory". (*Webster's New 20th Century Dictionary Unabridged*, 2nd ed.) So in *Granbury v. Islay Investment*,

161 Cal. App. 3d 382, 388 (1984) a legislative revision of Sec. 1950.5 Civil Code rendered every advance payment of rent a "security", and hence restricted the use of such payment by the landlord to uses other than the payment of rent. *"Such an absurd result would effectively put most landlords out of business and render tenants homeless"*. (See also, *Golden v. City of Oakland*, 49 Cal. App. 3d 284,288 (1975) and *County of Sacramento v Hickman*, 66 Cal. 2d 841, 844-5 (1966)).

The court repeatedly asked counsel for the defendants to state a reasoned basis for the application of Sec. 340.2 Code Civ. Proc. to bar the plaintiff's present action. Counsel labored mightily but could come to no more of a reason than it constituted the "bright line" which the Legislature found was for the greater good; a compromise between justice and efficiency.

It is clear that Sec. 340.2 Code Civ. Proc. does not prevent the filing of multiple actions. Unlike Sec. 377 Code Civ. Proc., which allows "an" action, 340.2 applies to "any civil action". Further, a plaintiff is not barred by the terms of 340.2 Code Civ. Proc. from starting a second or third action, so long as he commences it before the year's period is exhausted.

Neither does the application urged by the defendants tend to hasten the commencement or trial of any cause of action, for it is clear that so long as the plaintiff has left his usual occupation for reasons other than disability caused

by exposure to asbestos, the time in which to commence the action does not commence to run. *Hamilton, supra*.

The court cannot conceive of any reasoned basis for holding that a plaintiff who does not have cancer, and has no knowledge or reason to know that he has cancer, must nonetheless commence an action for damages for cancer within one year of the time he is first caused disability by another disease caused by exposure to asbestos. The literal application of Sec. 340.2 Code of Civ. Proc. is contrary to the purpose of the statute: "...to provide a special statute of limitations for asbestos-related illnesses consistent with the fact that such slowly developing occupational diseases typically become symptomatic long before they become disabling..." *Hamilton, supra* at 1139. Applied as defendants would have it, the statute would here bar plaintiff's action not only before he became disabled from cancer, but before he had any symptoms.

Is this court barred from interpreting Sec. 340.2 Code Civ. Proc. against its literal meaning because of the absurdity found in view of statements by the Supreme Court in *Hamilton, supra*? Certainly not because of the majority opinions [p.1145]: it discusses only cases of single or multiple cases brought where there was no precedent disability.

A more formidable barrier is the last three lines of the concurring

opinion by Justice Brown. "Moreover, section 340.2, by its terms, bars plaintiffs diagnosed with asbestos-related cancer over one year after becoming disabled due to asbestos exposure from asserting cancer claims. Such a result contravenes the main purpose behind section 340.2—to ameliorate the harsh application of the previous statute of limitations....in light of these bizarre and, I suspect, unintended results, I urge the Legislature to revisit and revise section 340.2". (Hamilton, at 1152.)

Be First, Justice Brown's statement is *dictum*. The facts of *Hamilton* did not present the case she put because *Mitchell* ~~Miller~~ was retired before he discovered his illness, hence was never "disabled" within the meaning of the statute. Second, and more importantly, although *dictum* is not controlling, it should not always be ignored. If the *dictum* is made "...by an able court after careful consideration, or in the course of an elaborate review of authorities, or when it has long been followed" it should be followed. (9, Witkin, *California Procedure*, 4th ed. Sec. 947, p.989.) This court bows to none in its admiration for Justice Brown. However, the text of her remarks on this issue do not show any consideration of the "absurdity" exception to literal application of a statute's language, nor any review of authorities on the subject. Of course, being a new question, it is not *dicta* that has been long followed. For these reasons, this court does not find it persuasive, and respectfully declines to follow it.

For the foregoing reasons, the defendants' motion for judgment in their favor and against the plaintiff based on the affirmative defense of statute of limitations is hereby DENIED.

Carlos Bea

Judge of the Superior Court

5 February 2001

(11)

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11 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **IN AND FOR THE CITY AND COUNTY OF**

13 **FRED ROBERTSON**

No. 304714

14 Plaintiff (s),

**Stipulated Facts Re: Bifurcated Statute of
Limitations Issue**

15 vs.

16 **ASBESTOS DEFENDANTS (BHC)**

17 Defendant (s). /

Date:
Time:
Dept:
Trial Date:
Action Filed:

18 For the purpose of efficient resolution of Defendants' Affirmative Defense pertaining to
19 the Statute of Limitations [C.C.P. Section 340.2] by the court, the parties have stipulated to the
20 following facts. This stipulation to the facts that follow is limited to resolution of issues
21 presented in this bifurcated proceeding. These stipulated facts do not constitute evidence
22 admissible in any other phase of this trial.

- 23 1. Fred Robertson was born in 1939.
- 24 2. Fred Robertson's regular occupation was plasterer.
- 25 3. Fred Robertson first noticed shortness of breath in 1989/1990.
- 26 4. Fred Robertson lost time from his regular occupation in 1990 due to shortness of breath,
27 which precluded the performance of his regular occupation as a plasterer.
- 28 5. Fred Robertson first associated shortness of breath with asbestos in 1990.

- 1 6. Fred Robertson was diagnosed with asbestosis and pleural plaques in April 1992.
- 2 7. Fred Robertson filed his first complaint in June 1993, SFSC No. 952638 for asbestosis.
- 3 8. In 1994 and 1995 Fred Robertson worked again as a plasterer, his regular occupation, and
- 4 was not precluded from the performance thereof.
- 5 9. Fred Robertson ceased working as a plaster, his regular occupation, and was precluded
- 6 therefrom, in 1995 due to shortness of breath.
- 7 10. Fred Robertson's first symptoms from cancer occurred in 1998, within one year of filing
- 8 the present case, SFSC No.304714.
- 9 11. Fred Robertson was first diagnosed with cancer in November 1998.
- 10 12. Fred Robertson filed the present complaint in July 1999, SFSC No. 304714, for cancer.
- 11 13. Fred Robertson does not seek recovery in the present case, SFSC No. 304714, for
- 12 damages other than cancer.
- 13 14. Asbestosis, pleural plaques, and cancer are separate and distinct diseases.
- 14 15. Based upon the specific medical circumstances of Fred Robertson, defendants do not
- 15 assert that Mr. Robertson's cancer progressed from, or is related to, his asbestosis or
- 16 pleural disease.
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FILED

San Francisco County Superior Court

JUL 21 1998

ALAN CARLSON, Clerk

BY: [Signature]
Deputy Clerk

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT NUMBER 514

COALITION FOR HEALTHY AND
HUMANE BUSINESS PRACTICES,

Plaintiffs,

vs.

NO. 986059

TENTATIVE OPINION

NEVER ENDING QUAILS, NEW ON
SANG POULTRY COMPANY, MING
KEE GAMEBIRDS, INC., BAY GAME
BIRDS, FOUR SEAS SUPERMARKET
HONG KONG MARKET, LUN SANG
MARKET, INC., LUEN SING FISH
MARKET, INC., DRAGON MARKET,
DUCK MARKET, WING HING SEA-
FOOD MARKET, SEAFOOD MARKET,
SEAFOOD CENTER #19, and DOES 1
THROUGH 100,

Defendants,

1 Plaintiff is a coalition of individuals and organizations formed for the purpose of prosecuting
2 this action. Defendants are twelve markets in San Francisco which keep, sell and kill live animals.

3 Plaintiff seeks a permanent injunction prohibiting defendants from continuing their business
4 of live animal sales in markets located in the Chinatown and Sunset areas of the city. Plaintiff
5 contends that defendants flaunt the laws prohibiting animal cruelty so flagrantly and frequently that
6 the only reasonable remedy is to shut down their markets. In the alternative, plaintiff seeks a
7 permanent injunction requiring defendants to treat the animals in a manner different from their
8 customary business practice, so as to avoid the alleged animal cruelty. Plaintiff also grounds its
9 complaint on claims of defendants' violations of Health and Safety Code provisions regarding the
10 keeping of live animals near food kept for sale.
11

12 **STATUTORY BASIS OF ACTION.**

13 Plaintiff invokes Business and Professions Code sections 17200 through 17209 which allow
14 injunctions against "unlawful business practices". It is settled law that continued violation of Penal
15 Code provisions can constitute an "unlawful business practice". *Stop Youth Addiction, Inc. v. Lucky*
16 *Stores, Inc.*, 17Cal.4th 553, 567 (1998).
17

18 At issue here is whether defendants' business practices violate the laws of the State of
19 California regarding animal cruelty¹ and health and safety.
20

21 **GENERAL OBSERVATIONS REGARDING THE STATUTES INVOLVED**

22 A merchant who violates a criminal statute is subject to arrest and fine or imprisonment, or
23 both, but only after being provided the full panoply of constitutional procedural safeguards. These
24

25 ¹ Generally, Penal Code sections 596-600.5.

1 safeguards include the prohibition against self-incrimination and a trial by a jury required to be
2 unanimous in its finding that all elements of the crime are established beyond a reasonable doubt. If
3 a first offense, and where the violation could be either a misdemeanor or a felony², the merchant
4 could reasonably expect a fine and probation.

5
6 Under Business and Professions Code sections 17200 through 17209, that same merchant
7 whose violations amount to a "business practice" can be permanently put out of business following a
8 trial conducted before a judge, sitting without a jury. Moreover, the burden of proof is based upon
9 the lower standard of the preponderance of the evidence. Finally, the merchant may be compelled to
10 testify against himself both at deposition and trial. The comparatively drastic nature of this procedure
11 and the remedy sought make it all the more important for the trial judge to consider and determine
12 the precise elements of the predicate violations and that each element is proven by the evidence.

13
14 Some time and effort has been devoted by defendants to justify their conduct on the basis of
15 their shared Chinese "culture". Claims have been made that what defendants do in their markets is
16 what has been done in China for thousands of years. This "culture" argument is not only irrelevant, it
17 is bothersome and is rejected. Defendants' markets are in San Francisco, not China. The laws which
18 apply here are Californian, not Chinese.

19
20 First, the court will examine each predicate misdemeanor statute plaintiff claims has been
21 violated³ with a view to identifying just what animal treatment California law prohibits. Then, the
22
23

24
25 ² Section 597, Penal Code

26 ³ In the vast majority of instances, there is no doubt the defendants' actions toward the animals occurred in sufficient
27 number to be "business practices" and, therefore, are neither random nor anecdotal.

1 court will weigh the evidence to determine whether defendants' treatment of its animals violates
2 California law.

3 HEALTH AND SAFETY CODE PROVISIONS

4 Plaintiff claims defendants have violated Health & Safety Code section 111970 by keeping
5 live animals in a wholesale establishment where food is stored, offered for sale or sold. A similar
6 charge is made under Health and Safety Code section 114045 as to retail establishments.
7

8 The evidence is clear that defendants' markets sell food both on a wholesale (to restaurants)
9 and retail level. There are live animals on the premises. Other foods (particularly eggs in cartons)
10 are sold under the same roof where live animals are kept and sold.

11 Read broadly and textually, it would seem that each defendant has violated both of the Health
12 and Safety Code sections. But when read this way: (1) an egg producer whose hens are for sale
13 would be liable the moment the hen laid an egg and the egg was not immediately removed; and (2)
15 the sale of peanuts and ice cream would be prohibited at the State Fair (where food animals are sold).

16 Defendants suggest the statutes need to be interpreted with a view to their obvious purpose:
17 preventing the contamination of food supplies by diseases carried by live animals. Defendants
18 presented evidence of administrative practice by San Francisco health inspectors⁴ charged with the
19 enforcement of these statutes. No enforcement proceedings have been taken against defendants
20 because there is no danger of contamination between the live animals kept on the premises and the
21 food products defendants keep on hand for sale. In addition, there is no evidence that any humans or
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25 ⁴ Ben Gale, Director of Environment Management Section, San Francisco Department of Public Health; John Breslin,
Assistant Director of the Environmental Health Center, San Francisco Health Department.

1 animals have been affected by the maintenance of live animals under the same roof or in proximity
2 to other foods.

3 Administrative practice is a recognized source of interpretation of statutes. *DeYoung v. City*
4 *of San Diego*, 147 Cal.App.3d 11,18 (1983).

5 Based both on a common sense reading of the statutes and the administrative practice
6 evidence adduced, the court finds no violation of the Health and Safety Code. The court finds in
7 favor of defendants and against plaintiff on the causes of action brought under the cited Health and
8 Safety Code sections.

10 **PENAL CODE SECTION 597(B)**

11 Plaintiff claims defendants have violated the prohibition against "unlawful business
12 practices" (Bus. & Prof. Code §§ 17200-17209) through various violations of Penal Code section
13 597(b). Section 597(b) reads as follows:

15 Except as otherwise provided in subdivision (a) or (c), every person who overdrives,
16 overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary
17 sustenance, drink, or shelter, cruelly beats, mutilates, or *cruelly kills* any animal...is, for
18 every such offense, guilty of a crime punishable as a misdemeanor or as a felony or
19 alternatively punishable as a misdemeanor or a felony and by a fine of not more than twenty
20 thousand dollars (\$20,000).

21 CAL. PENAL CODE § 597(b) (West 1998) (emphasis added).
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The parties have not cited, nor has the court's research found, a single appellate case that has applied this section to the keeping or killing of animals for food. Hence, what follows is necessarily the application of analogous general principles to the facts of this case.

Defendants point out that Penal Code section 599(c) exempts from criminal prosecution the killing of all animals used for food. From that, defendants argue that this exemption requires dismissal of plaintiff's claims made under Penal Code section 597(b). However, the court finds that defendants' argument overlooks the plain text of Penal Code section 597(b), which prohibits animals from being "cruelly killed". As a result, defendants' contention is without merit.

"Torture", "torment" and "cruelty" are defined in Penal Code section 599b as including the following essential elements:

1. **Physical**, (not mental) pain or suffering;
2. Inflicted **unnecessarily or unjustifiably**.

Decisional law adds two further essential elements of interest here:

3. That such physical pain or suffering was caused by a **grossly negligent act or omission**; and
4. That such act or omission **caused danger to the animal's life** ⁵ *People v. Speegle*, 53 Cal.App. 4th 1405, 1413 (1997).

⁵ Of course, this element is irrelevant where the charge is cruel killing of the animal.

Why endangerment of the life of the animal, rather than some lesser threat of harm, is an essential element of gross negligence does not appear from the *Speegle* decision. It may well be this element was recognized in *Speegle* because endangerment of human life is an element of criminal negligence directed toward humans. See 1 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW § 113 (2d ed. 1988): "The conduct must be aggravated or reckless; that is, it must be such a departure from what would be the conduct of an ordinarily prudent person under the same circumstances as to be incompatible with a proper regard for human life. The conduct must show an indifference to the consequences, and this has been said to require knowledge, actual or imputed, that the act tends to endanger another's life." (quoting *People v. Peabody*, 46 Cal.App.3d 43, 47 (1975)).

1 It is important to note that Penal code section 599b does not define "cruelty", "torture" or
2 "torment" as the placing of an animal in a habitat not similar to Nature's, or as depriving an animal
3 of one of its life activities. Furthermore, the statute does not endow an animal with human
4 sensibilities. Appeals to make conditions for food animals awaiting slaughter more humane, or to
5 impose upon food merchants standards and practices observed in pet stores, may have a place before
6 the Legislature. But, under the law as it is presently written, such appeals cannot be used to assess
7 criminal responsibility as a predicate to shut down businesses, or to require changes in business
8 practices.
9

10 Whether an animal suffers physical pain from an act is sometimes easily observable, as when
11 one unwittingly steps on a dog's paw and hears an immediate yelp. Other times, it is not so obvious,
12 as when a hooked fish has the barb—and some tissue from its cheek—removed. When the animal
13 makes no humanly heard sounds, whether it has felt physical pain may depend on expert testimony.

15 It also may be appealing to our sentiments to protect an animal from acts or omissions which
16 would cause pain in a human. But that sentiment would be based on the premise that the animal has
17 a similar pain-sensing constitution to that of a human; a premise which requires proof of similar
18 constitutions. Absent such evidence of constitutional similarity, to find pain in the animal would be
19 to indulge in anthropomorphic⁶ speculation, which is hardly a sufficient basis for the application of
20 criminal statutes.
21
22

23 ⁶ A term used by plaintiff's expert Dr. Kaplan as a basis for one of his opinions as to whether an animal suffers pain
24 under certain conditions. "Anthropomorphism" is defined as, "The attributing of human shape or characteristics to gods,
25 object, animals, etc." WEBSTER'S UNABRIDGED DICTIONARY (2ND ed.).

REVIEW OF THE EVIDENCE

The plaintiff produced a great deal of evidence as to specific market practices through photographs, videos, and lay and expert witnesses who visited the markets. After two defendants had testified as to practices in their markets, plaintiff stipulated that there were other defendants to testify and that their testimony would be substantially the same.⁷ The court will review the evidence animal by animal.

TURTLES.

1. *Lack of food and water.* Defendants admit that the turtles are not fed while they are in the markets awaiting their sale. The average time from their arrival in the markets to their sale is seven to ten days. Dr. Randy Ruble, of the University of California at Davis, testified that these reptiles lower their caloric requirements through estivation in the cool environments of the markets and can go three to four weeks without food or water with some loss of body mass, but without unimpaired physiologic functioning. Dr. Ruble is of the opinion that going several days without food will not cause pain to a turtle, since such abstinence occurs in its natural state. As to water, defendants' workers testified that they normally hose down the turtles in their crates twice a day, and in the summer up to six times a day.

Plaintiff's evidence showed one turtle with a broken shell, and that no food or drinking water is provided for the turtles. The evidence did not show any physical effects on the turtles because of the lack of food or drinking water, much less any life threatening endangerment. As a result, the

⁷ Stipulation entered into in open court, 20 April 1998.

1 court finds the evidence does not establish a violation of Penal Code section 597(b). *See Speegle*, 53
2 Cal.App. 4th at 1413.

3 2. *Lack of adequate exercise area; stacking; mixing species.* Defendants placed the
4 turtles in wooden crates. Two or three species were mixed. At times, some turtles were under one or
5 two other turtles.

6 Plaintiff claims defendants have violated Penal Code section 597t because the animals do not
7 have an "adequate exercise area". However, plaintiff overlooks the last sentence in section 597t,
8 which exempts from its operation animals "in the immediate control of a person". All the animals
9 involved here, including the turtles, were under the "immediate control" of market workers who are
10 charged with their care until the time of sale. Section 597t is designed to provide confined animals
11 which are not under the immediate control of a person with an "adequate exercise area". That
12 situation and this statute simply do not apply to the circumstances shown by the evidence here.

13 Furthermore, there is no evidence the lack of an adequate exercise area causes the turtles
14 physical pain. Indeed, some of the evidence is to the contrary. Specifically, Dr. Feldman, a
15 veterinarian from the University of California at Berkeley who was called by the plaintiff, opined
16 that while these conditions might cause "distress" to the turtles, they do not cause the turtles pain⁸.
17 With regard to all of the animals, plaintiff is quite frank as to the standards it wishes to impose on the
18 live food industry: all animals should be kept in conditions similar to their natural habitat, or in
19 conditions at least as good as those found in pet stores. These standards may be desirable as a matter
20 of public policy. Yet they are not required under the California Penal Code. The adoption of such
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25 ⁸ This is with the exception of the removal of the turtles' carapace (shell) with a knife before slaughter (discussed below
26 at pp.8-10).

standards may be urged to the Legislature, but not to this court, which must apply existing law and cannot adopt new laws.

Although the mixing of different species of turtles may or may not constitute good animal husbandry, there is no evidence that as a result of such mixing one species ate or mutilated another or caused any statutorily prohibited physical pain to its fellow turtles.

Similarly, even though some turtles were observed turned upside down, on their side, or under the weight of other turtles, there is only speculation⁹ or anthropomorphizing as to whether this causes physical pain to the turtles.¹⁰

4. *Killing of turtles.* Defendants testified that the turtles are slaughtered for customers by one of two methods. First, warm water is run over the turtle to encourage it to stick out its head. If that is successful, the turtle is decapitated. If the warm water method does not work, the second method is to remove the turtle's shell with a knife, and then to cut out its viscera immediately afterwards. The turtle's head is left on, but is severed from the vertebral column at the base of its neck. This severing, in effect, decapitates the turtle.

Dr. Feldman testified that the shell removal method involves great physical pain and is similar to a human scalping. Dr. Ruble agreed that turtles can experience pain and that skinning the shell off a turtle would probably cause the turtles physical pain.

When questioned about alternate methods of slaughtering turtles, Dr. Feldman suggested three, all of which have their problems.

⁹ Dr. Feldman testified the turtles are under 10 times their weight, although the photographs show at most a depth of two to three turtles.

¹⁰ Dr. Kaplan testified the turtles are in pain because he would be in pain if similarly layered with humans. *See supra* note 8.

1 1. *Injection of barbiturates sufficient to kill.* Although mentioned by him, Dr. Feldman
2 was quick to disavow this method as reasonable for food animals. This is because the amount of
3 undigested barbiturates in the animal would be inadvisable for human consumption.

4 2. *Partial freezing.* Partial freezing would relax the turtle and make its head vulnerable
5 to decapitation. However, Dr. Feldman admits this method has never been tried under market
6 conditions. For example, he does not know whether the turtle would need one to two hours or five
7 to six hours in the freezer. Dr. Ruble points out that the freezing itself would cause pain to the turtle
8 and decomposition of its tissue. Another reason to eschew this method is because the market
9 demand is for fresh, not partially frozen, turtle.
10

11 3. *Captive bolt.* A captive bolt is a device similar to that used to slaughter cattle. The
12 animal's head is held while a pneumatic metal rod is driven into it. Dr. Feldman admits a turtle's
13 self-protective act of ducking its head under its shell makes it difficult to locate the turtle's head. He
14 also grants that a captive bolt device for turtles has yet to be designed and built. Dr. Ruble testified
15 that the American Veterinary Medical Association routinely makes recommendations for methods of
16 killing and slaughtering animals, but has made none in the case of turtles. And, even though the
17 pneumatic captive bolt device is a possibility, he also has no knowledge of the existence of such a
18 device for turtles.
19

20 The state of the evidence shows that as distasteful as is the shell removal method of
21 slaughter, there presently is no reasonable alternative. As a result, there is no "cruelty"¹¹ because the
22

23
24
25 ¹¹ "The word "cruelty"...evidently means something more than to kill, the manner of killing, such as tormenting or
26 torturing to death, *or prolonging the agony, suffering and pain of the animal in terminating its life.*" *Horton v. State*, 124
27 Ala. 80, 27 So. 468 (1900) (emphasis added). The word "prolonging" implies a choice of a quicker death, not taken by
28

1 physical pain inflicted is neither unnecessary nor unjustified within the meaning of Penal Code
2 section 599b. Further, there is no evidence that defendants acted with gross negligence, which is
3 required by *Speegle*, 53 Cal. App. 4th at 1413. To act with "willful disregard of the consequences"
4 one has to know of an alternate way in which "the consequences" can be avoided. Absent a
5 reasonable method by which to kill the turtles with less pain and suffering, the court is not prepared
6 to find that this long-time practice constitutes gross negligence.
7

8 The court finds the plaintiff has not proved the essential elements of its case against
9 defendants with respect of keeping and killing turtles and denies the application for injunction on the
10 aspect of the case.

11 BIRDS

12 Plaintiff's evidence tends to show that food birds (chicken, chukker, quail, pheasant and
13 silkies) were kept in dirty and crowded cages. Sometimes the cages were so crowded the birds had
14 no room to move around, or to reach food and water. In addition, the birds are deprived of their
15 normal food seeking activities and interaction. Photographs show birds so close to each other as to
16 be touching.
17

18 However, plaintiff's evidence regarding the birds' conditions was based on twenty to thirty
19 minute visits to individual markets. Consequently, plaintiff's witnesses are unable to say how long
20 the birds remained in these conditions or how long they were deprived of food and water, if at all.
21 More important, there was no evidence that the crowding caused sickness or disease in the birds, or
22 even weight loss, much less any danger to the animals' life. *Speegle*, 53 Cal.App. 4th at 1413.
23

24
25 the actor. Here, there is no evidence that defendants prolong the death of the turtles because there is no reasonable
26 alternative to shelling when the warm water method of decapitation is unsuccessful.
27
28

1 Indeed, much of plaintiff's testimony centered on the "distress" which the birds are thought
2 to suffer because of their close proximity. According to plaintiff, the "distress" is caused in part
3 because of inhibition from normal ranging for food, called "hunting and pecking". Plaintiff claims
4 this "distress" is manifested by the birds' "droopy appearance", huddled stance, fluffed feathers,
5 closed eyes, and non-responsiveness.
6

7 Defendants' evidence was principally adduced by Dr. Ruble, whose experience included food
8 animal studies and work in food industry settings. Dr. Feldman and Dr. Kaplan also testified, and
9 have experience in the pet veterinarian field.¹² Dr. Ruble's experience includes treatment of birds in
10 the poultry industry. He opined that: defendants' cages met poultry industry standards for
11 production and transportation stages; adequate food and water were available to the birds (as their
12 healthy aspect demonstrated); and they had sufficient room to maneuver among each other toward
13 the food and water. He found no signs of abnormal agitation of the type to be expected when poultry
14 are in physical pain. His conclusion was that the birds were kept in containers similar to those used
15 in the poultry production and shipping industry and were not subjected to physical pain.
16

17 The court finds plaintiff's evidence fails to prove the essential elements of animal cruelty as
18 defined in Penal Code sections 599(b) and 597(b). Plaintiff is not entitled to the injunction it seeks
19 on this aspect of the case.
20

21 FISH.

22 Live fish, mostly catfish, are brought to defendants' markets from fish farms or from deep
23 sea fishermen. Once in the markets, the fish are placed in tanks until they are sold live to customers.
24

25 ¹² All three witnesses had impressive academic credentials, as does Dr. Dustin, a veterinarian from the Sunset District of
26 San Francisco.
27
28

1 Upon sale, they are removed from the tanks and then slaughtered by head blows and cleaning
(dissection). Occasionally, some live fish are placed in trays before they are sold to customers.

3 These fish are sprayed with water to keep their gills wet, but do run the risk of suffocation.¹³

4 Plaintiff's evidence is directed toward two distinct types of practices it claims to be violations
5 of the law:

6 1. The keeping of fish in crowded and dirty tanks which are insufficiently aerated; and

8 2. The dissecting and slaughtering of fish in a cruel manner. That is, cutting them up

9 before they are deadened through head blows.

10 **OVERCROWDED AND UNKEMPT TANKS**

11 Plaintiff's testimony centered on alleged crowded conditions which it thinks deprived the fish
12 of necessary oxygen. Plaintiff's witnesses assert that this deprivation caused the fish to breathe more
13 rapidly, and in some cases caused in-water suffocation, as attested to by the presence of some dead
14 fish in the tanks. Dr. Kaplan opined the fish were experiencing physical pain and suffering due to
15 respiratory difficulties. Further, he testified the fish were suffering from infections due to a lack of
16 cleanliness in the tanks (there was ammonia present as a result of insufficient removal of excretions).
17 Specifically, Dr. Kaplan said he observed some white film on the eyes of the fish, and thought this
18 evidence of a lack of cleanliness.

20 Defendants also kept eels in similar conditions.

22 Again, defendants' evidence tended to come from persons with food industry experience.

23 Mr. Shuur, in particular, has postgraduate experience in the physiology of fish and has published on

25 ¹³ There is no evidence of actual suffocation as a method of slaughter engaged in by defendants.

the subject. He focused on the healthy appearance of the fish as the best indication of whether they were crowded, under-oxygenated or infected. Mr. Shuur pointed out that the live fish market in San Francisco is extremely competitive, with low profit margins, and that the healthy appearance of the fish is required by a demanding and knowledgeable clientele. He counted the fish in the tanks and found their density to be at one pound per gallon, less than the industry standard at fish production farms (aquaculture ponds). He also found that all of defendants' markets have air pumps installed in their tanks which "while not pretty, got the job done". He notes that the fish tended to be oriented in one direction, rather than in chaotic distribution. To him, this "schooling behavior" was a sign of healthy fish. Mr. Shuur's conclusion was that all of defendants' stores operated within the standards of care of the commercial aquaculture industry.

On the issue of whether the conditions caused the fish physical pain, Mr. Shuur disagreed with plaintiff's expert Dr. Kaplan that increased rapidity in breathing is an indication of pain. Mr. Shuur testified that : (1) fish breathe more rapidly in captivity than in the wild; and (2) he is unacquainted with any studies showing oxygen deprivation causes pain in fish.¹⁴

The court's review of the evidence results in a determination that the plaintiff has not proved the elements of Penal Code section 597(b) as to the charge of cruelty in the keeping of fish.

SLAUGHTER AND DISSECTION OF FISH

Plaintiff's next claim focused on defendants' practice of placing fish, before their sale, in shallow trays without sufficient water to breathe. Plaintiff claims the fish are likely to suffocate in

¹⁴ Plaintiff's experts did not cite any such studies either.

1 the trays. In addition, plaintiff's witnesses testified that defendants occasionally will filet a fish
2 before killing it with stuns to the head.

3 The evidence showed that the fish are placed in trays for short periods of time just prior to
4 their slaughter, and for display purposes only. Their gills were kept moist by defendants, a practice
5 which defendants' witnesses testified allowed the fish to live for hours. Defendants' evidence of
6 cleaning and slicing fish contrasts sharply with plaintiff's: it shows that fish are stunned or
7 decapitated before being cleaned or sectioned. Defendants pointed out that sectioning a squirming
8 live fish with a sharp knife is more risky and difficult for the fish worker than sectioning a dead fish.
9

10 Plaintiff's claim that the fish suffer physical pain from lack of oxygen and dissection raises
11 the issue of whether fish actually do suffer physical *pain* as that word is commonly used.¹⁵

12 Dr. Kaplan, plaintiff's expert and an "exotics"¹⁶ veterinarian, opined that fish do feel physical
13 pain because of the similarity of their vertebrate structure and nervous system to those of humans.
14 Mr. Shuur, whose credentials with respect to fish are the most extensive of the witnesses, disagreed.
15 He opined that the relatively small portion of the fish brain dedicated to integrating information does
16 not allow distinction between stimuli that are painful and those that are not. To Mr. Shuur, fish react
17 to stimuli reflexively or autonomically, but do not "feel pain" as that term is ordinarily used.
18
19
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21

22 ¹⁵ "Although a particular statute is somewhat vague or general in its language because of difficulty in defining the
23 subject matter with precision, it will be upheld if its meaning is reasonably ascertainable." *People v. Deskin*, 10
24 Cal.App.4th 1397, 1400 (1992). "So long as the language embodies an objective concept, it is constitutionally
25 concrete...The notice component of due process does not require any more." *People v. Curtiss*, 116
26 Cal.App.Supp.771,779 (1931) (statute banning infliction of "unjustifiable" pain constitutional). "Physical pain" is a
27 sufficiently precise concept to allow determination of a violation of criminal law.

28 ¹⁶ Generally "exotics" are pet animals, exclusive of dogs and cats.

1 After review of the evidence, the court finds the defendants' evidence more credible and
2 accepts it as more convincing than plaintiff's evidence. The court finds defendants do not engage in
3 prohibited practices with respect to the fish.¹⁷

4 FROGS

5 Frogs are imported by airplane, mostly from Taiwan. They arrive in mesh bags, which are
6 within crates. From there, the frogs are placed in plastic bins. Like the fish and turtles, they are not
7 fed during the time they are in the markets. They are sprayed with water once or twice daily, and
8 kept in a refrigerator at a cool, but above freezing, temperature overnight and until they are placed in
9 the bins for customer purchase. The frogs last three to four days in the refrigerator. Once sold, and
10 at the customer's option, the frogs are either killed by a blow to the head or placed in a paper bag and
11 sold live to the customer.
12

13 Plaintiff's charges centered on the lack of food and water for the frogs while they are in the
14 plastic bins. The evidence is uncontradicted that the frogs can and do live for their predictable stay
15 in the markets without food and retain the healthy appearance required for their sale to
16 discriminating buyers. Further, the evidence proves that frogs do not require water to drink; they
17 absorb their requirements through their skin.
18

19 At first glance, plaintiff's photographs of frogs stacked on each other gave the impression of
20 a lack of adequate space. But, upon closer look, there are unused open areas of the bins.
21 Moreover, this first impression was dispelled when evidence was presented that frogs have the habit
22 of bunching and stacking upon each other to preserve their body water.
23

24
25 ¹⁷ Very little evidence is available with respect to the keeping of eels. No evidence was presented regarding the
26 slaughter of eels. The court's finding as to the eels is the same as that regarding the fish.

1 Again, on review of the evidence, the court finds that plaintiff has failed to prove the
2 elements required by Penal Code section 597(b), and that there are no unlawful business practices to
3 enjoin with respect of the frogs.

4 **RABBITS.**

5 Very little evidence was presented regarding rabbits. Dr. Feldman (4/9/98) testified
6 regarding conditions required to avoid pain: room to roam; constant access to food and water; and
7 an ambient temperature of sixty-five to sixty-eight degrees Fahrenheit. He saw a rabbit cage with
8 food in the cage's tray and a water bottle attached to the cage, but the bottle was empty. Dr.
9 Feldman was in the market for twenty to thirty minutes. He opined that the lack of food and water
10 would lead to dehydration and death of the rabbits, but he did not testify that any rabbits appeared
11 dehydrated or starved. From his limited time in the markets, this evidence does not suffice to
12 establish a business practice which endangers the animals' lives.¹⁸

13
14 The court finds in favor of defendants and against plaintiff on this charge.

15 **SUMMARY AND CONCLUSION.**

16 The issues before the court involve only the question whether defendants' repeated acts in the
17 keeping and killing of live food animals violate the California Penal Code, so as to constitute an
18 unlawful business practice under Business and Professions Code sections 17200-17209. The court
19 did not and cannot consider whether it would be desirable public policy, kinder or gentler, or
20 generally a good idea to impose on defendants a particular standard of care toward the animals, or
21 else to exit the industry.
22
23
24
25

26 ¹⁸ *Speegle*, 53 Cal.App.4th at 1413.

1 Plaintiff was very thorough and professional in its presentation of evidence and argument.

2 But Plaintiff's dilemma is best illustrated by its admissions in argument regarding the slaughter of
3 turtles. Conceding that the partial freezing method¹⁹ of decapitation is neither proven nor practical,
4 plaintiff simply requests the slaughter of turtles to be enjoined. This clashes directly with applicable
5 State legislation:

6 "No part of this title shall be construed....to interfere with the right to kill all animals
7 used for food...."

8 CAL.PENAL CODE § 599(c) (West 1988).

9 By making this the law of California in 1905, and refusing to amend it since then, the People
10 have spoken: humans have the right to kill *all* food animals. If they can reasonably kill the animals
11 with little or no physical pain, they should choose that method. However, if the slaughter involves
12 physical pain to the animal that is not reasonably avoidable, food animals can *still* be killed by
13 people even though the animal suffers physical pain.

14 This ninety-three year old legislation is viewed by the plaintiffs as creating a hierarchy
15 between people and animals, whereby people are allowed dominion over animals. As such, it is
16 described by plaintiff as an "anthropocentric" view of the world, and wrong notwithstanding its
17 longtime acceptance. Anthropocentric means a view regarding Man as the central part or aim of the
18 universe.

19 Such a view is perhaps most familiarly stated in Genesis:

20 ¹⁹ See *supra* pp.8-10.

1 "[The Lord said] Be fruitful and multiply, and replenish the earth, and subdue it, *and*
2 *have dominion over the fish of the sea, and the fowl of the air, and over every living*
3 *thing that moveth upon the earth*" Genesis 1:28. (Emph.supplied).

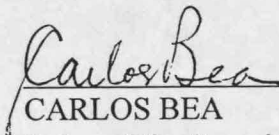
4 Whether plaintiff is correct in its world-view of what are desirable relations between humans
5 and animals is a matter which, in a democracy based on the separation of powers, must be addressed
6 to the People's Legislature. To date, the Legislature has not adopted plaintiff's view, and this court
7 must apply the law as it is presently written, not on its own legislate plaintiff's view into law.

8 For the foregoing reason, the plaintiff shall take nothing by its complaint on file herein, and
9 judgment shall be entered for defendants, with costs as provided by law.

10 In accordance with Rules of Court, Rule 232(a)(2), this Tentative Decision shall be the
11 Statement of Decision unless within 10 days hereof either party specifies controverted issues or
12 makes proposals not covered in the tentative decision. In that case, and after any proceedings
13 required, the defendants shall prepare the Statement of Decision agreeably to Rule 232(a)(1), Rules
14 of Court.

15 So ordered.

16 Dated: July 20, 1998

17
18
19
20
21 
22 CARLOS BEA
23 Judge of the Superior Court
24
25
26
27
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ENDORSED
FILED
San Francisco County Superior Court

FEB 5 - 2001

GORDON PARK-LI, Clerk
BY: RANI EDWARDS
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT 514

FRED ROBERTSON

PLAINTIFF

VS

ASBESTOS DEFENDANTS (BHC)

DEFENDANT

CASE NO: 304714
~~315418~~

DECISION ON DEFENDANTS'
MOTION FOR JUDGMENT BASED UPON THE
STATUTE OF LIMITATIONS (§340.2 CCP)

Attached please find the Court's Decision on Defendants' Motion for Judgment based upon the Statute of Limitations (§340.2 CCP)

DATED: FEBRUARY 5, 2001

By: *Rani Edwards*
RANI EDWARDS
DEPUTY CLERK

DECISION ON DEFENDANTS'
MOTION FOR JUDGMENT BASED
UPON THE STATUTE OF
LIMITATIONS (Sec.340.2 Code Civ.
Proc.)

The parties have submitted the trial of the affirmative defense based upon the Statute of Limitations¹ upon a stipulation of facts.² The trial of the matter has taken less than one day or eight hours; neither party has requested a Statement of Decision before submission.³

The issue framed by the pleadings is whether the above-entitled action⁴, commenced in July, 1999, is barred as untimely by the provisions of Sec. 340.2 Code Civ. Proc.

Civil actions for injury or illness caused by exposure to asbestos must be

¹. Sec. 340.2, Code Civ. Proc.

². "Stipulated Facts Re: Bifurcated Statute of Limitations Issue", attached hereto as Attachment 1. ("Stipulated Facts")

³. See Sec. 632, Code Civ. Proc.

⁴. The timeliness of San Francisco Superior Court Action No. 952638, commenced in June 1993 (Stipulated Facts #8) is not before the court.

commenced within one year of (1) the plaintiff's discovery⁵ that he⁶ has first suffered disability *and* (2) that such disability was caused or contributed to by such asbestos exposure. (*Hamilton v. Asbestos Corporation*, 22 Cal. 4th 112, 1138 (2000).

Both elements must be present to commence the running of the statute of limitations applicable to asbestos actions. If the plaintiff is neither diagnosed with cancer, nor is capable of diagnosis through reasonable diligence, the first element ("discovery") is not made out; the statute of limitation is not triggered. Similarly, if the plaintiff were retired from his regular occupation before he discovered his injury or disease, the period of limitations would not commence to run; the plaintiff's action would never be untimely. (See *Hamilton*, supra.)

However, if the plaintiff knows or should have known through the exercise of reasonable diligence that he has a "disability" caused or contributed to by exposure to asbestos, the statute is triggered, and the time in which to commence an action for injury or illness because of asbestos exposure

⁵. Either through actual knowledge of the presence of injury or disease or knowledge imputed by what plaintiff would have learned through exercise of reasonable diligence.

⁶. Rather than repeat the personal pronouns throughout this decision, which causes difficulties in its reading, the writer means "he/she" each time "he" is written. The writer does not intend to violate the court's rules regarding gender equity by this prose technique.

commences then to run.

Here, plaintiff Robertson first noticed symptoms of shortness of breath in 1989/1990. (Stipulated Facts, #3). That alone did not trigger the statute. Neither did the fact that he lost time from his regular occupation in 1990 due to shortness of breath (Stipulated Facts , #4). When he "associated shortness of breath with asbestos in 1990" (Stipulated Facts, #5), he may or may not have "known" or "should have known"⁷ that his lost time from his regular occupation as a plasterer constituted a "disability" within the meaning of the cited statute. But certainly by June, 1993, when he commenced his action in San Francisco Superior Court action No. 952638 "for asbestosis"⁸ he knew that he had first suffered a disability from exposure to asbestos either in 1990 or by 1993. Further, if those first losses of time from work were considered temporary, plaintiff's permanent loss of time from work because of shortness of breath in 1995 (Stipulated Facts, #9) clearly established his "disability" caused by exposure to asbestos, within the meaning of Sec. 340.2 Code Civ. Proc., as of 1995.

Does the establishment of that knowledge of disability caused or

⁷. Sec. 340.2 (a)(2) Code Civ. Proc.

⁸. Stipulated Facts, #7.

contributed to by the exposure to asbestos trigger the commencement of the one-year statute of limitations for purposes of the action commenced in July 1999, for damages solely for cancer?

The Stipulated Facts establish that plaintiff's first symptoms from cancer occurred in 1998, within one year of the commencement of the above-entitled case.(Stipulated Facts, #10). Plaintiff was first diagnosed with cancer in November, 1998. (Ibid., #11). Plaintiff commenced the above-entitled action in July, 1999 "for cancer", and seeks no damages other than for cancer. (Ibid., #12,13.). The defendants do not assert that plaintiff's cancer progressed from, or is related to his asbestosis or pleural disease. (Ibid #15). The parties stipulate that asbestosis, pleural plaques and cancer are separate and distinct diseases. (Ibid., #14).

Plaintiff urges the applicable statute of limitations cannot possibly commence to run on an asbestos plaintiff's cancer cause of action when he is first disabled by asbestosis, and at a time when he neither knows nor can, through the exercise of reasonable diligence, determine that he has cancer caused by exposure to asbestos. That position makes a great deal of sense to this court.

But it also does violence to the clear and unmistakable language of the

applicable statute of limitations.

The statute does not start the running of the one-year period on when the plaintiff knows that the first disability he suffered was caused by the *injury or illness* that he claims to have suffered by exposure to asbestos. It starts running when he knows that the first disability he suffered was caused by "such exposure". That is, "exposure to asbestos".

The statute was enacted for the purpose of enlarging the time in which a plaintiff could bring an action for injury or illness caused by exposure to asbestos. Social policy was served in encouraging workers to continue working although they had symptoms of asbestos related disease, without having to risk the running of the statute of limitations. The statute would not start running out on them until they suffered "disability", a specially defined term which required a loss of work time from the worker's regular occupation. Sec. 340.2 (b) Code Civ. Proc. *Hamilton*, *supra*.

But once the worker suffered such disability, the statute does not differentiate between one disability caused by one type of asbestos related disease, and another disability related to another disease. The statute refers only to the "first" disability (Sec. 340.2 (a)(1)) and "such" disability (Sec. 340.2(a)(1)).

Read this way, the statute does extend the period in which an action can

be commenced after discovery of the asbestos related disease until disability has occurred. But, in what may be an unintended result, its language *commences* the running of the statute of limitations when that first disability is known to be caused by exposure to asbestos.

Here, it means that plaintiff Robertson must have commenced his action for damages for cancer no later than 1996, one year from the latest date when he knew that he had first suffered disability from exposure to asbestos.

But It also means that although plaintiff ~~did~~ not know, nor through the exercise of reasonable diligence could he have known, that he had cancer, he was required to commence an action for cancer damages by June 1996, whether he had cancer or not.

It is said that where the language of a statute is clear and unmistakable, a court must apply it to the facts of the case, regardless of its result. That rule of statutory application is subject to the exception that when the literal reading of a statute renders an absurd result, the court will not so interpret it. (7, Witkin, *Summary of California Law*, 9th ed., Sec. 94, p. 147 and cases cited therein.) "Absurd" means "...ridiculously inconsistent with reason or the plain dictates of common sense; logically contradictory". (*Webster's New 20th Century Dictionary Unabridged*, 2nd ed.) So in *Granbury v. Islay Investment*,

161 Cal. App. 3d 382, 388 (1984) a legislative revision of Sec. 1950.5 Civil Code rendered every advance payment of rent a "security", and hence restricted the use of such payment by the landlord to uses other than the payment of rent. *"Such an absurd result would effectively put most landlords out of business and render tenants homeless"*. (See also, *Golden v. City of Oakland*, 49 Cal. App. 3d 284,288 (1975) and *County of Sacramento v Hickman*, 66 Cal. 2d 841, 844-5 (1966)).

The court repeatedly asked counsel for the defendants to state a reasoned basis for the application of Sec. 340.2 Code Civ. Proc. to bar the plaintiff's present action. Counsel labored mightily but could come to no more of a reason than it constituted the "bright line" which the Legislature found was for the greater good; a compromise between justice and efficiency.

It is clear that Sec. 340.2 Code Civ. Proc. does not prevent the filing of multiple actions. Unlike Sec. 377 Code Civ. Proc., which allows "an" action, 340.2 applies to "any civil action". Further, a plaintiff is not barred by the terms of 340.2 Code Civ. Proc. from starting a second or third action, so long as he commences it before the year's period is exhausted.

Neither does the application urged by the defendants tend to hasten the commencement or trial of any cause of action, for it is clear that so long as the plaintiff has left his usual occupation for reasons other than disability caused

by exposure to asbestos, the time in which to commence the action does not commence to run. *Hamilton, supra.*

The court cannot conceive of any reasoned basis for holding that a plaintiff who does not have cancer, and has no knowledge or reason to know that he has cancer, must nonetheless commence an action for damages for cancer within one year of the time he is first caused disability by another disease caused by exposure to asbestos. The literal application of Sec. 340.2 Code of Civ. Proc. is contrary to the purpose of the statute: "...to provide a special statute of limitations for asbestos-related illnesses consistent with the fact that such slowly developing occupational diseases typically become symptomatic long before they become disabling..." *Hamilton, supra* at 1139. Applied as defendants would have it, the statute would here bar plaintiff's action not only before he became disabled from cancer, but before he had any symptoms.

Is this court barred from interpreting Sec. 340.2 Code Civ. Proc. against its literal meaning because of the absurdity found in view of statements by the Supreme Court in *Hamilton, supra*? Certainly not because of the majority opinions [p.1145]: it discusses only cases of single or multiple cases brought where there was no precedent disability.

A more formidable barrier is the last three lines of the concurring

opinion by Justice Brown. *"Moreover, section 340.2, by its terms, bars plaintiffs diagnosed with asbestos-related cancer over one year after becoming disabled due to asbestos exposure from asserting cancer claims. Such a result contravenes the main purpose behind section 340.2—to ameliorate the harsh application of the previous statute of limitations....in light of these bizarre and, I suspect, unintended results, I urge the Legislature to revisit and revise section 340.2". (Hamilton, at 1152.)*

ABer First, Justice Brown's statement is *dictum*. The facts of *Hamilton* did not present the case she put because ^{*Mitchell*} ~~Miller~~ was retired before he discovered his illness, hence was never "disabled" within the meaning of the statute. Second, and more importantly, although dictum is not controlling, it should not always be ignored. If the dictum is made *"..by an able court after careful consideration, or in the course of an elaborate review of authorities, or when it has long been followed"* it should be followed. (9, Witkin, *California Procedure*, 4th ed. Sec. 947, p.989.) This court bows to none in its admiration for Justice Brown. However, the text of her remarks on this issue do not show any consideration of the "absurdity" exception to literal application of a statute's language, nor any review of authorities on the subject. Of course, being a new question, it is not dicta that has been long followed. For these reasons, this court does not find it persuasive, and respectfully declines to follow it.

For the foregoing reasons, the defendants' motion for judgment in their favor and against the plaintiff based on the affirmative defense of statute of limitations is hereby DENIED.

5 February 2001

Carlos Bea
Judge of the Superior Court

(10)

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8
9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 IN AND FOR THE CITY AND COUNTY OF

11 FRED ROBERTSON

No. 304714

12 Plaintiff (s),

Stipulated Facts Re: Bifurcated Statute of
Limitations Issue

13 vs.

14 ASBESTOS DEFENDANTS (BHC)

15 Defendant (s). /

Date:
Time:
Dept:
Trial Date:
Action Filed:

16
17 For the purpose of efficient resolution of Defendants' Affirmative Defense pertaining to
18 the Statute of Limitations [C.C.P. Section 340.2] by the court, the parties have stipulated to the
19 following facts. This stipulation to the facts that follow is limited to resolution of issues
20 presented in this bifurcated proceeding. These stipulated facts do not constitute evidence
21 admissible in any other phase of this trial.

- 22
23 1. Fred Robertson was born in 1939.
24 2. Fred Robertson's regular occupation was plasterer.
25 3. Fred Robertson first noticed shortness of breath in 1989/1990.
26 4. Fred Robertson lost time from his regular occupation in 1990 due to shortness of breath,
27 which precluded the performance of his regular occupation as a plasterer.
28 5. Fred Robertson first associated shortness of breath with asbestos in 1990.

- 1 6. Fred Robertson was diagnosed with asbestosis and pleural plaques in April 1992.
- 2 7. Fred Robertson filed his first complaint in June 1993, SFSC No. 952638 for asbestosis.
- 3 8. In 1994 and 1995 Fred Robertson worked again as a plasterer, his regular occupation, and
- 4 was not precluded from the performance thereof.
- 5 9. Fred Robertson ceased working as a plaster, his regular occupation, and was precluded
- 6 therefrom, in 1995 due to shortness of breath.
- 7 10. Fred Robertson's first symptoms from cancer occurred in 1998, within one year of filing
- 8 the present case, SFSC No.304714.
- 9 11. Fred Robertson was first diagnosed with cancer in November 1998.
- 10 12. Fred Robertson filed the present complaint in July 1999, SFSC No. 304714, for cancer.
- 11 13. Fred Robertson does not seek recovery in the present case, SFSC No. 304714, for
- 12 damages other than cancer.
- 13 14. Asbestosis, pleural plaques, and cancer are separate and distinct diseases.
- 14 15. Based upon the specific medical circumstances of Fred Robertson, defendants do not
- 15 assert that Mr. Robertson's cancer progressed from, or is related to, his asbestosis or
- 16 pleural disease.
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ENDORSED
FILED
San Francisco County Superior Court

JAN 16 2001

GORDON PARK-LI, Clerk
BY: MARY K. YAP
Deputy Clerk

CALIFORNIA SUPERIOR COURT
COUNTY OF SAN FRANCISCO
APPELLATE DIVISION

Bernice Lindstrom,

Plaintiff/Appellant,

vs.

Christopher Stone,

Defendant/Respondent.

) Limited Jurisdiction No. 170609

) Appellate No. 5215

) ORDER AFFIRMING JUDGMENT

This is an appeal from a judgment for the tenant in an unlawful detainer action to recover possession of a garage rented to the tenant together with his apartment. The question presented is whether or not the landlord may terminate the tenancy in the garage alone without cause. The case is one of first impression and involves application of the San Francisco Residential Rent Stabilization and Arbitration Ordinance¹ ("Rent Ordinance").

At trial, Respondent took the position that his garage was a part of his "rental unit" as defined in § 37.2(r) of the Rent Ordinance and that his interest therein could not be terminated without cause. (See, S.F. Admin. Code §§ 37.2 (r) and 37.9.) Appellant asserted that the garage is a

¹ S.F. Admin. Code, ch. 37.

1 mere "housing service" as defined in section 37.2(g) of the Rent Ordinance which may be curtailed
2 without just cause on condition the rent is reduced. (See, S.F. Admin. Code §§ 37.2 (g) and 37.2
3 (q).) The trial court found in favor of the tenant and entered judgment accordingly.

4 For the reasons set forth herein, the majority of this Court, affirms.

5 **Factual and Procedural Background**

6 On November 5, 1998, Appellant became the owner of 21-unit apartment building located
7 at 2240 Bay Street, San Francisco, California. (RT 25.) The building has three garage spaces
8 located on the ground floor. (RT 25.) Respondent has been a tenant since 1989, paying \$450 a
9 month as rent for an apartment and garage. (RT 9.) The lease established a rental relationship for
10 both an apartment and a garage. Respondent's apartment and garage are located in the same
11 building. (RT 25.)
12

13 On July 17, 1999, Appellant served a 30-day notice terminating Respondent's use of the
14 garage. This notice also informed Respondent that his rent would be reduced fifty dollars per
15 month to account for the loss of garage space. (RT 8.) When Respondent failed to surrender
16 possession of the garage, Appellant filed an unlawful detainer action.
17

18 Appellant took the position that that Respondent's garage was a "housing service" as
19 defined in 37.2(g) of the Rent Ordinance.² A landlord may deprive a tenant of a housing service
20 but to do so without a "corresponding reduction in rent" constitutes a prohibited rent increase.
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24 ² Section 37.2 (g) defines "housing services" as follows: Services provided by the landlord connected with the use or
25 occupancy of a rental unit including, but not limited to: repairs; replacement; maintenance; painting; light; heat; water;
26 elevator service; laundry facilities and privileges; janitor service; refuse removal; furnishings; telephone; parking; rights
27 permitted the tenant by agreement, including the right to have a specific number of occupants, whether express or
28 implied, and whether or not the agreement prohibits subletting and/or assignment; and any other benefits, privileges or
facilities. (S.F. Admin. Code § 37.2(g).)

1 (See, S.F. Admin Code § 37.2(q).) Respondent derives his position from the Rent Ordinance's
2 definition of a rental unit. Section 37.2(r) defines a rental unit as follows:

3 Rental Units. All residential dwelling units in the City and County of San Francisco
4 together with the land and appurtenant buildings thereto, and all housing services,
5 privileges, furnishings and facilities supplied in connection with the use or occupancy
6 thereof, including garage and parking facilities. (S.F. Admin. Code § 37.2(r).)

7 Section 37.9 of the Rent Ordinance provides that a landlord shall not endeavor to recover
8 possession of a rental unit without good cause.

9 On December 21, 1999, Judgment was entered for the Respondent. On February 2, 2000,
10 Appellant's request for a new trial was denied. The landlord appeals the December 21 judgment.

11 **Standard of Review**

12 Appellant seeks review of the trial court's interpretation of the Rent Ordinance. At trial,
13 there were no material disputed issues of fact, and the interpretation of seemingly inconsistent
14 provisions of the Rent Ordinance is a question of law. As such, the trial's court's judgment must
15 be reviewed *de novo*. (*Uniroyal Chemical Co. v. American Vanguard Corp.* (1988) 203 Cal. App.
16 3d 285.) This court gives no deference to the trial court's ruling or the reasons for its ruling and
17 decides the matter anew. (*Ghirado v. Antonioli* (1994) 8 Cal. 4th 791, 799.)

18 **Majority Opinion**

19 **Discussion**

20
21 **I. The trial court correctly ruled the Rent Ordinance requires a landlord to provide**
22 **good cause to evict a tenant from garage space.**

23 In interpreting statutory language, the court applies well-settled rules, commencing with
24 examination of the language of the statute itself. (*In re York* (1995) 9 Cal. 4th 1133.) When the
25 language of a statute is clear and unambiguous, there is no need for interpretation and a court must
26 apply the statute as written. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.
27

1 App. 4th 855.) Contrary to the position held by the dissent, we find the language of the Rent
2 Ordinance to be clear and unambiguous. Thus, we decline to engage in statutory construction and
3 shall apply the statute as written.

4 From the plain language of the statute, a garage as a structure is included in the definition
5 of a rental unit and is a distinct and narrower term than parking, which is included in housing
6 services.³ In short, a landlord may provide a tenant with a parking space as a housing service
7 without leasing the tenant a garage as part of the rental unit. Here, where the tenant leased his
8 apartment together with his garage and that garage is a distinct structure within the same building,
9 the intent and application of the Rent Ordinance is clear: the garage is part of his rental unit, and
10 he cannot be deprived of the garage without just cause.

12 We decline to adopt the dissent's approach and find no ambiguity in the statute. We further
13 decline to adopt the dissent's interpretation of housing services, which entirely eliminates a garage
14 from the definition of a rental unit. Such an interpretation of the Rent Ordinance would permit a
15 landlord to oust a tenant from possession of a garage no matter how inextricably linked it was with
16 the dwelling unit. Any number of single family dwellings in San Francisco are composed of a first
17 level garage and an upper level living area. In most cases, the off-street parking and storage space
18 afforded by the garage are more than mere services or luxuries which are optional to the
19 householder, they are an essential and integral part of the dwelling unit. To hold that a landlord
20 may recover possession of the garage portion of such a dwelling unit without cause would virtually
21 eliminate the protection of the Rent Ordinance for many tenants.

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26 ³ "Garage, *n* 1. A building or indoor space in which to park or keep a motor vehicle." "Parking *n* 2. Space in which to
27 park vehicles or a vehicle: *ample paring behind the building*." (The American Heritage Dictionary of the English
28 Language, (3d ed.) 1996, 1992.)

1 **II. The trial court did not err in limiting Appellant's remedies to administrative**
2 **procedures and remedies provided by the Rent Ordinance.**

3 Appellant argues that there are no applicable administrative remedies or procedures
4 provided in the Rent Ordinance. Because we find that a garage is part of a "rental unit," Appellant
5 should proceed before the Rent Control Board under 37.9(a)(11) of the Rent Ordinance, rather than
6 an upon an unlawful detainer action. Section 37.9(a)(11) permits a landlord to temporarily remove a
7 unit from housing in order to carry out capital improvements or rehabilitation work. Here,
8 Appellant contends that she needs access to Respondent's garage to assist in seismic retrofitting.
9 (RT 26.) A reasonable interpretation of section 37.9(a)(11) would certainly include seismic
10 retrofitting within the meaning of capital improvements or rehabilitation work. Appellant also
11 contends that it would be more convenient for the property manager to have a garage. (Appellant's
12 Opening Brief at p. 4.) Convenience of a property manager is not included (and should not be
13 included) in the list of "good cause" reasons to evict a tenant. In any event, the Rent Ordinance
14 does provide remedies to landlords seeking to evict their tenants. However, to effectuate the
15 purpose of the Rent Ordinance, the legislature has enacted various restraints on evictions. Thus, the
16 trial court did not err when it suggested that Appellant seek her remedy within the parameters of the
17 administrative procedures of the Rent Ordinance and those promulgated by the Rent Control Board.
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20 **III. Request for Judicial Notice.**

21 Upon request of a party, appellate courts have the same power as trial courts to take judicial
22 notice of any matter properly subject to judicial notice. (Evid. Code § 459; *Sebago, Inc. v. City of*
23 *Alameda* (1989) 211 Cal. App. 3d 1372, 1380.) Appellate courts have the option to take judicial
24 notice of any matter subject to discretionary judicial notice by the trial court under Evidence Code
25 § 452. (Evid. Code § 459; *Larson v. State Personnel Bd.* (1994) 28 Cal. App. 4th 265, 270.)
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1 **A. The Court grants Appellant's request take Judicial Notice of the**
2 **Rent Ordinance and the Rent Control Board's Rules and**
3 **Regulations.**

4 The Court takes judicial notice of the San Francisco Residential Rent Stabilization and
5 Arbitration Ordinance, San Francisco Administrative Code, Chapter 37.⁴ (Evid. Code § 452 (b).).
6 Moreover, this Court takes judicial notice of the Rent Control Board's Rules and Regulations.⁵
7 (*Hazon-Iny Development, Inc. v. Unkefer* (1980) 116 Cal. App. 3d Supp. 1, 3 [appellate department
8 took judicial notice of the Rent Control Act of the City of Santa Monica, as well as its rent control
9 board regulations under Evidence Code § 459.])

10 **B. The Court denies Appellant's request to take Judicial Notice of**
11 **information contained on the Rent Control Board's web site.**

12 Appellant also requests that the Court take judicial notice of two information sheets
13 published on the Rent Control Board's web site.⁶ Appellant asserts that Evidence Code § 452 (h)
14 provides authority for such information to be judicially noticed. However, Evidence Code § 452
15 (h) pertains to "[f]acts and propositions that are not reasonably subject to dispute and are capable
16 of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."
17 (Evid. Code § 452(h).) Here, whether a garage is considered a "Housing Service" is subject to
18 dispute and is not capable of immediate and accurate determination by resort to sources of
19 reasonably indisputable accuracy. Therefore, the Court denies Appellant's request to take judicial
20 notice of the web site information.
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24 ⁴ Appellant requests that the Court take judicial notice of the Rent Ordinance as of its original enactment (6/13/79) and
as well as the Rent Ordinance in effect as of commencement of the unlawful detainer action (12/18/98).

25 ⁵ Appellant requests that the Court take judicial notice of the Rules and Regulations as of their original enactment
(8/10/80) and as well as the those in effect as of commencement of the unlawful detainer action (5/18/99).

26 ⁶See San Francisco Rent Board, Information to Go, Menu No. 73, *Garages & Storage Rooms as Housing Services*,
<[http:// www.ci.sf.ca.us/rentbd/info73.htm](http://www.ci.sf.ca.us/rentbd/info73.htm)> See also San Francisco Rent Board, Information to Go, Menu 22,
27 *Decrease in Services Petition*, <[http:// www.ci.sf.ca.us/rentbd/info22.htm](http://www.ci.sf.ca.us/rentbd/info22.htm)>
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1 **CONCLUSION**

2 The definition of "rental unit" includes garages and parking facilities. However, the rather
3 detailed definition of "housing services" includes parking, but does not include garages. If the
4 legislature had intended garages to be a form of housing services they could have simply inserted
5 the word "garage" into the definition. By this omission, it can be construed that garages are not
6 merely parking facilities, which can be removed by a 30-day notice to vacate and accompanying
7 rent reduction. Thus, the trial court did not err when it found that Respondent's garage came within
8 the definition of "rental unit;" thereby requiring Appellant to provide a good cause reason to evict
9 Respondent from possession.
10

11 As such, the Court affirms the judgment in favor of Respondent.

12 **IT IS SO ORDERED**

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15 Dated: JAN 12, 2001

16 I Concur:

17 Anne Bouilane
18 Anne Bouilane, Associate Judge
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James J. McBride
James J. McBride, Associate Judge

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Dissenting Opinion

I respectfully dissent from the majority.

This appeal presents the question of what is considered within the definition of a "Rental Unit" provided in Section 37.2(r) of the Rent Control Ordinance. That section defines "Rental Units" to be:

All residential dwelling units ... together with the land and appurtenant buildings thereto, and all housing services, privileges, furnishings and facilities supplied in connection the use or occupancy thereof, including garage and parking facilities ... (S.F. Admin. Code § 37.2(r).)

The section, by its terms, includes elements other than a dwelling unit within the definition of "Rental Unit." Specifically, a rental unit is comprised of the following elements: (1) dwelling unit; (2) land and appurtenant buildings; (4) housing services; and (5) garage and parking. However, the section fails to indicate whether separate elements, independent of the dwelling unit, are entitled to the "good cause" eviction protections provided in Section 37.9 of the Rent Control Ordinance. Moreover, this section fails to indicate the manner in which separate elements are to be removed. For example, the section fails to indicate how a landlord would go about removing "land and appurtenant buildings."

The regulatory scheme was devised to provide decent, safe and affordable housing. Section 37.2(q) defines "Rent Increase" as "any additional monies demanded or paid for rent ... or any reduction in housing services without corresponding reduction in the monies demanded or paid for rent." It is instructive to note that the only allowable rent increases under the Rent Control Ordinance are for decreases in housing services and/or an increase in the landlord's property tax. By allowing rent increases in the form of a reduction in housing services, it is clear that the legislature did not intend to extend Rent Control protection to housing services.

1 Housing services are further defined by Section 37.2(g)¹ in a way that makes it virtually
2 impossible to construe them to be an integral component of a "Rental Unit," whereby decreases
3 would be subject to Rent Control protection. The Legislative intent that such services be considered
4 separate components is made clear by subsequent Rent Control Board Rule 12.20. That rule
5 prohibits evictions for conditions or covenants unilaterally imposed by a landlord, but exempts
6 "material changes that have resulted in a substantial decrease in housing services with respect to
7 garage, storage space, or access to common areas for which a commensurate rent reduction has been
8 provided by the landlord." (Rent Control Board Rules and Regulations § 12.20.)
9

10 No where in the Rent Control Ordinance does it state a that landlord must go through the
11 "good cause" eviction procedures in provided Section 37.9 to recover separate elements of a "Rental
12 Unit." However, it is clear, based on the definition of "Housing Services" that a landlord seeking to
13 recover a specific service is not required to go through Section 37.9. The Rent Control Board's
14 interpretations of the Rent Control Ordinance, together with their rules and regulations promulgated
15 thereunder, support this contention.

16 Discussion

17 I. The definition of "Housing Services" is ambiguous.

18 The dissent finds the language of the Rent Control Ordinance ambiguous. Section 37.2(g)
19 defines "Housing Services" as "[s]ervices provided by the landlord connected with the use or
20 occupancy of a rental unit including, but not limited to ... *parking* ... and any other benefits;
21

22
23 ¹ Section 37.2(g) defines "Housing Services" as "[s]ervices provided by the landlord connected with the use or
24 occupancy of a rental unit including, but not limited to: repairs; replacement; maintenance; painting; light; heat; water;
25 elevator service; laundry facilities and privileges; janitor services; refuse removal; furnishings; telephone; parking; rights
26 permitted the tenant by agreement, including the right to have a specific number of occupants, whether express or
27 implied, and whether or not the agreement prohibits subletting and/or assignment; and any other benefits; privileges or
28 facilities."

1 privileges or facilities.” (Emphasis added.) The use of the word “parking” in the definition of
2 “Housing Services” is ambiguous in that it is not clear on its face what “parking” includes.

3 Reasonable minds could differ on what is considered parking. Parking can be considered to be, *inter*
4 *alia*, a parking space in a garage, a parking pad outside, a carport, or a garage. Given this ambiguity,
5 statutory interpretation of Section 37.2(g) is required. The fundamental rules of statutory
6 interpretation apply when interpreting the Rent Control Ordinance and require this Court to: (1)
7 ascertain the legislative intent; (2) avoid absurdity; and (3) give great weight to administrative
8 construction.
9

10 **A. Legislative Intent.**

11 It is undisputed that the Rent Control Ordinance was designed to counter the shortage of
12 decent, safe and affordable housing. (Section 37.1(b)(1).) In order to safeguard such goals, the
13 Rent Control Ordinance has established restrictions on evictions. Section 37.9 states that eviction
14 restrictions shall apply to all landlords and tenants of “Rental Units” as defined in Section 37.2(r).
15 However, as previously discussed, Section 37.2(r) fails to provide a clear definition of what is
16 considered a “Rental Unit.”
17

18 **B. Avoiding Absurdity.**

19 As previously provided, the Rent Control Ordinance was designed to provide safe and
20 affordable housing. While a garage is capable of a multitude of uses, it is not housing, but rather is a
21 form of parking. Accordingly, it is unnecessary to require a landlord to show good cause to evict a
22 tenant from parking.

23 **C. Administrative Construction.**

24 While the ultimate interpretation of the Rent Control Ordinance rests with the Court, the
25 construction given by an administrative agency is entitled to *great weight*. (*Wallace v. State*
26 *Personnel Board* (1959) 168 Cal. App. 2d 543, 547.) The Rent Control Board has reasonably
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1 interpreted a "garage" as being a form of "Housing Services," which can be removed by a 30-day
2 notice and commensurate rent reduction.² The Rent Control Board's rules and interpretations are not
3 inconsistent with purpose of the Rent Control Ordinance and should be followed. Thus, the
4 interpretation of the Rent Control Board should be accorded its due deference.

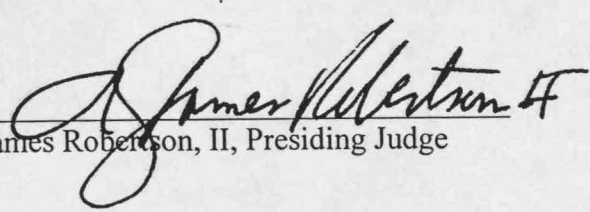
5 **II. The trial court erred in limiting Appellant's remedies.**

6 Inasmuch as the dissent finds that a landlord is not required to give a good cause reason to
7 evict a tenant from garage space, this dissenting judge finds that the trial court erred in limiting
8 Appellant's remedies to administrative remedies provided by the Rent Control Ordinance and Rent
9 Control Board.
10

11 **CONCLUSION**

12 While the definition of "Rental Unit" includes both garages and parking facilities, the
13 omission of the word "garage" in the definition of "Housing Services" is not dispositive. When the
14 definition of "Housing Services" is read in context with other provisions of the Rent Control
15 Ordinance, it can reasonably be interpreted that the "parking" does, in fact, include a "garage." It
16 follows then that a "garage" can be interpreted to be a form of "Housing Services," which can be
17 terminated upon 30-day notice and commensurate rent reduction.
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21 Dated: December 22, 2000

22 
23 A. James Robertson, II, Presiding Judge
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27 ² Rent Control Board Rules and Regulations § 12.20.
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CERTIFICATE OF SERVICE BY MAIL (CODE CIV.PROC.& 1013a(4))

I, Mary Yap, a deputy clerk of the Superior Court for the County of San Francisco, certify that:

- 1) I am not a party to this action:
- 2) On January 16, 2001 I served the attached:

ORDER AFFIRMING JUDGMENT

placing a copy thereof in a sealed envelope, addressed as follows:

The Hon.Carlos Bea
Supeiror Court, Dept. 514
400 McAllister Street, S.F. CA 94102

(Inter-office)

Nancy C. Lenvin
Judith S. Mitchell
BROWNING, WHOLEY & LENVIN
1388 Sutter Street, Suite 900
San Francisco, CA 94109

Christopher Stone
2240 Bay Street, Apt.#305
San Francisco, CA 94123

and

3) I, then placed the sealed envelope in the outgoing mail at 400 McAllister Street, First Floor San Francisco, CA 94102, on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court pratices.

DATED: January 16, 2001

GORDON PARK-LI, Clerk,

BY: Mary Yap Deputy