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002	Letter	[Letter] [Page 1] - To: Brett Kavanaugh - From: Carolyn Kuhl	1	04/28/2001	P6/b6;

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75 Cal. App. 4th 803

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

FRANCIS EGBULE IWEKAOGWU,

Plaintiff and Respondent,

v.

CITY OF LOS ANGELES,

Defendant and Appellant.

B120350

(Super. Ct. No. BC 140265)

COURT OF APPEAL - SECOND DISTRICT

FILED

OCT 13 1999

JOSEPH A. LANE

Clerk

Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County,
Ernest M. Hiroshige, Judge. Affirmed.

James K. Hahn, City Attorney, Winston F. Tyler, Senior Assistant City
Attorney, Richard M. Helgeson and Catharine H. Vale, Assistant City Attorneys,
for Defendant and Appellant.

Law Offices of Leo James Terrell and Leo James Terrell for Plaintiff and
Respondent.

Francis Iwekaogwu (Iwekaogwu) was employed as an engineer in the harbor department of the City of Los Angeles (City). While employed there Iwekaogwu, an African-American from Nigeria, complained that he was subjected to discriminatory treatment on the basis of his race and national origin. Eventually he brought this action against the City, alleging claims under the California Fair Employment and Housing Act, Government Code section 12900, et seq., for discrimination on the basis of race and national origin, hostile work environment, and retaliation. The jury found in favor of Iwekaogwu on his retaliation claim but was unable to reach a verdict on the other theories of liability. The jury awarded damages in the amount of \$775,000.

The City filed post-trial motions arguing that there was insufficient evidence to support the verdict, and that a new trial should be granted on grounds of jury misconduct and excessive damages. The court rejected the City's contentions concerning sufficiency of the evidence and jury misconduct. The court denied the City's motion for a new trial on damages, conditioned on the plaintiff's accepting a remittitur reducing the jury's verdict to \$500,000. Iwekaogwu accepted the remittitur and judgment was entered for the plaintiff in the amount of \$500,000. The City filed this appeal, reasserting the arguments made in its post-trial motions. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Because all reasonable inferences must be drawn in favor of the judgment below, we describe the facts in the light most favorable to Iwekaogwu.

Iwekaogwu is an African-American male. His national origin is Nigerian. He has two masters degrees in civil engineering.

Iwekaogwu was hired by the City of Los Angeles Department of Public Works in July 1988. In December 1989 he was hired by the harbor department of the Department of Public Works as a civil engineering assistant II. He was hired for the structural design section, a small unit of approximately six engineers. Iwekaogwu was the first African-American to join the structural design section of the harbor department.

During Iwekaogwu's interview with the harbor department, one of the interviewers asked him whether he had ever been harassed on the job before. The interviewer told Iwekaogwu that he should "get prepared because there [are] a lot of them in the Harbor Department."

After Iwekaogwu was hired, Max Weismair was his immediate supervisor. At the end of 1990 Weismair gave Iwekaogwu an evaluation, giving him the highest possible rating in all categories. The evaluation also was signed by Larry Anderson, Weismair's supervisor.

Iwekaogwu took and passed an examination to become a civil engineer associate. When the list of those who had passed the examination was published in 1991, Iwekaogwu approached Weismair about a promotion to the position of civil engineer associate. Weismair told Iwekaogwu that he would discuss the issue with Larry Anderson. Later Weismair told Iwekaogwu that Anderson had said that the harbor department was not a place for Iwekaogwu to continue his professional career and that if he needed any promotional opportunity he should seek it elsewhere. As of that time Iwekaogwu had not had any professional contact with Anderson.

After this incident, in a conversation with Doug Thiessen in 1991, Iwekaogwu threatened to file a race discrimination action against the harbor

department. Thiessen at that time was not a member of the structural design section of the harbor department. However, Iwekaogwu testified that Thiessen went to Adam Birkenbach and Vernon Hall to discuss the matter.¹ Birkenbach was Anderson's supervisor and Hall was Birkenbach's supervisor.

In August 1991 Iwekaogwu was promoted to the position of civil engineer associate. However, when promotions for the period from July 1991 to early 1992 were announced at a general meeting in early 1992, Iwekaogwu's promotion to civil engineer associate was not announced.

In October 1992 and May 1993 Weismair again gave Iwekaogwu the highest rating on his job evaluations.

In 1993 Iwekaogwu took an examination for the position of structural engineering associate I. He had the highest score of all the candidates in the harbor department on the examination and was ranked eighth in the City overall. Iwekaogwu also took and passed the examination for the position of civil engineer. He never was notified that he was eligible to apply for a position as civil engineer on the basis of his test scores. However, in 1993 the construction management division of the harbor department promoted a white male to the position of civil engineer in that division, even though that person had failed the civil engineer examination that Iwekaogwu had passed.

Raymond Aliviado became Iwekaogwu's supervisor in late 1993. Prior to that time Aliviado had been one of Iwekaogwu's coworkers in the structural design section. Aliviado had begun keeping a diary with comments about Iwekaogwu's work in 1991, when they were coworkers. Aliviado continued

¹ There was no objection to this testimony by Iwekaogwu concerning what Thiessen did.

keeping notes about Iwekaogwu after he became Iwekaogwu's supervisor. Iwekaogwu was the only employee about whom Aliviado kept notes.

On or about April 18, 1994, Iwekaogwu spoke to Bob Zmuda (who was second in command of the section under Aliviado) about Iwekaogwu's interest in a promotion to the position of structural engineering associate. Zmuda spoke with Aliviado and then told Iwekaogwu that Aliviado had said he was waiting to fill the existing structural associate position with the civil associate. Zmuda also told Iwekaogwu that Aliviado had said that Iwekaogwu was doing an unsatisfactory job, but that Zmuda had worked with Iwekaogwu on a lot of projects and found him very competent.

Slightly more than a week after Iwekaogwu inquired about a promotion, Aliviado gave Iwekaogwu a job evaluation, rating him as unsatisfactory overall. The evaluation included comments that Iwekaogwu needed to listen to and follow instructions more carefully, to be more careful in checking his work, to better interpret engineering drawings, and to take initiative and ask more questions.

Iwekaogwu then wrote a letter to Ezunial Burts, the executive director of the harbor department. He delivered it by hand to a secretary in the executive director's office in early May 1994.² Burts testified that he did not see the letter until after litigation was commenced, but that the letter was referred to Hall who in turn assigned it to Anderson for follow-up.

Iwekaogwu's letter was captioned "Discrimination Complaint in Engineering Division of the Harbor Department of the City of Los Angeles." After reciting Iwekaogwu's history of employment in the harbor department, the

² The letter bears the date May 2, 1992. However it discusses events that occurred through late April 1994. It bears a date stamp of May 4, 1994.

letter complained about the employment evaluation from Aliviado; hostile actions by Aliviado toward Iwekaogwu, including his yelling at Iwekaogwu in front of coworkers; the failure to announce his promotion in 1991; and other actions. Iwekaogwu described these as "instances where I have been discriminated against." The letter states: "I honestly feel that I have suffered more than enough reprisals for humbly requesting for a promotion, just as others did, in 1991." It concludes by stating: "I strongly feel that Mr. Ray Aliviado is not acting within his professional and city rules and regulations. Rather he is relying on his personal prejudices to make professional judgements [sic]. He is not acting alone. He is receiving advice from somewhere and I will appreciate a full fledged investigation."

On May 16, 1994, Iwekaogwu had a meeting with Anderson concerning Iwekaogwu's letter to Burts. Anderson said that he would speak with Birkenbach to discuss the letter and that he would get back to Iwekaogwu in a week. Anderson asserted that there was no discrimination in the harbor department and that it was not possible for Aliviado to discriminate against Iwekaogwu. Anderson asked if Iwekaogwu had heard about the Ku Klux Klan, Neo Nazis and Skinheads rising up all over the United States and Europe. Anderson said "that is racial discrimination" and there was no discrimination in the harbor department. Anderson also told Iwekaogwu that as long as he remained in the harbor department he should not expect any promotions. Anderson did not follow up with Iwekaogwu after this meeting. However, after the meeting, Aliviado no longer supervised Iwekaogwu.

In May 1994 Zmuda replaced Aliviado as supervisor in the structural design section. In October 1994 Zmuda selected Angel Lim to be the structural

engineering associate for the structural design section. Lim was transferred from the construction management section. Lim had taken the structural engineering examination and had scored lower on it than Iwekaogwu. Aliviado told Zmuda that Lim would be a good man for the job, although Aliviado had never worked with Lim on a project in the harbor department and had never evaluated his work performance. Zmuda hired Lim for the structural design section without looking at any of his prior performance evaluations and after talking to him for five or ten minutes on a couple of occasions.

After Zmuda became his supervisor in 1994, Iwekaogwu submitted a request for overtime. At about the same time two other members of the structural design section made similar requests. Zmuda approved overtime for the other two but tore up Iwekaogwu's overtime sheet. Zmuda told Iwekaogwu that he did not want him coming in and asking for overtime. After that, Iwekaogwu was not given overtime. Iwekaogwu asked for overtime again in 1995, but his request was denied. While Zmuda was the supervisor of the structural design section, everyone in the section was approved to do some overtime work except Iwekaogwu.³

In April 1995 Iwekaogwu telephoned Sandra Peelen of the equal employment opportunities section of the City of Los Angeles. He complained to her about discriminatory treatment and followed up with a letter dated April 14, 1995. The letter repeated many of the complaints made in the letter addressed to Burts and added others, including the denial of overtime. Iwekaogwu followed up with Peelen by telephone and met with her in June 1995. In July 1995 Iwekaogwu

³ Iwekaogwu filed an objection to Exhibit 233 lodged by the City. That exhibit is an employee overtime report. We strike Exhibit 233 as filed by the City as it appears to be incomplete when compared to the version of Exhibit 233 filed by Iwekaogwu.

filed a complaint with the California Department of Fair Employment and Housing (DFEH). Zmuda learned of this complaint at the time it was filed. An employee of the personnel department suggested to Zmuda that he keep a log on Iwekaogwu when the DFEH complaint was filed, and Zmuda began doing so.

Meanwhile, Iwekaogwu received a job evaluation from Zmuda in May 1995. The evaluation indicated that Iwekaogwu "needs improvement." The evaluation stated that Iwekaogwu needed to pay more attention to checking of finished work and to ask more questions early in the design process to develop better engineering judgment.

Iwekaogwu filed the complaint in this case in December 1995.

On July 3, 1996 Zmuda again rated Iwekaogwu. The overall rating was "improvement needed." Zmuda noted that Iwekaogwu's performance had deteriorated. On July 18, 1996, Zmuda wrote a letter to Iwekaogwu to document "an oral warning given to you on July 8, 1996 as a result of insubordinate behavior and performance problems." The letter documented several instances when Iwekaogwu refused to provide information or was uncooperative. The events described in the letter had occurred over a one-year period.

On several occasions Zmuda told Iwekaogwu that Iwekaogwu had to leave the structural design section "because [Zmuda] considered [Iwekaogwu] a litigant and a filer of discrimination complaints." On October 8, 1996, Zmuda drew an outline of a dead man with fake blood, like a crime scene drawing, in the harbor department offices on some carpet that was about to be replaced. The drawing was three to four feet away from the entrance to Iwekaogwu's office. Zmuda testified that he had drawn the figure outside of his own office, which was across from Iwekaogwu's, and that the drawing was a Halloween joke. Iwekaogwu

testified that Zmuda had told a witness that the drawing "shows that one of us would be leaving the structural section very soon and that individual knows that this is directed at him."

With respect to economic damages, testimony was introduced that the difference in salary between a civil engineer associate (the position Iwekaogwu held beginning August 1991) and a civil engineering is \$12,000 to \$15,000 per year. A civil engineer associate is paid \$23.35 per hour, and the difference in rate of pay between a civil engineer associate and a structural engineering associate is 51 cents per hour. Overtime is paid at time and one-half. For the year ending June 30, 1993, Iwekaogwu worked 58 hours of overtime.

With respect to evidence concerning Iwekaogwu's emotional distress, Iwekaogwu testified that he has nightmares about his supervisors "going after [him] at night," that he is under stress, that he has been treated by a doctor with medication for high blood pressure, that his relationship with his children has changed, that his wife threatened to leave him because of his "stressed-out" condition caused by his work situation, that he has trouble sleeping and that he eats less. He worries about mortgage payments and his future ability to afford private schooling for his children. Although he was referred for psychological counseling, there was no testimony that he received treatment from a psychologist or psychiatrist. No medical practitioner testified concerning his emotional distress. Iwekaogwu's wife testified that he used to be a fun-loving person but has changed. She testified that Iwekaogwu now cries a lot and has withdrawn from activities with his children and with social acquaintances. She confirmed that she had threatened to leave her husband because he was unhappy and would not

communicate. She testified that they were having difficulty paying bills and that they could not afford to send their children to private school.

The case was submitted to the jury on May 21, 1997. On June 3 a juror sent a note to the judge, informing him that another juror, Ms. Hirtle, had admitted that she had sought the advice of her spouse about the case. The court inquired on the record of Ms. Hirtle. She stated that she had discussed the facts of the case with her husband, a union representative, and that her husband had said "yes, that's retaliation." Ms. Hirtle stated that she had communicated her husband's opinion to the other jurors but had not told the other jurors anything more than this and had not communicated anything about her husband's reasoning. The court indicated that it would excuse Ms. Hirtle and substitute an alternate juror.

The City moved for a mistrial. The court then questioned the other jurors about Ms. Hirtle's statements in the jury room and whether they would be able to disregard what Ms. Hirtle had said about her conversation with her husband and form their own opinions. The other jurors agreed with Ms. Hirtle's account of what was stated in the jury room and each agreed that he or she could disregard what Ms. Hirtle had said about her husband's opinion. The court denied the City's motion for a mistrial, excused Ms. Hirtle for cause, substituted an alternate juror and instructed the jurors that they were to disregard Ms. Hirtle's statements about her conversation with her husband.

The jury returned a special verdict, finding in favor of Iwekaogwu on his claim that he was retaliated against by the City for making a complaint of discrimination based on race or national origin. The jury was unable to reach a verdict on Iwekaogwu's claim that he was discriminated against on account of his race or national origin by the City's failure to promote him and on his claim that

he was subjected to a hostile work environment. The jury awarded damages of \$775,000. No question concerning punitive damages was submitted to the jury.

The City filed a motion for judgment notwithstanding the verdict on the ground that the evidence was insufficient as a matter of law to support the jury's verdict. The City also filed a motion for a new trial and for reduction of damages. In the new trial motion the City again argued insufficiency of the evidence and also argued that the damages award was not supported by the evidence and was excessive as a matter of law.

The City also argued that juror misconduct deprived it of a fair trial. The City offered the declarations of three jurors. These jurors testified that (1) one juror had been very aggressive in deliberations, threatening to walk out when deliberations were not going his way, interrupting other jurors, and telling others "you don't know what you're talking about," "shut up," and "you're stupid;" (2) that when Ms. Hirtle had stated what her husband had told her, the foreperson had tried to secure an agreement from other jurors not to tell anyone about Ms. Hirtle's misconduct; (3) that when the discussion of damages started, each juror had written down what amount he or she would award, that one juror stated he was "playing the averages" by proposing the amount of \$2 million, and that the jury negotiated up and down from the various amounts proposed by jurors at the outset; and (4) that during the discussion of damages, when one juror pointed out the jury instruction stating that damages could not amount to punishment, another juror asserted that the jury ought to set an example and send a message to the City that it cannot treat any employee as Iwekaogwu was treated. The declaration of one juror stated that after Ms. Hirtle talked about her husband's opinion, the jurors "all discussed what had happened and everyone stated that he/she did not feel that

Ms. Hirtle's announcement had in any way affected his/her decision, only Ms. Hirtle's."

Iwekaogwu filed declarations of other jurors 35 days after the City served and filed its notice of motion for new trial and its juror declarations. The City moved to strike these declarations as untimely under Code of Civil Procedure section 659a. The court overruled the City's objections.

The court denied the City's motion for judgment notwithstanding the verdict. The Court denied the City's motion for new trial, conditioned on the plaintiff's accepting a remittitur reducing the jury's verdict to \$500,000. Regarding the City's allegations of juror misconduct, the court stated that it was "convinced . . . based on all of the evidence that, in general, the jurors did not commit misconduct," and that, regarding Ms. Hirtle, "the subsequent inquiry of other jurors and the instructions of the Court alleviated any possible taint regarding her consultation with her husband." In setting the remittitur amount, the court stated that it "was persuaded by the moving papers that the verdict was excessive due to the facts of the case and some possible questionable activity by some jurors during deliberations."

Plaintiff accepted the remittitur, and judgment was entered in the amount of \$500,000. The City filed a timely notice of appeal.

DISCUSSION

I

On appeal the City first argues that the evidence was insufficient to establish the elements of a claim for retaliation under the California Fair Employment and Housing Act (FEHA), Government Code section 12900, et seq.

The City concedes that in considering this issue "the appellate court must read the record in the light most advantageous to the plaintiff, resolve all conflicts in his favor, and give him the benefit of all reasonable inferences in support of the original verdict." (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 703, internal quotation marks and citations omitted.)

The FEHA makes it unlawful "[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint . . . under this [Act]." (Gov. Code, § 12940, subd. (f).) To establish a prima facie case of retaliation, "the plaintiff must show that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action." (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.)

The City alleges that only employment actions after May 1994 could be considered by the jury in determining whether Iwekaogwu was retaliated against by the City, because his first complaint of employment discrimination was the letter delivered to Burts' office in that month. However there was evidence that, prior to August 1991, Iwekaogwu had threatened to file a race discrimination action against the harbor department (after Anderson stated that Iwekaogwu should seek promotional opportunities outside the harbor department), and that this threat was communicated to two of Anderson's supervisors. The City concedes that an employee engages in protected activity under the FEHA when he threatens to file a charge of employment discrimination. (See, e.g., *Gifford v. Atchison, Topeka and Santa Fe Ry. Co.* (9th Cir. 1982) 685 F.2d 1149, 1156, fn. 3; *Silver v. KCA, Inc.* (9th Cir. 1978) 586 F.2d 138, 141, fn. 2.)

Thus there was evidence that Iwekaogwu engaged in activity that was protected from retaliation as early as August 1991. Subsequently Iwekaogwu experienced adverse employment actions (1) when he was not promoted to the structural engineering associate position in the structural design section and instead Angel Lim was given that job, (2) when he was not promoted to the level of civil engineer, and (3) when he was denied his requests for overtime.

The City argues that the position of structural engineering associate never was posted for promotion. However, although there was not a formal posting, the structural design section found a way to fill the position by transferring Lim from another section of the harbor department. The point is that the job was filled and Iwekaogwu did not fill it.

The City also argues that Iwekaogwu's place on the eligibility list for civil engineer never was high enough to allow him to be considered for that position. However, the City was willing to fill a civil engineer position in another section with someone who actually had failed the civil engineer examination that Iwekaogwu had passed. If the person who failed the examination was eligible for a civil engineer position, then the jury could have concluded that Iwekaogwu should have been eligible for the position as well, regardless of his place on the eligibility list.

Thus there was evidence from which a jury could have concluded that in 1991 Iwekaogwu engaged in protected activity by threatening to file a race discrimination complaint and that Iwekaogwu was subjected to adverse employment actions thereafter. The City argues, however, that there was insufficient evidence under the three-stage approach of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804, to allow a jury to conclude that there was

a causal relationship between the protected activity and the adverse employment actions. The City argues that it offered a legitimate, nonretaliatory explanation for its acts (poor performance by Iwekaogwu), and that Iwekaogwu failed to show that this explanation was pretextual because he did not offer evidence demonstrating that the criticisms of his performance were inaccurate.

The City takes too narrow a view of the type of evidence that may be offered to show that an employer's nonretaliatory explanation for its actions is pretextual. A plaintiff is not limited to a direct attack on the employer's explanation. At least three types of evidence can be used to show pretext: (1) direct evidence of retaliation, such as statements or admissions, (2) comparative evidence, and (3) statistics. (*Penk v. Oregon State Bd. of Higher Educ.* (9th Cir. 1987) 816 F.2d 458, 462 [considering sex discrimination claim].) Iwekaogwu offered both direct evidence of retaliation and comparative evidence.

Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive. (See *Lindahl v. Air France* (9th Cir. 1991) 930 F.2d 1434, 1439 [sexist comments in sex discrimination case].) The facts presented at trial include several remarks by Iwekaogwu's supervisors that can be interpreted as indicating an intent to retaliate against Iwekaogwu for his complaints of discrimination.

Most directly, there was evidence that Zmuda told Iwekaogwu on several occasions that Iwekaogwu had to leave the structural design section because Zmuda considered him a litigant and a filer of discrimination complaints. Poignantly demonstrating this attitude was Zmuda's statement that the "crime scene" outline drawn outside Iwekaogwu's office was intended to show that "someone" will be leaving the structural design section soon.

It was Zmuda who selected the person to fill the position of structural engineering associate and who refused Iwekaogwu's requests for overtime. Zmuda's supervisor, Anderson, had met with Iwekaogwu in May 1994 concerning the complaints of discrimination in the Burts letter. This occurred prior to Zmuda's decisions on the structural engineering associate position and the overtime requests. Indeed Anderson appointed Zmuda to be Iwekaogwu's supervisor immediately following Anderson's meeting with Iwekaogwu concerning his discrimination charge. The jury could have inferred that when Anderson appointed Zmuda to be Iwekaogwu's supervisor, he told Zmuda of Iwekaogwu's discrimination charge, even though Zmuda denied that he knew of Iwekaogwu's complaints before July 1995.

This inference (that Anderson told Zmuda of Iwekaogwu's discrimination charge) is supported by Anderson's exceedingly defensive reaction to Iwekaogwu's complaints of discrimination. Anderson's reaction also is direct evidence of an intent to retaliate. Anderson was assigned responsibility for addressing the allegations Iwekaogwu made in his letter to Burts. When Anderson met with Iwekaogwu, he categorically denied that there was any discrimination in the harbor department, apparently without conducting an investigation. Even more significantly, Anderson made comments indicating that the only conduct he considered to rise to the level of discrimination was conduct such as that of the Ku Klux Klan, Neo Nazis and Skinheads. Anderson's offensive comments plainly allow an inference that he did not take Iwekaogwu's complaints seriously and that he harbored a deep resentment about the complaints. At the same meeting he told Iwekaogwu not to expect any promotions.

Anderson was Iwekaogwu's second level supervisor when each of the adverse employment decisions described above was made. An individual employment decision should not be treated as a "watertight compartment, with discriminatory statements in the course of one decision somehow sealed off from (that is, irrelevant to) every other decision." (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 667, quoting *Roebuck v. Drexel University* (3d Cir. 1988) 852 F.2d 715, 734, fn. 32, citation omitted.) The jury could have inferred that, in retaliation for Iwekaogwu's complaints, Anderson ensured that Iwekaogwu was not given further promotions or opportunities for overtime.

Iwekaogwu also offered comparative evidence of pretext; that is, evidence that he was treated differently from others who were similarly situated. Although Iwekaogwu's performance was criticized, Zmuda did not even review the performance evaluations of the person hired to fill the structural engineering associate position and only conducted a brief interview of that person. A civil engineer position in the harbor department was filled by a person who had failed the civil engineer examination that Iwekaogwu had passed. Iwekaogwu was the only engineer in the structural design section who was not approved to perform at least some overtime work after 1994. All of these employment decisions took place after Iwekaogwu's discrimination complaints had been communicated to Anderson's supervisors in 1991. The denial of overtime and the decision concerning the structural engineering associate position occurred after Anderson met with Iwekaogwu about his complaint to Burts. From this evidence of disparate treatment, a jury could have inferred that Iwekaogwu experienced adverse employment actions in retaliation for his complaints of discrimination.

Iwekaogwu offered sufficient evidence to create an inference that the City's reasons for its employment actions with respect to Iwekaogwu were pretextual. The jury's verdict on the retaliation charge is supported by substantial evidence.

II

The City contends that the trial court should have granted its motion for a new trial on grounds of juror misconduct. On appeal from denial of a motion for new trial on grounds of juror misconduct, the appellate court, "has a constitutional obligation [citation] to review the entire record, including the evidence, and to determine independently whether the act of misconduct, if it occurred, prevented the complaining party from having a fair trial." (*English v. Lin* (1994) 26 Cal.App.4th 1358, 1364, internal quotation marks omitted, quoting *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1745.)

While a presumption of prejudice arises when there has been any juror misconduct, the presumption may be rebutted by evidence that no prejudice resulted. (*English v. Lin, supra*, 26 Cal.App.4th at p. 1364.) In this case, considering only the record that was created during juror deliberations and the declarations submitted by the City,⁴ we conclude that no prejudice resulted from any juror misconduct that occurred.

The City first argues that Ms. Hirtle's misconduct in seeking her husband's opinion of the case infected the remainder of the jury. The court obtained a

⁴ The City argues that the trial court was precluded by Code of Civil Procedure section 659a from considering the declarations filed by Iwekaogwu because they were filed outside the time limits prescribed by that section. Because we find on the basis of the declarations filed by the City that the court properly denied the new trial motion, we need not consider whether the time limits for filing affidavits or declarations by a party opposing a motion for new trial may be extended by the court.

representation from each juror that he or she could refrain from considering Ms. Hirtle's comments about her husband's views and that those comments would have no bearing on his or her consideration of the case. The court instructed the jury to refrain from considering anything Ms. Hirtle said about her conversation with her husband.

The court's colloquy with the other jurors is evidence that Ms. Hirtle's misconduct did not infect the verdict. Ms. Hirtle did not communicate to the other jurors any of her husband's reasons for his views. There is no evidence that the jurors failed to follow the court's instructions to ignore Ms. Hirtle's comments about her husband. The City expresses concern that at one point some jurors proposed to agree not to tell the judge of Ms. Hirtle's conduct. But this evidence does not impeach the jurors' statements to the court that they would not consider what Ms. Hirtle had said about her husband. To the contrary, in a declaration filed by the City, one juror stated that even before Ms. Hirtle's misconduct was reported to the court, the jurors had assured each other that what Ms. Hirtle had reported about her husband would not affect any juror's views. No prejudice resulted from Ms. Hirtle's misconduct.

The City also argues that one juror engaged in misconduct that affected the outcome of the case by rude behavior and strong words directed to fellow jurors. No juror declaration stated that any juror voted a particular way because he or she was intimidated by the conduct of any other juror. The courts have recognized that "[i]f transient comments made in the heat of discussion during deliberations become a potential vehicle for attacking the verdict of the jury, freedom of discussion in the jury room is chilled, and the free exchange of ideas is inhibited." (*Tillery v. Richland* (1984) 158 Cal.App.3d 957, 977.) Thus jurors' "remarks may

be candid, even unflattering. But cutting and sarcastic words do not ipso facto constitute jury misconduct.” (*Ibid.*) Our review of the record, including the description of deliberations included in the City’s juror declarations, convinces us that the juror’s “cutting and sarcastic words” did not constitute juror misconduct.

The City also complains that the same juror gave emotional descriptions of instances of discrimination he had seen as a reserve police officer. But “[j]urors do not enter deliberations with their personal histories erased, in essence retaining only the experience of the trial itself.” (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 741.) A juror does not commit misconduct merely by describing a personal experience in the course of deliberations. (*Id.* at pp. 741-742.) There is no evidence that any juror decided the case based on the juror’s description of his own experiences rather than on the basis of the evidence presented at trial. We find no basis for concluding that misconduct occurred.

The City also contends that the jury committed misconduct by “an arbitrary and flippant process of assessing damages by voting on various numbers proposed without regard to the evidence.” Putting to one side the issue of whether the damages awarded were excessive, there is no evidence of misconduct in the manner in which the jurors went about their deliberations. The juror declarations submitted by the City do not establish that there was a quotient verdict—a verdict determined by an agreement in advance to average the amounts suggested by each juror without further deliberation. (See *Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064-1065 [defining quotient verdict].) It is not misconduct for jurors to use an average as a basis for further consideration and deliberation. (*Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1647.) The juror declarations in

this case state only that individual jurors suggested damage awards and that several of these figures were selected for consideration and further balloting. This was not misconduct.

Finally, the City argues that a new trial should be ordered because a juror stated that the damages award should set an example and send a message to the City that it cannot treat its employees like Iwekaogwu was treated. The jury was not permitted to include punitive damages in its verdict. A statement by a juror suggesting that a verdict should include an impermissible category of damages is not by itself jury misconduct. (*Moore v. Preventive Medicine Medical Group, Inc.*, *supra*, 178 Cal.App.3d at p. 740.) “[T]o establish misconduct requiring reversal, juror declarations must establish ‘[a]n express agreement by the jurors to include such [impermissible categories of damages] in their verdict, or extensive discussion evidencing an implied agreement to that effect.’” (*Ibid.*, quoting *Krouse v. Graham* (1977) 19 Cal.3d 59, 81.) The juror declarations filed by the City evidence only one remark made by one juror. They do not establish either an express agreement to include exemplary damages in the verdict or that there was extensive discussion of the topic. (Compare *Tramell v. McDonnell Douglas Corp.* (1984) 163 Cal.App.3d 157, 172-173 [extensive discussion among jurors evidencing an implied agreement to inflate verdict to compensate for attorney fees and taxes].)

We conclude that no act of juror misconduct precluded the City from receiving a fair trial.

III

Although the trial court held that “in general, the jurors did not commit misconduct,” the court concluded that “the verdict was excessive due to the facts

of the case and some possible questionable activity by some jurors during deliberations." It was a "permissible procedure" for the court to include questionable activity by the jury "as a reason for his conclusion that damages were excessive." (*Id.* at p. 171.) The court granted a remittitur that was accepted by the plaintiff, thus reducing the jury's \$750,000 verdict to a \$500,000 award. The City nonetheless contends that the \$500,000 award is excessive as a matter of law.

"The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. As a result, all presumptions are in favor of the decision of the trial court [citation]. The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-507, quoted with approval in *Fagerquist v. Western Sun Aviation, Inc.* (1987) 191 Cal.App.3d 709, 727.)

The verdict in this case was not broken down into economic and noneconomic damages. From the evidence introduced at trial, it is clear that economic damages could have been only a relatively small portion of the jury's award. If Iwekaogwu had been given the structural engineer associate position instead of Lim, his salary would have been increased by \$1060.80 per year for the approximately two and one-half years between when Lim received the job and the time of trial. If, in addition to this promotion, Iwekaogwu had been permitted to work overtime during this period, and if he had worked 58 hours of overtime as he

did in 1993, he could have earned an additional \$2075.82 per year for the approximately two and one-half years he was denied overtime. Economic damages on this basis would be less than \$10,000. If the jury found that, absent retaliation, Iwekaogwu would have been promoted to civil engineer, his damages would have been \$12,000 to \$15,000 per year, for a maximum of \$37,500 if Iwekaogwu had been promoted to civil engineer in the fall of 1994.

The issue, then, is whether the evidence of Iwekaogwu's emotional distress damages can support an award of over \$450,000 for that element of damages. Giving deference to the ruling of the trial court, we cannot say that the amount of the remittitur was excessive as a matter of law.

In *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1293-1294, cited in the City's brief, the court held that an award of over \$1 million in emotional distress damages was not excessive in a race discrimination case. In that case, to be sure, the plaintiff's symptoms of emotional distress were more severe than Iwekaogwu's symptoms. In *Watson* the plaintiff, in addition to nightmares, loss of appetite, and loss of interest in ordinary activities, suffered from a severe psychiatric disorder which would require medical treatment. (*Id.* at p. 1283.) Iwekaogwu had been referred for psychological treatment but did not receive such care. Nevertheless, the jury could have concluded that Iwekaogwu should receive such treatment. The jury also could have concluded that he was suffering from emotional distress that significantly altered his ability to enjoy life and to engage in ordinary activities, that interfered with his family life, and that included fear of physical harm from coworkers. The remittitur amount chosen by the trial court was not excessive as a matter of law in light of the evidence presented at trial and the deference due the trial court's exercise of its discretion.

(See also *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 997 [award of \$662,000 for emotional distress in sex harassment case is “well within the range of awards in similar cases”].)

DISPOSITION

The judgment is affirmed. Iwekaogwu shall receive his costs on appeal.

CERTIFIED FOR PUBLICATION

KUHL, J.*

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, J.

* Assigned by the Chairperson of the Judicial Council.

CERTIFIED FOR PUBLICATION

76 Cal. App. 4th 1030

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

ROBERT S. WOLF,

Plaintiff and Appellant,

v.

MITCHELL, SILBERBERG &
KNUPP et al.,

Defendants and Respondents.

B119999

(Super. Ct. No. BC 158243)

COURT OF APPEAL - SECOND DIST.

FILED

DEC 07 1999

JOSEPH A. LANE

Clerk

Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County,
Lawrence W. Crispo, Judge. Reversed and remanded.

Mazursky, Schwartz & Angelo, Arnold W. Schwartz and Anthony
Kornarens for Plaintiff and Appellant.

Mitchell, Silberberg & Knupp, Lucia E. Coyoca and John LaSegal for
Defendants and Respondents.

This action is brought by a trust beneficiary against attorneys for the trustee. The trust beneficiary alleges that the attorneys actively participated with the trustee in breaches of fiduciary duty that essentially looted the trust. The trial court granted summary judgment in favor of the defendant attorneys on the ground that the trust beneficiary was not the real party in interest and only the trustee could bring this action. We reverse. Ordinarily the trustee is the real party in interest when a cause of action is prosecuted on behalf of a trust. However, the California courts have accepted the common law exception to this rule, permitting a trust beneficiary to bring an action against third parties who actively participate in a trustee's breach of trust. The allegations of the complaint in this case are sufficient to invoke that exception.

FACTUAL AND PROCEDURAL BACKGROUND

Reva Wolf was married to David Wolf. When she died on October 30, 1983 her will created a testamentary trust. The net income of the trust was to be paid to David during his lifetime. The trustee had the power to invade the principal for David's "proper support, care, maintenance and emergency medical needs." On David's death, the trustee or trustees were required to "divide the estate and pay the same, free of trust, in equal shares" to Reva and David's children, Robert Sterling Wolf and Sherwin Fred Wolf.

David was to serve as trustee. In the event he was unable to serve, Robert and Fred were to serve as cotrustees. If either Robert or Fred were unable or unwilling to serve as trustee, the other was to serve as sole trustee.

David served as trustee during his lifetime. He died October 19, 1995.

After David's death, Robert learned that a relatively small amount remained in the trust. He brought this action against Morton Alan Haas and Company, an accounting firm that had done work for the trust, and Mitchell, Silberberg & Knupp (MSK) and Stanley I. Arenberg, a law firm and lawyer that had done work for the trust.¹ The complaint alleges that trust assets had been improperly commingled with non-trust assets; that Fred controlled and directed David in making improper and inappropriate investments of trust assets; and that Fred improperly received from the trust in excess of \$450,000 in violation of the terms of the trust. The complaint further alleges that trust assets were used to pay the Bicycle Club and Commerce Casino for Fred's gambling debts, to pay Fred's mortgage on his personal home and to pay amounts due for losses on commodity accounts in Fred's name.

The complaint pleads causes of action for professional negligence, breach of fiduciary duty, constructive fraud and negligent misrepresentation against MSK and Arenberg. It alleges that until August 1995 Arenberg was employed by MSK; that MSK and Arenberg performed legal services for the trustee, the trust and its beneficiaries; and that Robert on occasion consulted with them about his own personal legal matters. Robert also alleges that MSK and Arenberg were aware that the assets of the trust were being commingled with non-trust assets and were being dissipated in breach of the provisions of the trust; that they performed legal services intended to prevent Robert from discovering these facts; that they advised Robert to waive his rights to on-going accountings that would have revealed the trustee's wrongful conduct; that they made misrepresentations of material fact concerning the trust; that they facilitated the dissipation of the

¹ Robert's claims against Morton Alan Haas and Company have been settled.

trust by preparing legal documents that provided the trustee with access to the principle of the trust; and that they drafted a codicil to David's will (providing that any questioning of David's acts as trustee would be a contest of his will) to discourage Robert from taking legal action as a beneficiary of the trust upon learning what had happened to trust assets.

In the cause of action for constructive fraud, Robert further alleges that by their breaches of duty and failure to disclose, MSK and Arenberg intended that Robert not learn of the conduct of David and Fred regarding the trust because they received a greater amount of fees from them "and wished to keep receiving a greater amount of fees." The complaint makes the same allegation as to MSK's and Arenberg's financial motive for making misrepresentations of material fact and failing to disclose material facts.

With respect to damages, the complaint alleges that absent MSK's and Arenberg's wrongful acts, "the Trust would not have been looted and its assets dissipated, the value of the Trust corpus would have substantially increased, and Plaintiff would have obtained far greater benefits from the Trust, and received the monies to which he was entitled."

MSK and Arenberg filed a motion for summary judgment, arguing that the damages sought were damages for injury to the trust and that Robert lacked standing to sue to recover those damages.² In support of their motion, MSK and Arenberg offered Robert's interrogatory responses in which he asserted that "his damages consist of the loss of trust funds to which he was a beneficiary, the loss

² MSK and Arenberg also argued that Robert lacked standing to sue to recover damages to the estate of David. Robert's opposition conceded that he did not seek such damages.

of accrued interest which would have enhanced the trust corpus, and other like damages and the payment to MSK/Arenberg of fees for legal services rendered." They also offered a portion of Robert's deposition in which he testified that he personally had never paid any money for legal services rendered by MSK or Arenberg concerning the trust or Reva's estate. MSK and Arenberg also asserted that Fred, a current cotrustee of the trust, had not authorized or consented to the filing of this lawsuit.

In opposition to the summary judgment motion, Robert offered his own declaration in which he testified that: "I am pursuing this action to recover monies owed to me by my former attorneys and accountants as a result of the harm caused to me personally. As successor trustee, I am also through this action attempting to maximize the amount of assets for the Trust." With respect to Fred's status as cotrustee, Robert offered the deposition of Fred in which he testified that he never had "done anything" in his capacity as cotrustee of the trust.

Robert's opposition also requested leave to amend the complaint to "more clearly specify for whose benefit Robert is maintaining this action."

The trial court granted summary judgment in favor of the defendants. The court found it was undisputed that Robert "is seeking money he claims is owed to the Trust, not to himself." The court stated that Robert's declaration asserting he is "pursuing this action to recover monies owed to me" was contradicted by his discovery response asserting he is seeking "the loss of trust funds to which he was a beneficiary." The court held that Robert could not maintain this action because the trustee of the trust is the real party in interest and a trust beneficiary lacks standing to sue third parties for injury to the trust. Further, the court held

that even if Robert purported to bring this action as a cotrustee on behalf of the trust, he could not maintain the action because he failed to comply with Probate Code section 15620 which mandates joint exercise of powers by both cotrustees.

Robert filed a timely appeal from the trial court's grant of summary judgment in favor of MSK and Arenberg.

DISCUSSION

A trial court's determination of a summary judgment motion is reviewed de novo. (*Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1015.) This review follows the same analysis required of the trial court under Code of Civil Procedure section 437c. (*Id.* at p. 1016.)

We begin with certain basic principles. Code of Civil Procedure section 367 requires that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." With respect to trusts, Code of Civil Procedure section 369 provides that the trustee of an express trust may sue "without joining as parties the persons for whose benefit the action is prosecuted" (Code Civ. Proc., § 369, subd. (a)(2).)

When a cause of action is prosecuted on behalf of an express trust, the trustee is the real party in interest. (*Pillsbury v. Karmgard* (1994) 22 Cal.App.4th 743, 753 (*Pillsbury*); *Saks v. Damon Raike & Co.* (1992) 7 Cal.App.4th 419, 427 (*Saks*); see *Thorpe v. Story* (1937) 10 Cal.2d 104, 114.) Generally, the beneficiary of a trust, having no legal title or ownership interest in the trust assets, is not the real party in interest and may not sue in the name of the trust. (*Pillsbury*, 22 Cal.App.4th at p. 753; *Saks*, 7 Cal.App.4th at p. 427.) A

trust beneficiary's "right to sue is ordinarily limited to the enforcement of the trust, according to its terms." (*Saks*, 7 Cal.App.4th at p. 427, citing *Botsford v. Haskins & Sells* (1978) 81 Cal.App.3d 780, 784.)

The issue in this case is whether any exception to this general rule is applicable and permits suit by Robert as a trust beneficiary against third parties who are alleged to have committed torts against the trust.

The court below relied primarily on *Saks* and *Pillsbury* in concluding that Robert could not proceed as a trust beneficiary in this case. In both *Saks* and *Pillsbury* the trust beneficiary asserted that he had a right to bring an action against a third party for injury to trust assets because the trustee had failed and refused to bring the action.

In *Saks* the trust beneficiaries sued a real estate broker and an attorney who had provided services to the trust, contending that they had breached duties of care and fiduciary duties to the trust by failing to disclose certain material information about a property transaction in which they had represented the trust. (*Saks*, *supra*, 7 Cal.App.4th at p. 423.) The complaint also alleged that the attorney had acted improperly in advising the beneficiaries (who previously had been trustees) to resign as trustees, leaving Sumitomo Bank as the sole trustee.³ (*Id.* at p. 424.) The trial court sustained the defendants' demurrers to the complaint and the court of appeal affirmed.

The beneficiaries argued that, "given [the trustee's] conflict of interest and

³ The beneficiaries also sued Sumitomo (although it is unclear from the opinion what allegations were made against the trustee), but the trial court granted Sumitomo's motion to strike on the ground that the probate department had exclusive jurisdiction of claims regarding internal affairs of testamentary trusts. (*Id.* at p. 424.)

refusal to bring a claim against [the real estate broker and the attorney]" the beneficiaries should be permitted to sue on behalf of the trust. (*Id.* at p. 428.) They relied on the following language from *Triplett v. Williams* (1969) 269 Cal.App.2d 135, 138: "If the trustee cannot or will not enforce the cause of action which the trustee ought to bring against a third person, the beneficiary may seek judicial compulsion against the trustee (Rest.2d Trusts, § 199); or the beneficiary may enforce his rights by a suit in which the third person and the trustee are joined in order that the claim may not be lost or prejudiced (Rest.2d Trusts, § 282; [citations])." (*Saks, supra*, 7 Cal.App.4th at p. 428, fn. 6, internal quotation marks omitted.) The court of appeal held that the beneficiaries' "only proper course was to proceed against the trustee in the probate department, seeking either to compel [the trustee] to proceed against [the third party tortfeasors], or to remove it and to appoint a trustee ad litem to sue the third parties." (*Id.* at p. 430.) The court further noted that the "trial court could have, on its own motion, transferred [the] action to the probate department under Code of Civil Procedure section 396, rather than dismissing it." (*Id.* at p. 430, fn. 8.)

In *Pillsbury*, the beneficiary of an express trust brought suit against third parties alleging that they had maliciously prosecuted a lawsuit against the trust. The beneficiary alleged that the trustee, Wells Fargo Bank, had failed and refused to bring the malicious prosecution action on behalf of the trust. (*Pillsbury, supra*, 22 Cal.App.4th at pp. 749-752.) After the beneficiary put on his evidence at trial, the trial court granted a nonsuit on the ground that the beneficiary had failed to sustain his burden of proof that the trustee had negligently or wrongfully declined to bring the malicious prosecution action. (*Id.* at pp. 752-753.) The court of appeal, relying on *Saks*, held that the trial court

properly required the beneficiary to establish his standing by proving the trustee's failure to bring the malicious prosecution action on behalf of the trust was "negligent, wrongful or otherwise improper." (*Id.* at p. 756.)

Thus *Saks* and *Pillsbury* are cases that consider the exception to the general rule against suits brought by trust beneficiaries that applies when the trustee has failed to bring suit against a third party on behalf of a trust. California has adopted the rule of the Restatement Second of Trusts, section 282, subdivision (2), which states that "[i]f the trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity against the trustee and the third person." (*Triplett v. Williams, supra*, 269 Cal.App.2d 135, 138; see 4 Scott on Trusts (4th ed. 1989) § 282.1 at p. 30.) *Pillsbury* adopts the clarification of the scope of such a lawsuit described in comment e to subdivision 2 of section 282: "If the trustee does not commit a breach of trust in failing to bring an action against the third person, as for example where it is prudent under the circumstances to refrain from bringing an action . . . the beneficiary cannot maintain a suit against the trustee and the third person." (Rest.2d Trusts, § 282, subd. (2), com. e; quoted with approval in *Pillsbury, supra*, 22 Cal.App.4th at p. 754, fn. 10.)

In this case, Robert did not join his cotrustee, Fred, in the lawsuit, nor did he allege that Fred committed a breach of trust in failing to bring suit against MSK and Arenberg.⁴ Thus Robert cannot take advantage of the exception to the

⁴ Robert apparently took advantage of the procedural option of proceeding against his co-trustee by bringing a separate action in the probate department of the superior court after the trial court granted summary judgment in favor of MSK and Arenberg in this case. In the probate department action, the court, at the request of Robert, removed Fred as co-trustee of the trust. The probate department also held that

general rule against trust beneficiaries' standing defined in *Saks, Pillsbury*, and section 282, subdivision (2), of the Restatement Second of Trusts.

However, in this case Robert rests his standing as a beneficiary on a different exception to the general rule against suits brought by trust beneficiaries. He argues that a beneficiary should be permitted to sue a third party for injury to the trust when the third party has actively participated with the trustee in a breach of trust.⁵

Section 16420 of the Probate Code expressly allows a beneficiary or a cotrustee of a trust to "commence a proceeding" "[i]f a trustee commits a breach of trust" One of the specified available remedies is an action "to trace trust property that has been wrongfully disposed of and recover the property or its proceeds." (Prob. Code, § 16420, subd. (a)(9).) This statutory provision adopts the well established common law rule that a beneficiary of a trust may bring an action against a third party to recover property transferred to the third party by the trustee in breach of trust. The rationale for this rule is that "because the trustee has already committed a breach of trust in making the transfer, it is unnecessary for the beneficiaries to call on him to undo what he has done." (4 Scott on Trusts, *supra*, § 294.1 at p. 100; cf., Rest.2d Trusts, § 294, com. a [the

Fred used his influence over David to take control of trust funds and ordered that Fred pay Robert over \$900,000, representing the amount of trust funds used to personally benefit Fred. An appeal of the probate department's ruling presently is pending.

⁵ MSK and Arenberg contend that Robert may not assert this theory because he has not challenged David's actions as trustee. However, although Robert has not named David's estate as a defendant in this lawsuit, the complaint in this case alleges that Fred controlled and directed David in making improper and inappropriate investments on behalf of the trust. Plainly Robert contends that breaches of trust occurred during the trusteeship of David, and that MSK and Arenberg actively participated in these breaches.

wrong committed by the third party is a wrong to the beneficiary in taking or retaining the property after notice of the breach of trust].)

In addition to the remedies for breach of trust specified in subdivision (a) of Probate Code section 16420, a beneficiary or cotrustee may "resort to any other appropriate remedy provided by statute or the common law." (Prob. Code, § 16420, subd. (b).) Such an appropriate common law remedy is defined in section 326 of the Restatement Second of Trusts. Section 326 of the Restatement provides that "[a] third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust." (See also Bogert, *The Law of Trusts and Trustees* (rev. 2d ed. 1995) § 868 at pp. 104-109 [person who knowingly aids trustee in committing a breach of his duties is liable to the beneficiary]; 11 Witkin, *Summary of Cal. Law* (9th ed. 1990) Trusts, § 164 at p. 1017 [beneficiary may sue third persons who participated in breaches of trust].) Comment a to section 326 of the Restatement provides an example that is relevant to this case: "[I]f the trustee purchases through a stockbroker securities which it is a breach of trust for him to purchase and the broker knows that the purchase is in breach of trust, the broker is liable for participation in the breach of trust."

A recent court of appeal decision (decided after the lower court's decision in this case) expressly adopts the rule of Restatement Second of Trusts section 326. In *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445 (*Atascadero*), the court considered whether beneficiaries of the Orange County Investment Pools, a statutory investment trust, could bring a direct tort action for breach of fiduciary duty (and other claims) against Merrill

Lynch, a securities and financial broker and advisor, even though the County, the trustee of the investment pools, already had filed suit against Merrill Lynch. (*Id.* at pp. 451-458.) As in this case, the defendant in *Atascadero* argued that the suit only could be maintained by the trustee, and that the beneficiaries lacked standing. (*Id.* at pp. 458-459.) The court of appeal, drawing extensively on the authorities cited above, held that "trust beneficiaries may bring suit on their direct claims against third persons who have actively participated with a trustee in a breach of trust for their own financial advantage, whether by inducing, aiding or abetting the trustee's breach of duty, or by receiving trust property from the trustee in knowing breach of trust."⁶ (*Id.* at p. 467; accord *Morales v. Field, DeGoff, Huppert & MacGowan* (1979) 99 Cal.App.3d 307, 314-315 [beneficiary may sue attorney for trustee when attorney actively participates in a breach of trust].)

In *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, the court of appeal defined when actions by an attorney for a trustee will give rise to liability to a beneficiary of the trust.⁶ Following *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, *Pierce v. Lyman* held that an attorney may be liable to a trust beneficiary for the attorney's active participation in a trustee's breach of duty if the attorney acted in furtherance of his or her own financial gain, or committed actual fraud by making express misrepresentations to the beneficiary. (*Pierce v. Lyman, supra*, 1

⁶ In *Pierce v. Lyman* the lawsuit was brought by the trustee who also was a beneficiary of the trust. (*Id.* at p. 1097.) The alleged wrongdoing had occurred during the tenure of prior trustees. (*Id.* at pp. 1098-1099.) Thus the court of appeal did not have occasion to consider the standing issue presented here. Nevertheless, the court discussed with approval authorities supporting the view that a beneficiary may bring an action against third parties who have breached fiduciary duties owed to the beneficiary. (*Id.* at p. 1103.)

Cal.App.4th at pp. 1104-1106.)

The allegations of the complaint in this case meet the requirements of *Atascadero* and *Pierce v. Lyman* for a claim by a beneficiary directly against a third person who participated in a trustee's breach of trust.⁷ The complaint alleges that MSK and Arenberg performed legal services intended to prevent Robert from discovering the dissipation of trust assets and the trustee's inappropriate investments, advised Robert to waive his rights to on-going accountings that would have revealed the trustee's wrongful conduct, and made misrepresentations of material fact concerning the trust. The complaint further alleges that MSK and Arenberg intended that Robert not learn of the misconduct of the trustee because they received a greater amount of fees from David and Fred and "wished to keep receiving a greater amount of fees."

These allegations are similar to those made by trust beneficiaries in *Atascadero* and *Pierce v. Lyman*. In *Atascadero* the beneficiaries alleged that Merrill Lynch made direct misrepresentations to the beneficiaries, actively participated with the trustee in breaches of trust, and acted for their own financial gain. (*Atascadero, supra*, 68 Cal.App.4th at pp. 457-458.) In *Pierce v. Lyman* the complaint alleged that the attorneys who represented the trustees actively concealed breaches of trust, made misrepresentations to the court, and acted to

⁷ We note that although defendant attorneys moved for summary adjudication of issues as to each cause of action in which they were joined, they made no separate argument as to any particular cause of action and argued only that Robert lacked standing to bring the entire action. Their motion did not argue that the substantive allegations of any particular cause of action were insufficient to state a claim by a beneficiary. Therefore we consider the allegations of the complaint as a whole and whether they support the type of active participation required to allow a beneficiary to bring a direct claim against a third party.

advance their own personal gain in the form of fees and investment opportunities. (*Pierce v. Lyman, supra*, 1 Cal.App.4th at p. 1105-1106.) The allegations of the complaint in this case are similar, and Robert has standing as a trust beneficiary to bring this action for the attorneys' alleged active participation in the trustee's breaches of trust.

In *Atascadero* the court of appeal considered a passage of Scott on Trusts which notes that a beneficiary should not be allowed to maintain an action against a third party that actively participates in a breach of trust if the offending trustee has been removed and a successor appointed. (*Atascadero, supra*, 68 Cal.App.4th at p. 467, citing 4 Scott on Trusts, *supra*, § 294.4 at pp. 104-105.) The court had no occasion to apply this rule in *Atascadero* because the County remained the trustee of the Pool both during and after the breaches of fiduciary duty, even though the occupant of the County treasurer position had changed. (*Id.* at pp. 468-470.) We also have no occasion to consider whether the rule suggested by this passage of Scott on Trusts should be applied in an appropriate case. Here a current cotrustee (Fred) is alleged to have actively participated with the prior trustee (David) in the breaches of trust alleged in the complaint. Indeed, he is alleged to have been the primary recipient of the funds dissipated from the trust. Under these circumstances, "it is unnecessary for the beneficiar[y] to call on [the current trustee] to undo what he has done." (4 Scott on Trusts, *supra*, § 294.1 at p. 100.)⁸

MSK and Arenberg argue that summary judgment properly was granted because Robert presented no evidence in his opposition to the motion for

⁸ Because we hold that Robert has standing to bring this action as a trust beneficiary, we need not decide whether he also has standing to sue as a cotrustee.

summary judgment that supported his allegations that MSK and Arenberg actively participated in a breach of trust. This argument misperceives the burden that the attorney defendants' narrow summary judgment motion placed on the plaintiff.

MSK's and Arenberg's motion argued that Robert was not the real party in interest in light of discovery responses indicating that he was seeking recovery of monies improperly taken from the trust. Thus, by their motion, defendant attorneys attempted to show that they had a complete defense to the case. (See Code Civ. Proc., § 437c, subd. (o)(2).) The burden then shifted to Robert to set forth specific facts showing that a triable issue of material fact existed as to the defense relied upon. (*Ibid.*) Of course Robert also could oppose the summary judgment motion on the basis that, accepting the facts offered by the moving parties, they were wrong on the law and had not made out a defense to the action. (*Ibid.*) That is essentially what Robert did on this motion. The defendant attorneys' standing argument was that Robert was not the real party in interest with respect to the claims asserted and the damages sought in this case. In order to establish his standing, Robert did not have to offer evidence proving the claims. He merely had to establish facts showing that he is the real party in interest for purposes of asserting those claims and seeking those damages.

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DISPOSITION

The trial court's grant of summary judgment in favor of defendants is reversed and the case is remanded for further proceedings. Plaintiff is to recover his costs on appeal.

CERTIFIED FOR PUBLICATION

KUHL, J.*

We concur:

HASTINGS, Acting P.J.

CURRY, J.

*Assigned by the Chairperson of the Judicial Council.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

QUEENIE PARNELL,

Plaintiff and Appellant,

v.

WORLD ON WHEELS, INC.,

Defendant and Respondent.

B123367

(Super. Ct. No. BC 165629)

COURT OF APPEAL - SECOND DIST.

FILED

JUL 28 1999

JOSEPH A. LANE . Clerk

Deputy Clerk

APPEAL from an order of the Superior Court of Los Angeles County,
Malcolm H. Mackey, Judge. Reversed and remanded.

Steinbrecher and Associates and Edward Steinbrecher for Plaintiff and
Appellant.

Even, Crandall, Wade, Lowe & Gates, Robert L. Murphy, Tod M.
Castronovo and Eve H. Korff for Defendant and Respondent.

This is an action for negligence and premises liability arising out of an incident in which the plaintiff, Queenie Parnell (Parnell), allegedly slipped on a liquid substance and fell at defendant's roller rink. The trial court granted summary judgment in favor of defendant Rinx, Inc., dba World on Wheels, Inc. (WOW), holding that Parnell had not offered evidence sufficient to create an issue of fact as to WOW's knowledge or constructive knowledge of the spilled liquid that allegedly caused Parnell to fall. We reverse. Parnell offered evidence that an inspection of the premises had not been made for a length of time prior to the incident sufficient to warrant an inference that the liquid was present long enough so that a proprietor exercising reasonable care would have discovered it.

FACTUAL AND PROCEDURAL BACKGROUND

The form complaint in this action alleges that on December 11, 1996, plaintiff Parnell, who was wearing roller skates at WOW (a skating rink), slipped on a liquid substance on the linoleum floor in the snack bar area of the rink and fell, injuring herself. The complaint alleges causes of action for premises liability and general negligence.

WOW filed a motion for summary judgment contending that, accepting plaintiff's version of the incident, no facts warranted an inference of negligence. In support of this motion WOW offered excerpts from plaintiff's deposition in which she testified that the premises was at least "pretty well lit," that she could see, that she did not know what the substance on which she slipped was, that she did not smell or taste or feel the substance, and that she did not know how long the substance had been on the floor. WOW also offered declarations of employees who stated that they were not notified of any spills, foreign

substances or dangerous conditions in the concession area before Parnell's fall. The declaration of WOW employee Carlotta Andrews (Andrews) stated that she performed maintenance in the concession area "regularly" and wet mopped the floor "at the end of each session." She testified that the security tape for the day in question showed that she had checked the area in front of the concession counter approximately 20 minutes before Parnell fell, and that there were no spills, dirt, foreign substances or problems in the concession area at that time.

WOW's motion also relied on the declarations of two employees who testified as follows: "We perform maintenance at WOW regularly. The floors are waxed every other Monday. The floors are also wet mopped at the end of each session, daily. Numerous employees assist with the maintenance including the maintenance people, Mr. Bright and Lomese, by cleaning the counters and floors. Party hosts, concession personnel, volunteer skate instructors, John Dargon and I roam the premises, including concession, constantly."

Defendant contended in its motion that the spill had been present for at most five minutes, citing deposition testimony of Ahmand Richardson (Richardson) that the liquid was not hardened. Richardson estimated that the liquid had been on the ground about five minutes, although he had not seen the liquid before Parnell went into the concession area.

In opposition to WOW's motion, Parnell offered her testimony that the spill looked like someone had tracked in it. Parnell also relied on the deposition testimony of a WOW employee who testified that one person, Andrews, was responsible for cleaning the floor in the concession area, and on Andrews' deposition testimony that she (Andrews) had not looked at the floor on the day of the incident to see if it needed to be cleaned. Parnell offered evidence that her

fall took place three hours after the rink opened. Parnell objected to Richardson's testimony about the length of time the spill was on the floor as based solely on "inadmissible speculation."

In its reply brief, WOW pointed out a change in Andrews's testimony in the course of her deposition. A break was taken after Andrews's testimony that she had not looked at the floor before Parnell's fall, and, after talking with her lawyer, Andrews testified as follows: "I was trying to say I was behind the concession, I just took a glance and there was nothing on the floor. I kind of, you know, looked over to see if it was clear, and I, I did everything I did to make sure everything was clear. I was behind the concession. And plus I walked out of the concession because I was walking back and forth a whole lot. And when I walked back and forth to the concession, it was still clean."

The trial court granted WOW's motion for summary judgment on the ground that "there's no evidence presented that the condition [the presence of liquid on the floor] existed long enough for the defendant, in the exercise of reasonable care, to have discovered it and remedied it. . . . In the absence of direct or circumstantial evidence establishing notice of [a] dangerous condition, defendant is entitled to a judgment as a matter of law." Parnell has appealed.

DISCUSSION

"Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. . . ." ([Code Civ. Proc.,] § 437c, subd.(a).) "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence . . . and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted . . . on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.' [Citations.] [¶] A defendant meets his or her burden on a motion for summary judgment if that party has proved there is a complete defense to the cause of action. ([Code Civ. Proc.,] § 437c, subd. (o)(2).) Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists. [Citations.] [¶] On appeal, we independently assess the correctness of the trial court's ruling, applying the same legal standard as the trial court. [Citations.] "[W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." (Van Dyke v. Dunker & Aced (1996) 46 Cal.App.4th 446, 450-451.)

The trial court held that a plaintiff must offer evidence that the owner of the premises had actual or constructive knowledge of the dangerous condition (the spilled liquid) before the owner may be found liable when someone is injured by that condition. This is a correct statement of the law. (*Bridgman v. Safeway Stores, Inc.* (1960) 53 Cal.2d 443, 447 [proprietor may be liable if he knew or by the exercise of reasonable care could have discovered the dangerous condition].) However, a plaintiff is not required to offer direct evidence of the length of time a dangerous condition has existed in order to establish the premises owner's constructive knowledge. The California Supreme Court has

held that "evidence that *an inspection had not been made* within a particular period of time prior to an accident may warrant an inference that the defective condition existed long enough so that a person exercising reasonable care would have discovered it." (*Ibid.*, italics added.)

Several cases provide examples of the application of this rule. In *Sapp v. W.T. Grant Co.* (1959) 172 Cal.App.2d 89, 91-92, the court upheld a jury verdict against a premises owner based on evidence that a patron stepped on a spool of thread after a 20-minute interval without inspection of the store aisles. In *Hale v. Safeway Stores, Inc.* (1954) 129 Cal.App.2d 124, 128, the appellate court reversed the trial court's grant of a nonsuit because plaintiff introduced evidence that the defendant grocery store had not inspected its produce section for from 12 to 30 minutes before a customer slipped on a banana and fell. The appellate court in *Louie v. Hagstrom's Food Stores* (1947) 81 Cal.App.2d 601, 607-609, held that substantial evidence supported a judgment for a plaintiff who had slipped in a pool of Karo syrup in a grocery store where there was evidence that the spill area had not been inspected for between 15 and 25 minutes.

Parnell offered evidence in opposition to summary judgment sufficient to create an issue of fact with respect to WOW's failure to make reasonable inspection of the premises. The testimony of a WOW employee was that one person, Andrews, was responsible for cleaning the floor in the concession area. Andrews testified that she had not looked at the floor on the day of Parnell's fall, although the rink had been open for three hours before that incident. Although Andrews changed that testimony after talking to her counsel, it is for the jury to determine which version of Andrews' testimony to believe.

WOW relies on Andrews' declaration that a security tape shows that she checked the area in front of the concession counter approximately 20 minutes before Parnell fell. Even if this testimony were admissible and not contradicted by Andrews' deposition testimony, a 20-minute lag in inspecting a food area where persons are wearing roller skates creates a jury issue with respect to reasonable inspection, under the cases cited above.

WOW offered evidence that other WOW personnel were responsible for assisting with maintenance and that various persons "roam the premises, including concession, constantly." This testimony, however, does not state that the persons "roam[ing] the premises" were looking for spills or that any of these persons inspected for spills in the concession area on the day in question prior to Parnell's fall. The evidence that Andrews was the one person responsible for cleaning the concession area floor and that she had not looked at the floor before Parnell's fall was sufficient to create an issue of material fact with respect to whether WOW failed to make a reasonable inspection. Under California Supreme Court precedent, the evidence warrants an inference that the spill existed long enough so that a person exercising reasonable care would have discovered it.

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DISPOSITION

The trial court's grant of summary judgment in favor of WOW is reversed and the case is remanded for further proceedings. Parnell is to recover her costs on appeal.

NOT TO BE PUBLISHED

KUHL, J.*

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, J.

*Assigned by the Chairperson of the Judicial Council.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

SIGNAL TREATING SERVICE, INC.,

Plaintiff and Appellant,

v.

LONRHO, PLC,

Defendant and Respondent.

B124370

(Super. Ct. No. BC 163467)

COURT OF APPEAL - SECOND DIST.

FILED

AUG 05 1999

JOSEPH A. LANE

Clerk

Deputy Clerk

APPEAL from an order of the Superior Court of Los Angeles County,
Mary Ann Murphy, Judge. Reversed and remanded.

Songstad, Randall & Ulich, L. Allan Songstad, Jr., and William D. Coffee
for Plaintiff and Appellant.

Shields Law Offices and Jeffrey W. Shields for Defendant and
Respondent.

The issue on this appeal is whether California courts may maintain personal jurisdiction over a foreign corporation (Lonrho, PLC), which has repeatedly invoked the protections of California law, when the litigation involves a business transaction to which the foreign corporation was not a party. We hold that, on the facts presented here, the foreign corporation's contacts with California are sufficiently related to the controversy underlying this lawsuit that California courts may maintain personal jurisdiction over the foreign corporation.

FACTUAL AND PROCEDURAL BACKGROUND

In September 1993 Signal Oil and Refining Company entered into a Stock and Asset Purchase Agreement (Purchase Agreement) with Hondo Oil and Gas Company (Hondo) and Pauley Pacific, Inc. (Pauley). The primary asset acquired by Signal in this transaction was Fletcher Oil and Refining Company (Fletcher), which owned property and a refinery located in Carson, California.

The Purchase Agreement was negotiated and entered into in California. The Purchase Agreement recites that it is to be construed and enforced in accordance with the laws of the State of California.

One of the representations made in the Purchase Agreement is that Fletcher's financial position as of June 30, 1993, is accurately reflected in a financial statement attached to the Purchase Agreement. In June 1996, Signal and Fletcher received a preliminary report from the California State Board of Equalization stating that Fletcher owed additional motor fuel taxes for the period January 1, 1991, through December 31, 1993, in an amount in excess of \$10

million. Signal, relying on an indemnification provision of the Purchase Agreement, sought indemnification from Hondo for tax liability allegedly in excess of that reflected in the financial statement and for costs and expenses associated with the California tax audit. Hondo refused to indemnify Signal.

Signal filed this action against Hondo and Pauley in December 1996, alleging causes of action for express indemnity and breach of contract. The complaint also alleged a cause of action for fraud and deceit, contending that Hondo and Pauley knew that Fletcher's potential tax liability was substantially higher than is reflected on the financial statement attached to the Purchase Agreement.

In September 1997, Signal filed a second amended complaint naming Lonrho, PLC (Lonrho) as an additional defendant. This complaint alleges that Hondo is the alter ego of Lonrho and joins Lonrho as a defendant in the indemnity, breach of contract and fraud causes of action. The second amended complaint also alleges a claim against Lonrho for conspiracy to defraud. Signal alleges that Lonrho employees directly participated in negotiations between Signal and Hondo and that Lonrho directed, approved and ratified Hondo's concealment of Fletcher's potential tax liability by, among other things, manipulating an intercompany account.

Lonrho filed a motion to quash service of summons on grounds of lack of personal jurisdiction. The trial court allowed Signal to take discovery related to the jurisdiction issue. Signal's discovery focused on Lonrho's relationship with Hondo, transactions entered into by Lonrho with a nexus to California, and Lonrho's relationship to the Purchase Agreement.

Lonrho is an English company registered in and incorporated under the laws of England with its headquarters in London. Lonrho does not have offices or facilities in California or anywhere in the United States.

Lonrho began investing in Hondo in 1986. Initially Lonrho entered into a partnership agreement with Robert O. Anderson, a principal shareholder of Hondo. In 1988, Lonrho acquired an ownership interest in a portion of Hondo's common stock. Currently, Lonrho, through a holding company and its subsidiaries, owns 70 percent of Hondo's common stock.

Hondo is a publicly traded company incorporated in Delaware and headquartered in Houston, Texas. Lonrho representatives sit on the Hondo board of directors. During certain times, Lonrho representatives constituted 50 percent of Hondo's board. From June 30, 1993, to November 15, 1993, Lonrho representatives occupied a majority of positions on the Hondo board of directors, although there was not a majority of Lonrho directors present and voting at any particular Hondo board meeting. Meetings of Hondo's board of directors were held at Hondo's office in California. Three of Lonrho's representatives each attended approximately six such board meetings in California.

For many years, Lonrho loaned Hondo substantial sums of money to support its oil and gas operations. Many of these financial transactions either involved a California business entity or specifically were governed by California law. Two transactions involved property located in California. The transactions with a California nexus may be summarized as follows:

- (1) In February 1987, Lonrho entered into a maintenance and indemnification agreement with Union Bank, a California bank. Lonrho agreed, among other things, to pay monies to Hondo so that Hondo would have amounts

necessary to make timely payments to Union Bank under Hondo's obligations to the bank. Lonrho agreed to submit to the jurisdiction of the California courts and appointed an agent for service of process for purposes of disputes arising out of the maintenance and indemnification agreement. The agreement expressly was governed by California law. In connection with this same transaction, Lonrho executed a guaranty in favor of Union Bank with respect to Hondo's obligations to the bank. In the guaranty agreement, Lonrho again consented to the jurisdiction of the California courts for any actions concerning the guaranty, appointed a California agent for service of process and agreed to be governed by California law.

(2) In August 1987, Lonrho entered into another guaranty agreement with Union Bank with respect to other Hondo obligations. The same conditions regarding consent to jurisdiction in California for matters relating to the guaranty, agent for service of process in California and governing law were included in this agreement.

(3) In May of 1991, Lonrho loaned Hondo \$5 million and Hondo executed a promissory note to Lonrho. The promissory note recited that it was governed by California law. In connection with this loan, Lonrho and Hondo entered into a subordination agreement with Union Bank which was governed by California law. As part of this transaction, Hondo promised Lonrho that it would "use its best efforts to sell as soon as possible" certain assets including the Fletcher refinery.

(4) In additional loan transactions, Lonrho accepted promissory notes from Hondo that expressly were governed by California law: a \$3 million loan in June 1991, and a \$2 million loan in July 1991.

(5) On November 1, 1991, Lonrho agreed to loan Hondo \$9 million. Accompanying correspondence makes clear that the purpose of the Lonrho loan was to "furnish financial support" to Fletcher during the refinery's shutdown period. In exchange for this loan, Lonrho received a \$9 million promissory note in November 1991. This promissory note also recited that it was governed by California law. As part of the November 1, 1999 agreement, Hondo again promised Lonrho that it would "use its best efforts to sell as soon as possible" the Fletcher refinery, among other assets.

(6) In December 1992, Lonrho and Hondo entered into a net profits share agreement by which Hondo assigned certain net profits to Lonrho. The agreement expressly was governed by California law.

(7) In a December 1992 letter agreement, Lonrho agreed to advance \$3 million to Hondo in return for a deed of trust lien against an 11-acre tract of California real property referred to as Via Verde Bluffs. One express purpose of the advance was to provide for "expenses required to effect the sale of the Fletcher refinery." In April 1993, Lonrho loaned the money and accepted a \$3 million promissory note from Hondo. The note stated it was to be governed by California law. A deed of trust in favor of Lonrho on the Via Verde Bluffs property was recorded in the Los Angeles County Recorder's Office in May 1993.

(8) In June 1993, Lonrho accepted a promissory note from Hondo based on a loan of \$4 million. This promissory note also was governed by California law. The note was secured by a deed of trust on real property located in Newhall, California. The deed of trust on this property was recorded in the Los Angeles County Recorder's Office in October 1993.

(9) In October 1994, Lonrho entered into an assignment agreement with Union Bank. Lonrho paid Union Bank \$40 million, and Union Bank in turn assigned Lonrho its rights to receive payment from Hondo. The agreement stated that it was to be governed by the laws of the State of California. In connection with this assignment, Lonrho filed with the Secretary of State of California a UCC-1 financing statement by which it asserted rights to shares of Hondo stock in which Union Bank previously had taken a security interest.

With respect to the Purchase Agreement between Signal and Hondo, Ian Brownlow, Hondo's principal negotiator, communicated with personnel of Lonrho concerning the proposed terms of the agreement. Lonrho contends that Brownlow communicated with these personnel as board members of Hondo and that he had the same exchange of information with other Hondo board members. Lonrho employees sent Brownlow comments about the proposed terms of the sale of Fletcher to Signal.

Lonrho representatives on the Hondo board of directors voted to approve the transaction by which Signal purchased Fletcher at the September 22, 1993, Hondo board meeting in California.

In 1996 Lonrho wrote to Hondo promising to provide Hondo with the funds necessary to meet certain of Hondo's potential obligations during the year ending September 30, 1997. One of these potential obligations was "payments related to the Fletcher Motor Vehicle Fuels Tax Audit in progress, currently estimated at approximately \$2,500,000." It is this potential tax liability for which Signal seeks indemnification in this lawsuit.

There is a substantial dispute between the parties as to the relationship between Lonrho and Brownlow, the employee who negotiated and signed the

Purchase Agreement for Hondo. Lonrho contends that Brownlow was supervised by his employers at Hondo and that he only communicated with Lonrho personnel in their capacities as members of the Hondo board of directors.

Lonrho concedes, however, that Brownlow was employed by Lonrho before he was hired by Hondo. Lonrho's principal witness for purposes of its motion to quash, Robert E. Whitten, stated in his declaration that because Brownlow "wished to continue maintenance of his British pension and social security benefits, Lonrho did not terminate Mr. Brownlow, but instead seconded him to Hondo" While Brownlow worked for Hondo and was paid a salary by Hondo, Lonrho itself paid him enough money "so as to maintain his British pension and social security benefits." In 1994, when Brownlow left Hondo, Lonrho offered him a position "by seconding Mr. Brownlow to one of Lonrho's subsidiaries" until 1995.

After the period for discovery ended, Lonrho renewed its motion to quash for lack of personal jurisdiction. After hearing argument and taking the matter under submission, the trial court granted Lonrho's motion to quash by minute order dated February 20, 1998. Signal thereafter filed a motion for new trial in which it presented evidence pertaining to the composition of Hondo's board of directors in 1993 and the purpose of one of the loans from Lonrho to Hondo. The trial court, by minute order dated April 21, 1998, granted the motion for new trial and vacated its prior order quashing service of summons for lack of personal jurisdiction.

Lonrho filed a petition for writ of mandate seeking appellate review of the April 21, 1998, order. On June 29, 1998, this court issued an alternative writ of mandate and set a briefing schedule. In response to the alternative writ of

mandate, on July 9, 1998, a different trial judge before whom the case was then pending issued a minute order vacating the April 21, 1998, order and granting Lonrho's motion to quash. Consequently, this court discharged the alternative writ and dismissed the petition as moot.

The trial court set a hearing on Signal's ex parte application to vacate the trial court's July 9, 1998, order granting the motion to quash. However, the court declined to vacate its prior order. This appeal followed.

DISCUSSION

The principles governing review of a trial court's ruling on a motion to quash are well established.¹ On a defense motion to quash service of process for lack of personal jurisdiction, the plaintiff has the initial burden of demonstrating facts that justify the exercise of jurisdiction. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449 (*Vons*).) Once facts showing minimum contacts with the forum state are established, the defendant bears the burden of demonstrating that the exercise of jurisdiction would be unreasonable. (*Id.*, citing *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 476-477 (*Burger King*).)

When conflicting evidence is submitted by the parties, "the findings of the trial court will not be disturbed on appeal if supported by substantial evidence." (*Felix v. Bomoro Kommanditgesellschaft* (1987) 196 Cal.App.3d 106, 111, cited with approval in *Vons, supra*, 14 Cal.4th at p. 449.) If the evidence submitted in

¹ An order granting a motion to quash service of summons is directly appealable. (Code Civ. Proc., § 904.1, subd. (a)(3).)

the trial court is not in conflict, "the question of jurisdiction is purely one of law and the reviewing court engages in an independent review of the record." (*Vons, supra*, 14 Cal.4th at p. 449.)

In this case certain evidence is in conflict, particularly evidence concerning the relationship of Brownlow to Lonrho and whether Lonrho employees were directing the Fletcher transaction in a capacity other than as Hondo directors. Signal argues that because no factual findings were made by the trial court when it issued its July 9, 1998, order granting Lonrho's motion to quash, this court should resolve any factual disputes by deferring to the trial court's prior ruling granting the motion for a new trial and denying the motion to quash. But none of the trial court rulings concerning Lonrho's motion to quash was accompanied by fact findings or by any rationale stated on the record.

The rule that a reviewing court should defer to the findings of the trial court is a specific application of the general rule that, on appeal, facts should be construed in favor of the party who prevails in the court below. "[W]herever affidavits filed in support of the motions to quash are in conflict with those opposing it we must deem the trial court resolved such conflicts against appellant and in support of its order." (*Tiffany Records, Inc. v. M. B. Krupp Distributors, Inc.* (1969) 276 Cal.App.2d 610, 615.) Therefore conflicts in evidence must be resolved in favor of the order from which the appeal has been taken: the July 9, 1998, order granting Lonrho's motion to vacate. The factual discussion in this opinion is based on evidence that either is undisputed or has been offered by Lonrho.²

² Signal filed a motion to add additional documentary evidence to the record, evidence that was not presented to the trial court. We decline to consider this additional evidence. No exceptional circumstances exist that would justify

Under California's long-arm statute, California courts may exercise jurisdiction on any basis not inconsistent with the Constitutions of the United States and the State of California. (Code Civ. Proc., § 410.10.) Assertion of jurisdiction over a nonresident defendant who has not been served with process in California meets the due process requirements of the federal Constitution if the defendant has minimum contacts with California such that exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice." (*Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316.)

Depending on the quality and frequency of a nonresident defendant's contacts with this state, personal jurisdiction may be either general or specific. General jurisdiction allows the court to maintain jurisdiction over a nonresident defendant whether or not "the specific cause of action alleged [is] connected with the defendant's business relationship to the forum." (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147.) A court may exercise general jurisdiction over a nonresident defendant when his contacts with the forum are "substantial . . . continuous and systematic." (*Vons, supra*, 14 Cal.4th at p.445, quoting *Perkins v. Benguet Mining Co.* (1952) 342 U.S. 437, 445, 446.)

deviating from the general rule that an appellate court will consider only matters that were presented to the trial court. (*Vons, supra*, 14 Cal.4th at p. 444, fn. 3; see also, *Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 796-797.)

Lonrho argues that the "newly discovered" evidence offered by Signal in its motion for a new trial was not material and did not justify the trial court's April 21, 1998 determination to reverse its prior ruling and to deny Lonrho's motion to quash. We need not consider this issue, however, because the trial court subsequently vacated the order granting Signal's motion for new trial. The trial court ruling at issue on this appeal is the subsequent July 9, 1998 order granting Lonrho's motion to quash.

Signal argues that Lonrho's activities in California are of a quality and frequency that would allow a California court to exercise general jurisdiction over Lonrho. We do not reach this issue, however, because we find that Lonrho's contacts with California are sufficient to give the California courts specific jurisdiction over Lonrho for purposes of the claims asserted in this action.

Specific jurisdiction allows a court to maintain jurisdiction over a nonresident defendant for purposes of the particular controversy before the court. Jurisdictional sufficiency depends on an assessment of the "relationship among the defendant, the forum, and the litigation[.]" (*Helicopteros Nacionales de Colombia v. Hall* (1984) 466 U.S. 408, 414 (*Helicopteros*), quoting *Shaffer v. Heitner* (1977) 433 U.S. 186, 204.) A nonresident defendant must have "purposefully directed" its activities at forum residents, "purposefully derive benefit" from forum activities or purposefully availed itself of "the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (*Burger King, supra*, 471 U.S. at pp. 472, 473, 475.) In addition, the particular controversy before the court must be "related to or 'arise[] out of' a defendant's contacts with the forum . . ." (*Helicopteros, supra*, 466 U.S. at p. 414; see also *Burger King, supra*, 471 U.S. at p. 472.)

Where a nonresident defendant "deliberately" has engaged in significant activities within a State, . . . or has created 'continuing obligations' between himself and residents of the forum," the defendant "manifestly has availed himself of the privilege of conducting business [in the forum], and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of

litigation in that forum as well.” (*Burger King, supra*, 471 U.S. at pp. 475-476, citations omitted.)

Lonrho deliberately has engaged in significant activities in California, has created continuing obligations with a resident of California and has availed itself of the benefits and protections of California law. Numerous transactions between Lonrho and Hondo explicitly invoke California law. In two separate transactions with Hondo, Lonrho took security interests in two different tracts of real property located in California. Lonrho protected those security interest by taking advantage of the benefits of the Los Angeles County recorder’s office. Lonrho also recorded a security interest in personal property with the California Secretary of State. Lonrho entered into repeated transactions with a California bank to support Hondo’s financial obligations to the bank. In all of the bank transactions, Lonrho agreed to be governed by California law. In several of the transactions, Lonrho expressly consented to the jurisdiction of the California courts and appointed an agent for service of process in California (for actions arising out of those transactions). In addition, Lonrho employees regularly traveled to California for meetings of the Hondo board of directors. Lonrho entered into an agreement with Hondo by which Hondo agreed to exercise best efforts to sell Fletcher, a California refinery. Lonrho manifestly availed itself of the privilege of conducting business in California and expressly sought the benefits and protections of California law.

The California Supreme Court recently held that the “intensity of forum contacts and the connection of the claim to those contacts are inversely related.” (*Vons, supra*, 14 Cal.4th at p. 452.) That is, the greater the extent and quality of a nonresident defendant’s purposeful contacts with the forum, the less strict the

required relationship of the forum activity to the controversy before the court. (*Id.* at pp. 452-453.) When, as in this case, a defendant has "sought out and maintained a continuing commercial connection with a California business, it is not necessary that the claim arise directly from the defendant's contacts in the state." (*Vons, supra*, 14 Cal.4th at p. 453.) Rather, when the defendant's forum contacts are of that quality, "it is not unfair to require that [the defendant] answer in a California court for an alleged injury that is *substantially connected* to the defendant[s] forum contacts." (*Ibid.*, italics added.)

"[T]he defendant's forum activities need not be directed at the *plaintiff* in order to give rise to specific jurisdiction." (*Vons, supra*, 14 Cal.4th at p. 457, italics in original.) "The United States Supreme Court has stated more than once that the nexus required to establish specific jurisdiction is between the defendant, *the forum*, and the litigation [citation]--not between the plaintiff and the defendant." (*Id.* at p. 458, italics in original.)

Lonrho's intentional and ongoing commercial relationship with California bears a "substantial connection" to the claims of misrepresentation in connection with the sale of Fletcher that are asserted by Signal in this case. Lonrho's commercial relationship with California centered on Lonrho's obligations to Union Bank to provide financial support to Hondo and to stand behind its obligations and on Hondo's financial obligations to Lonrho (governed by California law and secured in part by California property). Some of the money Lonrho loaned to Hondo was expressly intended to "furnish financial support" to the Fletcher refinery, the subject of the Purchase Agreement. Lonrho also obtained a promise from Hondo that it would "use its best efforts to sell [Fletcher] as soon as possible." Lonrho loaned money to Hondo expressly to

provide for "expenses required to effect the sale of the Fletcher refinery." Hondo's principal negotiator with Signal in connection with the Purchase Agreement communicated with Lonrho personnel who were Hondo directors about the Purchase Agreement and received comments from them on the deal. Hondo's principal negotiator was an employee of Lonrho "seconded" to Hondo, and some of his employment benefits were paid by Lonrho. Lonrho officials who were members of the Hondo board of directors voted to approve the Purchase Agreement at a meeting of the Hondo board in California. And finally, Lonrho has promised to provide Hondo with the funds necessary to pay the California motor fuel tax liability that is the subject of the misrepresentation alleged in this lawsuit and of Signal's indemnity claim.

In *Burger King*, the United States Supreme Court emphasized the need for a "'highly realistic' approach" to determining whether requirements for specific jurisdiction have been met. (*Burger King, supra*, 471 U.S. at p. 479.) "[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." (*World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297.) Lonrho reasonably could have anticipated that its activities in California might subject it to being "haled into court" in California in connection with a controversy over the sale of Fletcher by Hondo. Hondo's continuing financial reliance on Lonrho gave Lonrho a strong interest in the operations of Hondo, including Hondo's sale of Fletcher. Lonrho acted to protect its interests. Lonrho's financial relationship with Hondo, the locus of which was California, included Lonrho's contractual right to have Hondo exercise best efforts to sell Fletcher; payments by Lonrho for expenses of the sale

transaction; at least some oversight and approval of the transaction by Lonrho representatives; and ultimately a commitment by Lonrho to pay Hondo the amount of the California taxes that are the subject of the alleged fraudulent representation and the claim for indemnity in this case.

Lonrho argues that it should not be subject to suit in California because the evidence does not establish that Hondo is Lonrho's alter ego. *Third Nat. Bank in Nashville v. Wedge Group Inc.* (6th Cir. 1989) 882 F.2d 1087 (*Third Nat. Bank*), discussed with approval in *Vons, supra*, 14 Cal.4th at pp. 454-455, expressly rejects the view that contacts with the forum state arising from a nonresident defendant's ownership interest in a subsidiary "do not 'count' for personal jurisdiction purposes. . . . [T]he ownership of a subsidiary that conducts business in the forum is 'one contact or factor to be considered in assessing the existence or non-existence of the requisite minimum contacts.'" (*Third Nat. Bank, supra*, 882 F.2d at p. 1090, fn. 1, quoting *Velandra v. Regie Nationale des Usines Renault* (6th Cir. 1964) 336 F.2d 292, 297.)³ Similarly, in *Goehring v. Superior Court* (1998) 62 Cal.App.4th 894, 896, 906, the court held that an individual's conduct in his capacity as general partner of a partnership may be considered in determining whether there are constitutionally sufficient minimum contacts with California to impose jurisdiction over the general partner as an individual.

In this case Hondo is not a Lonrho subsidiary, but Lonrho has a substantial financial stake in the business and currently holds a majority of its stock. The

³ A concurring opinion in *Third Nat. Bank* takes the position that jurisdiction over a corporate parent based on its relationship with a wholly-owned subsidiary can only be obtained if the parent and the subsidiary are alter egos. (*Third Nat. Bank, supra*, 882 F.2d at pp. 1092-1094, conc. opn. of Keith, J.) This analysis was rejected by the majority.

conduct that establishes the substantial relationship between Lonrho and California is not the conduct of Hondo, but the direct conduct of Lonrho by which it has taken advantage of the benefits of California law. Where the nonresident defendant's own activity in the forum state meets the requirements for establishing personal jurisdiction, it is not necessary to demonstrate that the nonresident defendant is the alter ego of another business entity that is present in California.

Finally, we must consider whether assertion of specific jurisdiction in this case is fair. (*Vons, supra*, 14 Cal.4th at pp. 476-478.) Because we already have determined that Lonrho has the required minimum contacts with California, "the burden is now on [Lonrho] to 'present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" (*Id.* at p. 476, quoting *Burger King, supra*, 471 U.S. at p. 477.)

Lonrho's brief on appeal is limited to arguments that Signal has not met its burden of demonstrating forum contracts sufficient to give California courts jurisdiction over Lonrho. Lonrho does not suggest any facts or considerations that would make it unfair or unreasonable for California courts to exercise jurisdiction over Lonrho. This state has an interest in resolving a controversy over a transaction entered into in California, concerning a business located in California (Fletcher) and payment of California taxes. There is no reason this controversy cannot be efficiently adjudicated in a California court. Lonrho has not demonstrated that exercise of jurisdiction by California courts would be fundamentally unfair.

DISPOSITION

The trial court's order granting Lonrho's motion to quash is reversed and the matter is remanded for further proceedings with Lonrho as a party to the litigation. Signal is to recover its costs on appeal.

NOT TO BE PUBLISHED

KUHL, J.*

We concur:

VOGEL (C.S.), P.J.

CURRY, J.

*Assigned by the Chairperson of the Judicial Council.

ORIGINAL FILED

AUG 25 2000

LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

McCOLL-FRONTENAC INC., et al.,	)	Case No. BC 157394
	)	
Plaintiffs,	)	OPINION AND ORDER
	)	ON IMPERIAL OIL'S
	)	MOTION FOR SUMMARY
	)	ADJUDICATION OF ISSUES
ADRIATIC INSURANCE CO., et al.,	)	REGARDING ITS
	)	STANDING TO CLAIM
Defendants.	)	BENEFITS OF INSURANCE
	)	POLICIES THAT COVER
	)	TEXACO CANADA, INC.
	)	

Plaintiff Imperial Oil Ltd. ("IOL") moves for summary adjudication on the issue of whether IOL has standing to assert claims to insurance coverage based on insurance policies issued to Texaco Canada Inc. ("TCI") in years before 1987.

After full briefing the motion came on for hearing on August 18, 2000.

Appearances were as reflected in the clerk's minutes and in the court reporter's notes. After having considered the briefs, evidence and argument of counsel the court hereby issues its ruling granting summary adjudication of issues in favor of IOL.

I. Factual Summary

Texaco Canada Inc. had both upstream and downstream oil company assets. Upstream assets are those used in exploring for and developing petroleum and natural gas resources. Downstream assets are those used for manufacturing, marketing and distribution of petroleum and petrochemical products. The insurers in this litigation contracted to insure TCI under policies issued for various time periods prior to 1987. This case concerns insurance coverage under those policies with respect to harm occurring to TCI's various properties during the policy periods.

Beginning in 1989 a series of corporate transactions took place that are the subject of this motion. The basic facts of the corporate transactions are not disputed. Defendant insurers do not take issue with the description of these transactions presented in IOL's opening brief. For purposes of this opinion this court will not attempt to restate these facts in detail. Rather, a summary of the transactions presented in the Declaration of Brian J. Arnold (filed by defendants) at pp. 6-7 is set forth below to provide context for the legal discussion.

"In February 1989 IOL purchased all of the shares of Texaco Canada Inc. and changed its name to McColl-Frontenac Inc. (MFI). As a condition of the purchase, MFI was required by the Canadian Competition Tribunal to divest some

of its assets. In June 1990 IOL and MFI formed a partnership, the Imperial Oil Partnership (IO Partnership) with a January 31 year end and transferred to the partnership most of the assets and liabilities of their downstream businesses In January 1991 Esso Resources Canada Limited (ERCL), a wholly-owned subsidiary of IOL, transferred the assets and liabilities of its upstream business . . . to Esso Resources Canada (ERC Partnership) in consideration for an interest in the partnership. In June 1991 MFI transferred the assets and liabilities of its upstream business and its interests in the ERC Partnership to its wholly-owned subsidiary, Esso Resources (1989) Limited ("ER(89)"), in consideration for preferred shares. At the same time MFI transferred its interest in the IO Partnership to a newly-incorporated subsidiary (New MFI, later to become McColl-Frontenac Petroleum Inc. (MFPI)) in exchange for shares. Then MFI commenced to dissolve and transferred all of its remaining assets and liabilities to IOL.

"In essence, there are three separate but related series of transactions involving MFI after the takeover by IOL in February 1989. First, in June 1990 IOL and MFI formed a partnership with a January 31 year end to carry on their downstream businesses. The stated purposes of this transaction were to integrate the downstream businesses of IOL and MFI and to defer taxable income. Second, in January 1991, ERCL, a wholly-owned subsidiary of IOL, transferred the assets

and liabilities of its upstream business to the ERC Partnership. The purposes of this transaction were to combine the upstream businesses of IOL and MFI and to defer taxable income. Third, in June 1991 MFI commenced to dissolve and, in the course of winding up, transferred all of its remaining assets and liabilities to IOL. The stated purpose of this transaction was to obtain a step-up in the adjusted cost base of certain nondepreciable capital assets of MFI and thereby to minimize the capital gains realized on the subsequent sale of those assets.”

Defendants point out that this series of corporate transfers was extremely successful in obtaining very substantial tax benefits for the IOL family of companies.

The issue on this motion may be simply stated. May IOL stand in the shoes of the former TCI with respect to the pre-1987 insurance policies?

II. Discussion

A. Amenability of Issue Presented to Resolution on Summary Adjudication

Under Code of Civil Procedure section 437c(f)(1) a party may seek summary adjudication “as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty” In this case the insurers have asserted as a defense to the claims of IOL that IOL may not recover under insurance policies issued to TCI because IOL

is not the named insured and because the insurers have not consented to an assignment of the policies. These affirmative defenses are amenable to summary adjudication.

B. Application of the De Facto Merger Doctrine

IOL argues that the series of transactions that took place beginning in 1990 with the formation of the IO Partnership and ending in June of 1991 with the transfer of all assets and liabilities of MFI to IOL resulted in a de facto merger that transferred the TCI policies to IOL. IOL contends that the assignment clauses of the insurance contracts do not bar enforcement of the policies by the successor entity, IOL, because the transfer of contract rights occurred by virtue of a de facto merger.

1. The *Westoil* Case

In *Westoil Terminals Co. v. Harbor Ins. Co.* (1999) 73 Cal.App.4th 634 (“*Westoil*”), the Court of Appeal applied the de facto merger doctrine to allow a successor corporation to assert the insurance rights of a predecessor corporation despite a clause of the insurance policy requiring consent to assignment. In *Westoil* the insurer issued a policy that covered Westoil Corporation. The shareholders of Westoil Corporation were members of the family of C. Edward Miller, Jr. (Miller) and Expert Property Management, Inc., of which Miller was

president. Thereafter the individual shareholders traded their shares of Westoil Corporation for a limited partnership interest in Westoil Partnership, a limited partnership. Expert Property Management, Inc. traded its shares of Westoil Corporation for a sole general partnership interest in Westoil Partnership. Westoil Corporation assigned all of its assets save one to Westoil Partnership and Westoil Partnership assumed all liabilities of the corporation. Westoil Partnership carried on the same type of business operations as Westoil Corporation except as to the asset (an office building) that was not transferred to the Partnership. Westoil Corporation then dissolved. (*Id.* at p. 637.)

The *Westoil* court acknowledged prior case law, *General Accident Ins. Co. v. Superior Court* (1997) 55 Cal.App.4th 1444 (“*General Accident*”), and *Quemetco Inc. v. Pacific Automobile Ins. Co.* (1994) 24 Cal.App.4th 494 (“*Quemetco*”), holding that even though a corporate transaction transfers liability by operation of law, the contract rights for insurance coverage pertaining to that liability do not automatically follow the successor liability. (*Westoil*, 73 Cal.App.4th at p. 639.) However *Westoil* applied an exception recognized in *General Accident* and *Quemetco*, allowing a successor entity to assert a predecessor corporation’s rights under an insurance policy when the successor acquires the predecessor corporation in a de facto merger. (*Id.* at p. 640.) The *Westoil* majority held that the transfer of

assets and liabilities from Westoil Corporation to Westoil Partnership was a de facto merger, noting that the successor entity carried on the same operations as before, under the same name, with the same equity interests and under the same control. (*Id.*) “[T]o reach an opposite conclusion” the court reasoned, “would exalt form over substance and violate the maxim of jurisprudence set forth in Civil Code section 3528: ‘The law respects form less than substance.’” (*Id.*)¹

2. Other California Authority Supporting the *Westoil* Analysis

The conclusion reached by the *Westoil* court is consistent with California Supreme Court authority holding that a transfer of rights under a contract occurs by operation of law despite a contractual provision restricting assignment when (1) there is a change of corporate form that does not change actual ownership of a business, (2) the business continues, and (3) the change of corporate form does not change the nature of the contracting party’s obligation.

In *Trubowitch v. Riverbank Canning Co.* (1947) 30 Cal.2d 335, the Supreme Court considered whether a contract for the delivery of goods inured to the benefit of a successor to the business that was to receive the goods. In that case the corporation that was to receive the goods under the contract voluntarily dissolved,

¹In dissent, Justice Zebrowski contended that the majority’s analysis would lead to a situation where the insurer had a duty to more than one entity. Justice Zebrowski argued that the correct solution would be to allow the successor entity to bring a claim for indemnity against the defunct predecessor entity in order to take advantage of the predecessor’s insurance.

and its assets were transferred to its sole shareholders who then formed a copartnership and carried on the business of the contracting corporation. The resulting business entity sought to compel performance by the seller despite the change in corporate form and despite a contractual provision forbidding assignment of the contract.

The Supreme Court stated: "It is established that in the absence of language to the contrary in the contract, . . . if an assignment results merely from a change in the legal form of ownership of a business, its validity depends upon whether it affects the interests of the parties protected by the nonassignability of the contract." (*Id.* at pp. 344-345 [citations omitted].) In holding that the surviving business entity could enforce the sales contract at issue, the Supreme Court reasoned that "[i]f the dissolved corporation had brought an action for the delivery of the goods, the real parties in interest would have been its shareholders, and the purchase price would have been payable by the shareholders out of the assets of the corporation distributed to them or out of their other property. To require an action to be brought under such circumstances by the dissolved corporation rather than by the copartnership formed by its shareholders, which owns all the assets of the corporation and carries on its business, is to require compliance with a shallow formality that serves no substantial interest of the seller. The seller's financial

interests were fully protected.” (*Id.* at pp. 345-346.)

Subsequent cases discuss the transfer of rights and liabilities that occurs when a business entity changes form but not ownership in terms of the de facto merger doctrine.² In *Quemetco* the Court of Appeal held that when tort liability transfers to a successor corporation by operation of law, it does not follow that the predecessor company’s contract rights pursuant to an insurance policy also are automatically transferred. (*Quemetco, supra*, 24 Cal.App.4th at pp. 498-501.) However the court distinguished cases where a sale of assets “amount[s] to a merger which is an exception to the general rule against imposing liability on the successor only when one corporation takes all of the other’s assets without providing any consideration that could be made available to meet the claims of the other’s creditors.” (*Id.* at p. 501.)

General Accident was more explicit about the importance of identity of ownership. That court held “that the finding of successor liability in tort does not entitle the successor corporation, by operation of law, to the insurance coverage of its corporate predecessor.” (*General Accident, supra*, 55 Cal.App.4th at p. 1454.)

²Defendant insurers argue that the de facto merger doctrine only can be invoked by a third party who seeks to avoid injustice from a form of corporate transaction over which he had no control. This argument is contrary to *Westoil*. Moreover, as discussed *supra*, the California Supreme Court in *Trubowitch* allowed a business entity to assert that its own change in corporate form should not affect contract rights despite a contractual restriction on assignment.

The court explained that “a transfer by operation of law is a violation of the basic principles of contract and is also bad public policy.” (*Id.*) If the rule were otherwise, “an insurer which was never a party to an insurance contract would be held liable to an ‘insured’ that has never paid a premium or been subjected to an underwriting analysis. The law can impose tort liability on a successor corporate entity; it cannot impose a contractual insurance relationship between an insurer and a stranger to the insurance contract.” (*Id.* at pp. 1454-1455.) Despite its strong view that insurance rights cannot pass to strangers to the insurance contract by operation of law, the Court of Appeal nonetheless remanded so that the trial court could consider whether the corporate successor could enforce the insurance policy under the de facto merger doctrine. (*Id.* at p. 1455.)

The doctrinal distinction between the de facto merger doctrine and the separate, though related, rule of product-line successor liability enunciated in *Ray v. Alad Corp.* (1977) 19 Cal.3d 22, explains why the courts in *Quemetco* and *General Accident* rejected a rule that would transfer insurance rights whenever the facts established product-line successor liability but accepted that a successor corporation in a de facto merger transaction could assert those rights.

In *Ray v. Alad Corp.* (1977) 19 Cal.3d 22, the California Supreme Court discussed the rules ordinarily applied to determine whether a corporation that

purchases the principal assets of another corporation assumes the other's liabilities. (*Id.* at p. 28.) The Court described one of these rules as the doctrine "that a corporation acquiring the assets of another corporation is the latter's mere continuation and therefor liable for its debts . . . upon a showing of one or both of the following factual elements: (1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors, or stockholders of both corporations." (*Id.* at p. 29.) This rule is described in later cases as the de facto merger doctrine. (See, e.g., *Marks v. Minnesota Mining & Manufacturing Co.* (1986) 187 Cal.App.3d 1429, 1435.) In *Ray v. Alad* neither of these elements was met because the successor corporation paid substantial consideration for the business assets of the predecessor corporation, and the equity owners of the predecessor corporation had no interest in the successor corporation. (See *Ray v. Alad*, *supra*, 19 Cal.3d at p. 26.) However, the Supreme Court defined a different basis for successor liability for product defects based on acquisition of a manufacturing business and continuation of the product line previously manufactured and distributed. (*Id.* at pp. 30-34.)

Marks v. Minnesota Mining and Manufacturing Co. (1986) 187 Cal.App.3d 1429 ("*Marks*"), applied the de facto merger doctrine to create successor liability

and in so doing further defined the doctrine. The court identified five factors that indicate whether a transaction in the form of an asset sale actually achieves the same result as a merger: “(1) was the consideration paid for the assets solely stock of the purchaser or its parent; (2) did the purchaser continue the same enterprise after the sale; (3) did the shareholders of the seller become shareholders of the purchaser; (4) did the seller liquidate; and (5) did the buyer assume the liabilities necessary to carry on the business of the seller?” (*Id.* at p. 1436.)

Thus the product-line successor liability rule adopted by *Ray v. Alad* focuses on a continuation of a particular line of business or type of manufacturing that created the liability. As stated in *General Accident*, if a transfer of rights under an insurance contract were premised on this theory of successor liability it would “impose a contractual insurance relationship between an insurer and a stranger to the insurance contract.” (*General Accident, supra*, 55 Cal.App.4th at p. 1455.) By contrast, the de facto merger doctrine focuses on whether the person or entity holding the equity interest in the predecessor also held the equity interest in the successor and on whether there was consideration for the asset transfer other than stock of the purchaser or parent. As in *Trubowitch*, the focus under the de facto merger doctrine is on whether there is a mere change in the legal form of corporate ownership without changing the identity of the equity owners.

3. Application of *Westoil* to the Facts of this Case

Applying *Westoil* to the facts of this case, this court holds that IOL acquired MFI's rights under the insurance policies pursuant to the de facto merger doctrine. As in *Westoil*, the same equity interest and corporate control that existed with respect to MFI in 1989 existed with regard to MFI's assets and business in 1991 after MFI's assets were transferred to IOL.

In 1989 IOL acquired all of the outstanding shares of TCI, and IOL held the only equity interest in TCI. TCI then changed its corporate name to MFI. Defendant insurers concede that MFI succeeded to TCI's insurance rights. They also concede that they have a duty to defend and/or indemnify MFI pursuant to the terms of the insurance contracts.

In 1990 MFI transferred its downstream assets to the IO Partnership and IOL transferred its downstream assets to the same partnership. The partners in the IO Partnership were MFI (fully owned and controlled by IOL) and IOL. Thus, as to the IO Partnership, IOL controlled the downstream business of MFI as it had before this transaction. As in *Westoil*, the fact that the ownership interests were denominated a partnership does not change the reality of who controlled the business or who held the equity.

In January 1991, a wholly owned subsidiary of IOL (ERCL) transferred its

upstream assets to a partnership that was controlled by MFI (ERC Partnership). Thereafter in June 1991 MFI transferred its interest in the ERC Partnership (the upstream asset partnership) and its own upstream assets, to MFI's own subsidiary, ER(89). MFI received shares of ER(89) in exchange. This transaction merely was a transfer of ownership interest in MFI's assets to a subsidiary of MFI itself in exchange for shares in the subsidiary. MFI continued to control the business of the subsidiary and to hold all equity interest in the subsidiary. IOL of course continued to have the sole ownership interest in MFI and continued to control MFI.

Also in June 1991 MFI transferred its partnership interest in the IO Partnership to an entity denominated MFPI. MFI received shares in MFPI and MFPI became a wholly owned subsidiary of MFI. MFI controlled the business of MFPI and held all equity interest in it and therefore continued to control its former partnership interest in the IO Partnership. IOL continued to control both MFI and its own partnership interest in the IO Partnership.

Finally, MFI transferred all of its assets, including its interest in its subsidiaries ER(89) (holding upstream assets) and MFPI (holding downstream assets) to IOL. IOL expressly assumed all of MFI's liabilities. MFI did not dissolve, but it continues to exist effectively as a shell corporation without assets,

and IOL asserts that it exists for the sole purpose of allowing it to sue and be sued with respect to matters such as those at issue in this case.³

Although there are many steps between the time immediately after TCI was acquired by IOL and changed its name to MFI, and the time when MFI transferred all of its assets and liabilities to IOL, the sum of the transactions produced a result the same as that analyzed by the court in *Westoil*. The transaction was complete with the transfer of assets from MFI to IOL and the de facto merger was effected then. The issue of whether there is a de facto merger arises when a transaction is cast in the form of a sale of substantially all assets.

As in *Westoil*, the equity owner of the business did not change in the relevant transactions. After TCI was acquired, IOL had ownership and control of the business and all of the assets of TCI/MFI. After MFI transferred all of its assets and liabilities to IOL, IOL still had ownership and control of the business and all of the assets of MFI. Moreover, at no time after TCI was acquired by IOL (and certain assets were spun off for antitrust reasons) did IOL lose control of any part of the business or assets of MFI or even a portion of the ultimate ownership of

³Because defendants have taken the position that IOL may not assert rights under the insurance contracts with TCI, IOL sought to maximize the flexibility of arguments available to it by preserving the corporate form of MFI. Counsel stated at oral argument, for example, that if IOL failed to prevail on the issue presented by this motion, IOL might consider attempting to sue MFI for indemnification to take advantage of the insurance rights defendants concede they owe to MFI.

MFI's assets. MFI remained in the business of upstream and downstream oil operations from the time it was acquired by IOL (as TCI) until the time it transferred all its assets and liabilities to IOL, and thereafter IOL remained in the business of upstream and downstream oil operations. IOL's means of exercising control changed in form as the series of transactions progressed (for example, sometimes IOL exercised control over some operations as a partner with MFI while also controlling MFI as holder of all of its equity.) But as in *Westoil*, where there is control in reality the court will look to the substance rather than the form of control.

4. Application of the *Marks* Factors to the Facts of this Case

Despite the closely analogous fact pattern of *Westoil*, defendant insurers argue that the multi factor test set forth in *Marks* for determining whether a transaction in the form of an asset sale actually achieves the same result as a merger is not satisfied under the facts of this case. Application of the *Marks* test, however, does support finding that the series of transactions engaged in by MFI and IOL resulted in a de facto merger.

The first factor of the *Marks* analysis is whether the consideration paid for the assets was solely stock of the purchaser or its parent. (*Marks, supra*, 187 Cal.App.3d at p. 1436.) The transactions leading up to the point where MFI's

assets and liabilities were transferred to IOL involved only transfers of assets to subsidiary entities in exchange for equity or partnership interests. Moreover, there was no payment to MFI for the final transfer of its assets to IOL save only for the concomitant assumption of MFI's liabilities and agreement by IOL to indemnify MFI. This circumstance fits the alternative version of a de facto merger where "the assets of one corporation are transferred without consideration which can be made available to satisfy claims" (*Id.* at p. 1435.) Defendant insurers argue nevertheless that IOL's agreement to indemnify MFI was adequate consideration to take the transaction out of the definition of de facto merger. However, the indemnity agreement adds little to IOL's agreement to assume MFI's liabilities, and is more in the nature of a "belt and suspenders" affirmation of this assumption of liability. An agreement to indemnify is not the sort of substantial consideration that precluded application of the de facto merger doctrine in *Ray v. Alad*, 19 Cal.3d 22, 29.

The second *Marks* factor is whether the purchaser continues the same enterprise after the sale. Defendant insurers argue that IOL did not continue operating some properties as part of its refinery business. Defendants offer no factual support for this contention on this motion. However even though IOL may have idled, sold or turned to other business some individual properties that had

been assets of MFI, there is no contention that IOL did not continue on in the business of production, refining and distribution of petroleum products using MFI's assets. Because the insurance policies involved covered periods prior to 1987, defendant insurers are not responsible for losses caused by any current activity of IOL with respect to any properties. (See discussion of lack of increased risk, *infra*.)

Defendant insurers also argue that the de facto merger doctrine should not be applied because some of TCI's assets were transferred to an unrelated company in the course of the transaction by which IOL acquired TCI. This sale was done to satisfy concerns of antitrust regulatory authorities about IOL's (Exxon's) acquisition of operations of a competitor (Texaco). However the assets that were sold are analogous to the building that was not transferred from the old corporation to the new partnership in *Westoil*. (73 Cal.App.4th at p. 637.) The absence of these assets did not prevent the business of the former TCI from going forward. Apparently a small number of the properties that were spun off later came back into IOL's possession. The specific issue of coverage for these particular properties is not before the court on this motion, but it can be said with assurance that defendant insurers cannot be held liable for losses due to any of IOL's actions with respect to these properties because the policies in question had expired before

IOL had any ownership interest in the former TCI properties.

The third *Marks* factor is whether the shareholders of the seller became shareholders of the purchaser. As discussed above, IOL held all equity interests after acquisition of TCI/MFI, had ownership and control of the business and all assets of MFI after the asset transfer to IOL in 1991, and in between at all times had sole equity ownership and control of all assets of MFI. Defendant insurers argue that the acquisition by IOL of MFI's assets cannot be considered a de facto merger because it took place in several phases. However both *Marks* and a case on which it principally relies, *Shannon v. Samuel Langston Company* (W.D.Mich. 1974) 379 F.Supp. 797, considered multi-step transactions and concluded that they amounted to de facto mergers. (*Marks, supra*, 187 Cal.App.3d at pp. 1436-1438.)⁴

The fourth factor articulated in *Marks* is whether the seller liquidated. The insurers argue that this factor is not satisfied because MFI continues to exist as a corporate entity. However there is no reason to distinguish between a corporate entity that has been allowed to become defunct and a corporate entity that exists only as a shell without operating assets. There is no evidence that IOL intends to

⁴*Marks* disapproves of the approach taken by the court in *In re Related Asbestos Cases* (N.D.Cal. 1983) 187 Cal.App.3d 818, "in which the original corporation was compared to the entity surviving after a series of mergers." (*Marks, supra*, 187 Cal.App.3d at p. 1438.) However *Marks* does not disapprove of comparing the corporate forms before and after a merger. *In re Related Asbestos Cases* looked at the similarity of management personnel rather than at the "intrinsic structure and nature" of the transaction. (*Marks, supra*, 187 Cal.App.3d at p. 1438.)

do anything with MFI other than to retain flexibility to wind up any business that for some reason cannot be done in the name of IOL. MFI effectively liquidated even though it may not yet have lost all indicia of corporate existence.

The last factor of *Marks* is whether the buyer assumed the liabilities necessary to carry on the business of the seller. In this case, IOL expressly assumed these liabilities.

Thus applying the factors set forth in *Marks* for determining whether a sale of assets is substantially equivalent to a merger, IOL's acquisition of MFI's assets should be considered a de facto merger.

4. IOL Is Not Estopped from Relying on De Facto Merger

Defendant insurers also argue that IOL should be estopped from asserting the de facto merger doctrine because IOL obtained substantial tax benefits from the corporate forms it chose in the series of transactions after IOL acquired TCI/MFI. Defendants argue that judicial estoppel precludes IOL's arguments here because of representations made by IOL to the Canadian taxing authorities.

The fact that IOL had reasons for making its choices of corporate forms is unsurprising. The cases do not alter application of the de facto merger doctrine depending on the court's view of whether the underlying reasons for the transaction were worthy or not.

With respect to judicial estoppel, it is “an extraordinary remedy that should be applied with caution.” (*Kelsey v. Waste Management of Alameda County* (1999) 76 Cal.App.4th 590, 598.) The elements of judicial estoppel require that two “totally inconsistent” positions be taken “in judicial or quasi-judicial administrative proceedings” (*Id.*) Defendants’ evidence is insufficient to demonstrate that the Canadian tax authorities with which IOL was corresponding were engaged in a “quasi-judicial administrative proceeding” or that what was said to the authorities is “totally inconsistent” with IOL’s position with respect to the de facto merger doctrine.

C. Whether Application of the De Facto Merger Doctrine Increases the Risk to Defendants

In applying the de facto merger doctrine, the court in *Westoil* did not consider whether transfer of insurance coverage to the successor entity increased the risk to the insurer. The court did consider whether assignment of the insurance policies increased the risk to the insurers *assuming* there was an assignment of the policies. (*Westoil, supra*, 73 Cal.App.4th at p. 641.)

This court nevertheless will consider whether application of the de facto merger doctrine so as to allow IOL to take advantage of TCI’s rights under expired policies increased the insurer’s risk. In order to transfer contract rights despite a contractual provision restricting assignment, *Trubowitch* appears to require not

only that there be a change of corporate form that does not change actual ownership and that the predecessor's business continue, but also that the change of the corporate form does not change the nature of the contracting party's obligation. (*Trubowitch, supra*, 30 Cal.2d at pp. 344-346; see also *University of Judaism v. Transamerica Ins. Co.* (1976) 61 Cal.App.3d 937, 941 ["Forfeitures on technical grounds which bear no substantial relationship to the insurer's risk are disfavored."]))

In undertaking the risk analysis, however, it is important to clarify what risks are being compared. Defendant insurers expressly concede that MFI succeeded to the insurance rights of TCI. From the beginning of its existence, MFI was totally owned and controlled by IOL. Thus defendants insurers' arguments that IOL's corporate policies concerning cleanup of properties affected by pollution increased the insurers' risks are not well taken. MFI was or could have been made subject to IOL's corporate policies at any time after the TCI acquisition. No part of the transactions subsequent to the IOL acquisition of TCI/MFI gave IOL more control over MFI. Change of corporate form did not increase the risk that IOL policies would apply to MFI, because IOL could fully control MFI as soon as it acquired MFI, when the insurers concede they had a contractual obligation to MFI.

Defendant insurers also assert that their risks are increased because they now

must deal with a company, IOL, with which they never chose to contract and which they never had an opportunity to evaluate for underwriting purposes. This argument has the same flaw as that just discussed. The insurers concede that they would be required to meet their contract obligations even though TCI/MFI was taken over by IOL. Once IOL took over, it had full authority and opportunity to change management personnel and policies. Again, the risk of which the insurers complain is a product of the acquisition of TCI/MFI by IOL. That risk was not increased by subsequent transactions or by recognizing that the contract rights transferred to IOL itself by de facto merger.

It is important to recall that the risks undertaken by the insurers pursuant to their policies are risks of loss attendant to damage occurring only in 1986 and earlier policy periods. All of the policies had expired prior to IOL's 1989 purchase of TCI/MFI and prior to all subsequent transactions. The insurers' risk under the policies is only that some harmful occurrence arising out of TCI's operations prior to 1987 would result in property damage during the precisely limited time the policies were in effect. The insurers are not liable for losses caused by subsequent property damage, whether caused by TCI, MFI or IOL. Defendant insurers argue on this motion that the corporate policies of IOL increased their risks because IOL had a policy of voluntarily cleaning up environmentally impaired properties. Yet

in another motion the insurers have argued that their policies do not cover the costs of voluntary clean-up, and this court has indicated agreement with the insurers' position.

Defendants also argue that their risk will be increased because they will be required to defend two or more parties rather than one. This motion only seeks to adjudicate the standing of IOL under the policies. Companies subordinate to IOL, such as MFPI, cannot assert rights under the insurance policies because the de facto merger doctrine vests contract rights in the successor corporate entity which acquires the assets of the original insured. Subordinate entities such as MFPI that were part of the series of corporate transactions are not in a position to assert either that they held ownership interests in TCI/MFI prior to the de facto merger or that they held ownership interests in the successor corporate entity (IOL).

MFI also cannot claim rights under the policies because by this Opinion and Order this court adjudicates that the rights under the policies were acquired by IOL by de facto merger. *Westoil* allowed the defunct corporate predecessor to bring suit to assert rights to coverage under the insurance policies. (*Westoil, supra*, 73 Cal.App.4th at pp. 642-643.) However a close reading of that case makes clear that the *Westoil* court did not contemplate that the insurer would have duties toward both the predecessor and successor entities. The court only allowed the

predecessor to assert its claim “assuming for the sake of discussion, [the insurer] is correct that the policies were not transferred to Westoil Partnership [the successor entity] in 1986.” (*Id.* at p. 642; see also *id.* at p. 643 [“If, for the sake of discussion, coverage was not transferred to the limited partnership [the successor], we have determined that the policies belong to Westoil Corporation [the predecessor] and it can bring suit against [the insurers.]”]) Thus *Westoil* does not stand for the proposition that a predecessor entity may continue to have rights under a contract of insurance that has transferred to a successor entity by de facto merger. Indeed, allowing a predecessor entity to obtain contract rights under an insurance policy would be inconsistent with the theory that the insurance contract has passed to the successor by de facto merger. Because only IOL now can assert coverage under the policy, the insurers have no duty to MFI or any other subsidiary entity of IOL. Consequently the insurers’ argument that their risks have increased because they must defend a multiplicity of parties is not well taken.

D. Defendant Insurers Have Provided No Basis for Postponing Decision on this Motion

In a footnote at page 50 of the Opposition Brief, defendant insurers argue that they request the right to take additional discovery “[i]f the Court determines that it needs additional facts to resolve the issues raised by IOL’s motion in the exercise of its equitable jurisdiction.” This court is not of the view that additional

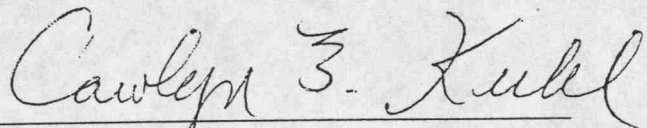
facts are necessary or would be helpful with respect to this motion. Defendants' conditional request for more discovery does not satisfy the requirement of Code of Civil Procedure section 437c(h) that to secure a continuance a party must show "that facts *essential to justify opposition* may exist but cannot, for reasons stated, then be presented" (Emphasis added.)

III. Conclusion

For the forgoing reasons the court grants IOL's Motion for Summary Adjudication and determines that IOL has standing to assert claims to insurance coverage based on insurance policies issued to Texaco Canada Inc. in years before 1987.

IT IS SO ORDERED

Dated: August 25, 2000

A handwritten signature in cursive script, reading "Carolyn B. Kuhl". The signature is written in dark ink and is positioned above a horizontal line.

Carolyn B. Kuhl
Judge of the Superior Court

**SPEECH TO GRADUATING CLASS OF UCLA
LEGAL INTERPRETATION AND TRANSLATION PROGRAM**

AUGUST 9, 1996

I am pleased and honored to be here to congratulate you on your achievement and to offer you words of encouragement as you begin your career in legal translation and interpretation.

I have been a judge in the Criminal Courts Building in downtown Los Angeles since last October. As I was thinking about what to say to you this evening, I asked one of the interpreters who regularly appears in my courtroom what she thought I should talk to you about. She said that probably you would be feeling apprehensive about what it would feel like to work in a courtroom and how you would find your place in that environment. Well, let me try to ease your mind. I recently made a transition similar to that you may be about to ^{we}embark upon. You are not alone in having to learn the system.

You see, my practice as a lawyer was almost exclusively in civil, not criminal, law. But when I was appointed to the Bench, I was immediately assigned to a criminal courtroom. After only a few days orientation I had to take the Bench and begin running a calendar, deciding whether or not to take pleas, and presiding at criminal trials. The lawyers argued legal issues and handled cases differently than I

was used to from my civil practice. The law was to a great extent unfamiliar, and all the people around me were new. I had never before even seen a defendant brought into a courtroom in handcuffs or chains.

Several months later, I can report to you that I very much enjoy what I do and that I feel quite comfortable in this new environment of criminal cases. So when you begin your new career, remember that it's not unusual or dishonorable to feel uncomfortable or even frightened in a new environment. You will find people to help you and draw on the tools you have learned in this program and it will become easier every day.

As I became more familiar with my new role as a judge in the criminal law area, I began to have an opportunity to observe and analyze more closely the role of each person in the courtroom, including the interpreters who appear there. I am no linguist -- in fact French was my worst subject. But I have some understanding of the professionalism that is required of interpreters. I would like to leave you with a few brief comments on that professionalism.

You may be asked to be a go-between in one of the most protected forms of communication in the law: the communication between attorneys and clients. This is a position of great trust. I am sure you all know of the great importance of the confidentiality of attorney-client communications. But there are times when attorney-client communications can become acrimonious. And there are other

times when, to my observation, the client tends to relate more to the interpreter as an advisor than to the attorney. These can be difficult situations for the interpreter. You must maintain your neutrality even as you are eager to facilitate the communication. You must struggle not to take sides emotionally. You must not allow yourself to substitute your own judgment for that of the attorney.

Perhaps an even more difficult situation is to translate for a sympathetic witness who is an alleged victim. Perhaps the witness is scared. Perhaps the witness is a child. You will have the normal human emotions. You will want to help the person. But the words can only be the witness's own. It is the job of the lawyer -- the prosecutor on direct examination -- to establish a way of communicating with that upset witness or that child. If the jury comes to feel that you, as interpreter, are trying to help the prosecution, trying to facilitate communication by word or manner beyond ~~simply~~ providing the translation, the jury may begin to question and perhaps disbelieve the testimony of that witness. You see, keeping a professional distance can be very important to the outcome of the case.

A final observation about professionalism. You are very visible in the courtroom to a jury, to spectators, and to the parties. In my courtroom, indeed, interpreters often are asked to accompany counsel into the lockup area to assist them in consulting with incarcerated defendants. It is very important that your dress and appearance be professional. Nothing is worse than having the courtroom distracted by a person's inappropriate dress.

It is no secret to any of you that we live and work in a multicultural environment. I have been extremely impressed with the way the juries I have seen have been able to put aside the cultural and social differences of individual jury members and to work together as part of our constitutional system. In your job, by definition, you will be working to bridge language gaps so as to bring participants in the legal system closer together. This is an extremely valuable endeavor. I would like to leave you with a quotation from a writer of the Second Century by the name of Tertullian. He wrote about the sameness of people despite language differences:

Man is one name belonging to every nation upon earth. In them all is one soul though many tongues. Every country has its own language, yet the subjects of which the untutored soul speaks are the same everywhere.

Congratulations, and best wishes for a successful and rewarding career.

ADDRESS TO CONSUMERS ATTORNEYS ASS'N OF L.A.

LAS VEGAS CONVENTION, OCT. 23, 1999

My plan was to title this presentation: "ADR: Not Whether But How"

My premise was that we had reached the point where everyone agreed that ADR is a good idea and the discussion now should shift to the most effective ways to use ADR

However recently I heard a story that made me question whether I should be so complacent about the general acceptance of ADR

One of my colleagues, Judge Haley Fromholz who is Chair of the LA Sup.Ct's ADR Committee was visiting a branch of our court (which branch shall remain nameless) to update the branch on the court's available ADR programs — a judge (who shall remain nameless) rose to make the following uncategorical assertion: "ADR is like Communism . . . Both of them sound good, but neither of them works"

So I decided maybe I couldn't be so complacent that we all agree that ADR is a good idea

Therefore I'm going to talk a bit about the L.A.Sup.Ct's experiences w/ ADR and why most of us think it's a good idea — then I'm going to spend most of my time discussing ~~what I think is a more interesting current issue in ADR which is~~ how ADR is best used and whether it can be used to save pretrial litigation costs

1st the LA SupCt's ADR Program *& why we think it works*

Program materials include an outline of the basic rules for ADR, which are spread among the Govt.Code, CCP, and CRC — useful summary

Program materials also include a doc prepared for the Court by the ADR Committee which is intended to advise judges on selecting among ADR options for a particular case — for example, suggests that mediation may be more appropriate than non-binding arbitration in a situation where there is concern that an arbitration award may polarize

future settlement efforts

In general you will find that fast track judges will ask you to address the issue of ADR at the 1st status conference — to make that discussion as productive as possible, recommend commencing that discussion with opposing counsel before the initial status conference (what I do — ask if discussion re resolution of case short of trial; few cases in which I do not have the parties agree on an ADR method at 1st status conference; those that don't come back for further status conference)

What we have found — ~47% success rate for court's mediation panel — evaluate that in context of measurement at or just after the mediation (not cases that settle later based on groundwork at the mediation)

Contrast with arbitration success rate of ~35% — significant difference

Relatively new ADR option that LA SupCt has set up — Commercial Provider program — retired judges/others volunteer — Primarily set aside for cases just prior to trial where previous ADR effort has failed— given that these are likely to be tougher cases to settle, success rate in the 40-50% range is quite good — this is a no cost program

Let me turn to the “not whether but how” portion of my remarks —

First, two observations:

One — Our entire pretrial process - all of our discovery rules and to some extent motion practice - is designed to lead up to a trial — the end goal of the process is to put on witnesses and offer documents before a trier of fact (judge or jury) that will see the complete picture from the standpoint of a neutral factfinder and will render a binding decision

But what we know is that well over 90% of cases settle — the resolution process, the dispute settlement process, is something other than a trial in more than 90 % of the cases, even though cases are being litigated in a system that is designed on the assumption that the case will be tried

Does this matter? Does it make any difference? If you knew the case was going to settle (or if there was a high likelihood that the case would settle) would something other than the rules of discovery and the CCP better serve that case?

707
A second observation — A goal of ADR is to reduce the costs of litigation —
But does ADR in fact do that?

The Rand Institute for Civil Justice did a study published in 1996 that looked at the results of case management under the federal Civil Justice Reform Act — several reforms were instituted as part of the case management that was required by the federal statute — the Rand study looked at the effectiveness of some of the case management techniques in terms of reducing time to disposition, effect on litigation costs & attorney views of fairness

In looking at the results of how ADR was used in the federal pilot project, Rand concluded that there was “no strong statistical evidence that the mediation or neutral evaluation programs as implemented in these [federal] districts significantly affected time to disposition, litigation costs or attorney views of fairness”

Rand had the following ~~observation and~~ recommendation: p.20

Do these 2 observations — that the statutes & rules governing our pretrial process are designed to prepare the parties for trial rather than for ADR, and that the effectiveness of ADR may depend on the “readiness” of the case for ADR (in terms of factual development) — have any implications for “how” ADR is used?

I believe it's time for judges and lawyers to focus on structuring the pretrial process, and particularly discovery, to prepare for effective ADR that reduces litigation costs

I believe they do
In particular I have in mind staged discovery whereby the parties initially would do only those tasks necessary to discover the essence of the case — this initial discovery would be followed by a serious effort at ADR — if ADR is unsuccessful, discovery can be completed prior to trial

Let me give you 2 examples of how this staged discovery geared toward ADR could work:

— Experience in wrongful term. case

Documents

2 days depo (one each side), leaving depo open

Successful mediation

— Possible use in legal malpractice case

Documents (full discovery of what happened in the represen.)

Exchange of written expert reports

Possibly some contention interrogatories

Partial depositions of percipient witnesses (may not even be needed)

Mediation attempt

In each instance, if ADR fails, discovery is completed and trial (or another mediation effort pretrial)

Cases need to be approached individually (although some techniques may work for most cases in a particular category)

If a trial lawyer believes this type of staged approach to ADR would be useful in a particular case, how would one implement it in an adversary system?

— Try to work out an agreed schedule with your adversary — he or she may think it's a good idea

— Ask the court to order staged discovery — courts are busy and many may not have time for extensive case management, but you might try coming to the initial status conference with a proposed discovery plan for the purpose of limiting discovery prior to ADR — Under CCP 2019(c), "on motion and for good cause shown, the court may establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice"

I would be very interested in any suggestions as to what the courts can do to promote use of ADR in a way that is cost-effective for the parties — Thank you for this opportunity to, I hope, begin a dialogue on this subject

*These are just
some preliminary observations
& suggestions for thinking
about how ADR might
be used more effectively
to reduce litig. costs*

Notes: March 14, 1998 Presentation on Legal Writing

4 3

Women Lawyers Ass'n 3/14
L.A. - Litigators Forum

Legal Writing

We have ltd time

- Discussion could be subject of entire course
- Should be something we all strive for throughout career

My focus

- Written work in trial court
- ~~Can~~ Can be described as "Law & Motion"

Because of ltd time, give you basic "Do's & Don'ts"

① Don't - neglect rules, local rules

- Different judges have different views re strict compliance

- Understand workload creates incentive/temptation to deny or continue a motion that doesn't comply

- Example re research atty - overlength brief - just don't consider

- The horror of calling a client re motion that wasn't heard because of technical defect

- if format
flaw disadvantages
other side most
judges wouldn't
consider or
would continue
(e.g.) SJ vs
S. Adj.

- ② Do use format to make brief & materials easier to follow
- Declar tabs & exhibit tabs
 - Clear references in the briefs

- ③ Do use every aspect of the brief to draw a clear roadmap for the court
- Put yourself in the Court's shoes - busy, looking for a quick way to focus on what the issues are
 - Use headings, table of contents, and esp. introduction to ~~the~~ ~~the~~ create a roadmap - make every word count

- ④ Don't weight down your brief with extraneous arguments
- If there's a procedural/format flaw in the other side's ~~brief~~ ^{papers}, note it as briefly as possible and move on
 - if judge cares doesn't need argument
 - if judge doesn't care, might think you're trying to avoid merits

- ⑤ Do evaluate & feature your strongest argument
- really evaluate the legal theories & put strongest 1st
 - if one argument ~~is~~ or case is clear and dispositive say so up front - say court only needs to reach it - ~~rebuttal~~ other arguments made as back-up
 - see advocates putting an argument last & then telling it. at oral argument that this is theme to focus on
 - this requires forethought

- ⑥ Do use cases effectively
- if a case is dispositive say so plainly & discuss the facts of the case
 - always use a parenthetical, not a string cite

- ⑦ Do keep your ~~advocacy~~ advocacy civil
- Local Rule 7.12 incorporates the L.A. County Bar Litig. Guidelines - read
 - Extremely imp't. to your credibility

DO -
CREDIBILITY
←

- Example - say "case is not as represented" - don't say "counsel intentionally attempted to mislead this court"
- If other side is shill, tell court you are not going to respond in ~~kind~~ kind & cite the rules

⑧ Do or don't ?

Attempt to "condition" court as to ultimate merits of case when arguing a legal issue that doesn't involve the merits (e.g., statute of lim.)

I view it as distracting, extraneous & suggesting that court might be willing to apply the law to reach result the Ct. personally thinks is "fair" as opposed to the correct application of law to fact

Others would strongly disagree - panel on appellate advocacy w/ Ninth Cir. judge who said all his colleagues looked at cases to try to reach a good or fair result

People v. Garcia, Case No. BA 134058, decided by Hon. Carolyn B. Kuhl,
December, 1996

In this criminal matter, the District Attorney's office reduced the charges from first degree murder to involuntary manslaughter in return for the defendant's agreement to waive jury trial and have the case decided by the court sitting without a jury. The defendant, Roberto Garcia, was accused of shooting into a crowd at a restaurant where a disturbance had broken out among patrons viewing a World Cup Soccer match on closed circuit television. The shot killed Pedro Gomez.

The trial court acquitted the defendant. Judge Kuhl read the attached statement into the record to explain her decision.

Prosecutor: Annamarie Acosta, Deputy District Attorney (213) 974-3611
Defense Counsel: Elena Saris, Deputy Public Defender (213) 893-7842

GARCIA VERDICT

Before I announce the verdict, I want to make a few general comments.

First, I agree with Ms Acosta that the victim is all too often simply a nullity in a criminal trial. The victim here, Pedro Gomez, was an innocent human being. His life has been snuffed out. Our system of justice is not one of vengeance, but it is meant to punish wrongdoers, those who break our laws, those who take innocent human life. And the punishment is not only meant to deter but also to require a price to be paid in light of the suffering caused to others. What happened in the restaurant was heinous. Shooting into a crowd is one of the very worst kinds of random violence. For me Pedro Gomez is not a forgotten man. He is the reason we are here.

Second, we have a system of justice which, by design, cannot punish all wrongdoing. Our federal and state constitutions constrain the criminal law in ways that are played out in this courtroom so frequently that we sometimes forget the constitutional origins of these procedures. The United States Supreme Court has declared that the federal constitution's procedural due process protections require that a person may be found guilty of a crime only on proof beyond a reasonable doubt. When the Supreme Court first plainly held that that burden of proof is constitutionally required, in *In re Winship* (1970) 397 U.S. 358, the majority opinion stated that "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." 397 U.S. at 364. In his concurrence in that case, Justice Harlan was even more explicit in acknowledging the trade-off inherent in our familiar burden of proof in criminal cases. He wrote: "In a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty." He continued: "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372 (Harlan, J., concurring).

With these general observations in mind, we confront the decision in this case. Let me say that the case has been well and very diligently presented by both sides. I cannot think of anything that either side left undone or should not have done.

Without in any way intending to give a complete explanation of my reasoning, I do want to make a few comments about the evidence. In my view some substantial portions of the testimony of the defense eyewitnesses lacked credibility, and therefore I could not give much, if any, credence to their version of events. Mildred Ruiz was a brave and very credible witness and she is to be commended for coming forward to testify. The issue for this finder of fact was whether the conditions in the restaurant at the time of Ms Ruiz's observations and conflicts between her recollections and observations and those of the two owners of the restaurant and of Sandra Matias created a reasonable doubt that Ms Ruiz's identification of the defendant as the one who shot was correct. I could not find that the prosecution had proved beyond a reasonable doubt that defendant Garcia in fact perpetrated the crime charged.

The Court therefore finds the defendant, Roberto Cervantez Garcia, not guilty of the crime of involuntary manslaughter as charged in Count 2 of the amended information. Count 1 of the information was dismissed on motion of the People December 9, 1996. Pursuant to Penal Code Section 1165 Mr. Garcia is ordered discharged forthwith.

Withdrawal Marker

The George W. Bush Library

FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
Letter	[Letter] - To: Brett Kavanaugh	1	03/23/2001	P2; P5; P6/b6;

**This marker identifies the original location of the withdrawn item listed above.
For a complete list of items withdrawn from this folder, see the
Withdrawal/Redaction Sheet at the front of the folder.**

COLLECTION:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Kuhl, Carolyn B. [Folder 2]

FRC ID:

9701

OA Num.:

2171

NARA Num.:

2082

FOIA IDs and Segments:

2018-0016-P

2017-0345-F

RESTRICTION CODES**Presidential Records Act - [44 U.S.C. 2204(a)]**

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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- A. Closed by Executive Order 13526 governing access to national security information.
- B. Closed by statute or by the agency which originated the document.
- C. Closed in accordance with restrictions contained in donor's deed of gift.

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- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.



**News From
U.S. Senator**

Barbara Boxer

112 Hart Senate Building, Washington D.C. 20510
Communications Office 202-224-9120 <http://boxer.senate.gov>

**Statement of Senator Barbara Boxer on the Kuhl Nomination
June 22, 2001**

I have received numerous statements of opposition to the nomination of Carolyn Kuhl to a seat on the Ninth Circuit Court of Appeals.

These letters and calls raise a number of issues important to Californians including: the right to choose, civil rights, representation of tobacco companies, privacy rights and whistleblower protection.

I have met with Judge Kuhl and the White House Counsel, informed them of these issues and I am continuing to evaluate this nomination.

#

Kozinski

May 23, 2001

To: Brett Kavanaugh

From: Carolyn Kuhl

of pages - 10 including cover sheet

These are the questions from Senator
Boxer. Also, two additional letters.

BARBARA BOXER
CALIFORNIA

COMMITTEES:
COMMERCE, SCIENCE
AND TRANSPORTATION
ENVIRONMENT
AND PUBLIC WORKS
FOREIGN RELATIONS

United States Senate

HART SENATE OFFICE BUILDING
SUITE 112
WASHINGTON, DC 20510-0505
(202) 224-3553
senator@boxer.senate.gov
<http://boxer.senate.gov>

May 22, 2001

The Honorable Carolyn B. Kuhl
210 W. Temple Street
Los Angeles, CA 90012

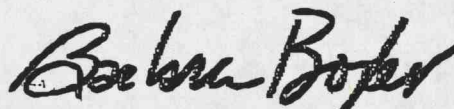
Dear Judge Kuhl:

I appreciated the opportunity to meet with you today. Again, I apologize for the last-minute changes I had to make in our meeting time and location, but thank you for your understanding and flexibility.

As I mentioned in the meeting, I have some lingering questions about your record that I would like you to clarify. I look forward to your responses.

Thank you again for meeting with me. I look forward to speaking with you soon.

Sincerely,



Barbara Boxer
United States Senator

1700 MONTGOMERY STREET
SUITE 240
SAN FRANCISCO, CA 94111
(415) 403-0100

312 N. SPRING STREET
SUITE 1748
LOS ANGELES, CA 90012
(213) 894-8000

901 'I' STREET
SUITE 7-600
SACRAMENTO, CA 95814
(916) 448-2787

130 'O' STREET
SUITE 2450
FRESNO, CA 93721
(559) 497-5109

600 'B' STREET
SUITE 2240
SAN DIEGO, CA 92101
(619) 259-3884

201 NORTH 'E' STREET
SUITE 210
SAN BERNARDINO, CA 92401
(909) 888-8526

SENATOR BOXER'S QUESTIONS FOR CAROLYN KUHL

1. (a) On a number of occasions while at the Justice Department you advocated overturning Roe vs. Wade and a woman's right to choose. Please explain to me how you became involved in these cases and what your views are on a woman's right to control what happens to her body and, specifically, on the issue of a woman's right to choose whether to have an abortion?

(b) In the cases of *Thornburgh* and *Diamond*, the amicus brief you submitted not only urged the Supreme Court to deem the state laws constitutional, but urged the wholesale reversal of Roe vs. Wade. What role did you play in getting the Solicitor General to go beyond the circumstances of the cases and instead appeal the Roe decision?

(c) After you entered private practice, you represented the American Academy of Medical Ethics – a fundamentalist, anti-choice organization – in arguing in favor of upholding a gag rule on Title X funding. What were and are your views on this issue, and why did you take this particular case?

2. In *Sanchez-Scott v. Alza Pharmaceuticals*, a breast cancer patient went in for a check up. An unidentified person accompanied her doctor, watched, and even laughed at her during the examination, in which she was nude from the waist up. Only afterwards was she told that this man was a drug salesman. She sued the company, claiming an invasion of privacy. You ruled against the patient, saying her privacy had not been invaded. Moreover, in the motion to dismiss, she was charged \$401. Your decision was reversed on appeal. How do you explain your decision, given the facts of the case and the appellate court's action?

3. In a highly publicized case involving the tax exempt status of Bob Jones University during the Reagan Administration, The New York Times described you as one of "a band of young zealots" who urged President Reagan to change his position and support tax exemptions for the University. What were the circumstances surrounding this case and the details of your involvement? Why did you disagree with the apparently overwhelming and deeply held views of others in the Department?

What are your views on the Federal Government's appropriate role in fighting discrimination? Should it be a force for change where discrimination exists?

4. In my experience with defense procurement reform, I have found it very helpful for private parties to be able to file whistleblower suits against defense contractors. In many cases, this is the only way that taxpayers are protected from waste, fraud and abuse. You filed an amicus brief on behalf of Rockwell and others in the case of *Madden v. General Dynamics Corporation*, in which a number of defense contractors argued that the qui tam statute was unconstitutional. What is your view about statutes such as qui tam which allow private citizens to file lawsuits protecting the public interest?

5. (a) While in private practice, you were involved in *Western Properties Service Corporation v. Shell Oil*, and *The State of Minnesota v. Philip Morris*. In both of these cases, you represented big business in opposition to the rights of consumers. In both cases, the Courts ruled against your clients. These cases are representative of dozens of others you have taken as a private attorney. How can I have confidence, given your long history of representing major corporations against consumers, that as a judge you will not continue to tip toward the rich and the powerful?

(b) I know lawyers in big firms represent big corporations such as you have in the cases of Shell, Rockwell, Fairchild, and others. But why did you choose to represent Phillip Morris against public health claims? Did that case cause you any personal ethical concerns? Couldn't you have asked your firm to excuse you from the case?

**Los Angeles County
Bar Association**



Litigation Section

Mailing address: P.O. Box 55020, Los Angeles, CA 90055-2020 (213) 627-2727 / Fax (213) 623-4336

May 18, 2001

The Honorable Dianne Feinstein
331 Hart Senate Office Building
Washington, D.C. 20510

Re: The Honorable Carolyn Kuhl

Dear Senator Feinstein:

We are the officers of the Litigation Section of the Los Angeles County Bar Association which, with over 3,000 members, is the largest voluntary Bar association in the United States. We understand that you will be meeting with Judge Carolyn Kuhl of the Los Angeles Superior Court on Tuesday, May 22, 2001. Given the shortness of time before your meeting, we have been unable to contact a quorum of our Executive Committee for a vote of that body and therefore write this letter in our individual capacities. We are confident, however, that it accurately reflects the feelings of most, if not all, of our Section members.

Collectively, we have known Judge Kuhl during her entire career in Los Angeles and, indeed, Alan Steinbrecher was her law school classmate at Duke. She presently serves with us on the Executive Committee of the Litigation Section. She is also the Supervising Judge of the pilot Complex Courts program that was implemented in 2000. By reputation and our personal experience, Judge Kuhl is extremely intelligent, hard working and thoughtful. She gained the prestigious appointment as Supervising Judge of the Complex Courts after only a few years on the bench because of those traits. In addition, she has a well-deserved reputation as being a fair minded judge who follows legal precedent. Her legal acumen is well-demonstrated by the scope of her career, including the fact that she has argued on multiple occasions before the United States Supreme Court. On a personal level, we have come to know her as a warm, witty and deeply caring person. We could not recommend her more highly for nomination to the Ninth Circuit Court of Appeals.

We know that you will be as impressed with Judge Kuhl as we are, and we urge that you support her nomination to the Court. Thank you in advance for your attention to her candidacy.

Very truly yours,

Alan K. Steinbrecher,
Chair, Litigation Section

Dean Ziehl,
Chair-Elect Litigation
Section

Gretchen Nelson,
Treasurer

Steve English,
Secretary

Rod Dorman,
Secretary-Elect

Section Officers
Alan K. Steinbrecher
(213) 683-6247
Chair

Dean Ziehl
(310) 772-2362
Chair-Elect

Gretchen M. Nelson
(213) 622-6469
Treasurer

Stephen R. English
(213) 615-1664
Secretary

Executive Committee
Debra Albin-Riley
Percy Anderson
Bruce Armstrong
Seth Aronson
Hon. Valerie Baker
Hon. Audrey Collins
Hon. Candace Cooper
Hon. Florence-Marie Cooper
Nicholas DeWitt
Roderick G. Dorman
Donna J. Ford
Hon. Haley Fromholz
Don Howarth
Hon. Carolyn Kuhl
George L. Mallory, Jr.
Elizabeth Mann
Hon. Veronica McBeth
Hon. George Schiavelli
Hon. Harvey A. Schneider
Marc M. Seltzer
John C. Taylor
Helene Wasserman
Hon. Andrew J. Wistrich

Immediate Past Chair
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LEO JAMES TERRELL

8383 WILSHIRE BLVD., SUITE 920 • BEVERLY HILLS, CA 90211 • TEL: (323) 655-6805 • FAX: (323) 655-5104

May 23, 2001

Senator Dianne Feinstein
Hart Senate Building, Ste. 331
Washington, D.C. 20510

By FAX (202) 228-3954
and U.S. Mail

Re: Judicial Appointment of Judge Carolyn B. Kuhl
to the 9th Circuit Court of Appeals

Honorable Senator Feinstein,

I am writing this letter to voice my support for the judicial appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit.

I have been a lawyer in California for over 13 years. My office is located in Beverly Hills, California. My practice specializes in Civil Rights litigation and Employment Law, particularly discrimination and sexual harassment in the workplace. I also specialize in Police Misconduct litigation.

I am an attorney for the NAACP. I have a weekly radio program in Los Angeles, California. I also do local and national TV and Radio commentary on various social, civil and political issues.

I am a lifelong Democrat. I have contributed to your Senate campaigns and the Senate campaigns of Senator Boxer as well.

I vigorously recommend the appointment of Judge Carolyn B. Kuhl to the United States Court of Appeals for the 9th Circuit.

I became aware of Judge Kuhl through my law practice, and have always found her to be a fair and competent Judge. I litigated a case before Judge Kuhl entitled Francis Iwekaogwu vs. City of Los Angeles (1999) 75 Cal. App. 4th 803, 89 Cal. Rptr. 2d 505 in which Judge Kuhl was a major factor in the successful resolution of that case.

Page 2

The Iwekaogwu case was an employment discrimination and retaliation case, where my client was discriminated because of his race (African-American) and ethnic background (Nigerian). During the lengthy litigation process I found that Judge Kuhl was fair, impartial, competent and at all times, extremely professional.

I personally have no problem with the appointment of a Republican Judge to the 9th Circuit bench, as long as that Judge is fair and impartial. Judge Kuhl is just that person.

If asked, I would be willing to speak on behalf of Judge Kuhl before any Congressional or Judiciary hearings.

I submit that your decision regarding the appointment should be based solely on the competency of the judicial candidate, not on politics. I will do everything in my power to ensure that Judge Kuhl receives the nomination, and to see that this nomination obtains the advice and consent of the Senate, as well as the public.

If you have any questions or require more information, please do not hesitate to contact me at your convenience.

Thank you for your consideration.

Very truly yours,



Leo James Terrell
Attorney at Law

LJT/mr

cc: Honorable Carolyn B. Kuhl
Los Angeles Superior Court

Carolyn B. Kuhl

(b)(6)

April 28, 2001

Brett Kavanaugh, Esq.
Associate Counsel to the President
Room 128
Old Executive Office Building
1601 Pennsylvania Avenue, N.W.
Washington, D.C. 20502

Dear Brett:

Enclosed are some materials you might use in responding to Sam Chapman. They are as follows:

(1) A letter I sent to Senator Hatch commenting positively on the qualifications of Judge Richard Paez. As you know, the fact that Judge Paez was held up for four years after being nominated for the Ninth Circuit is a very sore spot with the California Senators. I believe that Senator Boxer suggested Judge Paez for the District Court and felt that he was "her" candidate for the Ninth Circuit. I think this is an important letter, and I know that Vilma Martinez has mentioned it to Sam Chapman, but I do not think he has a copy. It may not seem comfortable for the White House to send this to Chapman, so if you think it appropriate, I can get it to him by way of someone out here in California.

(2) A recent article about my work with the Complex Litigation Program. The message here would be that I am doing good, nonpartisan work at a high level.

(3) A statement I read into the record in acquitting a defendant that was tried before me without a jury. It takes "beyond a reasonable doubt" seriously.

(4) A published opinion I authored upholding a jury verdict and substantial emotional distress award in favor of plaintiff in a race discrimination case. *Iwekaogwu v. City of Los Angeles*.

(5) A published opinion I authored allowing a cause of action against a fiduciary who assists a trustee in committing a fraud. *Wolf v. Mitchell, Silberberg & Knupp*.

(6) An unpublished opinion I authored overturning a grant of summary judgment and allowing a plaintiff to proceed on her negligence claim. *Parnell v. World on Wheels, Inc.*

(7) An unpublished opinion I authored finding that the California courts had personal jurisdiction over a defendant foreign corporation. *Signal Treating Service, Inc. v. Lonrho, PLC*

(8) An unpublished trial court opinion I authored holding that the corporate successor of an entity that entered into an insurance contract could enforce the contract. This allowed the plaintiff to proceed on its claim to collect insurance proceeds to remediate environmental damage. (This issue is so complicated it may not be worth including; it also is a decision merely on a threshold issue.) *McColl-Frontenac Inc. v. Adriatic Insurance*

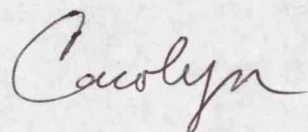
(9) A speech I gave to a graduating class of the UCLA legal interpretation and translation program. It talks about professionalism and expresses confidence in the ability of jurors to put aside cultural and social differences.

(10) An outline of a speech I gave to the Consumer Attorneys Association of Los Angeles annual convention. The speech is on the subject of ADR. The main point is to show that they invited me to speak and I accepted.

(11) Notes of a speech I gave to the Women Lawyers Association of Los Angeles Litigators Forum. The subject of the speech is improving legal writing skills. Again the main point is to show that the group invited me and I spoke to them. In addition, the last page expresses my view that a court must apply the law regardless of personal views.

Feel free to send all or any part of these materials you think could be helpful. Let me know what you think.

Sincerely,

A handwritten signature in cursive script, appearing to read "Carolyn".

Personal

May 18, 1998

The Honorable Orrin Hatch
United States Senate
224 Dirksen Senate Office Building
Washington, D. C. 20410

Re: Honorable Richard Paez

Dear Senator Hatch:

I wanted you to have the benefit of my personal experience with the work of Judge Richard Paez of the United States District Court for the Central District of California, who is a nominee for the United States Court of Appeals for the Ninth Circuit.

Judge Paez is without a doubt one of the very most prepared and intelligent judges before whom I have appeared. I had a case before Judge Paez in District Court not long after he was elevated to that court, and shortly before I assumed my current position on the state Superior Court. My case before Judge Paez raised environmental claims and I represented a group of oil company defendants. The plaintiff argued that the defendants should be held liable on a so-called "market share" theory of liability. This theory would have shifted the burden to the defendants to prove that they were not responsible for the pollution at the site in question. The "market share" theory has been accepted in the California courts under limited circumstances, and in particular has been applied to lessen plaintiffs' burden of proof in DES cases.

Judge Paez rejected the plaintiff's attempt to proceed on the basis of the "market share" theory in my case. I really had very little to do at the argument before Judge Paez. Judge Paez had a thorough mastery of the relevant cases and environmental statutes and discussed them at length with plaintiff's counsel after giving a tentative ruling in favor of defendants. He clearly perceived the difficulties with the "market share" theory and the need to limit its applicability. His impressive performance on the bench has remained very clear in my mind. I never have appeared on a motion before a trial judge who was more prepared or more articulate than Judge Paez.

Judge Paez has enjoyed an excellent reputation in this legal community during his time on the District Court. From my personal experience, this reputation is well deserved.

I hope this is helpful to you in your consideration of Judge Paez. If I can offer any additional information, I would be pleased to speak with you or your staff.

Sincerely,

Carolyn B. Kuhl

cc. The Honorable Patrick Leahy

Complex-Case Plan Lightens Load Management Project Avoids Burdening Court and Litigants

By Jeffrey Anderson
Daily Journal Staff Writer

Courthouses throughout Los Angeles were empty on President's Day, a government holiday.

That didn't deter Los Angeles Superior Court Judge Peter Lichtman from holding court.

The judge sat at the head of the table in the conference room at the offices of Los Angeles' Beck, De Corso, Daly & Kreindler, as lawyers and experts in a mass tort case — 11 of them, all billing by the hour — arrived for an *ex parte* meeting.

"Everything said here today is off the record," Lichtman said. "If anyone wants to go on the record, just speak up, and we'll calendar a formal hearing."

"Otherwise, I expect us to leave this meeting with an agreement for determining the factual elements of this case."

Not an easy task under normal circumstances, in a case involving multiple defendant utilities companies and six municipalities.

Yet the lawyers were surprisingly cheerful as opposing experts took turns presenting proposals for testing allegedly contaminated underground water systems and Lichtman took notes.

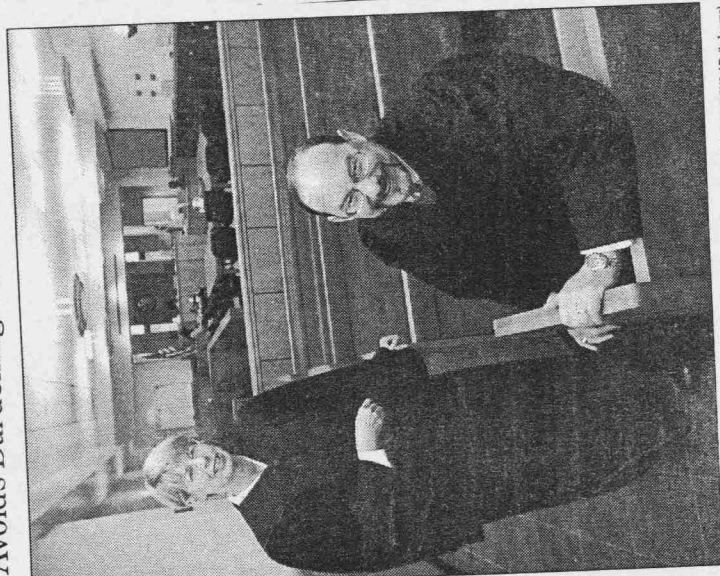
By the end of the three-hour meeting, the group reached consensus, without anyone so much as raising his or her voice, on a protocol to test the toxicity of miles of underground pipes and fittings, the key factual issue in the case.

"That was highly unusual," Brian Daly, counsel for one of the defendant utility companies, said. "We had an open dialogue at the urging of the judge and probably saved the clients three months of litigation and \$500,000 in legal fees."

So goes the Complex Civil Litigation Pilot Project, which Chief Justice Ronald George of the California Supreme Court will tout when he gives his annual State of the Judiciary address Tuesday.

The two-year pilot project is the first in the country to transfer complex cases to judges who have smaller caseloads and special case-management training.

Implemented in Los Angeles Superior Court on Jan. 24, 2000, the project, which is under way in five other court-



ROBERT LEVINS / Daily Journal

IMPROVING EFFICIENCY — "Our goal is to avoid formalities, avoid disputes and structure discovery in a sensible way," L.A. Superior Court Judge Carolyn Kuhl said. "It makes no sense to spend 60 days fighting over motions before talking about key issues which should be addressed up front." Kuhl, left, supervises the Complex Civil Litigation Pilot Project, and L.A. Superior Court Judge Peter Lichtman, right, is one of seven judges who preside over the complex cases.

ties, has not yet yielded quantifiable results. Nonetheless, area participants are smitten.

Lichtman and Los Angeles Superior Court Judge Carolyn Kuhl described the project recently from their adjoining chambers in the courthouse at 600 S. Commonwealth Ave., near downtown Los Angeles.

"When you have 300 civil cases, the complex ones get treated like any other," Kuhl said of the endless discovery motions and disputes that can force a case to drag on for years. "That gets in the way of the quality of decision making."

Kuhl supervises Los Angeles' pilot project, comprising seven judges who only preside over complex cases that

See Page 5 — PROGRAM

Complex-Case Plan Lightens Load

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By Jeffrey Anderson
Daily Journal Staff Writer

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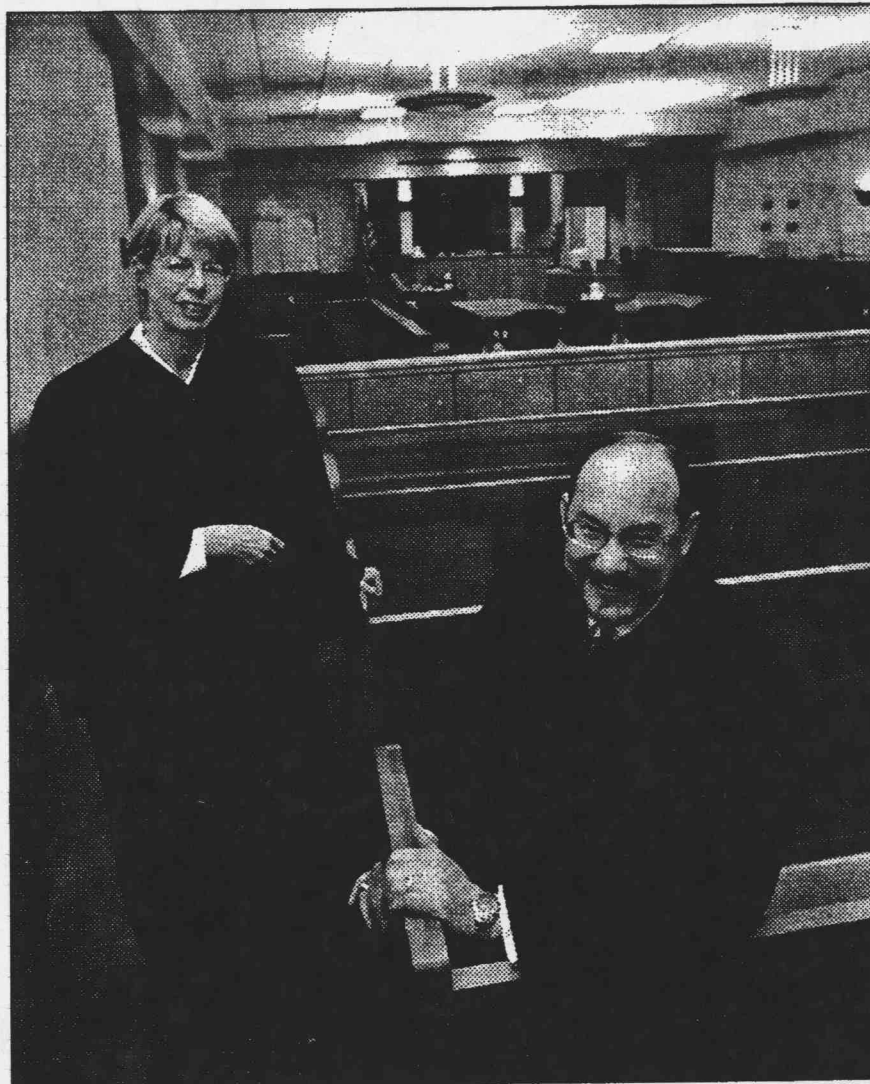
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Program Expedites Complex Cases

Continued from Page 1

quality under California Rules of Court 1800.

Rule 1800 defines a complex case as requiring "exceptional judicial management to avoid placing unnecessary burden on the parties or the court."

Factors for determining whether a case is complex include the number of parties, number of witnesses, amount of documentary evidence and number of pretrial motions that raise novel legal issues. (Those factors do not include length of trial, the determining factor for the long trial.)

In addition to mass tort litigation, typical complex cases include securities, antitrust, construction and intellectual property. Class actions, which formerly resided in Department 99, go straight to the complex court.

Complex cases avoid formalities, avoid disputes and secure discovery in a sensible way," Kuhl said. "It makes no sense to spend 60 days fighting over motions before talking about key issues which should be addressed upfront."

Complex-court judges applied for the project and vacated their caseloads to handle the complex cases. They handle dozens rather than hundreds of cases, which affords time to bring lawyers together outside the courtroom, Lichtman said.

"At one time, I had close to 500 cases; now I have 35," Lichtman said. "It's like a pilot program."

The court backfilled the seven vacancies with new appointees and redistributed any leftover cases to sitting superior court judges.

Judges who are not a part of the pilot project have the option of keeping or transferring their complex cases, Kuhl said.

She said that the option to transfer is intended to lighten judges' loads, yet some elect to keep their complex cases.

"Some people are happy to give up complex cases," Los Angeles Superior Court Judge Richard Bascue said.

"I don't want to go in with the attitude that I don't want to be there; I enjoy the intellectual challenge."

West, who presided over a toxic tort case against Lockheed Martin that lasted four years, has 45 open cases.

"There is a luxury of going to the complex panel that I can't provide," West said. "I can't provide the same level of efficiency in the civil justice system was self-evident, Bascue said.

"Los Angeles has 38 court locations, 600 bench officers and covers 4,000 square miles," Bascue said. "We conduct 6,000 trials per year and process 10,000 motions."

"Judges have little time to spend on injury matters, and time is the crucial commodity in managing complex cases."

Local lawyers welcome the judicial attention, Victoria Pynchon of Los Angeles' Hancock, Adair & Bumbolt said.

Pynchon said that the court's pilot case on the docket for four years when

The Players

California Superior Court Judges on the Complex Civil Litigation Pilot Project

Alameda County:
Ronald Scharf

Contra Costa County:
David Finn

Los Angeles County:
Victoria Cheney

Orange County:
Ann Kough

San Diego County:
Carolyn Kuhl (supervising judge)

San Francisco County:
Charles McCoy Jr.
Randall Norrner Jr.
Anthony Nola

San Jose County:
William McDonald (supervising judge)

San Mateo County:
Stephen Surdick
Stuart Waldrip

Santa Clara County:
Stuart Pollak

Santa Clara County:
Conrad Rushing

Source: California Judicial Council Trial Court Programs Division

Contra Costa, Orange, San Francisco and Santa Clara counties.

The project arose after an exhaustive nationwide survey in 1996, in which a Judicial Council task force reported the need for a pilot project in complex cases similar to those in Delaware, New York and Pennsylvania, Aldrich said.

The task force found that limiting the initiative to one practice specialty would diminish the benefits of the program to the judicial system as a whole.

In 1997, the state received a \$12 million state grant, appointed a 28-member civil litigation task force to provide training for judges, research staff and technology for the six pilot projects.

The individual projects later received additional grant money from the state. Los Angeles was the first to receive the judges voted to unify the courts also received a one-time technology grant of \$150,000.

Lichtman, the assistant supervisor of the local pilot project, has put the technology grant to use. He set up a Web site on the court's intranet for motions and correspondence that they can access without going to court.

"All I have to do is upload the court file from the server, and I can review the calendar, notices of depositions and requests for admissions and discovery," Lichtman said. "The Web site is a great thing. It is under a code which only the parties can access, and it allows me to globally monitor the case."

Such ingenuity from the bench is invaluable, Michael Crowe of Santa Monica County said. Crowe and Rogan said.

Crowe said that he handled one of 150 defendants in a tort action related to a Superfund site.

"Judge Kuhl required [the lawyers] to submit what were essentially minimalist judgment motions, staggered over a two-month period," Crowe said. "That helped preserve the time that the judge intended to rule on the various legal issues if we went to trial."

They settled the case in six months.

"By sheer volume and complexity of cases, Los Angeles is the ideal test environment for this project," Paul Kiesel of Pines, Kiesel, Kiesel, Boudner & Larson said. "Bascue is a great judge. He is personable, the judicial process."

Those kinds of reactions make the court ripe for customer-service analogies, George likened the project to the different checkout lanes at the grocery store.

"Separate the carts with 50 items and people with 10 items or less get out more quickly," he said.

Observers also have likened the complex court to alternative dispute resolution because it appears designed to promote efficiency.

"I think the complex court meshes with ADR," George said. "There is an emphasis on working out settlements, but the parties always have the option to go through formal court procedures."

As to the extent judges have a more in-depth involvement in the cases, perhaps some will find themselves wanting to stay on the bench longer.

"I'm a liar," Lichtman said.

More important, Bascue added, the court has not detected a backlog among judges who have kept complex cases.

The 1999 Budget Act funds similar pilot complex court projects in Alameda, Monterey and Santa Clara counties.

Jeffrey Anderson's e-mail address is jeffrey_anderson@dailyjournal.com.

Program Expedites Complex Cases

Continued from Page 1

qualify under California Rules of Court 1800.

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West, who presided over a toxic tort case against Lockheed Martin that lasted four years, has 475 open cases.

"There is a luxury of going to the complex panel that I can't provide," West said, acknowledging that attorneys have requested transfers to the pilot project. "But I'm happy to work harder and block out extra time for larger

The Players

California Superior Court Judges
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Contra Costa County:
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Los Angeles County:
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Carolyn Kuhl (supervising judge)
Peter Lichtman
Charles McCoy Jr.
Wendell Mortimer Jr.
Anthony Mohr

Orange County:
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William McDonald (supervising judge)
Stephen Sundvold
Stuart Waldrip

San Francisco County: Stuart Pollak

Santa Clara County: Conrad Rushing

Source: California Judicial Council Trial
Court Programs Division

Kuhl took it over in April.

"The case had been at a standstill," Pyncheon said. "We had a discovery referee and a judge who didn't have the time or the staff to push the litigation forward."

Then Kuhl arrived.

The judge started meeting with the parties informally, once a week, for more than a month. Within several months, the lawyers had resolved 80 percent of the legal issues before going to trial.

"Typically, one side wants to move forward, and the other doesn't," Pyncheon said. "You need a judge who is willing to study the case and be creative and flexible in figuring out ways to push the parties."

Complex-court judges have two things in common, according to Justice Richard Aldrich of the 2nd District Court of Appeal: temperament and ambition.

Aldrich, the program's chief architect, has written a technical assistance manual for judges called the "Desk Book on the Management of Complex Civil Litigation," which prescribes pretrial, discov-

Contra Costa, Orange, San Francisco and Santa Clara counties.

The project arose after an exhaustive nationwide survey in 1996, in which a Judicial Council task force rejected the idea of a specialized business court similar to those in Delaware, New York and Pennsylvania, Aldrich said.

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"By sheer volume and complexity of cases, Los Angeles is the ideal test environment for this project," Paul Kiesel of Beverly Hills' Kiesel, Boucher & Larson said. "Besides maximizing efficiency, it personalizes the judicial process."

Those kinds of reactions make the court ripe for customer-service analogies.

George likened the project to the different checkout lanes at the grocery store.

"Separate the carts with 50 items and people with 10 items or less get out more

"There is a luxury of going to the complex panel that I can't provide," West said, acknowledging that attorneys have requested transfers to the pilot project. "But I'm happy to work harder and block out extra time for larger cases."

Judges have welcomed the project, according to Los Angeles Superior Court Judge James Bascue. The need to improve efficiency in the civil justice system was self-evident, Bascue said.

"Los Angeles has 58 court locations, 600 bench officers and covers 4,000 square miles," Bascue said. "We conduct 6,000 trials per year and process 10,000 jurors per day."

"Judges have little time to spend on nonjury matters, and time is the crucial commodity in managing complex cases."

Local lawyers welcome the judicial attention, Victoria Pyncheon of Los Angeles' Hancock, Rothert & Bunshoft said.

Pyncheon had a complex environmental case on the docket for four years when

Aldrich of the 2nd District Court of Appeal: temperament and ambition.

Aldrich, the program's chief architect, has written a technical assistance manual for judges called the "Desk Book on the Management of Complex Civil Litigation," which prescribes pretrial, discovery, settlement and trial procedures for managing complex cases.

"The goal is to train the brightest, most motivated judges and establish a program that accrues to the benefit of the entire system," Aldrich said.

Although that mantra has prompted an aura of elitism, Bascue described the project's mission in a different light.

"I like to refer to the project as 'judicial self-selection,'" he said, pointing to judges' options for keeping complex cases.

More important, Bascue added, the court has not detected a backlog among judges who have kept complex cases.

The 1999 Budget Act funds similar pilot complex court projects in Alameda,

Those kinds of reactions make the court ripe for customer-service analogies.

George likened the project to the different checkout lanes at the grocery store.

"Separate the carts with 50 items and people with 10 items or less get out more quickly," he said.

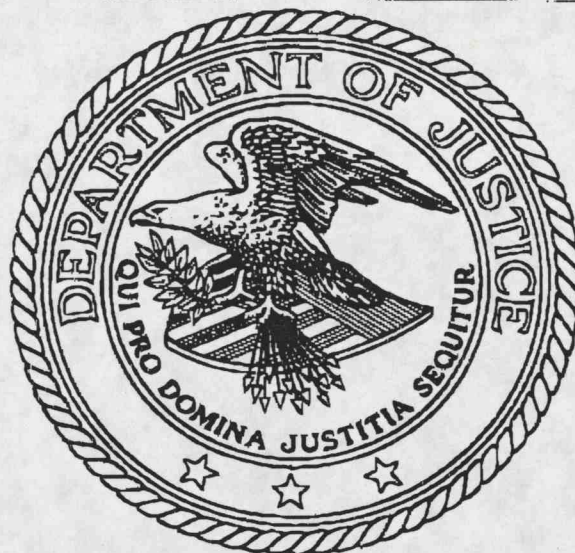
Observers also have likened the complex court to alternative dispute resolution because it appears designed to promote settlements.

"I think the complex court meshes with ADR," George said. "There is an emphasis on working out settlements, but the parties always have the option to go through formal court procedures."

"And to the extent judges have a more in-depth experience handling complex cases, perhaps some will find themselves wanting to stay on the bench longer."

"I'm a lifer," Lichtman said.

■ Jeffrey Anderson's e-mail address is jeffrey_anderson@dailyjournal.com.



Office of Legal Policy
United States Department of Justice
950 Pennsylvania Avenue, NW, Room 4639
Washington, D.C. 20530

DATE: 6/25/01

TO: Brett Kavanaugh
White House Counsel's Office

FAX: (202) 456-1647

FROM: Jennifer Newstead

VOICE: (202) 616-0038

FAX: (202) 353-9163

Total Pages (including this cover): 10

RE: Judge Carolyn B. Kuhl

Additional Message:

FROM : Highberger/Kuhl

PHONE NO. : 310+454+6138

Jun. 23 2001 12:05PM P1

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6/23/01

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COMMENTS:

Monday's editions of the two California main lawyer-oriented newspapers were available today. The LA Daily Journal also publishes the San Francisco Daily Journal (in competition with the SF Recorder) so it will presumably run the same article in the SF Daily Journal on Monday.

Bill Highberger

for Carolyn

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Bush to Name L.A. Judge to 9th Circuit

DAVID E. SAVAGE

WASHINGTON — President George W. Bush will nominate today for the Los Angeles County Superior Court Judge Carolyn B. Kuhl, a veteran of the Reagan administration and a longtime clerk to Justice Anthony M. Kennedy, to a seat on the U.S. 9th Circuit Court of Appeals, an administration official said Thursday.

If confirmed by the Senate, she would sit with the circuit's 28 appellate judges who sit in panels, review federal cases and set the law for a nine-state Western region that includes California.

Since March, the White House has been considering Kuhl and Rep. Christopher Cox of Newport Beach to fill vacancies on the 9th Circuit.

But the pair ran into early opposition from California's two Democratic senators, Dianne Feinstein and Barbara Boxer, who were reportedly troubled by the White House's choice.

Cox later withdrew from consideration but the White House decided to go ahead with Kuhl's nomination after getting a letter of approval from Feinstein.

An administration official said Kuhl spoke on condition of anonymity that she would not be involved in any political or public affairs.

Kuhl, 52, is a native of San Francisco and worked for the House of Representatives for 10 years. She was a clerk for Sen. Dianne Feinstein from 1981 to 1986 and then for Sen. Barbara Boxer from 1986 to 1991.

She worked for the Reagan administration from 1981 to 1986, where she was a clerk for the attorney general, Richard Thornburgh, and then for the deputy attorney general, William French Smith.

She worked for the Bush administration from 1989 to 1991, where she was a clerk for the attorney general, Michael D. DeLoach, and then for the deputy attorney general, William French Smith.

She worked for the Clinton administration from 1993 to 1995, where she was a clerk for the attorney general, Janet Reno, and then for the deputy attorney general, William French Smith.

She worked for the Bush administration from 1995 to 1997, where she was a clerk for the attorney general, Michael D. DeLoach, and then for the deputy attorney general, William French Smith.

She worked for the Clinton administration from 1997 to 1999, where she was a clerk for the attorney general, Janet Reno, and then for the deputy attorney general, William French Smith.

She worked for the Bush administration from 1999 to 2001, where she was a clerk for the attorney general, Michael D. DeLoach, and then for the deputy attorney general, William French Smith.

She worked for the Clinton administration from 2001 to 2003, where she was a clerk for the attorney general, Janet Reno, and then for the deputy attorney general, William French Smith.

She worked for the Bush administration from 2003 to 2005, where she was a clerk for the attorney general, Michael D. DeLoach, and then for the deputy attorney general, William French Smith.

She worked for the Clinton administration from 2005 to 2007, where she was a clerk for the attorney general, Janet Reno, and then for the deputy attorney general, William French Smith.

She worked for the Bush administration from 2007 to 2009, where she was a clerk for the attorney general, Michael D. DeLoach, and then for the deputy attorney general, William French Smith.

She worked for the Clinton administration from 2009 to 2011, where she was a clerk for the attorney general, Janet Reno, and then for the deputy attorney general, William French Smith.

She worked for the Bush administration from 2011 to 2013, where she was a clerk for the attorney general, Michael D. DeLoach, and then for the deputy attorney general, William French Smith.

She worked for the Clinton administration from 2013 to 2015, where she was a clerk for the attorney general, Janet Reno, and then for the deputy attorney general, William French Smith.

She worked for the Bush administration from 2015 to 2017, where she was a clerk for the attorney general, Michael D. DeLoach, and then for the deputy attorney general, William French Smith.

She worked for the Clinton administration from 2017 to 2019, where she was a clerk for the attorney general, Janet Reno, and then for the deputy attorney general, William French Smith.

She worked for the Bush administration from 2019 to 2021, where she was a clerk for the attorney general, Michael D. DeLoach, and then for the deputy attorney general, William French Smith.

She worked for the Clinton administration from 2021 to 2023, where she was a clerk for the attorney general, Janet Reno, and then for the deputy attorney general, William French Smith.

She worked for the Bush administration from 2023 to 2025, where she was a clerk for the attorney general, Michael D. DeLoach, and then for the deputy attorney general, William French Smith.

She worked for the Clinton administration from 2025 to 2027, where she was a clerk for the attorney general, Janet Reno, and then for the deputy attorney general, William French Smith.

She worked for the Bush administration from 2027 to 2029, where she was a clerk for the attorney general, Michael D. DeLoach, and then for the deputy attorney general, William French Smith.

She worked for the Clinton administration from 2029 to 2031, where she was a clerk for the attorney general, Janet Reno, and then for the deputy attorney general, William French Smith.

She worked for the Bush administration from 2031 to 2033, where she was a clerk for the attorney general, Michael D. DeLoach, and then for the deputy attorney general, William French Smith.

FROM : Highberger/Kuhl

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Jun. 22 2001 06:06AM P1

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Los Angeles Daily Journal
(daily legal newspaper)

MONDAY,

JUNE 25, 2001

VOL 114 NO. 22

OFFICIAL NEWSPAPER OF THE CITY OF LOS ANGELES AND THE COUNTY OF LOS ANGELES

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Bush Chooses L.A. Judge for 9th U.S. Circuit

Broad State Support Will Aid Confirmation, Administration Says

'Bipartisan Nature'

By David Houston
Daily Journal Staff Writer

President Bush's nomination of Los Angeles Superior Court Judge Carolyn B. Kuhl to the 9th U.S. Circuit Court of Appeals reflects his confidence in Kuhl's wide support in the California legal community.

He expects that support to carry her through what is likely to be contentious confirmation hearings centered on conservative positions she took throughout her career.

"I think this nomination reflects Judge Kuhl's broad support among the people who know her and have worked with her," one high-ranking administration official Friday said.

Contentious Issues

In the 1980s, Kuhl was a top aide to Attorney General William French Smith and later was deputy solicitor general. In both of those jobs, Kuhl weighed in on contentious political issues, including abortion and tax-exempt status for the racially discriminatory Bob Jones University.

After leaving Washington, she was a partner at Munger, Tolles & Olson until 1995, when Gov. Pete Wilson named her

After leaving Washington, she was a partner at Munger, Tolles & Olson until 1995, when Gov. Pete Wilson named her to the Superior Court, where she heads the complex litigation unit.

In an effort to highlight her support among members of the Los Angeles legal community, the administration arranged a Friday teleconference between reporters and three prominent liberal lawyers: Ronald L. Olson, Vilma Martinez, the former head of the Mexican American Legal Defense and Educational Fund, and Leo Terrell, the civil rights lawyer.

'Competence and Integrity'

"I think that we were concerned that the story about her was not properly characterizing the bipartisan nature of her support and her qualifications," the administration official said.

The administration, the official said, was concerned the media would focus only on Kuhl's record "as a 28-year-old Justice Department staff" and on "positions she took serving in the capacity in which she represented a client" in the solicitor general's office.

Olson said he agreed to talk to reporters because he thought Kuhl is "an extraordinary woman" and a "great judge" who embodies the ethics and judicial temperament necessary for a 9th Circuit judge.

Olson, who for years was a member of the American Bar Association committee

See Page 8 — BUSH

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Bush Taps L.A. Judge for 9th Circuit

Continued from Page 1

that rated the qualifications of federal judicial nominees, said Kuhl has the "competence and integrity that we looked for."

The lawyers speaking up for Kuhl said they did not feel used by the White House.

"I'm doing this because I believe we need the best judges we can get on the 9th Circuit. Carolyn would be such a judge," said Martinez, who, along with Olson, was a partner of Kuhl's at Munger Tolles.

"I think we should ratchet down the politics of the debate. [Kuhl] is a very good judge, and that is what we as lawyers and litigants need," said Martinez, who described herself as "a prominent liberal who is also a thoughtful watcher of a nation's political scene."

Terrell said he volunteered to speak out on Kuhl's behalf because he was so impressed with the way she has handled cases he tried before her.

"This woman is a fair judge. If I thought she was unfair, I wouldn't stick my neck out," Terrell said.

Olson said the administration asked him to talk to reporters after he sent the White House an unsolicited letter of support for Kuhl.

"Nobody briefed me on anything. Nobody told me to say anything. But I was happy to do it because I have a high regard for Judge Kuhl," Olson said.

Kuhl's nomination was expected more than a month ago when Bush sent his first judicial nominations to the Senate. But the administration backed down at the last minute at the request of California's two Democratic senators, Dianne Feinstein and Barbara Boxer, who wanted a chance to talk to the judge.

Now under Democratic leadership, the Senate has not decided how much power it plans to give senators to veto confirmation of judges from their own state. But whatever is decided, California's senators, particularly Feinstein, who sits on the Judiciary Committee, likely will have a significant say over whether Kuhl's nomination is successful.

port behind Kuhl.

"She supports Judge Kuhl having a hearing and a vote," Feinstein spokesman Howard Gantman said. "She's not taking a public position on how she'll vote."

Boxer, who is one of the more liberal members of the Senate, said she too had not made up her mind how she'll vote on Kuhl's nomination.

"I have received numerous statements of opposition to the nomination of Carolyn Kuhl to a seat on the 9th Circuit Court of Appeals," Boxer said in a statement. "These letters and calls raise a number of issues important to Californians including: the right to choose, civil rights, representation of tobacco companies, privacy rights and whistle-blower protection."

Planned Parenthood and Justice For All Project, an umbrella group for several liberal organizations, issued statements Friday opposing Kuhl's nomination.

"Americans do not want extremists on the bench," the Planned Parenthood statement read. "But by nominating Kuhl, President Bush is clearly continuing his attempts to impose extremist, anti-choice views on a country that overwhelmingly supports a woman's right to choose."

University of Southern California law professor Erwin Chemerinsky said that Kuhl's confirmation may have a significant impact on the 9th Circuit, which is "a very closely divided court ideologically."

If confirmed, Kuhl, 48, would take the seat vacated last year by Judge James R. Browning, who took senior status. The White House also nominated Richard R. Clifton, a partner at Cades Schutte Fleming & Wright in Hawaii, to fill another vacancy on the 9th Circuit.

The court has three vacancies, which have created a "judicial emergency," administration officials said.

Bush had planned to nominate Rep. Christopher Cox, R-Newport Beach, to fill the third slot. But facing tough criticism over his conservative views, Cox last month took himself out of the running.

Kuhl, a Republican, was nominated to the Los Angeles County Superior Court

9th Circuit Judge Anthony M. Kennedy.

In 1978, Kuhl, a St. Louis, Mo., native, became an associate at Munger Tolles. After three years specializing in corporate law, antitrust and contractual disputes, Kuhl moved to Washington in 1981 and became a special assistant to Attorney General William French Smith in the Reagan administration's Justice Department.

In 1982, soon after she arrived at the Justice Department, Kuhl and two other top aides persuaded Smith to support tax-exempt status for Bob Jones University, the South Carolina religious institution that banned blacks until 1975 and did not allow interracial dating until last year. Even now, the university requires students of different races who want to date to get a note of permission from their parents.

Kuhl's position was an unpopular one, even within the Justice Department. Several top officials, including the current solicitor general, Theodore Olson, opposed her. Eventually, in an 8-1 decision, the Supreme Court rejected Bob Jones' bid for tax-exempt status.

Some colleagues at the time said that Kuhl's position was a separation of powers issue and that she thought Congress, not the Internal Revenue Service, should bar racially discriminatory schools from getting tax-exempt status.

On Friday, the administration sought to downplay Kuhl's role in the Bob Jones case.

"It wasn't her job to make the ultimate decisions," one official said. "She was simply assigned a research project."

Kuhl later became a deputy to acting Solicitor General Charles Fried and argued four cases before the U.S. Supreme Court.

During that time, she also argued before the U.S. Circuit Court of Appeals for the District of Columbia in favor of a Reagan administration proposed "squeal law," which would have required publicly funded family planning clinics to notify parents before giving contraceptives to minors. She also wrote an amicus brief in support of overturning *Roe v. Wade*. the

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LOS ANGELES DAILY JOURNAL

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he case was decided," she



ROBERT LEVINS / Daily Journal

CAROLYN B. KUHL — The nomination of the Los Angeles Superior Court judge to the 9th U.S. Circuit Court of Appeals reflects President Bush's confidence in Kuhl's wide support in the California legal community.

As a Superior Court judge, Kuhl once dismissed a lawsuit filed by a woman who claimed her doctor allowed a drug company representative to be present during her breast exam. And, siding with homeschooling advocates, she struck down a daytime curfew in Monrovia. That ruling was overturned by an appeals court.

On Friday, officials in the administration said they hoped Senate Judiciary Committee members would not "pick out isolated cases" in Kuhl's record to focus on.

"We hope they will listen to the people who work with her in California and who

support her and not just focus on the various interest groups in Washington."

Bush's other nomination, Clifton, who has been a partner in the firm of Cades Schutte Fleming & Wright since 1977, also has served as volunteer attorney for the local Republican Party in Honolulu and as legal counsel for GOP gubernatorial candidates in Hawaii.

■ David Houston's e-mail address is david_houston@dailymjournal.com.

Fredance writer Elisabeth Frater contributed to this story from Washington, D.C.

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Bush Taps L.A. Judge for 9th Circuit
But Carolyn Kuhl could face a rough ride from Senate DemocratsBy Jason Hoppin
The Recorder
June 25, 2001

President Bush on Friday nominated Los Angeles Superior Court Judge Carolyn Kuhl to the 9th U.S. Circuit Court of Appeals.

Also nominated to the court was Richard Clifton, a politically connected Republican lawyer in Hawaii. A third opening on the court, expected to come from California, was not filled.

Los Angeles Superior Court
Judge Carolyn Kuhl

Kuhl, whose star rose quickly in the U.S. Department of Justice under President Ronald Reagan, was appointed to the Los Angeles bench in 1995 by Gov. Pete Wilson. She did not comment on her nomination.

At Main Justice, Kuhl, 48, was a deputy solicitor general under Charles Fried, and later served as deputy assistant attorney general for the Justice Department's civil division. She worked on several high-profile cases in the 1980s.

Among other cases, Kuhl urged a court to uphold a rule requiring publicly funded clinics to notify parents when a minor is prescribed birth control, defended Reagan's establishment of diplomatic ties with the Vatican and argued for the preservation of tax-exempt status for Bob Jones University, which was then racially segregated.

She also argued a closely watched case which rose to the 7th U.S. Circuit Court of Appeals before becoming moot. A 12-year-old boy who defected while his Ukrainian parents were in the U.S. (and turned 18 before the case was ultimately decided) did not want to return. According to news reports at the time, Kuhl told the court Soviet agents might be plotting to remove the boy from the United States.

She has also argued before the 9th Circuit. In 1984, she asked the

court to vacate Northern District Judge Stanley Weigel's order that the U.S. government investigate covert activities in Nicaragua.

"She has quite an intellectual bent," said Vilma Martinez, a former partner of Kuhl's at Munger, Tolles & Olson. "She did a number of appeals for the firm."

After graduating cum laude from Princeton University and Duke University School of Law, Kuhl clerked for 9th Circuit Judge Anthony Kennedy. If approved, she would join Judge Alex Kozinski as former Kennedy clerks on the 9th Circuit.

Confirmability is the latest watchword in the nation's capital. Some have speculated it is why Northern District U.S. Attorney Robert Mueller III is reportedly the leading candidate to succeed former FBI Director Louis Freeh.

Kuhl may have trouble before the Senate Judiciary Committee, which is controlled by Democrats. The committee chairman, Sen. Patrick Leahy, D-Vt., is expected to grant a home state's senators more power to veto judicial nominations through the use of blue-slips — literally, blue pieces of paper circulated to senators on which they can register opposition to nominees. Rules for the handling of blue slips have not been finalized.

A spokesman for Sen. Dianne Feinstein, D-Calif., a member of the Judiciary Committee, said Feinstein would not oppose a vote on Kuhl.

"She is supportive of Judge Kuhl coming up for a vote," spokesperson Howard Gantman said. "She never has blue-slipped, and she doesn't intend to blue-slip."

But a more ominous tone was sounded in a statement released by Sen. Barbara Boxer, D-Calif.

"I have received numerous statements of opposition to the nomination of Judge Kuhl," Boxer said. "These letters and calls raise a number of issues important to Californians, including the right to choose, civil rights, representation of tobacco companies, privacy rights and whistle-blower protection."

"I have met with Judge Kuhl and the White House counsel, informed them of these issues, and I am continuing to evaluate this nomination."

The spot for which Clifton was nominated is statutorily mandated (every state in the circuit must have a seat on the court). His nomination might be expected to go more smoothly, but President Bill Clinton's nomination for the Hawaii seat sat for years without approval.

The graduate of Yale Law School is a business litigator focusing on antitrust law at Honolulu-based Cades Schutte Fleming & Wright. He is also general counsel to the Republican Party of Hawaii and a director of the 9th Judicial Circuit Historical Society.

Bush had originally chosen Rep. Christopher Cox, R-Newport Beach. Facing opposition from Boxer and others, Cox withdrew his nomination. At the same time, Kuhl's expected nomination was also shelved temporarily.

The last open seat on the 9th Circuit is expected to be from California. However, 9th Circuit Judge M. Margaret McKeown is expected to move her chambers from Washington to Southern California later this summer, which could open a spot there.

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1 GEORGE H. LINK, ESQ. (State Bar No. 36436)
2 GREGG A. FARLEY, ESQ. (State Bar No. 115593)
3 BROBECK, PHLEGER & HARRISON
4 550 South Hope Street, Suite 2100
5 Los Angeles, CA 90071-2604
6 Telephone: (213) 489-4060

7 Attorneys for Defendant
8 Christopher Cox

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ORANGE

11 KARMELE MURRAY; JOSEPH T.
12 MURRAY; LINDA COLLINS; MIKE
13 KRASOWSKI; GERALDINE KRASOWSKI;
14 RONALD WONG; RUTH WONG; BETTY
15 BOLGER; CLAUDETTE FOSDICK;
16 THOMAS KAISER; JEAN KAISER; CANDY
17 RENDALL; WILLIAM RENDALL; BETTY
18 ROGERS; MARGARET SHELEY; JOHN
19 SHELEY; SANDRA VAN LOBEN SELS;
20 and ELLEN WISE, Individually, and on
21 behalf of all others similarly situated.

22 Plaintiffs,

23 vs.

24 GLEN BELKA, an individual; LATHAM &
25 WATKINS, a professional corporation;
26 GARY MENDOZA, an individual; JOHN R.
27 STAHR, an individual; C. CHRISTOPHER
28 COX, an individual; WILLIAM E. COOPER,
an individual; ROBERT E. LINDLEY, an
individual; VALERIE JENSEN, an
individual; SMITH & HILBIG, a professional
corporation; MILAN SMITH, an individual;
COOPERS & LYBRAND, a professional
corporation; BMF MORTGAGE INCOME
FUND, a California limited partnership; and
DOES 1 through 100, Inclusive,
Defendants.

Case No. 740706

**DEFENDANT COX'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF DEMURRER TO FIRST
AMENDED CLASS ACTION
COMPLAINT**

Date: July 12, 1995

Time: 1:30 p.m.

Place: Dept. 16

Before: Hon. James H. Poole

[Filed concurrently with Motion to Strike]

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23	282 Cal. Rptr. 627 (1991)	9, 13
24	<u>St. Paul Title Co. v. Meier</u> , 181 Cal. App. 3d 948, 226 Cal. Rptr.	
25	538 (1986)	9
26	<u>Sun 'n Sand, Inc. v. United California Bank</u> , 21 Cal. 3d 671, 148	
27	Cal. Rptr. 329 (1987)	15
28	<u>Tarmann v. State Farm Mutual Automobile Ins. Co.</u> , 2 Cal. App. 4th	
	153, 2 Cal. Rptr. 861 (1991)	11
	<u>Wise v. Southern Pacific Co.</u> , 223 Cal. App. 2d 50, 35 Cal. Rptr.	
	652 (1963)	13

1 OTHER AUTHORITIES:

2 7 Cal. Jur. Attorneys at Law §350 (recognizing only civil conspiracy) 11

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1 **I. INTRODUCTION**

2 The recent amendment of this lawsuit to add Congressman Cox as a defendant
3 is an attempt to exploit his name and reputation in order to attract press attention,
4 thereby pressuring the professional firms who have been sued into "settling" as a
5 means of avoiding further adverse publicity. It is also the latest in a series of efforts by
6 plaintiffs' counsel,^{1/} in concert with other lobbying groups,^{2/} to misuse this litigation
7 for the collateral purpose of embarrassing a member of the U.S. Congress who for the
8 last several years has been a well-known proponent of litigation reform legislation that
9 plaintiffs' counsel has publicly opposed.

10 There is no other explanation for plaintiffs' counsel extending this lawsuit to
11 Congressman Cox since, according to the complainants' own allegations, Mr. Cox's last
12 legal work -- on a draft prospectus -- was in December 1985, more than one year
13 before completion of work on the prospectus and the commencement of the public
14 offering in which plaintiffs invested. Mr. Cox did not even work for defendant Latham &
15 Watkins at any time contemporaneous with the offering.^{3/}

16 Although Mr. Cox was not a defendant in this action as originally filed, the first
17

18 ^{1/} During the last several months, plaintiffs' counsel, Mr. Aguirre -- a failed
19 Democratic candidate for Congress -- has been quoted in the press attacking
20 Congressman Cox, his legal reform legislation, the Contract with America, and Governor
21 Pete Wilson (whom he urged United States Attorney General Janet Reno to prosecute).

22 ^{2/} Immediately upon filing the amended complaint, and before any of the
23 defendants were notified (their copies were mailed), Mr. Aguirre and NASCAT -- a
24 Washington lobbying organization funded by securities class action lawyers -- began
25 aggressively planting stories with the national press. Reporters, unlike the defendants,
26 were provided with immediate copies of the amended complaint naming Congressman
27 Cox as well as a defamatory "spin" thereon.

28 ^{3/} Congressman Cox had left Latham & Watkins nearly two years prior to the times
during 1987 and 1988 that the complaint alleges plaintiffs purchased their interests in
the BMF Mortgage Income Fund. By March 1986, he had relocated to Washington to
serve as Senior Associate Counsel to the President. Pursuant to Evidence Code
Sections 451-453, Mr. Cox requests that the Court take judicial notice of the fact of Mr.
Cox's employment at the White House after March 1986.

1 complaint contained virtually identical allegations concerning him. The Court in April
2 1995 granted the request for demurrer to each of those causes of action. Yet the very
3 same allegations against Mr. Cox are repeated in the amended complaint without any
4 material change or addition.

5 Because the last legal work by Mr. Cox alleged in the amended complaint was in
6 December 1985, it is impossible for plaintiffs to overcome the fatal statute of
7 limitations problems so well described in Latham & Watkins' moving papers. But that
8 is hardly all that is wrong with plaintiffs' claims against Mr. Cox.

9 Despite its length, the amended complaint contains precious little concerning
10 him. It is utterly bereft of any allegation that he owed a duty to the plaintiffs, who
11 obviously were not his clients and who allegedly invested years after his work on early
12 drafts of the eventual disclosure documents. Yet duty is an essential element of
13 plaintiffs' legal claims based on negligence or nondisclosure.

14 Likewise, the amended complaint contains no alleged facts which, if proved,
15 would legally establish that Mr. Cox made representations of any kind to the plaintiffs –
16 let alone affirmative and knowing misrepresentations. Neither are there allegations of
17 facts showing that any such representations by Mr. Cox to the plaintiffs were material,
18 or that they directly caused the plaintiffs' losses, or that any plaintiff directly relied on
19 them to his detriment. Yet all these elements – affirmative misrepresentation to
20 plaintiffs, along with scienter, materiality, causation, and reliance – are legally necessary
21 to each of plaintiffs' fraud-based claims.

22 As to the remaining claims, for "aiding and abetting", there is no allegation of
23 Mr. Cox's improper financial gain or reaping the benefit of another's wrongful conduct.
24 Yet this is an essential element of these causes of action. Moreover, under California
25 law, "aiding and abetting" is treated as a claim for conspiracy in another's wrongful act.
26 Under CCP § 1714.10, such claims may be alleged against attorneys only with prior
27 leave of court, under a standard that plaintiffs would find impossible to meet. The filing
28 of an amended complaint containing these "aiding and abetting" counts is thus in

1 | flagrant violation of the statute.

2 | Indeed, plaintiffs fail miserably to state any valid cause of action against Mr. Cox
3 | on behalf of themselves or the classes they allegedly represent. Plaintiffs purport to sue
4 | on behalf of two separate classes. In the first class are all the investors in an allegedly
5 | unregistered mortgage pool called "BMF1." Since Mr. Cox and Latham & Watkins had
6 | nothing to do with the creation or selling of these investments, the first class can have
7 | no claims against Mr. Cox or his former law firm. In the second class are investors
8 | who, in 1987 and 1988, purchased interests in the SEC-registered BMF Mortgage
9 | Income Fund (the "Mortgage Income Fund"). Since the most that the complaint can
10 | allege is that more than a year after he had left the law firm, other lawyers at Latham &
11 | Watkins -- not Mr. Cox -- assisted in preparing the offering documents for the Mortgage
12 | Income Fund, the second class likewise can have no claims against Mr. Cox.

13 | Plaintiffs' attempt to cover-up the absence of any valid cause of action against
14 | Mr. Cox by alleging a morass of irrelevant facts concerning BMF1. The complaint
15 | repeatedly refers to BMF1, to the criminal "information" against the First Pension
16 | defendants involving BMF1, and to "BMF MIF" (the intentionally similar-sounding name
17 | that plaintiffs have adopted for the Mortgage Income Fund). But there is not a shred of
18 | an allegation that Mr. Cox or Latham & Watkins were ever engaged to work on BMF1.
19 | To the contrary, the complaint affirmatively alleges that other law firms -- not Latham &
20 | Watkins, and certainly not Mr. Cox -- were engaged for the BMF1 transactions.

21 | The obvious fact is this: Mr. Cox's early-stage legal work on what was then only
22 | a proposed public offering did not cause plaintiffs' losses. The First Pension
23 | defendants' criminal activity did.

24 | This Court should grant the Demurrer and dismiss the First Amended Complaint
25 | against Mr. Cox with prejudice. Furthermore, based on the foregoing and in light of
26 | plaintiffs' flagrant violation of CCP § 1714.10, Mr. Cox intends to seek sanctions
27 | pursuant to CCP § 128.7 for the frivolous and unauthorized filing of this action.

28 |

1 **II. SUMMARY OF ALLEGATIONS**

2 Plaintiffs try to bootstrap claims against Mr. Cox based on transactions in which
3 he was not involved. First, plaintiffs allege that the First Pension defendants sold a
4 variety of other investments – not the Mortgage Income Fund, on which Latham &
5 Watkins was engaged – between 1980 and 1984. (Cmpl. ¶¶ 2, 6, 84, 85). But nowhere
6 do plaintiffs allege that Mr. Cox or Latham & Watkins were engaged on these other
7 transactions. Plaintiffs also incorporate by reference the U.S. Attorney's criminal
8 "information" against the First Pension defendants. But likewise, the criminal information
9 contains no allegations whatever concerning the Mortgage Income Fund.

10 Next, plaintiffs allege that the First Pension defendants created an unlawful,
11 "quasi-mortgage pool," known as BMF1, in which individual trust deeds were
12 commingled. (Cmpl. ¶¶ 8, 95-98, 160-162). However, plaintiffs do not and cannot
13 allege that Mr. Cox or Latham & Watkins were involved in the origination or sale of
14 these trust deeds to investors, or in the creation or operation of BMF1. Moreover,
15 plaintiffs even admit that the existence of BMF1 was fully disclosed to investors.
16 (Cmpl. ¶ 162). As Paragraph 161 of the amended complaint concedes:

17 The First Pension Defendants made no attempts to hide the particular
18 details of BMF1. Indeed, the specific details of BMF1 were described to
19 all First Pension clients in the First Pension/VestCorp news letters
20 distributed quarterly during 1983 and 1984.

21 Next, plaintiffs allege that beginning in 1984 the First Pension defendants
22 retained Latham & Watkins, in connection with the preparation of a new, SEC-registered
23 offering of partnership interests in an entity to be formed later. Eventually this became
24 known as the Mortgage Income Fund. (Cmpl. ¶ 27).

25 The sole alleged role of Mr. Cox consists of legal services he provided in 1984
26 and 1985, during the early stages of planning a proposed limited partnership which –
27 years after he left the practice of law – eventually became the Mortgage Income Fund.
28 (Cmpl. ¶¶ 168, 185, 188, 194, 199, 229, 249, 258, 267 and 278). By plaintiffs' own
allegations, Mr. Cox did not have any involvement after December, 1985. (Cmpl.

1 ¶ 278). Nor is it anywhere alleged (1) that Mr. Cox ever had an attorney-client
2 relationship with, or any other duty to, any of the plaintiffs; (2) that Mr. Cox ever had
3 any oral or written communications of any kind with any of the plaintiffs; or (3) that Mr.
4 Cox ever obtained any improper financial gain from his legal services.

5 Further, plaintiffs describe numerous and substantial changes to the draft S-11
6 Registration Statement and prospectus that occurred after Mr. Cox left Latham &
7 Watkins in March 1988. This significant further work materially changed the terms of
8 the Mortgage Income Fund and the accompanying disclosures that were first provided
9 to investors in 1987. (Cmpl. ¶¶ 288, 291, 300, 337).

10 Likewise, the complaint alleges that Latham & Watkins' "due diligence" was being
11 conducted in January 1987 – nearly a year after Mr. Cox left the firm, yet still well
12 before the offering. (Cmpl. ¶ 332). It is nowhere alleged that Mr. Cox was in any way
13 involved in these activities. Indeed, no such allegation could be made, since he did not
14 have even the opportunity to be involved: he simply did not work for Latham & Watkins
15 at these times.

16 It is then alleged that in April 1987 – more than a full year after Mr. Cox's last
17 involvement – the SEC approved the S-11 Registration Statement. It was only then that
18 the Mortgage Income Fund was formed and interests were first offered to investors.
19 (Cmpl. ¶ 339). During 1987 and 1988, the Mortgage Income Fund allegedly sold
20 approximately \$4.8 million of Mortgage Income Fund interests for cash, but only
21 \$160,000 of interests in exchange for trust deeds. (Cmpl. ¶ 339, 340). It is not even
22 alleged that the \$160,000 in trust deeds (representing 3% of the Mortgage Income
23 Fund) came from BMF1, or that they were in any way defective. These allegations
24 show the utter disingenuousness of plaintiffs' attempts to confuse the criminal
25 "information" concerning the unregistered BMF1, on the one hand, and the SEC-
26 registered Mortgage Income Fund, on the other hand.

27 Finally, plaintiffs allege that the prospectus used to offer interests in the
28 Mortgage Income Fund beginning in 1987 contained material misrepresentations. Not

1 only was this prospectus issued over a year after Mr. Cox left the firm, but also most of
2 its alleged nondisclosures relate to the alleged failure to describe the unlawful aspects
3 of BMF1, rather than to plaintiffs' involvement in the Mortgage Income Fund. (Cmpl.
4 ¶¶ 365-366).

5 Plaintiffs claim that these allegations are sufficient to state three direct causes of
6 action against Mr. Cox: (1) for fraud and deceit based on active concealment; (2) for
7 fraud and deceit based upon failure to disclose and material misrepresentations; and (3)
8 for negligent misrepresentations (counts 5, 7 and 19, respectively). They also claim to
9 have alleged eight "aiding and abetting" causes of action (counts 6, 8, 10, 14, 18, 20, 22
10 and 24).^{3/} Plaintiffs also purport to sue on behalf of all investors in BMF1 and the
11 Mortgage Income Fund, despite the lack of sufficient allegations connecting Mr. Cox to
12 their investment in either. As briefly outlined above, both the direct and the so-called
13 "aiding and abetting" claims are insufficiently pleaded as well as time-barred,
14 necessitating the Court's granting of this demurrer.

15 **III. PLAINTIFFS HAVE FAILED TO ALLEGE ANY CAUSAL CONNECTION**
16 **BETWEEN MR. COX'S WORK AND PLAINTIFFS' LOSSES**

17 Causation is an essential element not only of plaintiffs' fraud-based causes of
18 action, but also of each of the others as well.

19 For the breach of an obligation not arising from contract, the measure of
20 damages . . . is the amount which will compensate for all the detriment
21 proximately caused thereby

21 CC § 3333 (emphasis added).

22 Here, plaintiffs have failed completely to show a causal connection between Mr.
23

24
25 ^{3/} Plaintiffs' complaint is "uncertain" under CCP §430.10(f) as to which counts Mr.
26 Cox is a defendant. Plaintiffs' chart on pp. 146-147 of the complaint indicates Mr. Cox
27 is a defendant in counts 5, 6, 7, 8, 10, 14, 18, 19, 20, and 24. However, the caption
28 and body of counts 19 and 20 are inconsistent and do not indicate Mr. Cox is a
defendant in them. Likewise, the caption of count 22 indicates Mr. Cox may be a
defendant, but this conflicts with the chart on pp. 146-147. Consequently, Mr. Cox
"specially" demurs on this ground under CCP § 430.10(f).

1 Cox's work in 1984 and 1985 and plaintiffs' losses in either the earlier BMF1 or the 1987
2 Mortgage Income Fund. There is no allegation whatever that Mr. Cox played any role
3 in the origination, offering, or sale of the BMF1 trust deeds. Nor is it alleged that he
4 played any role in the supposedly unlawful pooling of the trust deeds into BMF1
5 sometime in 1983 or 1984. Nor is it alleged that Mr. Cox even worked for Latham &
6 Watkins for nearly two years prior to the public offering of the Mortgage Income Fund.

7 Instead, it is only alleged that Mr. Cox worked in 1984 and 1985 on the early
8 stages of a proposed public offering that did not take place until 1987. (According to
9 the complaint, many plaintiffs did not buy interests in the Mortgage Income Fund until
10 1988 or later.) On the contrary, it is alleged that the Mortgage Income Fund offering
11 documents were substantially modified in 1986 and 1987, when Mr. Cox was no longer
12 with Latham & Watkins.

13 An attorney that leaves his or her firm is not liable for activities which occur
14 afterward at his former firm. For example, in Daniels v. DeSimone, 13 Cal.App.4th 600,
15 16 Cal.Rptr. 2d 615 (1993), the court held that plaintiffs could not sue a former partner
16 in a two-attorney law firm because he had left the law firm three years prior to the
17 malpractice. In Daniels, plaintiffs retained the law firm of Billips & DeSimone to file a
18 lawsuit on their behalf. Thereafter, the partnership dissolved, and DeSimone left the
19 firm. However, both Billips and DeSimone continued to share office space. Thereafter,
20 Billips filed a complaint on plaintiffs' behalf but then became ill and neglected to serve
21 the complaint. DeSimone helped move Billips' files into storage and took possession of
22 some of plaintiffs' records shortly before the three-year period for serving the complaint
23 expired. Id. at 604-606. The court held that plaintiffs could not sue the former partner,
24 DeSimone, because he "owed no duty of representations to plaintiffs," and there was no
25 causal "connection between [DeSimone's] conduct and plaintiffs' injury." Id. at 608-609.

26 Under Daniels and CC § 3333, Mr. Cox cannot be liable to the Mortgage Income
27 Fund investors because there no causal connection between his alleged preliminary
28 work on the proposed transaction and plaintiffs' decisions years later, based on offering

1 documents completed long after Mr. Cox left the firm, to invest in the Mortgage Income
2 Fund. And with or without Daniels, Mr. Cox obviously cannot be liable to the BMF1
3 investors because there is literally no allegation that either Latham & Watkins or he was
4 ever engaged to work on BMF1, or was in any way involved in the offering or sale of
5 securities to the BMF1 investors, or ever made any representations of any kind to the
6 BMF1 investors. There is simply no causal connection between Mr. Cox's work and the
7 plaintiffs' losses.

8 **IV. PLAINTIFFS' CLAIMS ARE ALL ESSENTIALLY BASED ON NON-**
9 **DISCLOSURE, BUT FAIL PROPERLY TO ALLEGE ANY DUTY TO DISCLOSE**

10 Mere failure to disclose is ordinarily not actionable as fraud unless there is active
11 concealment, and it is not actionable at all absent some fiduciary relationship giving rise
12 to a duty to disclose. Goodman v. Kennedy, 18 Cal.3d 335, 134 Cal.Rptr. 375, 556
13 P.2d 737 (1976); Heliotis v. Schuman, 181 Cal.App.3d 646, 651, 226 Cal.Rptr. 509
14 (1988).

15 **A. It Is Not Even Alleged That Mr. Cox Breached Any Duty Owed To Plaintiffs,**
16 **Which Is An Essential Element Of All Their Causes Of Action.**

17 Even if plaintiffs had alleged a causal connection between plaintiffs' losses and
18 Mr. Cox's preliminary legal work on what eventually became the Mortgage Income Fund
19 – which they did not and cannot – plaintiffs would still be unable to state any of their
20 causes of action because each is essentially a claim based on nondisclosure, and thus
21 each requires, as an element of the offense, breach of a duty owed by Mr. Cox to the
22 investors. An attorney does not owe any such duty to a third party.

23 [P]ublic policy dictates that attorneys remain free to counsel their clients
24 without fear of subjecting themselves to liability as a result of the proper
25 discharge of their professional obligations. Clients as well must feel free
26 to seek out an attorney's advice on any issue at any time. "Any rule to
the contrary would constitute a serious impairment to the attorney-client
relationship, and a resulting deleterious effect on the administration of
justice."

27 * * * *

28 An attorney generally will not be held liable to a third person not in

1 privity of contract with him since he owes no duty to anyone other than
2 his client.

3 Schick v. Lerner, 193 Cal.App.3d 1321, 1329, 238 Cal.Rptr. 802 (1987) (emphasis
4 added; citations omitted).

5 The Supreme Court held in Goodman v. Kennedy, supra, 18 Cal.3d 335, that an
6 attorney could not be sued by third parties absent a "showing that the legal advice was
7 foreseeably transmitted to or relied upon by [the third parties] or that [the third parties]
8 were intended beneficiaries" of that advice. Id. at 339. In Goodman, plaintiffs
9 purchased shares of a company's stock based on the seller's representation that the
10 shares were exempt from registration. Id. at 339-342. When the SEC subsequently
11 suspended the stock's exemption from registration, plaintiffs sued the seller's attorney
12 alleging (1) that the attorney "negligently advised" the sellers regarding the non-exempt
13 status of the shares and (2) that the attorney fraudulently failed to disclose to the
14 plaintiffs' own attorney certain material facts regarding the lack of exemption. Id. The
15 Supreme Court held that the plaintiffs could not sue the attorney for either negligence or
16 fraud. They could not sue for negligence because the attorney "had no relationship to
17 plaintiffs that would give rise to . . . any duty of care." And they could not sue for fraud
18 because there were no "allegations that would establish some duty of disclosure." Id. at
19 343, 346.

20 Cases after Goodman have repeatedly held that an attorney cannot be liable to
21 third parties absent a showing (1) that the attorney intended his advice to be
22 transmitted to third parties for their benefit or to be relied upon by them, or (2) that the
23 attorney made affirmative misrepresentations (as opposed to mere omissions) to them.
24 See, e.g., St. Paul Title Co. v. Meier, 181 Cal.App.3d 948, 851, 226 Cal.Rptr. 538 (1986)
25 (no duty to "adverse parties" in a transaction); Fox v. Pollack, 181 Cal.App.3d 954, 962,
26 226 Cal.Rptr. 532 (1986) (no duty absent an affirmative misrepresentation); Skarbrevik
27 v. Cohen, England & Whitfield, 231 Cal.App.3d 692, 282 Cal.Rptr. 627 (1991)(same).

28 For example, in Heliotis v. Schuman, supra, 181 Cal.App.3d at 651, the court

1 held that an attorney who handled all the details of a real estate sale for his client, but
2 who did not personally "attempt to persuade [the investor] to purchase," could not be
3 found liable for fraud based on nondisclosure or active concealment.

4 [A]n attorney's duties [are] to his or her client to keep confidences, to
5 zealously represent the client, and to give undivided loyalty to the client.
6 Berger [the attorney] owed his allegiance solely to the [sellers], his
7 clients. He owed no duty to [the purchaser].

8 Id. (citations omitted).⁵¹

9 Here, as discussed above, plaintiffs have not alleged any specific facts showing
10 that Mr. Cox was in an attorney-client or fiduciary relationship with them that would give
11 rise to a duty. Indeed, at each portion of the amended complaint which conclusorily
12 (and erringly) alleges that other defendants owed a duty to the plaintiffs, Mr. Cox is
13 expressly omitted. (See, e.g., Cmpl. ¶ 64). Thus, plaintiffs have conceded that Mr. Cox
14 owed them no duty. Nor is there any allegation that Mr. Cox gave advice with the intent
15 that it would be transmitted to the investors for their benefit or relied upon by them. (It
16 is not even alleged that Mr. Cox ever communicated with the investors – let alone made
17 any affirmative misrepresentations to them.)

18 Accordingly, all of plaintiffs' direct causes of action against Mr. Cox must be
19 dismissed with prejudice, since they are all grounded on an alleged omission or failure
20 to disclose by Mr. Cox, yet fail to allege any duty owed to the plaintiffs.

21 **B. Because The Complaint Does Not Even Allege That Mr. Cox Affirmatively**
22 **Misrepresented Or Actively Concealed Anything From The Investors, It**
23 **Fails To State Any Cause Of Action Against Him.**

24 In addition to failing to allege any breach of duty, as discussed above, the

25 ⁵¹ Most recently, in the landmark case of Bily v. Arthur Young & Co., 9 Cal.4th 970,
26 11 Cal.Rptr. 2d 51, 834 P.2d 745 (1992), the Supreme Court held (1) that accountants
27 owed no "general duty of care" to third parties and could not be liable for negligence to
28 them, (2) that the accountants could not be liable for negligent misrepresentations
unless the accountant "intended to influence" the third parties, and (3) that the
accountants could not be liable for fraud to third parties except for "intentional
misrepresentation" – i.e., affirmative misstatements. Id. at 376, 415.

1 complaint does not allege that Mr. Cox affirmatively misrepresented or actively
2 concealed anything from the investors. It follows that plaintiffs cannot state any cause
3 of action against Mr. Cox based on either his action or inaction.

4 The lack of any allegation that Mr. Cox actively concealed anything from, or
5 expressly misrepresented anything to, any plaintiff is particularly fatal to the complaint,
6 because fraud and negligent misrepresentation must be pleaded with specificity.

7 Tarmann v. State Farm Mut. Auto Ins. Co., 2 Cal.App.4th 153, 156, 2 Cal.Rptr. 881
8 (1991)(fraud); Committee on Children's Television, Inc. v. General Foods Corp., 35
9 Cal.3d 197, 215-216, 197 Cal.Rptr. 783 (1983). A plaintiff must also specifically plead
10 actual and justifiable reliance on the misrepresentation. Mirkin v. Wasserman, 5 Cal.4th
11 1082, 1090, 23 Cal.Rptr.2d 101 (1993). Here, plaintiffs have done neither, and certainly
12 not with specificity.

13 It is not too much to say that the amended complaint does not even try to allege
14 any misrepresentation to the plaintiffs, or active concealment from them, by Mr. Cox.
15 Plaintiffs have also failed even to attempt to allege specifically any reliance on such
16 misrepresentations or active concealment by Mr. Cox. Thus, each of plaintiffs' causes
17 of action must be dismissed with prejudice.

18 **V. THE "AIDING AND ABETTING" CLAIMS ARE A SHAM AND NOTHING MORE**
19 **THAN LEGALLY INSUFFICIENT CONSPIRACY CLAIMS**

20 Plaintiffs' so-called "aiding and abetting" claims are a sham and fail to state a
21 valid cause of action. Under California law, such "aiding and abetting" claims are not
22 cognizable as such,⁹ but rather are the legal equivalent of conspiracy claims. And
23

24 ⁹ Plaintiffs' "aiding and abetting" claims would require this court to make significant
25 new law, since it is not at all clear that California law even recognizes the existence of
26 an independent civil tort for aiding and abetting. See 7 Cal. Jur. Attorneys at Law §
27 350 (recognizing only civil conspiracy). In the trust area, a few cases hold that a
28 defendant can be liable for assisting or conspiring with a fiduciary to commit a breach
of trust even when the defendant does not himself owe a fiduciary duty. However, as
the Supreme Court held in Doctor's Co. v. Superior Court, 49 Cal.3d 39, 47, infra, such
(continued...)

1 plaintiffs have failed to allege a valid conspiracy claim against Mr. Cox

2 In Howard v. Superior Court, 2 Cal.App.4th 745, 33 Cal.Rptr. 575 (1992), the
3 Court of Appeal held that aiding and abetting claims against attorneys are tantamount
4 to conspiracy claims. In Howard, the plaintiff sued attorneys alleging that they aided
5 and abetted their clients in committing a fraud. The defendant attorneys demurred
6 arguing that there was no civil action under California law for aiding and abetting and
7 that, in any event, the cause of action was the legal equivalent of a civil conspiracy
8 claim and therefore governed by CC § 1714.10. Id. at 747. The Howard court agreed,
9 holding that even if a civil cause of action for aiding and abetting existed (which it
10 declined to rule on), such a cause of action was nothing more than a conspiracy claim.

11 In the abstract there may be a distinction between an aiding and abetting
12 cause of action and one for civil conspiracy. However, while aiding and
13 abetting may not require a defendant to agree to join the wrongful
14 conduct, it necessarily requires a defendant to reach a conscious
15 decision to participate in tortious activity for the purpose of assisting
16 another in performing a wrongful act. A plaintiff's object in asserting such
17 a theory is to hold those who aid and abet in the wrongful act responsible
18 as joint tortfeasors for all damages ensuing from the wrong. Because the
19 conduct of which petitioners are accused falls within the ambit of former
20 section 1714.10 [governing conspiracy], [plaintiff] was obligated to
21 comply with that section prior to filing a civil action against [the
22 attorneys].

23 Id. at 749 (citations and footnote omitted). Under Howard, plaintiffs' "aiding and
24 abetting" causes of actions must be considered as nothing more than disguised
25 conspiracy claims.

26 But the amended complaint utterly fails to state any valid conspiracy cause of
27 action against Mr. Cox. In Doctor's Co. v. Superior Court, 49 Cal.3d 39, 260 Cal.Rptr.
28 183, 775 P.2d 508 (1989), the Supreme Court ruled that attorneys generally cannot be
liable for civil conspiracy with their client to injure a plaintiff, since they ordinarily do not
owe an independent duty of their own to the plaintiff and are acting merely as the

29 ²¹(...continued)

30 cases are limited to where the non-fiduciary defendant obtains an improper financial
31 gain from the breach. None of these cases hold that there exists a wholesale aiding
32 and abetting tort on the scale alleged by plaintiffs.

1 clients' agents.

2 "A civil conspiracy however atrocious, does not per se give rise to a
3 cause of action unless a civil wrong has been committed resulting in
4 damage." . . . A cause of action for civil conspiracy may not arise,
5 however, if the alleged conspirator, though a participant in the agreement
underlying the injury, was not personally bound by the duty violated by
the wrongdoing and was acting only as the agent or employee of the
party who did have that duty."

6 Id. at 44 (citations omitted).

7 The Supreme Court went on to explain that attorneys are agents of their client,
8 and, consequently, are subject to the so-called "Wise Rule" established over 30 years
9 ago in Wise v. Southern Pacific Co., 223 Cal.App.2d 50, 35 Cal.Rptr. 652 (1963),
10 holding that agents can not be held liable for conspiring with their principal.

11 "Agents and employees of a corporation cannot conspire with their
12 corporate principal or employer where they act in their official capacities
on behalf of the corporation and not as individuals for their individual
advantage."

13 Doctor's, 49 Cal.3d at 45 (quoting Wise.) Under this rule, the Supreme Court
14 recognized only limited circumstances in which an attorney could be held liable for
15 conspiracy: (1) if the attorney violates his "own duty to the plaintiff" in the conspiracy;
16 (2) if the attorney commits actual fraud by making express misrepresentations to the
17 plaintiff; or (3) if the attorney conspires "in furtherance of the attorney's own financial
18 gain." Id. at 46-48. See also Pierce v. Lyman, 1 Cal.App.4th 1093, 1104-1105, 3
19 Cal.Rptr.2d 236 (1991) (recognizing the same 3 exceptions under Doctor's).

20 As amply discussed above, plaintiffs have not alleged that Mr. Cox (1) had a
21 duty to the plaintiffs, or (2) made any express misrepresentation to the plaintiffs. As for
22 the third circumstance, cases since Doctor's have made clear that the types of cases in
23 which attorneys can be considered conspiring "in furtherance of their own financial gain"
24 are cases in which the attorneys obtain an improper financial recovery over and above
25 their ordinary fees. Skarbrevik, supra, 231 Cal.App.3d at 710 (attorneys not liable for
26 conspiring because they received nothing over and above ordinary attorneys fees).

27 Here it is absolutely clear that Mr. Cox did not obtain any improper financial gain

28

1 from his work. (Indeed, as an individual defendant, it is not and cannot be alleged that
2 he even received the fees from the work; rather, these were paid to Latham & Watkins,
3 while he received a salary). Consequently -- because neither duty, nor express
4 misrepresentation, nor improper gain is alleged -- the complaint fails to state "aiding and
5 abetting" or conspiracy charges against Mr. Cox.

6 **VI. PLAINTIFFS' CLAIMS ARE ABSOLUTELY TIME-BARRED**

7 As amply demonstrated in Latham & Watkins' moving papers, plaintiffs' claims
8 remain absolutely time-barred by the statutes of limitations in CCP § 340.6 governing
9 actions against attorneys, and in CCP § 338(d) governing fraud. If plaintiff's claims
10 against Latham & Watkins are time-barred, a fortiori, their claims against Mr. Cox are
11 even more untimely, since he left the firm nearly a decade ago in March 1986.

12 Plaintiffs have failed utterly to allege any fraudulent concealment from the
13 plaintiffs by Mr. Cox, which is the necessary ground for tolling. It is hornbook law that
14 fraudulent concealment requires a showing of active or willful concealment by the
15 defendant. Pashley v. Pacific Elec. Ry. Co., 25 Cal.2d 226, 231, 153 P.2d 325 (1944)
16 ("[T]he defendant, having by fraud or deceit concealed material facts and by
17 misrepresentations hindered the plaintiff from bringing an action within the statutory
18 period, is estopped" to raise the defense); 3 Witkin, Procedure, "Actions," § 530, et seq.
19 Indeed, CCP § 340.6(3) requires that the attorney against whom the statute is to be
20 tolled be shown to have "willfully concealed the facts constituting the wrongful act or
21 omission."

22 Here, it is impossible for plaintiffs to meet this burden of alleging fraudulent
23 concealment by Mr. Cox. For tolling to be effective, plaintiffs would have had to
24 allege that Mr. Cox -- not the other defendants -- actively and willfully concealed
25 his "wrongful act or omission" from plaintiffs for a period of five years after he left
26 Latham & Watkins, until May 1991 -- four years prior to the filing of the First
27 Amended Complaint. Yet the last act by Mr. Cox alleged in the amended complaint
28 was ten years ago, in December 1985. Moreover, the mere failure to disclose, absent

1 some fiduciary or other duty of disclosure, will not toll the statute. See, e.g., Love v.
2 Fire Ins. Exchange, 221 Cal.App.3d 1136, 1144, 271 Cal.Rptr. 246 (1990).

3 Likewise, plaintiffs have failed to meet their burden under CCP § 338(d) of
4 alleging their reasonable diligence in failing to discover Mr. Cox's allegedly fraudulent
5 conduct over ten years ago. 3 Witkin, Procedure, "Actions," § 454; Sun 'n Sand, Inc. v.
6 United California Bank, 21 Cal.3d 671, 701-702, 148 Cal.Rptr. 329 (1987) (plaintiff must
7 show facts demonstrating diligence and reasonable lack of discovery). Despite its
8 length, the complaint utters not a single word meeting this affirmative pleading
9 requirement.

10 **VII. CONCLUSION**

11 For all the foregoing reasons, Mr. Cox requests that the Court grant this
12 Demurrer with prejudice.

13
14 Dated: June 19, 1995

BROBECK, PHLEGER & HARRISON

15
16 By: Gregg A. Farley
17 Gregg A. Farley
18 Attorneys for Defendant
19 Christopher Cox
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FILED
ORANGE COUNTY SUPERIOR COURT

MAR - 3 1998

THOMAS M. JEFFERSON, Executive Officer/Clerk

A. Davis
BY A. DAVIS

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY ORANGE

Coordination Proceeding
Special Title (Rule 1550(b))

FIRST PENSION CASES I

Coordinated actions:

Henry, Receiver v.
Latham & Watkins

Murray v. Belka

JUDICIAL COUNCIL
COORDINATION PROCEEDING
NO. 3131

ORDER OF DISMISSAL WITHOUT
PREJUDICE OF DEFENDANT C.
CHRISTOPHER COX; PLAINTIFFS'
REQUEST FOR DISMISSAL

LOS ANGELES SUPERIOR COURT
NO. BC 129 715

ORANGE COUNTY SUPERIOR
COURT
NO. 74 07 06

Date: N/A
Time: N/A
Dept: N/A
Hon. Francisco F. Firmat

Plaintiffs Karnele Murray, Joseph T. Murray, Linda Collins, Mike Krasowski, Geraldine Krasowski, Ronald Wong, Ruth Wong, Betty Bolger, Claudette Fosdick, Thomas Kaiser, Jean Kaiser, Candy Rendall, William Rendall, Margaret Sheley, John Sheley, Sandra Van Loben Sels, and Ellen Wise, individually and together (hereinafter collectively referred to as "Plaintiffs"), by and through their attorneys of record, hereby request the dismissal without prejudice of this action, and all claims and

1 causes of action alleged herein, against Defendant C. Christopher Cox ("Cox"), as
2 follows:

3 1. On or about September 26, 1996, Plaintiffs filed their Fourth Amended
4 Class Action Complaint ("Complaint") in the Superior Court of the State of California
5 in and for the County of Orange as Case No. 740706 against Cox, Latham & Watkins
6 and other defendants (the "Action"). Cox was alleged in the Complaint to be an agent
7 of Latham & Watkins.

8 2. The Court sustained demurrers of Cox to the Complaint as to three
9 causes of action and overruled Cox's demurrer as to three causes of action. The latter
10 three causes of action are asserted against defendants Cox, Latham & Watkins,
11 Mendoza, and Stahr. At all times, Cox has denied each and every one of these causes
12 of action and has denied the accuracy of the factual allegations upon which they are
13 based. The claims asserted against Cox and Latham & Watkins arise out of alleged
14 actions by Latham & Watkins that cover the period of June 1983 to December 1988.
15 Discovery has shown Cox was employed at Latham & Watkins from before March
16 1984 to March 1986. Discovery has also revealed that BMF Mortgage Income Fund
17 100, a registered public offering alleged in the Complaint, was first offered and sold to
18 Plaintiffs in April 1987.

19 3. Plaintiffs now wish to dismiss without prejudice any and all claims or
20 causes of action against Cox, before, now or hereafter alleged in the Complaint or in
21 this action in general. Plaintiffs are taking this action based on the provisions set forth
22 in the letter agreement of February 23, 1998 and the mutual release between Plaintiffs,
23 on the one hand, and Cox, on the other hand. Neither Cox nor Plaintiffs have given
24 any other consideration for this dismissal.

25 4. Plaintiffs wish to continue to assert their claims against Latham &
26 Watkins, Stahr, and Mendoza. Therefore this request for dismissal as to Cox is
27 without prejudice and shall not prejudice in any way Plaintiffs' right to proceed against
28 Latham & Watkins or any other defendant in any fashion, on any theory set forth in the

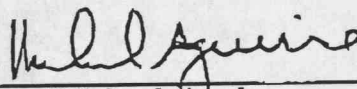
1 Complaint. Defendants Latham & Watkins, Stahr, and Mendoza are not intended to be
2 and are not third party beneficiaries of this request for dismissal and order or of the
3 related mutual release.

4 5. Plaintiffs, Cox and their respective lawyers believe that California Code
5 of Civil Procedure Section 581(k) does not require notice of this dismissal to be given
6 to members of the proposed class or classes.

7 6. Upon execution hereof by the Court, the related Order shall operate as a
8 dismissal without prejudice of the entire action, and claims or causes of action arising
9 thereunder, against Cox.

10 Dated: ^{March} ~~February~~ __, 1998

AGUIRRE & MEYER

11 By 

12 Michael Aguirre
13 Attorneys for Plaintiffs

14 Karnele Murray, Joseph T. Murray, Linda
15 Collins, Mike Krasowski, Geraldine
16 Krasowski, Ronald Wong, Ruth Wong, Betty
17 Bolger, Claudette Fosdick, Thomas Kaiser,
18 Jean Kaiser, Candy Rendall, William Rendall,
19 Margaret Sheley, John Sheley, Sandra Van
20 Loben Sels, and Ellen Wise.

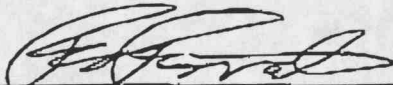
21 ORDER

22 Based upon the foregoing Request for Dismissal, and good cause appearing
23 therefor,

24 IT IS HEREBY ORDERED, that the Request for Dismissal is hereby
25 approved and that the Fourth Amended Complaint, and any and all claims or causes of
26 action alleged therein or arising thereunder and any and all amendments thereto, against
27 Defendant C. Christopher Cox are hereby dismissed without prejudice.

28 Dated: February __, 1998

3-3-98


JUDGE OF THE SUPERIOR COURT

FRANCISCO F. FIRMAT