In the Court of Appeal of the State of California

Fourth Appellate District

Division 3

Case No. G049624

Orange County Superior Court Appellate Division Case No. 30-2013-00623099

Huntington Continental Town House Association, Inc.,

Plaintiff and Respondent,

vs.

The JM Trust, Dated January 1, 2005, Joseph A. Miner Trustee, and Does 1 through 100, inclusive,

Defendants and Appellants.

On Transfer From the Superior Court for the County of Orange Appellate Division
Hon. Craig Griffin, Presiding Judge

APPELLANTS' REPLY BRIEF

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I. THE DISPOSITIVE FACTS ARE NOT DISPUTED

Quite contrary to respondent's representations, the dispositive facts presented in this appeal are not disputed. This is not a case where the trial judge heard conflicting testimony and found some more credible. The Court need not even consider any of appellants' evidence to conclude that reversal is required.

A. It Is Not Disputed That As Of December 31, 2011 Joseph Miner Had Paid Or Tendered $1,172 *More* Than He Owed For Assessments

According to respondent, as of December 31, 2011, the total amount of assessments since April 1, 2008 was $8,460. (Respondent's Brief at 23.)

According to respondent, as of December 31, 2011, Miner had paid and respondent had accepted a total of $5,756. (Respondent's Brief at 23.)

According to respondent, as of December 31, 2011, Miner had sent an additional total of $3,876 that respondent had refused to accept. (Respondent's Brief at 2-3.)

Therefore, it is not disputed that, as of December 31, 2011, Miner had paid or tendered $1,172 *more* than he owed for assessments.

Respondent's trial exhibit 21 shows that, as of December 31, 2011, the total charges for Miner's account, including late fees and interest, since April 2008 was $9,582.57. Therefore, it is undisputed that, as of December 31, 2011, Miner had paid or tendered more than he owed even for assessments, interest, and late fees and that the only charge not satisfied in full was for attorney's fees.

These undisputed facts are compelling. They demonstrate more clearly than argument why the Davis-Stirling Act must not be interpreted and applied as respondent wishes. If respondent has its way an association's right to foreclose

will be determined, not by the Act or the homeowner, but by the amount a collection attorney chooses to bill. An association and its attorneys will be able to do as respondent and its attorneys did here: unilaterally determine what constitutes a "partial payment", then refuse to accept anything that met their criteria in order to evade the Davis-Stirling foreclosure rules.

II. RESPONDENT BASES ITS CONTENTIONS ABOUT THE DAVIS-STIRLING ACT ON A PRE-LIEN \ POST-LIEN DISTINCTION THAT DOES NOT EXIST

The Davis-Stirling Act does not impose one set of rules to govern collection of assessments before a lien is recorded and another set to govern collection after a lien is recorded. Nor is there still another set of rules governing the process after a foreclosure suit is filed. Yet respondent bases its contentions about the Act on a divide between pre-lien and post-lien collection activity. This Rubicon in the process does not exist.

Civil Code § 5655(a)[1] plainly contemplates a homeowner making partial payments on a delinquent assessment account. There is nothing in the Act even suggesting that once a lien is recorded, or a foreclosure lawsuit commenced, this statute becomes irrelevant and a homeowner who wants to keep his home has no choice but to pay the entire amount demanded by an association and its attorneys.

Respondent contends that section 5655(a) concerns only payments made pursuant to a payment plan. There is no basis whatsoever for this extraordinary claim.

[1] As noted in appellants' opening brief, the proceedings below were governed by the former code sections. Respondent has chosen to use only the new section numbers. For clarity, appellants will do the same here, except as used in a cited opinion. To the extent there is any conflict, of course, the former code sections supply the correct authority.

The code certainly gives no support to it. The section itself makes no reference to payment plans, nor to section 5665, which governs them. It is equally significant that the latter section does not refer to the former as qualifying the very subject the latter addresses.

There is no indication anywhere that the Legislature intended the term "payments" in section 5655(a) to mean only payments pursuant to a payment plan. So respondent is attempting to graft onto the Act a modifying provision that favors homeowners associations and their attorneys, at the expense of the homeowners the Act was adopted to protect.

In this regard, respondent's discussion of *Diamond v. Superior Court (Casa Del Valle Homeowners Association*) (2013) 217 Cal.App.4th 1172 is quite erroneous. Respondent contends that *Diamond* is authority only with respect to the notice requirements of Civil Code §§ 1367.1 and 1367.4. The Court of Appeal in *Diamond* analyzed the assessment collection provisions of Davis-Stirling generally and concluded "that the public purpose of sections 1367.1 and 1367.4, *including* the notice requirements, was to protect the interest of a homeowner who has failed to timely pay an assessment levied by a homeowners association." (*Id*. at 1190-1191, emphasis added.)

Respondent's further narrowing of section 5655(a) to apply only to the personal debt referred to in section 5650(a) is equally absurd. According to respondent's reading, the section may be invoked solely for the personal debt that is the subject of a payment plan. This would mean that, even with a payment plan, a homeowner cannot make partial payments if a lien has been recorded. So

what could be the point of a payment plan if the only payment allowed is *one* and that one for the full amount?

This nonsensical interpretation also would conflict with the Davis-Stirling payment plan provisions themselves. Section 5665(d) states that "[p]ayment plans shall not impede an association's ability to record a lien on the owner's separate interest to secure payment of delinquent assessments." However, according to respondent, once it records a lien a homeowner cannot make partial payments even if there is a payment plan and the plan becomes meaningless. Likewise, the association can nullify the payment plan simply by recording a lien. Respondent's construction of these sections is manifestly incorrect.

A. Respondent's Erroneous Interpretation Of Irrelevant Code Sections Proves Nothing

Respondent refers to three additional Civil Code sections and argues that they preclude the partial payments contemplated by section 5655(a). Even if there sections actually were relevant, however, respondent's interpretation of them is erroneous.

Section 5685(a) does not provide any method for satisfying a lien, let alone the sole method. This section concerns only what an association must do once a homeowner has paid an amount sufficient to satisfy a lien. It has no bearing on the payments referred to in section 5655(a).

Likewise section 5658(a) addresses only the circumstance where a homeowner disputes whether the assessments and related charges are valid. The section does not concern the means by which a homeowner can pay down a delinquency in assessments the validity of which he does not dispute.

Section 5665 concerning payment plans is not inconsistent with allowing partial payments. Payment plans provide special features that do not pertain to a homeowner simply paying down the debt without such a plan. For example, no late fees may be charged while a payment plan is in effect. (Civil Code § 5665(c).) The homeowner's association can offer additional benefits with the "standards" contemplated by section 5665(a).

B. The Mortgage Foreclosure Authorities Cited By Respondent Actually Support Appellants' Contentions

In relying on the Civil Code sections pertaining to foreclosure of mortgages respondent ignores one very significant point: The Legislature designed and enacted the Davis-Stirling Act specifically to govern California common interest developments. Thus the Legislature acted to create a statutory scheme wholly separate and distinct from the laws governing mortgages and other real property security mechanisms. So, even if the code sections cited by respondent appeared to have the effect it claims, they would not constitute valid authority for how the Davis-Stirling Act should be interpreted.[2]

Thus section 2924c requires full payment before a mortgagee must halt the foreclosure proceeding. While this does not preclude partial payments, as explained below, the Legislature has determined that the foreclosure process for common interest developments is to be treated much differently. Consequently, foreclosure of a common interest property for delinquent assessments depends very much on the amount of the existing delinquency in pure assessments. Ergo

[2] Respondent notes that section 5710(a) makes the mortgage foreclosure statutes applicable to homeowner's association foreclosures. This section is not relevant here, however, because it only applies to non-judicial foreclosures.

the effect of a partial payment in that context is quite different from the effect of partial payments on a mortgage delinquency.

There is another significant distinction between mortgages and assessment balances. Most mortgages involve a large lump sum debt to be paid over a number of years. Assessments are levied monthly primarily for maintenance and are perpetually repeating charges imposed on the homeowner for as long as he owns the property.

In any event, the code sections on foreclosure of mortgages do not suggest the construction of Davis-Stirling argued by respondent. Yes, section 2924c requires full payment before a mortgage will be reinstated. But this does not mean that a mortgagor cannot make partial payments until the delinquency is paid in full. It also does not mean that the mortgagee can reject money sent to it by the mortgagor just because some amount remained delinquent.[3]

C. Interpreting the Davis-Stirling Act To Allow Partial Payments Will Not Frustrate the Legitimate Use of Judicial Foreclosure

Respondent claims that the Legislature, in its 2002 amendments to Davis-Stirling, intended to promote judicial foreclosure over private sale and that requiring homeowner's associations to accept partial payment will frustrate that intent. The only support respondent proffers is some legislative history that respondent cites to but does not request the Court to judicially notice. Respondent did not even provide a copy of the materials.

Respondent's example is the provision in section 5705(b) that allows a homeowner to opt for binding arbitration in lieu of non-judicial foreclosure. In

[3] Note that Miller and Starr even contemplate partial payments. The passage quoted concerns only the effect of such payments, not the mortgagor's right to make them.

adopting this measure, respondent asserts, the Legislature has empowered the homeowner with the ability to ensure judicial oversight of a foreclosure action despite the association's choice to pursue private sale." Yet, with marked inconsistency, respondent then goes on to say that "[an] interpretation of the Act which frustrates the judicial foreclosure process will force associations to use private sale in which there is no judicial overview."

Respondent fails to explain how interpreting the Act to allow partial payments will frustrate the judicial foreclosure process. Perhaps it will frustrate those who use the process unscrupulously to manipulate collection of assessments for their own benefit. Collection attorneys accustomed to unilateral control of foreclosure procedures will not be happy to lose the lever of demanding "payment in full or else..." But respondent cannot demonstrate any legitimate harm that a ruling permitting partial payments in the circumstances of this case would cause to homeowner's associations in the use of judicial foreclosure.

D. Assessments Are So Important That a Homeowner's Association Should Not Be Able To Refuse Payment From a Homeowner Merely Because It Does Not Cover All the Collection Costs

Although there is no dispute about it, respondent stresses the importance of assessments to common interest developments . Respondent fails to explain, however, why this means that homeowners associations should be able to refuse a homeowner's attempt to pay delinquent assessments, merely because the payment does not cover all the collection costs.

The association and its members will have other means to recover these costs. They will remain a debt of the homeowner, which will be subject to

enforcement like any other personal debt.

Indeed, it is because assessments are so important that a homeowner ready and willing to pay them should not be discouraged from doing so by requiring payment of costs that can be collected by means less costly and draconian than foreclosure. The Legislature certainly did not intend the Davis-Stirling Act to have such an effect.

III. RESPONDENT'S OWN EVIDENCE DEMONSTRATES THE BREACH OF ITS FIDUCIARY DUTY AND FAILURE TO MITIGATE ITS DAMAGES

Respondent's answer to appellants' arguments concerning its fiduciary duty and failure to mitigate is to complain that Miner, when he filed his answer in pro per, did not assert them as affirmative defenses. Respondent also represents, falsely again with respect to fiduciary duty, that appellants did not raise these issues in the trial court and have thereby waived them. Respondent then cites a 1941 case, *Wieczorek v. The Texas Co.* (1941) 45 Cal. App. 2d 450, that does not even mention affirmative defenses, fiduciary duty, or failure to mitigate.

In his answer Miner alleged the facts supporting application of principles of fiduciary duty and mitigation of damages. (Clerk's Transcript ["CT"] 66.) Miner also specifically raised the issue of fiduciary duty in his trial brief. (CT 94.)

In any event, "[on] appeal, a party may raise a new issue of law based on undisputed facts... and may even 'change the legal theory he relied upon at trial, so long as the new theory presents a question of law to be applied to undisputed facts in the record.'" (*C9 Ventures v. SVC-West, LP* (2012) 202 Cal. App. 4th

1483, 1492, citations omitted.) In their opening brief appellants described the facts demonstrating respondent's breach of its fiduciary duty and its failure to mitigate its damages. The record, if not respondent's characterization of it, shows those facts to be undisputed.

A. The Duty To Mitigate Does Not Pertain Only To *Prevention* Of Damages

Respondent argues that the principle of mitigation does not apply here because the damage had already occurred before it filed this lawsuit. Respondent is quite mistaken.

An injured party has a duty to mitigate its damages whenever it is possible to do so: before a lawsuit, during a lawsuit, even pending an appeal. (*See, e.g.*, *Jarchow v. Transamerica Title Ins. Co.* (1975) 48 Cal. App. 3d 917, 929, 950 [buyers suing for damages resulting from undisclosed easement "failed to mitigate their damages since they did not develop the property pending the trial, although they could have done so"]; *In re Elizabeth W.* (2004) 120 Cal. App. 4th 900, 908 ["The Department has not ... attempted to mitigate the damage it has caused by sending a new notice while this appeal has been pending"].)

B. Quite Contrary To Respondent's Assertion, The Facts Demonstrating Its Breach Of Fiduciary Duty Were Proven By Its Own Evidence

Respondent's claim that the evidence at trial was controverted and that the judge simply did not believe Miner is a misrepresentation of the record. The facts upon which this appeal must be decided were proven by respondent's own evidence and, therefore, are undisputed.

1. Respondent's Witnesses Confirmed That There Was No Payment Plan

It did not breach its fiduciary duty, respondent says, because it had a non-capricious basis for acting as it did: the payment plan. Respondent accepted partial payments from Miner in May, June, and July because of the payment plan, and then refused them after Miner defaulted on the plan and it was cancelled.

There is one huge flaw in this explanation: It is not true. There never was a payment plan. This is not according to Miner; this is according to respondent's own witnesses.

Respondent's property manager and its president testified at trial. Both confirmed that there was no payment plan. The property manager, Liza Salinas:

> "Q. Your company never sees the payment plan?
> A. The board of directors would receive any payment plan offers. And if they're approved and accepted by the board of directors, we do hold it in their file. But it is forwarded to the collections attorneys.
> Q. Is there any payment plan involving Mr. Miner in your file?
> A. No, sir." (Reporter's Transcript ["RT"] 35:16-23.)

Respondent's president, Rustan Laine:

> Q. So a payment plan was never presented to the board?
> A. No.
> Q. And a payment plan does not come into existence unless the board approves it; correct?
> A. Correct.
> Q. So that would mean there was never a payment plan with Mr. Miner; correct?
> A. Correct. (RT 81:7-15.)

Tyler Jones, the legal assistant who managed collection of the assessments. testified that Miner did not ask for a payment plan, contrary to respondent's claim that he did. (RT 53:20 – 54:1.)

Respondent's "payment plan" claim is a fabrication. To the extent that respondent uses this "plan" to support its contentions, therefore, those contentions are groundless.

2. The Record Shows That Respondent's Claim To Have A Policy Precluding Partial Payments Without A Payment Plan Is Also False

Respondent did not even address the most significant of its own evidence showing that it did not actually have a policy precluding partial payments without a payment plan. Apparently they have no answer for it.

Appellants pointed out in their opening brief that respondent has a detailed, 5-page, single-spaced "Assessment Collection Policy", which it introduced into evidence as plaintiff's exhibit 2. This document does not contain a single reference to the phantom partial payment policy.

The testimony of respondent's president was equivocal at best. In effect, he admitted that sometimes they followed the policy and sometimes they did not.

Of course, if respondent really had such a policy its attorneys would not have accepted partial payments of $2,000, $1,000, and $500 with no payment plan. Even if there was such a plan, respondent clearly waived it as to Miner.

3. Respondent Certainly Did Not Act In The Interest Of Its Members When It Refused To Accept A Payment That Would Have Paid His Delinquent Assessments In Full

The final defense respondent pleads for its conduct is perhaps the most nonsensical. It is also ironic. Its fiduciary duty extends to all its members, respondent cries, not to Miner alone. So for the good of all it must compel Miner to pay his delinquent assessments.

Yet respondent had fulfilled this duty. It had in its president's hands payment in full for Miner's delinquent assessments, late fees, and interest charges. Rather than completing its responsibility, however, and depositing the payment into its assessment account, then perhaps pursuing Miner for the attorney's fees, respondent returned the payment and continued this wasteful litigation.

This conduct was decidedly not in the interest of its members. Respondent thus breached its fiduciary duty to them, as well as its duty to Miner.

IV. THERE ARE NO GROUNDS FOR THE IMPLIED FINDINGS AND NEW FINDINGS OF FACT RESPONDENT PROPOSES

Invoking the doctrine of implied findings to argue that substantial evidence supports the trial court's decision, respondent actually proposes that the Court make new findings of fact: 1) That Miner's total assessment delinquency in September 2012 was more than $4,441; 2) That the assessments had been delinquent more than 12 months; and 3) That the erroneous interest and late fee charges were reversed in November 2011. There are no grounds for such findings, either as implied findings or new findings of fact.

The principles behind waiver from failing to request a statement of decision, and the corollary doctrine of implied findings, are not involved here. The trial concluded in less than eight hours, which meant that the parties were required to request a statement of decision before the matter was submitted. (Code Civ. Pro. § 632.). So by the time the court issued its minute order (CT 119) such a request would have been untimely. Neither the code nor the rules impose on a litigant the obligation to request a statement of decision before he knows of

the court's tentative ruling.

The doctrine of implied findings clearly is intended to address a party's failure to obtain an explanation of a ruling he considers uncertain, ambiguous, or incomplete. (*See* Code Civ. Pro. § 634; *In re Marriage of Arceneaux* (1990) 51 Cal. 3d 1130, 1134 ["to avoid implied findings on appeal favorable to the judgment" a party first "must request a statement of decision as to specific issues to obtain an explanation of the trial court's *tentative decision*"], emphasis added.) He cannot be deemed to have waived his right to challenge such a ruling by not requesting a statement of decision before the ruling even exists.

Even if the Court were to search for implied findings not stated by the trial court there is no support in the record for the findings respondent proposes. A court cannot create findings from numbers appearing on a document admitted at trial. Without evidence in the trial record establishing the foundation, meaning and credibility of the numbers they cannot themselves constitute substantial evidence supporting implied findings.

A. Respondent Did Not Move For Findings of Fact

Rule of Court 8.252(b) requires that a party seeking findings of fact on appeal under Code of Civil Procedure § 909 must do so by motion, and the motion must include proposed findings. Respondent has not complied with this rule.

Even if it had made the motion respondent could not have established the exceptional circumstances required for a reviewing court to exercise this authority. " 'Although appellate courts are authorized to make findings of fact on

appeal by Code of Civil Procedure section 909 and rule [8.252(b) of the California Rules of Court, the authority should be exercised sparingly ... *Absent exceptional circumstances, no such findings should be made*.'" (*Bombardier Recreational Products, Inc. v. Dow Chemical Canada* (2013) 216 Cal. App. 4th 591, 605, emphasis in original.)[4]

B. Contrary to Respondent's Representation, Appellants Did Raise the Futility Of Miner Attempting To Pay Assessments After January 1, 2012

It is not disputed that Miner attempted to pay the monthly assessments for October and November 2011, but respondent refused to accept his payments and returned them. The obvious inference from this fact is that it would have been futile for Miner to attempt to pay further assessments. The law did not require Miner to perform these futile acts. (*Sutherland v. Barclays American/Mortgage Corp.* (1997) 53 Cal.App.4th 299, 313.)[5]

Respondent's only answer to this point is to claim, falsely, that appellants did not raise it in the trial court. Appellants raised it below in their closing trial brief." (See CT 117.)

C. Respondent Is Legally And Factually Wrong With Respect To Its Common Counts

An account stated comes into existence only when the parties agree on a *final* statement of the account. (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752-753.) "It is elementary law that a claim must be reduced to a *definite* amount by agreement between the parties before it can form a legitimate portion of an

[4] To the extent that respondent should be deemed to have made the motion by making the argument, appellants formally object to it.

[5] Respondent's attempt to distinguish *Sutherland* fails. The difference in procedures involved there and here does not lessen the effect of the futility rule on similar circumstances.

account stated." (*H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola* (1979) 99 Cal. App. 3d 711, 727.) So respondent's communications on October 13, 2010 and May 2, 2011 cannot constitute an account stated because neither one stated a final or a definite amount, as evidenced by the account records themselves.

Furthermore, the undisputed facts demonstrate that Miner never agreed to any definite amount. This is evident from the post-May 2, 2011 correspondence introduced by respondent itself. And if Miner impliedly agreed to the October 13, 2010 statement he has paid, and respondent has accepted, enough to cover that amount in full.

As appellants pointed out in their opening brief, open book account requires a sum certain. Respondent did not prove any sum certain. As explained above, respondent cannot now cure the uncertainty with new findings of act on appeal.

In any event, respondent's attempt to "correct" the record by pointing to negative entries in the account merely muddies the picture even more. Counsel's self-serving "explanation" of these entries does not prove their meaning. It also does not prove that the isolated reversal of charges totaling $233.20 cures the uncertainty that permeates the record due to the failure to properly account for payments.

Another big problem with respondent's claim for open book account is that it admittedly used two different systems to keep Miner's account. There was the Action account and the law firm account. The Action account registered only

the charges, unless the law firm happened to pass on a payment. Otherwise, the law firm kept account of Miner's payments. (RT 27:17-26, 34:19 – 35:5.)

V. WITH NO EVIDENCE OF EXCUSABLE ERROR, THE TRIAL JUDGE DID NOT HAVE DISCRETION TO HEAR RESPONDENT'S UNDISCLOSED WITNESS

Respondent's rationalization of the trial judge's disregard of the economic litigation statutes is flat wrong. The trial judge did not have discretion to allow the testimony of Tyler Jones. Code of Civil Procedure § 97(b) states that a court may permit an undisclosed witness to testify "***so long as***" there is evidence from which the court can find either a good faith effort to comply or "mistake, inadvertence, surprise or excusable neglect as provided in Section 473."

With no evidence a court has no authority to act under either section 97 or 473. The party seeking relief has the burden "to show why he is entitled to it. The assumption of this burden necessarily requires the production of ***evidence***." (*Bruskey v. Bruskey* (1935) 4 Cal. App. 2d 472, 479; emphasis added. *See Kendall v. Barker* (1988) 197 Cal. App. 3d 619, 624 [burden on "moving party to prove excusable neglect by a 'preponderance of the ***evidence***'"]; emphasis added; *Hewins v. Walbeck* (1943) 60 Cal. App. 2d 603, 609 [relief under section 473 "necessarily" requires ***evidence***] emphasis added.)

No reported case has addressed the requirements of section 97. However, section 2037.6 contains very similar language with respect to when a court may permit a party to present an expert witness who was not disclosed in a pre-trial designation of experts. In *Gallo v. Peninsula Hosp.* (1985) 164 Cal. App. 3d 899, the trial court permitted defendant hospital to present expert testimony from a

witness it had not listed, although a dismissed co-defendant had. The Court of Appeal held that this was an error. The Court's criticism of the proceedings is equally applicable here:

> The trial court made no record to support excusing the hospital's failure to disclose Dr. Eddy as its expert; no reasonable diligence, no inadvertence, surprise, or excusable mistake. Such a record is necessary if we are to decide whether the trial court properly exercised its discretion. (*Id*. at 905.)[6]

Respondent presented no evidence to support its claim of "clerical error", made no offer of proof, no request for a continuance to obtain proof, not even a word of explanation as to how the supposed "clerical error" occurred. (RT 3:28 – 8:19.)

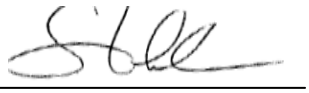
It was not clerical error that allowed respondent to spring a surprise witness against Miner. It was the very type of gamesmanship and manipulation of the process the rules of procedure and discovery are intended to prevent. (*See, e.g., Emerson Elec. Co. v. Superior Court* (1997) 16 Cal. 4th 1101, 1107 ["One of the principal purposes of discovery was to do away 'with the sporting theory of litigation--namely, surprise at trial"].)

Nor is there the slightest merit to respondent's complaint that Miner was not prejudiced. Tyler Jones' testimony was the core of respondent's case. At least half of its exhibits were admitted through his testimony. He was the only Association witness who knew anything about Miner's payments and what happened to them. He also made personal claims that he sent itemized accounting statements to Miner, which Miner disputed.

[6] The Court ultimately concluded the error was harmless because the jury found that there had been no negligence so the expert's testimony on proximate cause became moot. (*Id*. at 905.)

This Court must not pass over this issue as insignificant. Otherwise the economic litigation rules will mean nothing. Miner clearly suffered the kind of prejudice these rules should prevent: having to rebut a surprise witness on essential elements of the case. Miner is entitled to a fair procedure before his property is forfeited. He respectfully urges the Court to reverse the judgment and, at a minimum, remand the action for a new trial.

Dated: May 29, 2014

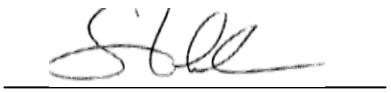


Sam Walker
Attorney for Appellants
The JM Trust and Joseph A. Miner

CERTIFICATE OF WORD COUNT

The text of this brief, excluding the Table of Contents, Table of Authorities, this Certificate and Proof of Service, consists of 5288 words, as counted by the Microsoft Word 2007 word processing program used to generate this brief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed by my hand on May 29, 2014, in Arcata, California.



Sam Walker

PROOF OF SERVICE

I am an active member of the State Bar of California, over the age of eighteen years, and not a party to this action. My business address is 340 S. Lemon Ave. #4709, Walnut, CA 91789.

. On May 29, 2014, I served the attached:

APPELLANTS' REPLY BRIEF

by placing a copy thereof in an envelope addressed as follows:

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And depositing the envelope with the United States Postal Service with postage fully prepaid in the city of Arcata, California.

On this same day I submitted an electronic copy of the document to both the Supreme Court and the Orange County Superior Court

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 29, 2014, at Arcata, California.

Sam Walker