CASE NO. B275955

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs and Appellees,

vs.

MITCHELL J. STEIN,
Defendant and Appellant,

THE LAW OFFICES OF KRAMER AND KASLOW, *et al.*
Defendants.

Appeal from the Superior Court of California
Los Angeles Superior Court Case No.: LC094571
Related Los Angeles Superior Court Case No.: LS021817
The Hon. Frank J. Johnson, the Hon. Michael A. Latin, the Hon. Louis M. Meisinger, the Hon. Jane Johnson; the Hon. Ann I. Jones

APPELLANT'S OPENING BRIEF

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Service on the Office of the Attorney General and the District Attorney of the County of Los Angeles required by Bus. & Prof. Code § 17209.

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL Second **APPELLATE DISTRICT, DIVISION** 5	COURT OF APPEAL CASE NUMBER: B275955
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 36643 NAME: James N. Fiedler FIRM NAME: Law Offices of James N. Fiedler STREET ADDRESS: 6700 Fallbrooke Ave, Ste 100 CITY: West Hills STATE: CA ZIP CODE: 91307 TELEPHONE NO.: (855) 244-5033 FAX NO.: (818) 597-2132 E-MAIL ADDRESS: jfiedlerlaw@gmail.com ATTORNEY FOR (*name*): Mitchell J. Stein	SUPERIOR COURT CASE NUMBER: LC094571 (Related Case No. LS021817)
APPELLANT/ PETITIONER: Mitchell J. Stein RESPONDENT/ REAL PARTY IN INTEREST: The People of the State of California	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Corrected) (*Check one*): ☐ INITIAL CERTIFICATE ☒ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Mitchell J. Stein

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. ☒ Interested entities or persons required to be listed under rule 8.208 are as follows:

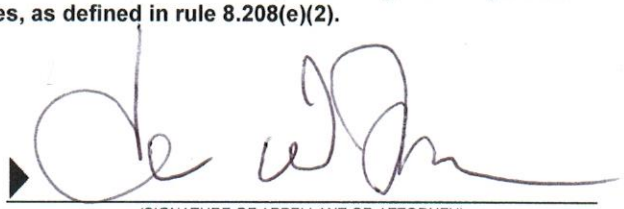
Full name of interested entity or person	Nature of interest (*Explain*):
(1) ATTORNEY PROCESSING CENTER	Defendant
(2) BALLARD SPAHR LLP	Receiver
(3) BUTT CLARENCE JOHN	Defendant
(4) CONSOLIDATED LITIGATION GROUP	Defendant
(5) CUSTOMER SOLUTIONS GROUP	Defendant

☒ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 26, 2017

James N. Fiedler
(TYPE OR PRINT NAME)


(SIGNATURE OF APPELLANT OR ATTORNEY)

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APP-008 [Rev. January 1, 2017]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
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Attachment to Certificate of Interested Entities or Persons

The People of the State of California vs. The Law Offices of Kramer & Kaslow, et al.

Court of Appeal Case Number: B275955
Los Angeles Superior Court Case Number: LC094571
Related Los Angeles Superior Court Case No.: LS021817

No.	Name of Interested Entity or Person	Nature of Interest
6	Data Management LLC	Defendant
7	DiGirolamo Gary	Defendant
8	Home Retention Division	Defendant
9	K2 Law	Defendant
10	Kramer Philip A.	Defendant
11	Marier Ryan William	Defendant
12	Mass Litigation Alliance and Cons. Lit. G	Defendant
13	McNamara Thomas William	Receiver
14	Mesa Law Group Corp.	Defendant
15	Mitchell J. Stein & Associates, Inc.	Defendant
16	Mitigation Professionals LLC	Defendant
17	Pate James E.	Defendant
18	Pate Marier and Associates Inc.	Defendant
19	Petersen Paul	Defendant
20	Phanco Thomas David	Defendant
21	Reneau Glen	Defendant
22	Robertson II Andrew Wells	Receiver
23	Stephenson Bill Merrill	Defendant
24	Tapia Michael Anthony	Defendant
25	The Law Offices of Christopher J. Van Son	Defendant
26	The Law Offices of Kramer & Kaslow	Defendant
27	Van Son Christopher	Defendant
28	Lewis Marketing Corp.	Defendant
29	State Bar of California	Plaintiff in related action (Case No. LS021817)
30	Mitchell J. Stein & Associates LLP	Non-Party whose accounts were frozen by Plaintiffs.

Attachment to Certificate of Interested Entities or Persons (Cont'd)

The People of the State of California vs. The Law Offices of Kramer & Kaslow, et al.

Court of Appeal Case Number: B275955
Los Angeles Superior Court Case Number: LC094571
Related Los Angeles Superior Court Case No.: LS021817

No.	Name of Interested Entity or Person	Nature of Interest
31	Plaintiffs in *Copper, et al. v. Harris, et al.*, N.D.Cal. Case No. 3:12-Cv-00987-CRB.	Financial interest based on order of Hon. Charles R. Breyer, Senior District Judge, U.S. District Court Northern District of California. (*See*, AOB, at pp. 10-11, 61, 68; 10CT2213,2215.)
32	Kamala D. Harris	Defendant in *Copper, et al. v. Harris, et al.*, N.D.Cal. Case No. 3:12-Cv-00987-CRB. (*See*, AOB, at pp. 10-11, 61, 68; 10CT2213,2215.)

Dated: July 26, 2017

Respectfully Submitted,

s/James N. Fiedler
James N. Fiedler

TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Cases

Federal Cases

Statutes

Rules

Other Authorities

IN THE COURT OF APPEAL
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THE PEOPLE OF THE STATE OF CALIFORNIA,
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MITCHELL J. STEIN,
Defendant and Appellant,

THE LAW OFFICES OF KRAMER AND KASLOW, *et al.*
Defendants.

APPELLANT'S OPENING BRIEF

INTRODUCTION

In a case emanating from the recent banking crisis, this is an appeal following the trial court's order granting summary adjudication in favor of Plaintiff-Appellee – the People of the State of California, through the California Attorney General – on a cause of action added just prior to dismissal of this action for the sole purpose of preventing Defendant-Appellant Mitchell J. Stein ("Stein" or "Appellant") from claiming he prevailed in the case and thereby adjudicating the Attorney General as the prevailing party.

In the face of some 200 unrebutted client declarations proving Plaintiffs and the trial court have clearly overstepped their bounds in

this matter, both the trial court and the Attorney General conceded that the unusual summary adjudication order was implemented as a "way [this case] can come to an end" without "call[ing] Stein the prevailing party."

Against the backdrop of a $1 billion suit against the Attorney General by Stein's former clients for the injury this action has caused them – injury the trial court refused to consider despite well-established authorities requiring it to do so – the Attorney General's underlying concern in finding a way to end this case without calling Stein the prevailing party stemmed, in part, from the total lack of evidence of wrongdoing by Stein, as repeatedly and candidly admitted by the State Bar investigator on the matter. Not one penny of the $30,409.84 frozen in the accounts of Stein and his LLP – a non-party to this action – was ever found to have been proceeds from the alleged scheme, nor was one penny of the over $7,000,000 frozen in the accounts of the other defendants ever traced to Stein. Rather, the trial court "simply [did] not believ[e]" Stein was uninvolved and reasoned that there "may" be evidence that has "not [yet been] identified."

The court's speculative findings as to Stein became the basis for depriving hundreds of consumers of what they bargained for,

although Plaintiffs had no plan to care for them, ultimately ending lawsuits against powerful lending institutions nationwide, which the court conceded may have "a great deal of merit." Section 6190 was not formulated for such purposes.[1]

All judicial predilections aside, it is at least highly unusual for an injunction to be issued and a party to be deemed to have prevailed in an action based on the trial court's "belie[fs]" and hypotheses about what evidence "may" be "identified" later; the court's order of summary adjudication should be reversed.

STATEMENT OF THE CASE AND OF FACTS

Factual and Procedural Summary

Stein and The Law Practice

Stein was a prominent 25-year award-winning lawyer with an unblemished record. (2CT257-58,283-292;4CT752-56.) Stein's law practice, Mitchell J. Stein & Associates LLP, which was never named as a party to this action (*see*, e.g., 2CT293,257,n.3,261), had three law partners prior to the initiation of this action. (4CT925.) Stein's two

[1] "Thousands of clients" as used herein refers to former clients affected by this action; "hundreds of clients" refers to Stein's former clients.

law partners, Erikson Davis and Michael Riley, are not defendants to this action.

In 2009, Stein was the first to file suit against a major lending institution, on behalf of hundreds of homeowners, in an action styled *Ronald v. Bank of America*, LASC Case No. BC409444, alleging lending-related misconduct later prosecuted by the state and federal government, resulting in a National Mortgage Settlement involving more than $100 billion in penalties against the nation's biggest lending institutions. (*Id.*; 2CT256-57,319-36; *see*, Ex. A, Request for Judicial Notice filed herewith ("RJN").)

The August 15, 2011 Orders

On August 15, 2011, without notice to the defendants or their clients, the Attorney General of California ("Attorney General" or "Plaintiff" or "Appellee"),[2] filed suit and applied *ex parte* for a temporary restraining order ("TRO") and order to show cause

[2] Appellee is primarily referred herein not as "the People" but as "the Attorney General." Stein presented overwhelming evidence that many of the people which have spoken in this matter have been injured – not truly represented or protected – by the Attorney General's action. Of course, "the Attorney General [is supposed to be] concerned with the protection of the [People]." *D'Amico v. Bd. of Med. Examiners* (1974) 11 Cal. 3d 1, 13. "The People" as used herein refers to the former clients affected by this action.

("OSC") re: preliminary injunction and applied for an asset freeze and appointment of a receiver against 20 defendants comprising attorneys and non-attorneys. The Attorney General alleged a marketing and fee sharing scheme in violation of BPC §§ 17200 and 17500, and alleged that misleading statements were made to consumers in connection with their home loans and litigation against lending institutions. (1CT43-91A.) At the same time, the State Bar of California applied – without notice to the defendants or defendants' clients – for OSC and interim orders assuming jurisdiction over the named law practices, including an entity named Mitchell J. Stein & Associates Inc., a corporation dissolved as of November 3, 2008. (9CT1964; *see also*, Ex. B, RJN.) The State Bar assumption of jurisdiction proceedings were filed in the Northwest District of the Los Angeles Superior Court, Case No. LS021817, and were deemed related to this action on September 2, 2011. (1CT182.) The August 15, 2011 applications were granted ("August 15, 2011 orders"). (1CT206.)

The Raid

On August 17, 2011 – although the LLP was not named in the August 15, 2011 orders – all of the LLP's accounts were frozen, its

doors and cabinets broken into by armed officers, all of its files seized, and its phone, facsimile lines and internet disconnected.

Complex Determination and Stay

On September 7, 2011, the trial court transferred the case to the complex litigation program and ordered it stayed until the initial status conference. (1CT197.)

Stein's Emergency Application to Vacate Orders

On September 19, 2011, Stein filed an emergency *ex parte* application to lift the complex litigation stay for the purpose of vacating the August 15, 2011 orders against Stein and submitted declarations of clients who stated that they were facing the prospect of losing their homes as a direct result of the Attorney General's action and requested the court to allow them to be represented by Stein's LLP. (2CT255-377.)

Preliminary Injunction, Permanent Order Assuming Jurisdiction, Order Affirming Appointment of Receiver

On October 6, 2011, Stein filed an opposition to the three OSCs, an *ex parte* application for OSC why the State Bar should not immediately return illegally seized property, and evidentiary objections to the declaration of State Bar investigator, Thomas Layton. Stein's submission included nearly 200 client declarations.

(2CT433—4CT760.) On October 13, 2011, the Attorney General replied and filed evidentiary objections to the client declarations. (4CT761-98.) On October 19, 2011, following a hearing (4CT909—5CT1007), the trial court granted the OSCs. On October 26, 2011, the trial court entered permanent orders assuming jurisdiction "over the law practice of Mitchell J. Stein" and ordered additional briefing on the proposed injunction. (4CT878,890.) On October 27, 2011, the trial court entered an order confirming the appointment of receiver (4CT851-76,878,892) and on November 8, 2011, it entered an order for preliminary injunction against Stein. (5CT1100; AR1-11 (injunction order designated by Stein but not included in the record by clerk (*see*, 11CT2645;1CT (Index)).)[3]

Stein's CCP § 170.1 Motion

On November 1, 2011, Stein moved to disqualify the assigned Judge from further proceedings, appending, among other declarations, declarations of clients who had attended the October 19, 2011 hearing and had observed biased behavior by the Judge towards Stein.

[3] "AR" refers to the augmented record appended to the motion to augment the record filed herewith ("motion to augment").

(4CT899—5CT1067.) The application was stricken on November 7, 2011. (5CT1086-98.)

Stein's Application to Sever Stein or Continue Trial Date; Application to Set Fairness Hearing

On March 21, 2013, Stein applied *ex parte* for a fairness hearing as to the settlement agreements the Attorney General entered into with the other defendants and moved to sever Stein from the case and to continue the trial date then set for April 29, 2011. (6CT1382-97.) The Attorney General opposed the application for fairness hearing and severance but stipulated to a continuance of the trial. (6CT1400-18.) The court continued the trial to June 3, 2013 and denied the other motions. (6CT1419-23.) On June 3, 2013, the court continued the trial until August 26, 2013 and on July 2013, the court vacated the trial date. (7CT1563,1596.)

Summary Adjudication; Dismissal Without Prejudice

In 2013, after the other defendants to this action entered into settlement agreements, final judgments were entered against them. Stein did not enter into a settlement agreement but wished to proceed to trial. (7CT1456-1550,1568-1641.) On April 20, 2015, the court entered an order re: transfer of frozen funds to Receivership Restitution Fund, still refusing to include the LLP as a named party in

the case but purporting to justify its money seizure by now identifying the LLP as a "dba." (7CT1680-80B.) After status conferences held on April 28 and July 17, 2015, in Stein's absence,[4] the trial court proposed that the Attorney General "explore the idea of adding a cause of action for declaratory relief re: injunction which has already been issued" so it "may move for summary judgment" against Stein as a way this case "can come to an end" without "call[ing] Stein the prevailing party." (7CT1681-82;9CT2070,2079;8CT1706-13.)

Thereupon, on July 21, 2015, the Attorney General filed a second amended complaint – still not naming the LLP but naming the dissolved corporation – alleging Plaintiff is the prevailing party against Stein. (8CT1686.) On July 31, 2015, Stein filed a status conference statement disclosing his intention to move for summary judgment against Plaintiff because its investigation had uncovered no evidence of Stein's involvement in the alleged scheme. (8CT1717-1813.) On September 15, 2015, the Attorney General moved for summary adjudication on its newly added fifth cause of action. (9CT1929-2108.) On January 7, 2016, Stein filed an *ex parte* application to continue summary adjudication hearing to allow for

[4] Due to his incarceration. *See*, "Other Proceedings," *infra*.

additional time for an opposition to be filed (9CT2120—10CT2353), which the court denied, but it deemed the application as Stein's opposition to the motion for summary adjudication (10CT2354,2390). On February 5, 2016, the court granted summary adjudication in favor of the Attorney General. (10CT2380-2411.) On March 10, 2016, the court discharged the receiver and terminated jurisdiction over Stein on April 4, 2016. (11CT2513,2521.) On April 4, 2016, the Attorney General moved for entry of judgment against Stein. Stein opposed the motion and the Attorney General replied. (11CT2560-89.) On May 9, 2016, the court entered final judgment against Stein and dismissed without prejudice counts one through three against Stein. (11CT2589,2602.)

The People's Suit Against the Attorney General

On February 7, 2012, 399 of Stein's former clients filed suit against then Attorney General, Kamala Harris, in an action styled *Copper, et al. v. Harris, et al.*, N.D.Cal. Case No. 3:12-cv-00987-CRB ("*Copper* action"), for the damages they alleged resulted from this action, in the amount of $1 billion. The Attorney General moved to dismiss the *Copper* action on June 13, 2012. On August 3, 2012,

Judge Breyer of the Northern District of California, "STAY[ED] the case as to damages." (10CT2215; Ex. C, RJN (emphasis in original).)

Other Proceedings

Four months after Plaintiffs[5] obtained the August 15, 2011 orders, Stein was indicted, and sued by the SEC on allegations concerning three purchase orders the government alleged never happened and were made up by Stein in connection with a company named Signalife, nna. Heart Tronics, Inc. Stein was convicted on May 20, 2013, S.D. Fla. Case No. 11-cr-80205-KAM based on evidence which was later proven to be false.[6] On December 5, 2014, Stein was sentenced to 17 years imprisonment. The sentence and restitution order were vacated on appeal by the Eleventh Circuit Court of

[5] "Plaintiffs" as used herein collectively refers to the Attorney General and the State Bar of California.

[6] Specifically, among other items of false evidence, two key government witnesses falsely testified they "never received any backup or anything" on the purchase orders when they had received a down-payment on one of the purchase orders from a real customer, whom the government never called at Stein's trial. Stein is now represented by attorneys Paul D. Clement of Kirkland & Ellis LLP and Jeffrey L. Fisher of Stanford's Supreme Court Litigation Clinic in the U.S. Supreme Court on the issue whether the government's failure to correct material testimony its prosecutors knew was false is justifiable under the circumstances outlined by the Eleventh Circuit Court of Appeals. (Ex. E, RJN;8CT1720-1809.)

Appeals, Case No. 14-15621, on January 18, 2017. *See*, Ex. D, RJN. Stein remains incarcerated pending the resolution of the Eleventh Circuit's remand order and U.S. Supreme Court proceedings.

The relevancy to this action is that Stein proceeded in *propria persona* following his conviction, unable to attend hearings and oftentimes requiring additional time to receive, prepare and file pleadings due to his indigency and federal incarceration in Florida.[7]

Additionally, the summary adjudication now on appeal is based on the Attorney General's reasoning that "continuing its action against … Stein" under these circumstances would place a "drain on state and judicial resources." (8CT1711.)[8]

Finally, it is notable that the assets Plaintiffs rushed to "safeguard," which would ordinarily be available to pay criminal defense costs, were later seized by the Department of Justice under a

[7] Further, although the Attorney General always denied any interrelation with the other governmental actions against Stein (*see, e.g.*, 6CT1405), a privilege log produced by the SEC reveals correspondence between the California Attorney General and the SEC concerning Stein as early as 2009 (10CT2178), and the Plaintiffs arguably knew Stein would lack the time to fully focus on his defense while facing charges by the federal government. It is perhaps compelling that the Attorney General misspoke about the "joint actions … of the state and federal law enforcement." (9CT2076.)

criminal forfeiture order following Stein's conviction. *See*, pp. 27-28, *infra*.

APPEALABILITY

The trial court entered final judgment against Stein on May 9, 2016. (11CT2589.) Stein filed a timely notice of appeal. (11CT2614.) This appeal is authorized by CCP § 904.1.

STANDARD OF REVIEW

An appellate court reviews an order granting a temporary restraining order for abuse of discretion. *See*, *Biosense Webster, Inc. v. Superior Court* (2006) 135 Cal.App.4th 827, 834. The appellate court applies *de novo* review if the propriety of the issuance of the TRO turns upon a pure question of law, such as the interpretation of a statute. *Maggi v. Superior Court* (2004) 119 Cal.App.4th 1218, 1224.

An appellate court will review an order assuming jurisdiction over a lawyer or law practice for an abuse of discretion. *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 66.

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[8] Of course, neither Stein's sentence nor any of the judgments entered against him were final.

A trial court's ruling on an application for a preliminary injunction is reviewed for an abuse of discretion. *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.

"The trial court's determination of the prevailing party *for purposes of awarding attorney fees* is an exercise of discretion which should not be disturbed on appeal absent a clear showing of abuse of discretion." *Ritter & Ritter, Inc. v. Churchill Condominium Ass'n* (2008) 166 Cal.App.4th 103, 126 (emphasis added). "When, however, the determination that a litigant is a prevailing party involves the interpretation of a statute, the issue concerns a matter of law that is reviewed de novo." *Sharif v. Mehusa, Inc.* (2015) 241 Cal.App.4th 185, 191.

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question." *People v. Hovarter* (2008) 44 Cal.4th 983, 1007–08.

Finally, "when the trial court mistakenly applies erroneous legal principles when exercising its discretion, [the appellate court] may review the error de novo." 569 *East County Boulevard LLC v. Backcountry Against the Dump, Inc*. (2016) 6 Cal.App.5th 426, 434.

ARGUMENT

I. THE TRIAL COURT LACKED JURISDICTION OVER STEIN'S LAW PRACTICE

A. Misuse of Section 6190

BPC § 6190 provides that

> [t]he courts of the state shall have the jurisdiction as provided in this article when an attorney engaged in the practice of law in this state has, for any reason, including but not limited to excessive use of alcohol or drugs, physical or mental illness, or other infirmity or other cause, become incapable of devoting the time and attention to, and providing the quality of service for, his or her law practice which is necessary to protect the interest of a client if there is an unfinished client matter for which no other active member of the State Bar, with the consent of the client, has agreed to assume responsibility.

With the exception of this action, no California court has ever permitted the assumption of jurisdiction over a lawyer or law practice based on allegations of violations of BPC §§ 17200 and 17500. The reason is obvious: § 6190 was not enacted to provide the courts with a vehicle to terminate – without notice or opportunity to be heard – the legal representation of an untold number of clients represented by an attorney alleged to have violated a California statute.

It is undisputed that "section 6190 proceedings are designed to reach the issue of *competency*" only. *People v. Hinkley* (1987) 193 Cal.App.3d 383, 388. In *Hinkley*, the court assumed jurisdiction over

the attorney's practice because "Hinkley[] was convicted by a jury of the unlawful taking of a vehicle (Veh. Code, § 10851) and driving under the influence of drugs (Veh. Code, § 23152, subd. (a)) [and] sentenced to state prison." *Hinkley*, 193 Cal.App.3d 383.

The California State Bar Court itself admitted that only "[i]n the *limited circumstances* where an attorney is shown to be *incapacitated*, the State Bar may then seek an order from the Superior Court for the court to assume jurisdiction over the law practice." *Matter of Frazier* (Cal. Bar Ct., Oct. 10, 1991) 1 Cal. State Bar Ct. Rptr. 676, 707, n. 17 (emphasis added).

As to presuming the alleged incompetency of an attorney, the Supreme Court of California's opinion in *In re Johnson* (1992) 1 Cal.4th 689 is instructive. The Court explained that even

> [a] mandatory suspension pending finality of the judgment of conviction following commission of a crime of moral turpitude does not reflect a legislative or judicial assessment of the attorney's professional competence…. [Only w]hen it appears that an attorney is *not competent* to practice law, involuntary enrollment as an inactive member of the State Bar, and/or a judicial assumption of jurisdiction over the attorney's practice may be ordered as an interim measure to protect the attorney's clients and the public…. Merely because an attorney has been disciplined for some infraction of the rules by which he must abide is no reason for assuming that he is not a qualified and efficient lawyer. Erring morally or by

> breach of professional ethics does not necessarily indicate a lack of knowledge of the law.

In re Johnson, 1 Cal.4th at 697, 698, n. 4, 699 (citing §§ 6007, 6180, 6190 *et seq*. and *Friday v. State Bar* (1943) 23 Cal.2d 501, 508) (emphasis added). Similarly, in *People v. Barillas* (1996) 45 Cal.App.4th 1233, dismissed, remanded and ordered published (Cal. 1996) 57 Cal.Rptr.2d 850, a case in which the attorney had been suspended from the practice of law pursuant to § 6102 following his conviction for child molestation, this Court held that it was "not persuaded that a suspension under section 6102 … alone creates a presumption of incompetence." *Barillas*, 45 Cal.App.4th at 1237.

These holdings beg the question: If not even a *criminal conviction* can create a presumption of incompetence, how could *allegations* of violations of §§ 17200 and 17500 – without notice or adjudication – create a presumption of incompetence under § 6190? As § 6190 clearly provides, the trial court did not have jurisdiction over Stein's law practice unless and until it first determined that Stein and all of his law partners were incompetent.

B. <u>The Law Practice Was Never Sued</u>

The trial court lacked jurisdiction over Stein's law practice for the additional reason that his LLP was never sued. Stein presented to

the trial court a Certificate of Registration for the LLP, certificate number 54393. (2CT293.) Though the trial court called into question the authenticity of the certificate, neither the Attorney General nor the State Bar present at the October 19, 2011 hearing attempted to disprove the document's authenticity or that the LLP did not in fact exist. The reason was revealed later, when the receiver admitted that it had frozen "five [accounts] in the name of [Stein's] LLP" (5CT986), and when the Attorney General later conceded that the corporation was "dissolved" as of November 2008. (9CT1931,1960,1964.) Plaintiffs must have been aware of this reality no later than in 2011, when they froze the accounts in the name of the LLP, yet they did nothing to cure the defect. To the contrary, after Plaintiffs failed to inform the trial court of the existence of the LLP, Plaintiffs' later justified the unlawful raid by stating:

> We are simply acting as a receiver for the superior court. The Superior court gave us the authority, pursuant to the Superior court's jurisdiction, to go in. They appointed us to go in for the superior court to take these files.

(AR43.)[9]

[9] "AR" refers to the augmented record appended to the motion to augment the record filed herewith.

To make matters worse, after the State Bar apparently was unable to "dole out this money" it froze (9CT2074), an order *suddenly identifying* the LLP as "dba" – but still not going so far as to name the LLP so as to subject it to any lawful process under the due process clauses of the California and United States constitutions[10] – was entered in 2015 purporting to authorize the transfer of the LLP's frozen funds. (7CT1680A.)

The trial court repeatedly reasoned that "there's no record with the Department of Corporations and the Secretary of State site." (4CT923-24 ("They are not on line (sic). Okay? They are not on line (sic).").) However, while business records for other types of entities are available at the Secretary of State's website, records of California LLPs *are never published on its website* and the trial court erred in relying on information available online. *See*, http://www.sos.ca.gov/business-programs/business-entities/cbs-field-status-definitions/ (*see*, "Disclaimer," Ex. F, RJN). The error was particularly egregious, because the State Bar indisputably issued the

[10] *See, e.g., Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612 ("[d]ue process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest"); *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965) (describing due process requirements).

LLP's certificate based on its registration with the Secretary of State. (Ex. G, RJN.) According to the State Bar's Application for Issuance of a Certificate of Registration as an LLP, the certificate Stein presented could not have been issued without the LLP first having registered with the Secretary of State. (*See*, Ex. H, at § 2, RJN.) The requirements the trial court listed in its ruling for complying with Ca. Corporations Code, § 16953(a) (4CT853) are all *prerequisites* to obtaining the State Bar Certificate Stein presented.

The information that *is*, however, readily available on the Secretary of State's website shows that "Mitchell J. Stein & Associates, Inc." had been dissolved as of 2008. *See*, Ex. B, RJN. None of the allegations in this action date back to 2008. Even if they date back to before the LLP was formed, the existence of the LLP on August 15, 2011 bound the trial court to the requirements under §§ 6180 and 6190 *et seq.*, because its orders concerned clients represented by "a law practice conducted by a partnership" at the time, in which case "Section 6180 [must] appl[y] to *all partners*." (*See*, § 6180.14 (emphasis added).) One of the LLP's partners, Erikson Davis, a California attorney, could have assumed responsibility. (4CT930.) (*See*, § 6190 (assumption order only

appropriate if it is "necessary to protect the interest of a client if there is an unfinished client matter for which no other active member of the State Bar, with the consent of the client, has agreed to assume responsibility").) The court's reasoning that Davis practiced as the Law Offices of Erikson Davis *following* the State Bar's raid of the LLP is misguided (4CT925-31;5CT971), because the §§ 6180.14 and 6190 inquiries naturally have to be made *before* and *in order for* the court to acquire jurisdiction over the LLP. Plaintiffs and the trial court never even attempted to follow these procedures, and this deficiency could not be cured by suing an entity that does not exist. If the trial court was unaware of the existence of the LLP and its partners on August 15, 2011, how could it have made the necessary determinations under the statute and acquire the jurisdiction afforded by § 6190 over, for example, the funds in the LLP's lawfully opened bank accounts?

Stein also argued that the trial court lacked jurisdiction over his *federal* practice as well as his out-of-state clients and had illegally seized those files for these additional reasons. (*See, e.g.*, 2CT262.) *See, Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 74 ("[t]he State Bar Act and other statutes enacted for the purpose of

regulating the practice of law in this state are applicable to our state courts only…."). Plaintiffs even seized the files of Erikson Davis, a non-party to this action and partner to the LLP at the time. (AR37-42.) In any event, because it is clear that the allegations here do not concern the competency of Stein or any of his law partners, the trial court lacked jurisdiction with respect to all components of his law practice.

II. THE TRIAL COURT ABUSED ITS DISCRETION THROUGHOUT THE LOWER COURT PROCEEDINGS

A. The August 15, 2011 Orders Were a Clear Abuse of Discretion

i. Review of the August 15, 2011 Orders is Authorized and Necessary in This Case

Generally, when the issuance of a preliminary injunction replaces a TRO, the TRO is rendered moot for purposes of appellate review. *See, e.g., Cont'l Baking Co. v. Katz* (1968) 68 Cal. 2d 512, 520. However, the Supreme Court of California has carved out exceptions to the rule, e.g., when a case "poses an issue of broad public interest that is likely to recur" and the Court seeks to prevent certain such TRO "orders … [from] elud[ing] appellate review." *United Farm Workers of Am. v. Superior Court* (1975) 14 Cal. 3d 902,

906. In such cases, the Court would "exercise what has been described as [its] 'inherent discretion to resolve that issue.'" *Id*. The Court explained in *In re William M.* (1970) 3 Cal.3d 16 that such "questions do not become moot by reason of the fact that the ensuing judgment may no longer be binding upon a party to the action" and thus, the Court "should not avoid the resolution of important and well litigated controversies arising from situations which are 'capable of repetition, yet evading review.'" *In re William M*., 3 Cal. 3d at 23, 24, n. 14.

The public interest in resolving the following questions and issues that arise from the August 15, 2011 orders are of significant importance: Can a party avoid giving notice in an action that would detrimentally affect a third party? Can the State Bar apply to terminate the legal representation of an untold number of clients without notice to the law practice or its clients based on allegations of a California statute? Can an attorney's incompetence be presumed on the basis of allegations of a violation of a California statute? Should a party – whether a government entity or otherwise – be permitted to apply, without notice, for a TRO, asset freeze, appointment of receiver and/or order assuming jurisdiction over a law practice when the

applicant lacks evidence of wrongdoing and is "not done with the investigation yet?" (6CT1236.)

ii. Plaintiffs Failed to Show a Likelihood of Success

"Appellate review of an order granting a restraining order involves … the likelihood of success on the merits and interim harm. If the trial court abused its discretion on either factor, the Court of Appeal must reverse." *Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal. App. 4th 1244, 1252.

Importantly, four months *after* the trial court was tasked with finding a reasonable likelihood of success or, rather, a substantial likelihood of success,[11] the investigator on the matter admitted that he had no evidence of any "fee sharing" by Stein. *See*, pp. 40-42, *infra*. The fact that, to this day, not one penny from the more than $7 million in profits from the alleged scheme was traced to Stein renders a finding that Stein engaged in fee sharing impossible. Rather, it increases the probability that Stein would succeed in his defense that his name and trade dress were exploited by other lawyers and marketers to profit, which would impact the credibility of any

[11] *See*, pg. 42-43, *infra*, (discussing heightened burden).

statements by the co-defendants Layton interviewed.[12] The August 15, 2011 orders against Stein cannot be justified when Plaintiffs' own investigator admitted four months later that his investigation as to Stein is incomplete and so far brought about no evidence of any fee sharing by Stein, and highlights the need for proper notice and opportunity to be heard, particularly when a third party falls victim to the procedural improprieties. *See, People v. Litmon* (2008) 162 Cal.App.4th 383, 396 (no opportunity to be heard until after initial deprivation permitted only if "accompanied by a substantial assurance that the deprivation is not baseless or unwarranted").

iii. The Resulting Harm Was Substantial and Irreparable

It is well-settled law that "[a]n order granting or denying a restraining order is void if the court issues the order in violation of a party's due process rights to notice and an opportunity to be heard." *Brown v. Williams* (2000) 78 Cal.App.4th 182, 186, fn. 4. Under CCP

[12] The other defendants in this action may have used Stein's name and likeness because, as the unrebutted evidence shows, Stein was the only one of the charged lawyers with both significant banking experience – having represented the FDIC, RTC, FSLIC, and numerous banks and financial institutions throughout his career – and with a pattern of representing homeowners *pro bono*. (2CT283;3CT645-654,581,681.)

§527 "informal notice is required except under the *most extreme circumstances*." *Pac. Decision Scis. Corp. v. Superior Court* (2004) 121 Cal. App. 4th 1100, 1110 (emphasis added); *McCall v. McCall Bros. Co.* (Cal. Ct. App. 1933) 135 Cal. App. 558, 559 ("an appointment [of a receiver without notice], under the established law of this state, cannot be legally made except upon a showing of great emergency"); *Tyler v. Park Ridge Country Club* (Cal. Ct. App. 1930) 103 Cal. App. 117, 123 (same).

The voices of those People heard after the issuance of the August 15, 2011 orders clearly established that the questioned People did not approve of this action and were, in fact, irreparably injured by it. Plaintiffs have not and cannot deny that hundreds of homeowners were opposed to and ultimately victimized by this action, nor could the trial court, after reviewing some 200 client declarations, have been unaware of the injury. For example, as the court conceded, the evidence in support of Stein's motion to disqualify the judge were complaints by Stein's clients. (5CT1090-91 ("[Stein] simply appears to be dissatisfied with the court's rulings…." "[M]ost of [the complaining persons] are [Stein's] clients….").) This further

highlights the court's complete disregard for the homeowner clients – the *actual* People of the State of California.

Plaintiff's specific claims under its no-notice arguments were that "Kramer" had "one bank account frozen due to irregular activity," that "Pate Marier, Pate and Marier are subject to a California Department of Real Estate Cease and Desist Order" that "DiGirolamo has a prior felony conviction," and that "ACP recently moved locations … after a State Bar investigator asked questions…." (1CT57,87.) Plaintiffs failed to give any basis for not giving notice to Stein. A plaintiff's "failure to give notice … in the absence of adequate grounds for the lack of notice render[s] [an] application totally and completely without merit…," and a plaintiff "was acting in bad faith [if] … the circumstances were such that notice could easily and appropriately have been given." *Brewster v. Southern Pacific Transportation Co*. (1991) 235 Cal.App.3d 701, 714.

Even to the extent Plaintiffs relied entirely on an argument that they needed to "safeguard the assets" (1CT89), it is ironic that Stein's frozen assets were seized by the DOJ under a forfeiture order some four years after the $30,409.84 asset freeze and thus used for an entirely different purpose, when those assets would normally be

available to pay criminal defense costs. (Ex. I, RJN.) *See, United States. v. Monsanto*, 491 U.S. 600, 603 (1989) (frozen assets must be made available for payment of criminal defense costs unless it is "property constituting, or derived from ... proceeds ... obtained" from the alleged crime). Here, the Attorney General repeatedly stated that the criminal action was "unrelated" (*see, e.g.*, 6CT1405), yet those funds remained frozen and were apparently never claimed by any allegedly "victimized" consumer. This result may explain why Plaintiffs could not trace Stein's $30,409.84 (or any funds for that matter) to any alleged offense. (11CT2450.)

It was clear from the beginning that Plaintiffs were utterly without a plan to tend to the many clients suddenly unrepresented by any lawyer after they either had paid for the representation of their choice or had been *pro bono* clients of the lawyer of their choice. If the Attorney General's motive had truly been to protect the People of the State of California, as opposed to, e.g., pursuing a self-serving interest, it would have assured it had a strategy in place. Although Plaintiffs knew well that the substantial litigation of thousands of consumers would be dismissed as a result of this case, they felt that no action was necessary on their part to prevent the harm from occurring.

(*See, e.g.*, AR35 (Plaintiffs' felt their obligations as to the abandoned clients was "not a complex process").) With no such plan in place and no such genuine interest, Plaintiffs left thousands of clients nationwide without *any* legal representation and without *any* protection of their legal rights. As a result, all of the clients' lawsuits against the banks were eventually dismissed (*see*, e.g., Ex. J, RJN; 4CT809), many of their homes on the brink of foreclosure,[13] and the abandoned People were advised "to find a new attorney." (3CT500.) A miscalculation of the challenges arising from its suit is easily distinguishable from a complete lack of planning or intention to care for the clients. Plaintiffs' disregard for the affected consumers "rendered the application totally and completely without merit." *Brewster*, 235 Cal.App.3d at 714.

B. The Court Should Have Vacated the August 15, 2011 Orders

While the trial court abused its discretion in failing to consider the harm to the affected clients and in misapplying § 6190 at the August 15, 2011 proceedings, the trial court should have vacated these

[13] The law practice was successful in protecting clients from foreclosure. (*See, e.g.*, 5CT972-73;2CT255-377.)

orders when the desperate voices of the People were disclosed to the court.

See, Declaration of Sheryl Ford (2CT270):

> … [T]here has been a complete lack of response from the State Bar and I have left at least three messages over the past two weeks…. Not only is the State Bar not protecting my legal rights, they are essentially preventing me from obtaining competent counsel to represent me in my current litigation against Ally Bank.

Declaration of Gina Adams (2CT268-69):

> At this moment the California State Bar has deprived me of my right to competent legal representation of my choice and has hindered my ability to keep my home. … I wish to utilize Mitchell J. Stein & Associates LLP with regard to my federal court litigation against the bank and this is now an emergency….

Declarations of Elizabeth Matsik (2CT273,275):

> I was told [in a telephone call with the State Bar] that the State Bar … had no idea where my files were and had no idea when they would be returned. When I told the State Bar of my predicament, it stated that the State Bar has no procedure to safeguard my files and that "there is nothing [the State Bar] can do." … [The State Bar] told me that [it] could not protect my legal rights regarding my home.

Declaration of Blajit Singh (2CT276):

> I was told in [my telephone call with the State Bar] that the State Bar will not be returning my files for at least three years.

Remarkably, instead of addressing the desperate pleas by those very clients § 6190 purports to protect, the Attorney General falsely stated on September 20, 2011 that Stein sought to vacate the orders "merely because … Judge West issued an order taking off calendar all previously scheduled hearings..." and even called the emergency application a "gamesmanship" without once addressing the injury the People were reporting to the court. (2CT380,381.) The pleas by the LLP's homeowner clients under oath were neither a "gamesmanship" nor in any way connected to Judge West's order concerning the complex litigation assignment and concomitant stay other than to lift the stay for purposes of minimizing the harm that was occurring to the clients.[14] (2CT255-377;1CT197.) The trial court erroneously found that "there wasn't one statement with respect to any emergency" (AR55), although there were several such statements (e.g., 2CT273 ("I am in a dire emergency…."); 2CT266,268,270,276,278,280) and erroneously concluded the clients were somehow "being taken care of" (AR49), although it was fully aware that the LLP's accounts remained frozen. The court should have considered the reality that the

[14] This gross misinterpretation of Stein's emergency application and supporting evidence arguably rules out that the Attorney General had the *competency* to care for the clients as contemplated in § 6190.

August 15, 2011 orders were the beginning of what was bound to develop into irreparable harm to thousands of consumers and litigants. Indeed, Plaintiffs admitted at the hearing that they did not truly endeavor to care for the clients or their cases against lenders, which the court admitted may be meritorious but were necessarily doomed as a result of this action (e.g., AR24-25). If the trial court had a good faith belief that there was no true emergency, the correct remedy was to hold an evidentiary hearing in which it could hear live testimony as opposed to completely ignoring the clients' desperate pleas. The court, apparently confused by the Attorney General's false "gamesmanship" argument, denied the application on the basis that "Stein … stipulated to delay the Motion for Preliminary Injunction" and failed to consider the harm to Stein's clients. (2CT430.)[15]

C. Preliminary Injunction and Permanent Order Assuming Jurisdiction Were a Clear Abuse of Discretion

The trial court abused its discretion in not fairly evaluating Plaintiffs' likelihood of success on the merits and in refusing to

[15] Judge Highberger, who was handling Stein's *Ronald v. Bank of America* action, even stated that "[i]f attorney Kramer … want[s] to hijack Mr. Stein's name, business name, or even his trade dress, … it sounds like Mr. Stein would be the victim of this, not the perpetrator").) (2CT306,259.)

adhere to the two-prong balancing test enunciated by the Supreme Court of California in *IT Corp. v. Cty. of Imperial* (1983) 35 Cal. 3d 63, 69–70.

i. The Injunction is Reviewable

While, generally, an order granting preliminary injunction is immediately and separately appealable, if the preliminary injunction stays in effect until entry of judgment, it is reviewable by the appellate court. *See, e.g., People v. Gordon* (1951) 105 Cal.App.2d 711, 725 (appeal from order granting the preliminary injunction may be taken before permanent injunction has been granted). The preliminary injunction against Stein was never dissolved or replaced by a permanent injunction, was treated as a permanent injunction and was in effect at entry of judgment. (AR1-11;11CT2552 ("the inability to obtain a permanent injunction was only because of Mr. Stein's unavailability...").) Finally, it is in the Court's inherent discretion to review orders that may otherwise elude appellate review. *United Farm Workers of Am. v. Superior Court* (1975) 14 Cal. 3d 902, 906; *In re William M.* (1970) 3 Cal.3d 16, 23.

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ii. Likelihood of Success on the Merits

The Evidence the Trial Court Relied On

While the trial court repeatedly stated it found "overwhelming" evidence against Stein (e.g., 4CT869,951,962), an evaluation of that evidence shows it is anything but overwhelming and actually proves no wrongdoing by Stein.

1. Mailers

The trial court found Stein approved deceptive mailers based on the investigator's testimony that one witness who claimed to have business relations with Kramer and Stein purportedly saw "Kramer show Stein a draft of the mailers to be sent and saw Stein approve the mailers." (4CT859.) This testimony leaves uncertain which exact language Stein purportedly approved and would require a cross-examination to ascertain, e.g., whether the language violated a California statute. Similarly, the statement by a co-defendant that "Stein never responded [about the Brookstone mailer he purportedly

sent to Stein], leading [him] to believe [Stein] had no objection" is no evidence of any wrongdoing by Stein.[16] (4CT860.)

2. DiGirolamo

Stein's dissemination of a March 17, 2011 press release stating he was not affiliated with the listed individuals (including DiGirolamo), their associates and companies – in March 2011 (4CT860,861) – is not untruthful or suspicious, and does not conflict with DiGirolamo's statement that he *used to be* affiliated with Stein (4CT860 ("I *have been* affiliated with … Stein") (emphasis added)) or Stein's statement that he briefly worked with DiGirolamo in late 2010 – not March 2011 – in connection with data and file management. None of the correspondence cited at 4CT861 shows any wrongdoing or is inconsistent with Stein's description of the brief relationship with DiGirolamo, which reveals no violation of any statute. (4CT944-52;3CT678 (explaining the nature of the relationship).)

[16] Brookstone Law was a law firm Stein had actually reported to the State Bar as having used his name to generate business and disseminated illegal mailers without his authorization. (3CT684-92.) Curiously, Brookstone was not included as a defendant to this action, but Layton interviewed Brookstone owner, Torchia, and its CEO, Kutzner, as a way to bolster its theory that evidence of Stein's involvement may exist and has not yet been identified. (4CT859-60;6CT1238.)

3. Reneau

The trial court relied on a website post by Reneau, stating Stein has a referral arrangement with K2 Law. (4CT861.) This again supports Stein's theory, as substantiated by the money trail. Stein's statement that he "met Reneau in 2010" (*id*.) and Stein giving Reneau an email update on the *Ronald* action (4CT861) are any evidence of wrongdoing by Stein. As the court then conceded, "[t]he Kramer & Kaslow bank records [– not Stein's –] show payment of millions of dollars to Mitigation Professionals [– not Stein]." (*Id*. (citing Layton Decl.)) Throughout the trial court proceedings, the "fee sharing" claim was based on the fee sharing proven between the other defendants but never against Stein. Of course, there can be no legitimate claim against Stein of unlawful "fee sharing" without any such "fee sharing" by Stein.

4. Call Centers

Matthew Davis admitted that the call centers were set up to "refer clients to Kramer." (4CT863.) He then stated that "client processing" included "communications with clients and prospective mass joinder clients on behalf of … Stein" but nevertheless called it "Kramer's mass joinder operation" (4CT864), which is, again,

consistent with the money-trail evidence, and is buttressed by Davis perceiving it as unusual for Stein's clients to "beg[i]n contacting the [call center]" and to "contact[] Stein directly," after which "Stein claimed he knew nothing about them." (*Id*.) As to Davis allegedly seeing payment go out to Stein in connection with the call center (*id*.), it turned out to be untrue or else, surely, the investigator would have come up with at least one such payment over the years.

5. Client Declarations

The trial court relied on Ms. Nepomuceno's alleged complaint that Stein "never provided her with a signed retainer agreement [after which] she asked for a refund." (4CT865.) However, Ms. Nepomuceno explained on August 22, 2011 under oath that she "made it perfectly clear to [the State Bar that her] complaint was against Phillip Kramer and NOT … Stein." (3CT581 (emphasis in original).) Layton concluded in a November 2011 letter that "there is no evidence of attorney misconduct on the part of Mr. Stein" and that "the case against Philip Kramer remains open." (10CT2176.) *See also*, 2CT448 (Layton admitting the "investigation focused extensively on Kramer & Kaslow and Phillip Kramer"). Notwithstanding its five-year investigation, Plaintiffs provided no evidence that all or part of

Ms. Nepomuceno's $2,500 was paid to Stein, whether directly or through any of the other defendants. This example proves that Stein actually *protected* those very People the Attorney General purported to protect but abandoned. Stein was entitled to a trial or evidentiary hearing so he could, for example, cross-examine Layton on how many such cases the Plaintiffs were mistaken about.

Ms. Prezio's statement that she was solicited by a caller asserting to engage in intake for Kramer and Stein and Mr. Murray's submission about an email he stated he received about alleged affiliations with Stein (4CT865) are consistent with Stein's theory and the money trail.

6. Money Received

Layton admitted in his declaration that the money led to Kramer, *not Stein*. (*See, e.g.*, 4CT866; *see also*, declarations of Butt and Phanco (*id*.) ("We instructed clients to make their checks out to Kramer and Kaslow and those checks were deposited into the Kramer and Kaslow account. After the check cleared, the money was transferred to Mitigation Professionals [which] would pay [APC].").) Even the checks cashed by Kramer bearing any purported reference to Stein in the "memo section" only further supports Stein's claim that

he was not involved in any fee sharing scheme and that other lawyers and non-lawyers exploited his name and trade dress in order to profit.

Stein could have been found to have been involved in a fee sharing scheme if even one of those payments with an alleged reference to Stein had made its way into any of Stein's accounts. Alternatively, some suspicion may have arisen if any of the other defendants were withdrawing large amounts of cash. The evidence shows neither, and thus Stein could not have been found to have engaged in unlawful fee sharing.

Indeed, the trial court tacitly conceded that there is no evidence Stein ever received any money from the alleged scheme, but it reasoned that there "may" be evidence that has "not [yet been] identified." (4CT873 (citing the Attorney General's reasoning).) Issuing an injunction requires more than a finding that it is irrelevant that no direct evidence exists on the basis that there may be evidence that has not yet been identified.

In sum, although the foregoing evidence constitutes the trial court's best examples at finding that Plaintiff will likely prevail at a trial (4CT938 ("I have spent a lot of time on this…")), none of the evidence shows any wrongdoing by Stein, and it amounts to nothing

more than the mere speculation that evidence may still be uncovered (but never was).

The analysis in sections IIA-C applies with at least equal force to the orders assuming jurisdiction. *See, e.g.*, § 6190.34 (the court must find, among other things, that the "*facts* set forth in Section 6190 *have occurred*") (emphasis added); *see*, 4CT854 (court finding that "[i]t is simply not believable that Stein did not participate in the mass joinder marketing scheme").

It is important to note that it was revealed at Stein's December 19, 2011 bail hearing – two months after the court made its speculative findings – that the State Bar's investigator admitted under oath that there was no evidence of even one penny traced to Stein:

> THE COURT: … [H]ow much money have you been able to attribute to this defendant that was maybe laundered through somebody else?
>
> [MR. LAYTON:] I'm unable to come up with an exact amount. I know that from the amount of this – November through March, about $7 million came into [Kramer's] account based on the mass joinder. Part of it was from Phil Kramer but a lot of it with the memo section was to Mitchell J. Stein.
>
> THE COURT: In the memo sections that you've seen, what amount -- can you -- as best you can, understanding you don't have all the information that you need to give me an exact number, can you

estimate what percentage of that was Mr. Stein's and what was Mr. Kramer's?

[MR. LAYTON:] A certain -- from a certain time it was Mr. Stein's. But I'm unable to determine how much money -- because it goes to the third-party marketers. It goes from Kramer to attorney processing center. And then Cashier's checks were made out to -- I don't know in the amount of -- to Mitchell Stein. So I'm unable to --

THE COURT: But some percentage of the 7 million?

[MR. LAYTON:] Yes, your Honor.

…

Cross-examination

By Mr. Saunders:

…

Q: You had the cashier's checks?

[MR. LAYTON:] No, I do not.

Q: Do you know how many there are?

[MR. LAYTON:] No, I do not.

Q: Do you know what amount they are?

[MR. LAYTON:] No, I do not.

Q: Do you have any evidence, as you sit here today, that there was, in fact, any money that came from Philip Kramer's accounts to Mitchell J. Stein in any form?

[MR. LAYTON:] I'm not done with the investigation yet. So, no, I do not.

Q: So the answer is, no, you don't have any evidence; is that correct?

[MR. LAYTON:] No, I do not.

…

BY MR. SAUNDERS:

Q: How many money orders?

[MR. LAYTON:] I don't know.

Q: How many cashier's checks?

[MR. LAYTON:] I don't know.

Q: What was the amount?

[MR. LAYTON:] I don't know.

Q: What are the names of the three people you spoke to?

[MR. LAYTON:] Gary DiGirolamo, Damian Kutzner and Bill Stevenson.

Q: Give me the first one again, please?

[MR. LAYTON:] Gary DiGirolamo.

Q: Do you have any bank records that in any way support anything?

THE COURT: I'm going stop. We're done.

(6CT1234-38.)

Plaintiff's Heightened Burden

Plaintiffs' burden of showing that it is likely to prevail on the merits at a trial was substantially heightened due to the irreparable

injury its action was causing the People. *See, Benda v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978) ("when the balance [of harm] tips less decidedly [toward the plaintiff]," "then the plaintiff [must] show [a more] robust … likelihood of success on the merits"). And "the harm which the defendant [or third party] might suffer if an injunction were issued may so outweigh that which the plaintiff might suffer in the absence of an injunction that the injunction should be denied even though the plaintiff appears likely to prevail on the merits." *IT Corp*., 35 Cal. 3d 63, 73. Of course, where the injured party happens to be the very party sought to be protected by the action, the test is not so much one of "balancing" harms, but the question is then to which extent plaintiff has, at a minimum, grossly miscalculated the matter.

iii. Balancing of Injury to Parties and Non-Parties

The trial court reasoned that it was absolved from balancing the harm and that it could issue a preliminary injunction "solely on [its analysis of] the reasonable probability of success on the merits" because "the plaintiff [is] a governmental entity seeking to enjoin an alleged violation of its law." (4CT874.) The trial court relies on a line of cases so holding prior to 1983, when the Supreme Court of

California established an important additional balancing test. It instructed that *even where the plaintiff is a governmental entity*, when "the defendant [or third party] shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties." *IT Corp. v. Cty. of Imperial* (1983) 35 Cal. 3d 63, 72.[17] California courts have since followed this rule irrespective of who brought the action. *See, e.g., People v. FXS Management, Inc*. (2016) 2 Cal.App.5th 1154, 1159 (balancing harms although the action was brought by the Attorney General); *State Bd. of Barber Examiners v. Star* (Ct. App. 1970) 8 Cal. App. 3d 736, 738-39 (applying test established in *IT Corp*.); *Water Replenishment District of Southern California v. City of Cerritos* (2013) 220 Cal.App.4th 1450, 1463 (same); *People ex rel.*

[17] The injunction at issue in *IT Corp*. was brought by the county in its cross-complaint against IT Corp. In stark contrast to the court's findings in this case, the affirmance of the issuance of the preliminary injunction in *IT Corp*. was based on findings of specific and substantial wrongdoing by IT Corp. ("approximately 66 percent of [IT's] wastes were [unlawful]") (*compare*, Layton admissions: no dollar traced to Stein) and the finding that "[e]ven after issuance of the injunction, IT would still be able to process geothermal and pesticide wastes." *IT Corp.*, 35 Cal. 3d 63 (*compare*, consumer complaints: tremendous harm suffered by the many clients left without the lawyer of their choice, their suits being dismissed as a result, and many losing their homes with no substitute representation).

Brown v. Black Hawk Tobacco, Inc. (2011) 197 Cal.App.4th 1561, 1571 (same); *County of Kern v. T.C.E.F., Inc.* (2016) 246 Cal.App.4th 301, 315 (same); *see also*, Leubsdorf, *The Standard for Preliminary Injunctions* (1978) 91 Harv.L.Rev. 525, 541 (the ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause). This test extends to non-parties to the suit. *See, Santa Cruz Fair Bldg. Ass'n v. Grant* (1894) 104 Cal. 306, 308 ("in granting an injunction the court is bound to consider the amount of injury which may be thereby inflicted on strangers to the suit and third parties"); *Socialist Workers etc. Comm. v. Brown* (Ct. App. 1975) 53 Cal. App. 3d 879, 888 ("[i]n reaching that conclusion, the court considers whether a greater injury will result to the defendant (and to third persons) from granting the injunction").

Stein presented overwhelming evidence of injury suffered by the People by presenting the very voice of the People, including 173 declarations of his former clients, stating that "Mitchell J. Stein & Associates LLP never did any marketing of [and] never sent out any mailers to [the client]" and that the clients do "not consent to, nor will ever consent to, having another or different lawyer represent [the

client] in connection with [his or her] homeowner litigation matters" (2CT461-82;3CT483-644), declarations of *pro bono* clients, clients who "sought out Mr. Stein" themselves, never saw any advertising and were never solicited by a marketer (3CT645-654), and numerous additional client declarations and letters refuting Plaintiffs' allegations and confirming Stein's assertions. *See, e.g*., declaration of Editha Nepomuceno (3CT581):

> I explained to [the State Bar] that during my search for Mitchell J. Stein, I found a website that directed me to what appeared be (sic) Mitchell J. Stein's office. When I called the number on the website, it was in fact not Mitchell J. Stein's office but an office named Mass Litigation Alliance…. I ended up paying $2,500 to Kramer & Kaslow under the promise that Mitchell J. Stein would be the attorney representing me…. I made it perfectly clear to [the State Bar] that my complaint was against Phillip Kramer and NOT Mitchell J. Stein…. When I finally contacted the office of Mitchell J. Stein, he agreed to represent me on a contingency only basis. I have not paid Mitchell J. Stein one penny.

(Emphasis in original.)

Letter of Hugh M. Collins (3CT500):

> Mitchell J. Stein and Associates did not make any promises of guaranteed results…. I believe some people falsely represented themselves as Mitchell J. Stein and Associates. From my first conversation with Mitchell J. Stein and Associates they assured me they did not have an association with people I first dealt with and later posted that on their website. I believe

> these people collected money that Mitchell J. Stein and Associates never saw…. [The State Bar told me] I have to find a new attorney…. I find this as an outrageous corruption within our system.

Letter of Frank Martinez (3CT570-71):

> … I came to the conclusion that [Stein] was not part of Brookstone Law or the others since they would never let me speak to [Stein] or even see any type of retaining document that [Stein] was the lead attorney [as they had previously promised]. … [After seeking out Stein myself], [h]e met with me personally for five hours … and I can see that he was very serious in helping people.

Declaration of Nancy Frost (3CT655):

> In or about the first week of August, 2011, I learned that Mitchell J. Stein was not associated with Brookstone Law and more importantly, not lead counsel on the Wright v. Bank of America lawsuit.

Declaration of Nikki White (3CT656):

> At no point was it represented to me that Vito Torchia would be lead counsel on the Wright case. If I would have known that, I would not have paid Brookstone any money … under the impression that I was retaining … Mitchell J. Stein.

No reasonable precautions were undertaken to protect the clients (e.g., § 6180.5 "file notices, motions and pleadings on behalf of the client where jurisdictional time limits are involved and other legal counsel has not yet been obtained"). Consumers were deprived

of their property without due process. Lawsuits on behalf of the clients, which were criticized by no party except for the banks being sued, were dismissed as a result of this action. (*See,* RJN; 4CT809; *see also*, 4CT939 (THE COURT: "I'm sure that the cases [against the banks] have a great deal of merit."); 2CT285;4CT813 (JUDGE HIGHBERGER: "[*Ronald*] plaintiffs … are presumably going to get a judgment for billions of dollars against Bank of America").)

While the authorities require a showing of harm that *would* result from the issuance of the preliminary injunction, here, there was ample evidence that the court's August 15, 2011 orders *had already caused* and continued to cause substantial harm to the People.

Instead of focusing on harm to himself, Stein was more concerned with injury to his clients, which underscores Stein's continuing devotion to them and clearly conflicts with a purported finding that Stein was "incapable of devoting the time and attention to, and providing the quality of service for, his … law practice which is necessary to protect the interest of a client." § 6190. If there is any evidence of a lack of devotion and attention to Stein's clients, it is by the Plaintiffs and trial court. (*See, e.g.*, 3CT500 (State Bar told clients "to find a new attorney"); 4CT874 (court need not consider "relative

harms in its evaluation of the facts"); *compare*, *e.g.*, 3CT570-71 ("[Stein] was very serious in helping people"); 3CT581 ("I have not paid Mitchell J. Stein one penny").)

The trial court's focus was clearly not on the harm to the affected People, but on its gut feeling that she "simply [did] not believ[e]" Stein was uninvolved and thus should be sanctioned. However, the law is settled that "by denying a preliminary injunction the court does not per se protect a wrongdoer from judicial sanction, which in most cases would come following trial on the merits." *DVD Copy Control Ass'n Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 253.

Here, the trial court abused its discretion because it undoubtedly " 'exceeded the bounds of reason [and] contravened the uncontradicted evidence.' " *IT Corp*. (1983) 35 Cal. 3d 63, 69 (citing *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527, quoting *Estate of Parker* (1921) 186 Cal. 668, 670; *California State University, Hayward v. National Collegiate Athletic Assn*. (1975) 47 Cal.App.3d 533, 544). This conclusion is underscored by the fact that the very party this action was purportedly brought for was injured by the action, and it cannot be said that a plaintiff could prevail or even likely prevail in an action that is frivolous to begin with. It is further

highlighted by the fact that the Attorney General ultimately went out of its way to avoid a trial on the merits in favor of what it admitted was a strategy calculated to avoid Stein being declared the prevailing party.

D. Summary Adjudication, Dismissal Without Prejudice Were a Clear Abuse of Discretion

i. Fifth Cause of Action Is Invalid

On April 28, 2015, outside of Stein's presence, the trial court and the Attorney General began weaving an unprecedented plan to find a way this case "can come to an end" without "call[ing] Stein the prevailing party." (7CT1681-82;9CT2070,2079;8CT1706-13;9CT2078 (Attorney General expressing concern because "Stein has continually contested the factual underpinnings of the case").) The trial court eventually proposed that the Attorney General "explore the idea of adding a cause of action for declaratory relief re: injunction which has already been issued" so it "may move for summary judgment" against Stein. (7CT1681-82;9CT2070,2079;8CT1706-13.)

The use of CCP § 1032 was clearly erroneous and transparently deceptive. The Attorney General purported to "seek declaratory relief on the issue of costs" (7CT1684), yet the very basis for its addition of the "prevailing party" cause of action was that Stein was "judgment-

proof" (9CT2087,2098-2100,2077,10CT2384-85), and it had no intention to seek costs.[18] No authorities exist allowing for § 1032 to give rise to a separate, stand-alone, cause of action for declaratory relief or allowing a plaintiff to dispose of an action because it does not know "what to do with" a defendant who will not settle and who is "judgment-proof." (9CT2098-2100,2077,2087;11CT2529;11CT2555 ("dismissal … would bring this case to an end").)

Stein is entitled to a trial despite his circumstances. Under long-standing law, "[a] prisoner may not be deprived, by his or her inmate status, of meaningful access to the civil courts if the prisoner is both indigent and a party to a … civil action threatening his or her personal or property interests." *Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792 (listing possible "remedies to secure access," e.g. "deferral … until … release[]," "appointment of counsel," "holding of trial in prison") (*id*., 792–93); *Payne v. Superior Court* (1976) 17 Cal.3d 908, 927, 933 ("when a prisoner is threatened with a judicially sanctioned

[18] § 1032, read in conjunction with §§ 1021.5 and 1021.8 (setting forth limits to awarding costs and fees in enforcement actions) arguably makes § 1032 inapplicable to the Attorney General in this action in any event.

deprivation of his property, due process and equal protection require a meaningful opportunity to be heard").

The fifth cause of action fails to even specify which causes of action Plaintiff purportedly prevailed on. *See, e.g., Childers v. Edwards* (1996) 48 Cal.App.4th 1544, 1550 (to be determined the "prevailing party," plaintiff must have prevailed on a specific "cause of action itself," not even just "*an element* of a cause of action") (emphasis in original). The reason Plaintiff failed to specify the cause of action it purportedly prevailed on is that none of its original causes of action against Stein remained after its dismissal of counts one, two and three. Of course, there cannot be a determination that a plaintiff prevailed on any cause of action when the plaintiff dismisses its causes of action. These defects cannot be cured by a finding that the Plaintiff "did a wonderful job" (9CT2079)[19] or prevailed against Stein because of the "results [it] obtained against the *other defendants* in this case…." (8CT1713 (emphasis added).) By the court's own admission, its suggestion to add the cause of action was unprecedented, unstudied and perhaps ill-considered. (9CT2079 ("I

[19] Hundreds of clients complaining about Plaintiffs' action and the admitted lack of evidence clearly conflict with a finding that Plaintiffs "did a wonderful job."

haven't really thought about it…. This case is unlike any other case I've had … with respect to prevailing").)

The trial court further failed to consider that the judgments against Stein and sentence were not final, and that Stein could prevail against the Plaintiffs at a trial. Meanwhile, Stein's sentence was vacated and Stein is represented by Professors Paul D. Clement and Jeffrey L. Fisher to present his false-evidence claim to the U.S. Supreme Court. Just like the trial court abused its discretion in *presuming* that Stein was involved in a mass marketing and fee sharing scheme (4CT854) and in failing to balance the harms in "*presuming* that public harm will result if an injunction is not issued" (4CT874 (emphasis added)), it also abused its discretion in *presuming* that the federal judgments and conviction were final, that a delay would somehow "prejudice" Plaintiff, and that Stein could not prevail at a trial, despite Layton's admissions and the clients' very own voices that this suit was wrongfully brought against Stein. Just like the Plaintiffs impermissibly availed themselves of § 6190 to terminate – against the will of countless consumers – the legal representation they bargained for, its use of § 1032 to deprive Stein of adequate

adjudication and avoid having to answer the People it harmed makes a mockery of the integrity of the judiciary.

ii. The Trial Court Lacked Jurisdiction

Because the trial court lacked jurisdiction over Stein's law practice (*see*, section I, *supra*), it could not have entered an order of summary adjudication and judgment against Stein. The fact that the second amended complaint again failed to name the LLP although the court had entered an order against the LLP to authorize the transfer of its assets four months prior, naming instead Stein's dissolved corporation, which the Attorney General still alleged "at all relevant times, has transacted and continues to transact business throughout California…." (8CT1688), when it *concurrently conceded* that Stein's corporation was dissolved (as of 2008) and even made this part of its separate statement as an "undisputed fact" (9CT1931,1964), smacks of bad faith. *See*, *Penasquitos, Inc. v. Superior Court* (1991) 53 Cal.3d 1180, 1183, 1194 ("a party may not sue [a dissolved corporation] … on a claim that arose after the dissolution…." because "injury or damage [must have been] caused by the corporation's predissolution activities") (citing Corp.Code, § 2011, subd. (a)). The courts should

not tolerate such gamesmanship, whether by a governmental entity or any other party to a legal proceeding.

iii. The Court Improperly Relied on Its Prior Orders in Awarding Summary Adjudication

Even if the trial court had jurisdiction over Stein and if summary adjudication on the newly added cause of action were permissible, the trial court abused its discretion in relying on the August 15, 2011 orders, preliminary injunction and order assuming jurisdiction as the basis for finding the Attorney General to be the "prevailing party." As the Attorney General conceded, it was concerned about the following:

> [COUNSEL FOR PLAINTIFF:] Stein has continually contested the factual underpinnings of the case, which, I think – well –
>
> THE COURT: Yeah. Right. That's true. But there have been certain findings already…. And there's an injunction in place.

(9CT2078.)

It is well-settled that

> [t]he granting or denial of a preliminary injunction *does not amount to an adjudication* of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, *pending a trial on the merits*, the defendant should or that he should not be restrained from exercising the rights claimed by him.

Socialist Workers etc. Comm. v. Brown (Ct. App. 1975) 53 Cal. App. 3d 879, 887–88 (emphasis added); *Bomberger v. McKelvey* (1950) 35 Cal. 2d 607, 612 ("unless it appears that the court intended a final adjudication of the issue involved, a decision on an application for a preliminary injunction does not amount to a decision on the ultimate rights in controversy"). The trial court clearly did not intend for the preliminary injunction to finally adjudicate the issues, rather, on May 20, 2013, the court "estimated [the trial] to last for three weeks." (6CT1484.) Stein was prepared to cross-examine witnesses at an evidentiary hearing requested by Kramer (5CT1001,1000 ("[Plaintiffs] would object to having an evidentiary hearing")), proceed to trial (5CT998), or move for summary judgment against the Attorney General (8CT1717-1813).

iv. Summary Adjudication Briefing Should Have Been Continued

Stein set forth specific reasons for requiring additional time to prepare an opposition to the motion for summary adjudication. (9CT2121-31.) The trial court did not find that Stein failed to make the requisite showing under § 437(h). Instead, the court erroneously

found that Stein's request was "late-made." (10CT2355.)[20] The request was not late-made, because CCP § 437c(h) expressly allows for the application to be made "at any time on or before the date the opposition response to the motion is due." *See also, Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1353. It is well-established that "[t]o mitigate summary judgment's harshness, the statute's drafters included a provision making continuances-which are normally a matter within the broad discretion of trial courts-*virtually mandated*." *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 34 (citing CCP § 437c(h); *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395) (emphasis added). "[T]he interests at stake are too high to sanction the denial of a continuance without good

[20] The court also concluded that Stein did not need additional time because he was represented by counsel in the other pending actions, however, Stein explained in detail and under oath that his CJA counsel had informed the Florida district court that he was transitioning into private practice, and *pro bono* counsel also could not devote as much time to the matter as a paid lawyer would, and Stein was working closely with counsel to assist in navigating them through the complex record and prepare extensive filings. (9CT2122;2129-31.) In fact, the federal cases are so extended and complex that the government in both appeals requested an additional 90 days to file its respondents briefs. *See*, Ex. E, RJN. Rather than consider Stein's well-reasoned basis for needing additional time, it baselessly presumed that a delay would somehow "prejudice the People." (10CT2355.)

reason." *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 634. The court's reasoning that Stein was already provided a continuance is misguided because the first continuance was based on a *stipulation* and not on an application under § 437c(h). (9CT2112-14.)) A stipulation between the parties is, of course, entirely different from, if not contrary to, an application under § 437c(h).

By the trial court's own admission, the "prevailing party" stratagem was unprecedented, and Stein could have, if given the additional time, more thoroughly researched why it is impermissible. Stein was also attempting to obtain additional discovery to prove the Attorney General did not misspeak when it referred to a "joint" effort with the federal government in first shutting down and discrediting his law practice based on no evidence, then to have Stein convicted based on false evidence and sentenced based on what the Eleventh Circuit found was a record too "thin" and "speculat[ive]" to justify Stein's sentence. (9CT2076,2121-31; *see*, Ex. D at pg. 36, RJN.)

Though undoubtedly innovative and imaginative, the court's "prevailing party" remedy surely is not one of the "innovative [and] imaginative procedures" this Court contemplated in *Wantuch*, *supra*, 32 Cal.App.4th at 793 to secure access.

v. Plaintiff Failed to Meet Its Initial Burden

Under well-established law, if a movant fails to meet its initial burden of persuasion that it is entitled to summary adjudication, the burden of persuasion is not shifted to the respondent. *See,* § 437c(p)(1) (burden of persuasion does not shift to defendant until "the plaintiff or cross-complainant has met [its initial] burden"); *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468 (" '[t]here is no obligation on the opposing party … to establish anything by affidavit unless and until the moving party has by affidavit stated " 'facts establishing every element … necessary to sustain a judgment in his favor…"); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, as modified (July 11, 2001) (same). Thus, although Stein filed an affidavit, no separate statement or affidavit was required because the Attorney Generally wholly failed to meet its initial burden. None of the alleged "undisputed material facts" set forth in the Attorney General's separate statement are proper grounds for summary adjudication in the first instance. *See, e.g*., 9CT2087,20982100,2077,10CT2384-85;11CT2529 ("Stein is judgment-proof"); 8CT1713 (Plaintiff "prevailed against the *other defendants* in this case….") (emphasis added); 10CT2382;9CT2078

(court entered a preliminary injunction against Stein). Thus, even if Stein had admitted these facts, the Attorney General would not be entitled to summary adjudication on its fundamentally flawed cause of action.

vi. The Evidentiary Rulings

The trial court abused its discretion in ruling that the Layton testimony is "[ir]relevant" and "hearsay." (10CT2408-09.) The testimony is critical to the case and is an exception to the hearsay rule under Evid. Code § 1220; *see also, People v. Hovarter* (2008) 44 Cal.4th 983, 1007. Additionally, Stein had cited to the Layton testimony earlier in the proceedings (*see, e.g.*, 6CT1227) and the Attorney General did not object to the evidence and has waived its right to object to it in the summary adjudication proceedings. *See, e.g., 3 Witkin, Cal.Evidence* (3d ed. 1986) §§ 2033 and 2034, pp. 1994–1996; *Mosesian v. Pennwalt* Corp. (1987) 191 Cal.App.3d 851, 865. In addition to all of the trial court's evidentiary rulings as to the material Stein respectfully asks this Court to independently take judicial notice of (*see*, RJN), Stein also appeals the evidentiary rulings as to the *Copper* action (10CT2409-10), which is clearly more relevant than the actions against Stein Plaintiff asked the court to

judicially notice despite repeatedly admitting these actions are "unrelated." *Thierfeldt v. Marin Hosp. Dist.* (1973) 35 Cal.App.3d 186, 193 ("[j]udicial notice may be taken of matters set forth in related actions"). In contrast, the *Copper* action is related inasmuch as it directly resulted from the injury caused by this action. Judge Breyer's unambiguous instruction that the outcome of this action would "directly impact" the *Copper* action (10CT2213) introduces significant issues of federal law affecting at least hundreds of parties.

The Court is respectfully requested to take judicial notice of these proceedings under its inherent authority. *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal. App. 4th 875, 881("a reviewing court is required to take judicial notice of any matter the trial court has properly judicially noticed *or should have judicially noticed*[] (Evid.Code, § 459, subd. (a))[,] … [and] is not required to [do so] in the same tenor as that used by the trial court. (Evid.Code, § 459, subd. (a).)") (emphasis added). *See*, RJN.

vii. Dismissal Without Prejudice Was Improper

Plaintiff engaged in a 4-page discussion about its "tremendous latitude in determining whether to dismiss – with or without prejudice – its complaint" and why *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097,

1102 is inapposite, which Stein cited to point out that, unlike in *Kurwa*, the Attorney General had no intention to dismiss its causes of action "for possible litigation later." (11CT2582-84,2563.)[21] A plaintiff's intent is critical to "the *proper* exercise of a plaintiff's right to voluntary dismissal...." *Lee v. Kwong* (2011) 193 Cal.App.4th 1275, 1280 (emphasis in original).

Stein argued that the Attorney General has "made abundantly clear that" it intends to dismiss the action as "a 'way [this case] can come to an end'" (11CT2563.) This goes to the heart of the discussion set forth herein and the Attorney General's concern Stein would be the prevailing party upon dismissal. *See*, § 1032(a)(4) ("'[p]revailing party' includes … a defendant in whose favor a dismissal is entered").

Plaintiff was aware of Stein's intention to move for summary judgment *against* it and expressed concerned about the "factual underpinnings of the case." (8CT1717-1813;9CT2078.) The California Court of Appeal has imposed restrictions to a plaintiff's right to voluntary dismiss its action to "avoid abuse by plaintiffs who, when led to suppose a decision would be adverse, would prevent such

[21] In *Kurwa*, *supra*, the parties entered into a mutual "agreement holding some causes of action in abeyance for possible future litigation." *Id*., at 1100.

decision by dismissing without prejudice." *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 909.

The repeated admissions that the intention was to dispose of the case (*see, e.g*., 9CT206 ("THE COURT: So this case is finally coming to an end, correct? [PLAINTIFF'S COUNSEL:] Hopefully, your Honor."); 11CT2555 ("dismissal … would bring this case to an end")), clearly would have required dismissal *with* prejudice. The courts are "loath to adopt a rule that would encourage dishonesty and gamesmanship [by way of abusing §§ 581(b)(1), (c)]." *Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765, 770.

III. THIS COURT'S MARCH 24, 2017, JUNE 15, 22 AND 28, 2017 ORDERS

A. The Record Contains a Suitable Substitute for the Reporter's Transcript

On March 24, 2017, the Court ordered the parties to brief the issue of providing a reporter's transcript. The record contains a suitable substitute[22] by including the transcripts of hearings on the OSCs re: preliminary injunction, order assuming jurisdiction over Stein's law practice, asset freeze and order appointing receiver (October 19, 2011)

[22] *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 707, as modified (Nov. 7, 2012) (appellant may provide "a suitable substitute").

(4CT909), the motion for order approving procedures for receivership and transfer of frozen funds and status conference (April 13, 2015) (9CT2060), the application for an extension of time to oppose summary adjudication motion and the motion for summary adjudication (February 5, 2016) (11CT2548).[23] Counsel meanwhile ordered the transcript of the hearing on the application to lift the stay for the purpose of vacating the August 15, 2011 orders, which is appended to the motion to augment filed concurrently herewith. (AR12-57.) These oral proceedings are extensively briefed herein.

Cal. Rules of Court, Rule of Appellate Procedure 8.130, 28 U.S.C.A. provides that "appellant [may] elect[] to proceed without a reporter's transcript." … "[T]he reviewing court, on its own or the respondent's motion, may order the record augmented under rule 8.155 to prevent a miscarriage of justice." While the record already provides an extensive basis for this Court to reverse the judgment and remand to the trial court, Stein respectfully files, concurrently herewith, a motion for an order permitting the record to be augmented

[23] No additional hearing was held prior to the order granting preliminary injunction (5CT1100) and the hearing on entry of judgment was not reported, but the record contains its minutes (11CT2600).

with the transcript of the August 15, 2011 hearings in accordance with Rule 8.130(a)(4). Counsel for Stein have attempted to order the foregoing transcript but have been informed by the court that the reporter's transcript is still deemed sealed. *See*, motion to augment. In the alternative, the Court has the authority, on its own motion after review of the briefs and record, to allow for the transcript to be included in the record. *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 699 (this Court would order record augmented with transcript, if, after its review of the briefs and record, it "determine[s] that a reporter's transcript was necessary 'to prevent a miscarriage of justice'").

B. <u>Stein's Motions Before This Court</u>

After the parties' initial stipulation for a 60-day extension of time to file opening and respondent's briefs, Stein filed his first application for an extension of 60 days within which to file his opening brief on June 12, 2017. The application was unopposed, contained far more details than the Court's form application provides for (http://www.courts.ca.gov/documents/2DCA-04.pdf) and set forth specific reasons for the request under oath, which included the fact that Stein was incarcerated and did not receive the record until April 2017. Nevertheless, on June 15, 2017, the Court denied the

application. Given the Court's extraordinary order, the undersigned joined the appellate team shortly thereafter. The Court again summarily denied new counsel's request for additional time although Mr. Harris became counsel of record only one day prior to the due date of the opening brief (June 22, 2017). On June 23, 2017 (incorrectly docketed by the clerk as having been filed on June 26, 2017), the undersigned filed a notice of deficient record and motion to correct and augment the record, which was also denied by this Court.

While extensions of time are discretionary, the California Court of Appeals regularly grants applications for an extension of time to file an appellate brief, oftentimes several successive such applications, when the requesting party requires additional time to prepare and file its brief. *See, e.g.*, *Doran v. White* (Ct. App. 1961) 196 Cal. App. 2d 676, 677 (granting "six successive extensions of time"); *Santa Venetia Ctr. for the Arts & Humanities v. San Rafael Unified Sch. Dist.* (Cal. Ct. App. Aug. 14, 2006) *No. A108849*, 2006 WL 2338242, at *4 (granting ten successive applications for an extension of time to file opening brief); *In re Baby Boy L.* (1994) 24 Cal. App. 4th 596, 611, as modified (May 3, 1994) (granting "five requests for extensions of time to file appellant's opening brief"); *People v. Hale* (Cal. Ct. App.

Oct. 31, 2013) No. A136133, 2013 WL 5861545, at *3 (granting five requests for extension to file appellate brief).

No prejudice would have arisen from an order granting an unopposed first application for extension of time or providing additional time to correct and augment the record. To the contrary, Appellee could arguably attempt to bolster its arguments in being able to reference the records sought to be added. *See, Capital Nat. Bank of Sacramento v. Smith* (1944) 62 Cal.App.2d 328, 339 ("liberality should be exercised in granting continuances when they are not prejudicial to the interests of other parties to the actions").

Even without the additional record and time to file the opening brief, this brief reflects proper grounds and the record contains overwhelming evidence establishing that the trial court abused its discretion at each step of the proceedings. For example, the trial court stated it "spent a lot of time on [its preliminary injunction ruling] … and [it] wrote an extensive tentative setting forth very direct pieces of evidence that tie [Stein] to this" (4CT938 (referring to 4CT849-74)), and Stein has shown that not one piece of evidence it relied on proves any wrongdoing by Stein. No additional record could possibly cure the wrong legal standards applied by the trial court in first terminating

the legal representation of countless consumers and then disregarding the harm caused to them. The numerous significant "error[s are] apparent on the face of the existing appellate record." *In re Estate of Fain* (1999) 75 Cal.App.4th 973, 992.

Nevertheless, because "due process requires [among other things] … a record of the proceeding adequate to permit meaningful judicial or appellate review," *In re Roger S.* (1977) 19 Cal. 3d 921, 937–38, should the Court find insufficiencies in the record, it is respectfully submitted that it would be in the interest of justice to allow the record to be made even at a late stage, as the Court contemplated in *Chodos, supra*. For all of the reasons set forth herein, Stein has no reason to lack confidence about having the record augmented with whichever additional records the Court may wish to review that Stein inadvertently did not designate from his prison cell (and neither did Appellee) and currently does not have access to. The outcome of this appeal may affect hundreds of consumers and homeowners nationwide. In the words of Judge Breyer, "if Stein prevails in state court, that victory will directly impact [Stein's former clients]." (10CT2213.)

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court reverse the judgment against Stein and remand with instructions to declare as null and void the orders appealed herein, reverse the evidentiary rulings appealed herein and determine Stein to be the prevailing party or allow the case to proceed in the trial court.

Dated: July 26, 2017

Respectfully Submitted,

s/James N. Fiedler

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CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, Rule 8.204(c))

I hereby certify that this brief complies with the type-volume limitation of Rule 8.204(c), California Rules of Court, in that the brief contains 13,987 words as counted by the Microsoft Word processing program used to generate the brief.

Undersigned counsel further certifies that this brief complies with the typeface and type style requirements of Rules 8.204(b)(3) and 8.204(b)(4) because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface.

Dated: July 26, 2017

Respectfully Submitted,

s/James N. Fiedler
James N. Fiedler

CERTIFICATE OF SERVICE

The People of the State of California vs. The Law Offices of Kramer & Kaslow, et al.
Court of Appeal Case Number: B275955
Los Angeles Superior Court Case Number: LC094571
Related Los Angeles Superior Court Case No.: LS021817

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 6700 Fallbrook Ave, Suite 100, West Hills, CA 91307.

On July 26, 2017, I served the foregoing document described as

APPELLANT'S OPENING BRIEF

by placing true and correct copies thereof in sealed envelopes addressed as follows:

See attached Service List.

I enclosed said documents in envelopes for U.S. postal service delivery, deposited each envelope in the mail at Delray Beach, FL with postage thereon fully paid.

Executed on July 26, 2017 at Delray Beach, Florida. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Rasika Reichardt

Service List

The People of the State of California vs. The Law Offices of Kramer & Kaslow, et al.
Court of Appeal Case Number: B275955
Los Angeles Superior Court Case Number: LC094571
Related Los Angeles Superior Court Case No.: LS021817

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