**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 REPLY 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<br>NAME: James N. Fiedler<br>FIRM NAME: Law Offices of James N. Fiedler<br>STREET ADDRESS: 6700 Fallbrooke Ave, Ste 100<br>CITY: West Hills STATE: CA ZIP CODE: 91307<br>TELEPHONE NO.: (855) 244-5033 FAX NO.: (818) 597-2132<br>E-MAIL ADDRESS: jfiedlerlaw@gmail.com<br>ATTORNEY FOR (*name*): Mitchell J. Stein | SUPERIOR COURT CASE NUMBER: LC094571 (Related Case No. LS021817) |
| APPELLANT/ PETITIONER: Mitchell J. Stein<br>RESPONDENT/ REAL PARTY IN INTEREST: The People of the State of California | |
| **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS** (Corrected)<br>(*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:

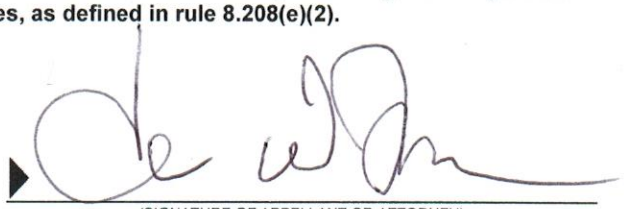
| Full name of interested entity or person | Nature of interest (*Explain*): |
|---|---|
| (1) ATTORNEY PROCESSING CENTER | Defendant |
| (2) BALLARD SPAHR LLP | Receiver |
| (3) BUTT CLARENCE JOHN | Defendant |
| (4) CONSOLIDATED LITIGATION GROUP | Defendant |
| (5) CUSTOMER SOLUTIONS GROUP | Defendant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

☒ 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

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*Defendants.*

# APPELLANT'S REPLY BRIEF

## PRELIMINARY STATEMENT

The Respondent's Brief ("RB")[1] is replete with misstatements of the law and facts, conflicting theories, and baseless assertions. For example, the AG maintains that the MSA order and judgment appealed from "contain[] no findings of liability" under the SAC it dismissed, yet it does not explain how it could, under such circumstances, be found to be the prevailing party. The AG claims that Stein's exhibits are immaterial to the SAC it dismissed,

[1] "RB" refers to Respondent's Brief; "AOB" refers to Appellant's Opening Brief; "AG" refers to Respondent, the Attorney General; "MSA" refers to the motion for summary adjudication; "TRO" refers to the August 15, 2011 temporary restraining order against Stein, "SAC" refers to the AG's second amended complaint, "the People" as used herein refers to Stein's former clients; "Plaintiffs" as used herein refers to the AG in this action and State Bar in the related action.

yet it also takes the position that facts immaterial to the SAC should support a finding that it is the prevailing party.

It asserts that the notice of appeal fails to give notice that Stein is appealing the TRO and Preliminary Injunction, yet it argues throughout its RB that the MSA is based in large part on these orders. The AG argues Stein failed to properly designate the record to include the exhibits attached to the August 15, 2011 orders, yet the AG chose to designate other records – excluding those very exhibits, which Stein in any event moved this Court to include and which this Court ultimately ordered to be added to the record in the interest of justice.

In order to support its claims against Stein, the AG – even on appeal – cites to the very transcript it also objects to as being "irrelevant" and "hearsay" and as being improperly before this Court (RB:46 ("should not be before this Court") and does so misleadingly and in violation of the applicable rules of evidence.

Perhaps in an effort to explain the extraordinary bias of the trial court against Stein, the AG argues that a trial court's credibility determinations are not reviewable and that it is not, under any circumstance, an abuse of discretion to automatically disbelieve a convicted litigant, when these propositions find no support in the law.

Many other issues are simply ignored by the AG, such as the fact that it sued the wrong entity, the fact that it transferred Stein's funds to the DOJ (not a purported victim), and that the People did in fact suffer irreparable injury as a result of the Plaintiffs' action. The AG misstates that the trial court balanced the harms, when in truth the court clearly refused to even acknowledge that the initial presumption of harm is rebuttable, citing

to cases which are no longer the law in California. The AG wholly ignores a defendant's due process rights, calling it instead mere "theater."

## ARGUMENT

### I. Record On Appeal And Notice of Appeal Are Not Insufficient

#### A. No Lack of Notice

As the AG is aware and repeatedly concedes, this appeal attacks the trial court's findings, which are based in large part on the TRO and Preliminary Injunction – two orders specifically used by the trial court as a basis for avoiding that Stein be deemed the prevailing party. Indeed, the AG argues at least seventeen times throughout its RB that the MSA was in large part based on its purported "victories" throughout the trial court proceedings. *See, e.g*., RB:40-41 (calling TRO and Preliminary Injunction "instrumental in putting an end to the Mass Joinder Scheme"); RB:27,28,38,40 ("victories"); RB:12,13,16,27,38,39,41,49 (success in "shut[ting] down the scheme"); RB:12,23,28,40,41 ("putting an end to" the scheme); 9CT2094-95,2101,2105 (basing its MSA in large part on prior orders); 10CT2381-82;11CT2591 (trial court basing its findings in large part on prior orders).

The Supreme Court of California repeatedly instructed that because "'[t]he law aspires to respect substance over formalism and nomenclature …," a reviewing court should apply liberality "when it is reasonably clear the appellant intended to appeal from the judgment [or order not listed] and the respondent would not be misled or prejudiced." *Walker v. Los Angeles County Metropolitan Transp. Authority* (2005) 35 Cal.4th 15, 22 (citing *City of Shasta Lake v. County of Shasta* (1999) 75 Cal.App.4th 1, 11; *Vibert*

*v. Berger* (1966) 64 Cal. 2d 65, 67–68 (same); *see, Aweeka v. Bonds* (1971) 20 Cal. App. 3d 278, 282, n.1 (applying liberal construction doctrine to preliminary injunction order not listed on notice of appeal).

Finally, this Court has held that a notice of appeal gives sufficient notice if the order or judgment appealed from references the order(s) not noted on the notice of appeal. *See, Vernon v. Great Western Bank* (1996) 51 Cal.App.4th 1007, 1011, n. 2. In this appeal, both the order and judgment listed on the notice of appeal specifically reference the TRO and Preliminary Injunction. (10CT2381-82;11CT2591.)

The AG was put on sufficient notice for purposes of this appeal.

**B. The AG's Choice To Designate The Record**

The AG designated its own record on appeal (11CT2652). While Stein explained that he sincerely believed that he had designated the exhibits to the August 15, 2011 filings in designating the August 15, 2011 applications and petition from his prison cell, and while Stein – *not* the AG – filed motions for an extension of time to file AOB and for this Court to include these files,[2] the latter of which the Court granted, the AG does not explain its choice not to designate its very own exhibits on which its case is based when it took the time to designate numerous other records it felt were important to its RB (such as each of the final judgments against the eleven other defendants not being appealed (11CT2652)). The AG's strategy on appeal should be transparent to the Court: The trial court's rulings are indefensible.

[2] *See*, motions filed with the Court on June 23, 2017, July 26, 2017, September 21, 2017, and October 12, 2017.

### C. Suitable Substitute For Reporter's Transcript

In the trial court as well as its appellate brief, the AG cites to and relies on the pertinent reporter's transcripts it to its pleadings in the lower court, which are part of the record on appeal. (*See, e.g.*, RB:40 (citing 9CT2079) (reporter's transcript of April 13, 2015 hearing at which the trial judge proposed the unprecedented summary adjudication strategy, which the AG appended to and relied upon in its MSA (9CT1959)); RB:26 (citing 11CT2551-52) (reporter's transcript of hearing on MSA, which the AG appended to and relied upon in its motion for entry of final judgment (11CT2529)).) The parties did not object to the transcripts' admissibility in the trial court proceedings. The AG cites to no authority that under these circumstances – in which the transcripts were submitted in the court below in support of the very order appealed from – those very transcripts do not constitute a suitable substitute.[3]

### D. The AG's "Waiver" Claims Are Moot

The authorities cited at RB:14,n.1 for the proposition that the record is insufficient are inapposite. It is settled that if record insufficiencies are cured, the Court will consider the augmented record. *See, e.g., Ehman v. Moore* (1963) 221 Cal. App. 2d 460, 463. Prior to the due date of Stein's AOB, Stein noted that the August 15, 2011 pleadings he designated did not

[3] Even if the Court were inclined to not consider the transcripts a suitable substitute, Stein would follow the Court's instructions on providing a different substitute. Particularly because both parties cited to these records both in the trial court as well as in their respective appellate briefs, Stein submits that it would be fair to provide an opportunity to cure what the Court may deem a technical defect.

have the exhibits attached thereto (which is the same evidence the trial court relied on in entering the Preliminary Injunction) and filed an emergency motion to augment the record and for an extension of time.[4] The Court eventually granted Stein's motion after Stein's AOB was filed and well before the RB was due and thus, the AG's waiver claims are incongruous with the Court's order.[5]

Stein submits that the augmented record now only further supports Stein's claims and explains the AG's choice not to designate what it says would have "best protect[ed] the trial court's orders" (RB:34).

**E. Stein Cites To All Relevant Evidence**

Finally, the AG's "waiver" argument in contending that Stein only cites to evidence favorable to his claims (RB:54 (citing *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881)) [6] is plainly inaccurate. Stein clearly does not "ignore the testimony [or other evidence] of the

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[4] The record was not received until April 2017 – months after it was due to be delivered. (*See*, June 12, 2017 motion for an extension of time, at 3.)

[5] Stein does not suggest that the AG should have cited to records not yet delivered to the Court by the Superior Court Clerk but that the AG was well aware that the Court chose to review the record in the interest of justice and could have, for example, moved for a continuance of the deadline of its appellate brief.

[6] In any event, the *Foreman* waiver does not apply to arguments not involving sufficiency-of-evidence claims, such as the trial court's failure to balance the harms, the AG's failure to sue the correct entity, as conceded in the AG's separate statement, and the significant other deficiencies concerning the MSA.

respondent," *Kruckow v. Lesser* (1952) 111 Cal.App.2d 198, 200, but extensively discusses each and every piece of evidence the trial court relied on in finding that Stein was involved in the alleged scheme: indeed, Stein discusses the matters far more extensively than the AG does in its RB. (AOB:34-39.) The appellant's "burden is … to show that error has been committed in the trial court" and only "[i]n the absence of a contrary showing in the record, all presumptions in favor of the action of the trial court will be indulged by an appellate court." *Alexander v. McDonald* (1948) 86 Cal.App.2d 670, 671. Unlike in *Foreman* and its progeny, Stein made the sufficient contrary showing by citing to *all* of the evidence allegedly in support of Plaintiffs' position, which the trial court relied on by directly quoting the evidence.[7] The AG cannot complain about not being able to "protect the trial court's orders on appeal" merely because the evidence does not truly justify the trial court's findings. The findings reflect the trial judge's personal beliefs that there "may" be evidence as to Stein that has "not [yet been] identified" (4CT873). The trial court's admission that it relied on believing in the existence of evidence that has not yet been identified as to Stein rules out the possibility that such non-existent evidence can be in the record for the AG to identify in "best protect[ing] the trial court's" findings; however, as Stein stated, it would

[7] The AG explains that, due to the purported record deficiencies, it cites to the "applications themselves" (which it also describes as "evidence submitted in support of the [TRO] and Preliminary Injunction") (RB:14,n.1), however, it fails to mention at RB:14,n.1 that the AG also relies on the trial court's direct quotes from the underlying evidence in support of its factual findings (*see, e.g.*, RB:58-59).

welcome the Court providing the AG with another opportunity to attempt to identify the evidence referred to by the trial judge as having "not [yet been] identified." The AG's response that it is unable to defend the trial court's findings after Stein discusses all of the evidence the trial court relied on can be deemed a tacit admission that the trial court's findings are as indefensible as Stein submits at AOB:34-39. Stein presents a *prima facie* case of insufficiency of evidence and the Court augmented the record. As the Supreme Court held in *Sutro Heights Land Co. v. Merced Irr. Dist.* (1931) 211 Cal. 670, 688 "where [the appellant] made out a *prima facie* case of the insufficiency of the evidence to justify a finding of fact" and respondent cannot prove otherwise, the waiver applies to the respondent, not appellant.

## II. The August 15, 2011 Orders and Preliminary Injunction Are Reviewable

### A. The AG Fails To Show Why Exception To Mootness Doctrine Should Not Apply

The AG submits no untimeliness argument as to the TRO and Preliminary Injunction but argues that "both … are appealable orders [and] Appellant was required to include them in his notice of appeal" (RB:34). The AG fails to demonstrate that the August 15, 2011 orders and Preliminary Injunction do not fall within the exception to the mootness doctrine for issues that are capable of repetition, yet evading review. (AOB:23-24.)

The AG argues that because it specified reasons for not giving notice of the TRO, it "complied with the[] requirements" (RB:54). *See*, Code Civ. Proc., §527(c)(2)(C) ("for reasons specified the applicant should not be

required to so inform the opposing party"). However, Stein submits that the stated reasons (RB:54), which turned out to be baseless as to Stein, are insufficient reasons for not giving notice under Code Civ. Proc. § 527(c)(2)(C) when the action could – and did – cause irreparable injury to a third party. Not once does the AG deny that its action caused substantial harm to Stein's clients. Stein demonstrated that this is a textbook example of a case that is "capable of repetition, yet evading review" with devastating consequences. It is, among other things, the reality of this injury which directly conflicts with a finding that the AG was "victor[ious]," and the injury should be respected "over [any] formalism and nomenclature." *Walker, supra,* at 22.

Finally, the AG declined to address all of Stein's arguments under the guise that the State Bar is currently not a party to this appeal, including the question whether notice may be omitted where an "applicant lacks evidence of wrongdoing and [admits that it] is 'not done with the investigation yet….'" (AOB:23-24 (citing 6CT1236).) Thus, the Court may "assume ... the ground urged by appellant … is meritorious." *Miles v. Speidel* (1989) 211 Cal.App.3d 879, 881.

**B. The Evidence Fails To Show Stein's Involvement**

Because the AG's arguments about the record and notice of appeal are in truth specious, in addition to its baseless claim that Stein "recit[es] only his own evidence" (RB:32-33; *see*, section IE, *supra*), the AG waives its arguments in response to Stein's evidence claims and the Court may thus assume the arguments are meritorious (*Miles, supra,* 211 Cal.App.3d at 881). More importantly, the Court can verify these claims given it ordered

the record and/or may order additional briefing, and, in the interest of justice, decide whether the trial court improperly entered the August 15, 2011 orders and Preliminary Injunction as to Stein. (*See*, AOB, at sections I, IIA-C.)

### C. Abuse of Discretion By Refusing To Balance Harms

The AG briefly addresses the substantial harm its action caused to the many homeowners and other clients only once within its 63-page RB in making the conclusory suggestion that Stein's "former clients may not have been aware of the laws defendants were breaking" and that the trial court evaluated "the correct harm" (RB:56-57). This reasoning is flawed for several reasons.

First, the AG suggests that even after its allegations against Stein were made public, Stein's clients at the time should not be able to freely chose whom they wish to be represented by. Stein's clients expressly wished – despite the disclosure of the Plaintiffs' allegations – to be represented by Stein, and these clients' decision should not have been forcefully interfered with.[8]

The AG's reasoning that "no party may consent to waive a law … established for the public good" (RB:56,n.134) is misguided. This appeal does not concern revoking a "private agreement" that waives any law (Cal. Civ. Code, § 3513). *See, McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 962 ("§ 3513 … is a generally applicable contract defense"). For the sake of argument, even if any evidence of fee-splitting as to Stein and a waiver

[8] The AG's reasoning does not even address clients outside of the court's jurisdiction and who were engaged in other litigation.

provision in an agreement existed – which they do not – the clients' wish to nevertheless be represented by Stein after the disclosure of Plaintiffs' claims could not be interfered with based on purported public policy concerns. It is well-settled that waivers freely made after a dispute has arisen are not contrary to public policy. *See, e.g., Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 383. As the California Supreme Court recently clarified, "a party may waive a statutory provision if a statute does not prohibit doing so …, the statute's public benefit ... is merely incidental to [its] primary purpose, and waiver does not seriously compromise any public purpose that [the statute was] intended to serve." *McGill, supra,* 2 Cal.5th at 961. The People's choice to continue to be represented by Stein would not have compromised any public purpose, and the trial court erred in not granting Stein's application to vacate the orders. (AOB:29-32.) The harm is amplified by the AG's admission that it "never took a stance on the merits of [Stein's] lawsuits [on behalf of the People against the banks]" (RB:14,n.2), thus conceding that its action caused possibly meritorious litigation the People bargained for to be terminated as a result of its unfounded public policy concerns and incomplete investigation.

Because there is no contract dispute concerning a waiver and because the only relevant and reliable evidence that exists to this day proves that Stein did not engage in any fee-splitting (*see, e.g.*, section IIIC, infra), there is no express or implied "waiver [of] a law … established for the public good" at issue in the first place. Section 3513 does not justify depriving the People of their choice of representation or ending the litigation they bargained for under these circumstances.

Second, the admitted lack of evidence as to Stein (AOB:34-43) and substantial doubts that arise thereunder should have caused the Plaintiffs to, at a minimum, give notice to those who would be most affected by the proceedings, rather than to rush to freeze those very retainer moneys the People paid which the AG later handed to the DOJ. The better practice would have been to either continue the investigations or choose to not name Stein as a defendant.

The AG incorrectly infers the trial court balanced the harms (RB:59-60). The trial court, without once addressing the harm caused to Stein's complaining clients, made the conclusory finding that "Plaintiff … is more likely to suffer" followed by its reasoning that (a) "the court is justified in *presuming* that public harm will result," and (b) "courts of this state have upheld preliminary injunctions issued against alleged law violations in a variety of statutory contexts *without expressly balancing the actual harms* to the parties … [where] the plaintiff was a government entity…." (4CT873-74 (emphasis added).) The trial court did not acknowledge that the initial presumption is rebuttable and that the caselaw it relied on in its final paragraph (*id*.) is no longer the law, which can lead to no other conclusion that it improperly refused to balance the harms. (AOB:42,43,44-49 (citing, e.g., *IT Corp. v. Cty. of Imperial* (1983) 35 Cal. 3d 63, 72).)

Finally, at no point does the AG dispute that substantial harm *was indeed* caused to hundreds of clients by the Plaintiffs' actions here, but it apparently infers that this harm was not "the correct harm" to be evaluated. The People whom the AG purportedly protected have now spoken and would disagree with a finding that the trial court was excused from

evaluating what the AG discounts as the "[in]correct harm." There is no support for the proposition that the law allows there to be an "incorrect" harm which should be disregarded if the harm is substantial and a direct result of a litigant's ill-advised enforcement action.

## III. The Trial Court Abused Its Discretion In Its "Prevailing Party" Findings

As an initial matter, Stein does not "misleadingly quote[]" from the transcript (RB:24,n.49) in order to show the AG's apparent concern about the weakness of its case against Stein. Stein agrees that the AG's counsel was "responding to questions from the court…." (*Id.*) More specifically, the exchange between the trial court and Mr. Jones, counsel for the AG, reads as follows:

> The Court: Why wouldn't you think about a dispositive motion [against Stein]?
> Mr. Jones: Without getting too much into –
> The Court: But it seems to me – I mean, then he's given due process. He can file responsive papers if he wants, you know.
> Mr. Jones: Stein has continuously 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.
> Mr. Jones: That's true, your Honor.
> The Court: And there's an injunction in place.
> Mr. Jones: That's true, your Honor.

(9CT2078.)[9]

[9] It cannot be said to be fair for any defendant to face a MSA which the trial court itself proposed to be filed under a new count the trial judge itself proposed to be added after giving *sua sponte* leave to amend, while inferring that the court would grant the MSA. The trial judge's bias against

The AG again concedes the weakness of its case by admitting that Stein "could technically be declared the prevailing party" (RB:24,13). The concerns raised in this appeal are more than concerns over mere "technical[ities]" (*id.*), as the law is clear that the prevailing party determination under Code Civ. Proc., § 1032(a)(4) (prevailing party may be "a defendant in whose favor a dismissal is entered") is not "a rigid interpretation" and that courts must instead "analyze[ ] which party had prevailed on a practical level." *Gilbert v. National Enquirer, Inc*. (1997) 55 Cal.App.4th 1273, 1277.

### A. None Of The "Facts" The Trial Court Relied On Are Material

The four criteria the MSA is based on can be summarized as follows: (1) the TRO, (2) the Preliminary Injunction, (3) the judgments against the *other* defendants, and (4) Stein's judgment-proof status and incarceration. (RB:12,39-40.) None provide a legitimate basis for entry of summary adjudication in favor of the AG, and the AG fails to cite to a single authority supporting its claims. It ignores the inescapable rule that the facts must be "facts which are material to the law suit and could change the result one way or the other if resolved in favor of one side or the other." *Pettus v. Standard Cabinet Works* (1967) 249 Cal.App.2d 64, 69. None of the facts "meet the quantum of proof required to establish liability, and thus

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Stein was exceptional, as observed by numerous witnesses and as is apparent from the record. (4CT899-5CT1067.)

could not change the result of the law suit one way or the other." *Id*. For this reason, Stein was not required to file a separate statement.[10]

*i. The TRO And Preliminary Injunction Are Immaterial To MSA*

The AG wholly ignores that "[f]or decades now, our Supreme Court has consistently reaffirmed that [t]he granting or denial of a [TRO or] preliminary injunction does not amount to an adjudication of the ultimate rights in controversy." *Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.* (2016) 6 Cal.App.5th 1178, 1186; *see, Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528 (citing *Miller & Lux v. Madera Canal etc. Co*. (1909) 155 Cal. 59, 62—63; *Kendall v. Foulks* (1919) 180 Cal. 171, 174; *People v. Black's Food Store* (1940) 16 Cal.2d 59, 62; *Bomberger v. McKelvery* (1950) 35 Cal.2d 607, 612—613; *Cal-Dak*

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[10] It is submitted that asking a defendant to confirm that he is "judgment-proof," incarcerated and that the trial court entered a TRO and Preliminary Injunction, when no such facts have any bearing on the merits, makes a mockery of the judiciary. To the contrary, Stein confirming, for example, the AG's admission in its separate statement that it sued the wrong defendant would arguably support entry of summary judgment in favor of Stein. (AOB:59-60.)

There can be no rule that not filing a separate statement in opposition to purported facts wholly unrelated to the case or a defendant's right to a proper adjudication on the merits will result in a mechanical granting of the MSA. It is settled that if "the moving parties' separate statement [does] not address a material fact in the complaint, it [does] not assert a *prima facie* case of entitlement to a summary judgment and [does] not shift the burden to plaintiff to file an opposing separate statement." *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 160 (citing Code Civ. Proc., §§ 437c, subd. (p)(2), 437c, subd. (b)(1)).

*Co. v. Sav-On Drugs, Inc*. (1953) 40 Cal.2d 492, 254 P.2d 497; *Surrey Restaurants v. Culinary Workers and Bartenders Union, Local No.* 535 (1960) 54 Cal.2d 461, 469); *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625, 1634. (*See also*, AOB:55-56.) This renders the orders immaterial to the prevailing party determination, though Stein has also shown that the orders were improperly entered in the first place.

*ii. Stein's "Judgment-Proof" Status And Incarceration Are Immaterial To MSA*

It is unclear how the fact that the AG settled with all of the other named defendants – a fact extensively briefed by the AG and relied on by the trial court (RB:12,14,18-19,39,41;9CT2096,2101,2084¶4; 10CT2382,2386) – is material. To the contrary, one cannot find fault with Stein wishing to proceed to trial or otherwise adjudicate the issues on the merits. Stein's case is clearly distinguished for the facts alone that not one penny from the profits of the scheme was traced to Stein, that the $30,409.84 the Plaintiffs froze were transferred to the Department of Justice because no "victim" claimed these funds,[11] that hundreds of the purportedly victimized People continued to support Stein and sued the AG as a result of the harm it caused to them.

The AG's concern about "wast[ing] judicial resources … only on an uncollectable paper judgment" and its contention that further proceedings are "unnecessary" due to Stein's incarceration (RB:23-24) are unfounded

[11] (*See*, AOB:2,27.)

and conflict with the foregoing precedent (section IIIAi, *supra*) as well as an incarcerated defendant's due process rights.[12] (AOB:51-52 (citing *Payne v. Superior Court* (1976) 17 Cal.3d 908, 927, 933*; Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792).) The AG wholly ignores Stein's due process rights, claiming instead that further litigation would be "solely for theater" (RB:41-42).

**B. Statutes Underlying The MSA Are Unavailable To AG**

The trial court clearly abused its discretion in finding that "Kamala D. Harris, Attorney General" is somehow a "person" that could avail herself to declaratory relief under Code Civ. Proc., § 1060 in the AG's enforcement action. (11CT2621.) The AG does not deny that § 1032 is not available to the AG in this action (AOB:50-51) and that it does not actually

[12] The AG's inference that Stein's resentencing might result in a longer sentence because the sentencing court "downwardly departed from the sentencing guidelines" at the first sentencing (RB:48,n.114) is misguided. The Eleventh Circuit did not remand because the court downwardly departed in finding that "there[ are] some obviously good aspects to [Stein's] background" (S.D. Fla. DE429:70, *United States v. Stein*; Case No. 11-cr-80205-KAM), but because the Eleventh Circuit found that the government presented a "thin record" to support its loss enhancement theory, based on which "the district court 'engage[d] in the kind of speculation forbidden by the Sentencing Guidelines.'" *United States v. Stein*, 846 F.3d 1135, 1154 (11th Cir. 2017) (citing *United States v. Bradley*, 644 F.3d 1213, 1292 (11th Cir. 2011)). Notably, Stein's petition for writ of certiorari (*see*, AOB:11,n.6) was denied recently, though the Supreme Court may have agreed with the government's argument that the "interlocutory posture" of the criminal action would prevent the granting of the petition and that Stein should bring "a single petition for a writ of certiorari seeking review of the final judgment." *Stein v. United States of America*, 2017 WL 5158038 (U.S.), ** 23, 24. The adjudication of Stein's substantial false evidence claims is not final.

seek "costs," and that asking for costs would directly conflict with its argument that Stein is "judgment-proof" and would be unlawful and exceed what it would be entitled to. Even if the statute were available to the AG, "[t]he declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action. The object of the statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues." *General of America Ins. Co. v. Lilly* (1968) 258 Cal.App.2d 465, 470. Finally, the AG fails to address the requirement that it must have prevailed on a specific "cause of action itself," not "*an element* of a cause of action," *Childers v. Edwards* (1996) 48 Cal.App.4th 1544, 1550 (emphasis in original), which it cannot show because it dismissed the SAC (AOB:52). These defects alone are fatal to the MSA.

**C. The AG's Evidentiary Objections**

The AG complains that the authority cited at AOB:60 instructing that evidentiary objections must be timely made "is over 30 years old" (RB:45,n.106), however, "[i]t is hornbook law that a timely and specific objection is required to prevent the consideration of certain evidence." *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co*. (1993) 14 Cal.App.4th 1595, 1611.

More importantly, as Stein argued, the ruling to exclude the Layton testimony as "hearsay" and "irrelevant" was an abuse of discretion because the grounds are clearly frivolous. "[S]pecifying the wrong ground [in the

litigant's objection also] constitutes a waiver." *Wagner v. Osborn* (1964) 225 Cal. App. 2d 36, 43.

Quite how frivolous the AG's objections are is aptly demonstrated by the following facts:

In describing the scheme at RB:15-16, the AG specifically mentions Stein twice – once in misleadingly alleging Stein did not "object" to a mailer,[13] and once in alleging that "Stein preferred to be paid his portion of the fees with money orders and cashier's checks, not checks" (RB:15,16). Astonishingly, in support of the latter claim, the AG cites to the very Layton testimony it states is "irrelevant" and "hearsay." (RB:16 (citing 9CT2147).) Specifically, the AG references, from Layton's testimony, the statements purportedly made by two of the other defendants (Gary DiGirolamo and Bill Stephenson) and one non-defendant (Damian Kutzner of Brookstone Law) (9CT2148) that are obviously hearsay. *See, e.g.*, *People v. Sanchez* (2016) 63 Cal.4th 665, 674 (hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated") (citing Evid. Code, § 1200(a)). Layton repeatedly admitted that he had no evidence that would back up these hearsay statements. (AOB:40-42 (quoting

[13] As Stein explains, the actual quote by the witness the trial court relied on is that "Stein *never responded* [about a Brookstone mailer the witness purportedly sent to Stein], leading [Vito Torchia of Brookstone Law – a non-defendant to this action –] to believe [Stein] had no objection." (*See*, AOB:34-35 (citing 4CT860) (emphasis added).) Stein's non-response to a mailer purportedly sent by a non-party to the alleged scheme does not constitute evidence of any involvement in the scheme, let alone "overwhelming" evidence (RB:58,59;AOB:34-35).

6CT1234-38).) In other words, in order to support its theory against Stein on appeal, the AG relies on the very Layton testimony it also objects to as being "irrelevant" and "inadmissible," when the only relevant and admissible statements Layton made show that there is no evidence of wrongdoing by Stein.[14] *See*, *People v. Hardy* (1992) 2 Cal. 4th 86, 139 ("[h]earsay statements by coconspirators … may [only] be admitted against a party if, at the threshold, the offering party presents 'independent evidence to establish *prima facie* the existence of ... [a] conspiracy'") (citing *People v. Leach* (1975) 15 Cal.3d 419, 430 (referencing Evid. Code, § 1223)).

Additionally, a party citing to the same evidence in presenting an argument may not object to the evidence on the grounds of authenticity, hearsay or relevancy. *See, e.g., Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 856 (ruling that "trial court abused its discretion … [in sustaining hearsay and relevancy objection because party raising objection]

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[14] It is clearly the AG – not Stein – who "misleadingly summar[ized Layton's] testimony" (RB:46; *see*, RB:16,26; *see* section IIIC, *supra*). In contrast, Stein directly quoted Layton's exact statements. (AOB:40-42.)

The AG also mischaracterizes Layton's letter in which he substantiated his finding that "there is no evidence of attorney misconduct on the part of Mr. Stein" (10CT2176;AOB:37) as being a letter "to an unknown consumer" (RB:46). The letter was sent to Ms. Nepomuceno (10CT2176), whose purported statements the Plaintiffs and trial court heavily relied on as to Stein and which she later revealed were misconstrued. (3CT581;AOB:37,46-47.) Ms. Nepomuceno is among the many homeowners who sued the AG for the injury Plaintiffs had caused her in *Copper, et al. v. Harris, et al.*, N. D. Cal. Case No. 3:12-cv-00987-CRB, which Stein asked the Court to take judicial notice. For these reasons, she is not an "unknown consumer" to the AG.

had relied on this very same evidence, [and] there was [thus] no merit to these objections").

For the AG to proclaim that this transcript "should not be before this Court" (RB:46) when one of the only two instances it specifically alleges involvement by Stein in its description of the scheme at RB:15-16 relies on this very transcript – and that in violation of Evid. Code §§ 1200(a) and 1223 – is stunning.

The evidence should be considered and, at a minimum, establishes genuine issues for a trial or would entitle Stein to entry of summary judgment in his favor or to be deemed the prevailing party on a non-technical basis.

**D. "Credibility" Claims**

As an initial matter, the trial court never made the express finding that Stein's declarations should be disbelieved due to the conviction he was appealing in the unrelated criminal action. One of the two "credibility" claims the AG makes occurred prior to Stein's criminal trial (RB:58-59), and, in any event, Stein does not argue that the trial court's findings of his involvement are baseless merely because his declaration stated he was uninvolved. It is nevertheless apparent that the trial court's posture towards Stein cannot be described as impartial, and it appears to have disbelieved Stein's declaration requesting a continuance (10CT2355), which is why Stein is compelled to address the AG's credibility reasoning (RB:25,47): indeed, under that reasoning, every convicted defendant would be bound to lose each and every baseless civil action brought against him on the sole basis that the defendant's statements should be summarily ignored and

disbelieved. The case law cited by the AG neither stands for this proposition, nor does it allow a trial court to disbelieve a witness based on speculations and misreading of other evidence in the record or, as in this case, to simply *believe* that there is evidence as to Stein that has "not [yet been] identified."

*Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832 (RB:47) is not helpful to the AG's position. In *Donchin*, the Court analyzed whether the party in that case "introduced enough evidence" to challenge the credibility of the witness, and the court ultimately found "other evidence in the record sufficient to create a triable issue about the credibility." *Donchin*, 34 Cal.App.4th at 1836, 40. In contrast, the AG merely makes conclusory assertions about Stein's credibility to justify disbelieving Stein whenever convenient.

*In re Jordan R.* (2012) 205 Cal.App.4th 111, 136 (RB:29,58-59) (suggesting that trial court's credibility findings are conclusive on appeal) is inapposite. A trial court's credibility findings are reviewable and could be deemed an abuse of discretion if "there [is] no substantial evidence in the record to support the findings of the trier of facts." *Darr v. Clevelin Realty Corp.* (1939) 33 Cal.App.2d 500, 507; *see also, People v. Lawler* (1973) 9 Cal.3d 156, 160 (credibility findings must only be upheld "if they are supported by substantial evidence"). For example, "where the record demonstrates that in the very nature of things *certain testimony cannot be true*," an appellate court will judge the witness' credibility. *Wilson v. Kestenholz* (1931) 113 Cal.App. 13, 15 (emphasis added). The rule generally applies to the trial court "where the case is tried without a

jury." *Badover v. Guaranty Trust & Savings Bank* (1921) 186 Cal. 775, 777.

The applicable statutes demand that "[t]he admission of such evidence is still subject to [Evid. Code, §] 352, which [only] allows the court to exclude evidence if its probative value is substantially outweighed by its prejudicial effect." *Piscitelli v. Salesian Soc.* (2008) 166 Cal.App.4th 1, 7; *People v. Castro* (1985) 38 Cal.3d 301, 307 ("when sections 788 and 352 are read together they clearly provide discretion to the trial judge to exclude evidence of prior felony convictions when their probative value on credibility is outweighed by the risk of undue prejudice"); *see*, Evid. Code, § 352 ("[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury").

The trial court never applied the test set forth in Evid. Code, § 352, nor is there any genuine "conflict[] in the evidence," Shamblin v. Brattain (1988) 44 Cal.3d 474, 479, nor are the findings supported by the requisite "substantial evidence," *Darr, supra*, 33 Cal.App.2d at 507. Rather, the trial court presumed that Stein's request for a continuance was insincere because Stein was assisted by counsel in the criminal action (10CT2355) and simply speculated – based on her personal belief – that the evidence made it "simply not believable" to her that Stein was uninvolved and that additional evidence exists but has not yet been identified. (4CT854; 4CT873.) The trial court's speculations were improper and, worse, they became the basis for the MSA, rendering illusory Stein's right to an adequate adjudication on the merits.

### E. Stein's Request For Continuance Should Have Been Granted

The citation to *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709 (RB:50) does not support the AG's claim that the refusal to grant Stein a continuance was justified. In *Lerma*, though "[t]he only thing before the court was the attorney's bald assertion that facts essential to justify opposition may have existed[,]" the court nevertheless remanded because it held that "a continuance of a summary judgment motion is … mandatory [if] the requirements of Code of Civil Procedure section 437c, subdivision (h)" are met, but if they are not met, "the court must [still] determine whether the party requesting the continuance has nonetheless established good cause therefor." *Lerma*, 120 Cal.App.4th at 716. Courts "must abide by the guiding principle of deciding cases on their merits rather than on procedural deficiencies. … Such decisions must be made in an atmosphere of substantial justice." *Id*., at 718. The AG's arguments, as adopted by the trial court, that the denial is proper because "the deadline had been known to [defendant] for three months," that the request was "not timely" (though it was timely pursuant to Code Civ. Proc, § 437c(h) (AOB:57)), the conclusory claim that the AG would somehow be "prejudiced" and that the court already once continued the hearing based on a stipulation (RB:51;10CT2355;AOB:53,57) could not be more conflicting with the court's instructions in *Lerma*.

Stein's detailed declaration in support of the request for continuance belies the claim that there was "no cogent justification" or that the request

was the result of any "extreme tardiness" (RB:50).[15] None of the circumstances supporting denial of a continuance existed, to wit, "proximity to trial; prejudice to the other party; previous dilatory conduct or abuse of pre-trial procedures." *Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 96. The unprecedented nature of the AG's scheme to dismiss the action and be declared the prevailing party alone would justify the continuance Stein sought.

The error in refusing to grant a continuance is exasperated by the AG's unlawful failure to seek leave to amend its complaint, referencing instead the reporter's transcript of the hearing at which the trial court appears to give *sua sponte* permission to amend (9CT2093 ("*sua sponte*"); 7CT1682; 9CT2078-79; *see*, 1CT8, *et seq*.). "The Fourteenth Amendment's guarantee of due process" extends to the "opportunity to be heard in opposition to [a] motion." *Cordova v. Vons Grocery Co.* (1987) 196 Cal.App.3d 1526, 1531. The additional opportunity to oppose the motion the AG was required to file could have given Stein a chance to prevent the implementation of the improper scheme, given notice of the AG's reasoning and given Stein more time to prepare to, e.g., move to strike the SAC or MSA pursuant to Code Civ. Proc., § 475 (court must cure "defect … in the pleadings…." if "substantial rights of the parties [are affected]"); *see also, Anmaco, Inc. v. Bohlken* (1993) 13 Cal.App.4th 891, 901 (striking non-compliant amended complaint and holding that plaintiff also "put an

[15] *See also*, section IIID, *supra* (discussing "credibility" claim (RB:47,51)).

end to the provisions of the previous complaint" by amendment which had to be stricken).

### F. The Other Bases For Granting the MSA, Dismissal Without Prejudice, And Entry Of Final Judgment Are Unsupportable

The AG points to the rule that "this Court may affirm summary adjudication on any correct legal theory so long as the parties had the opportunity to address that theory in the lower court" (RB:30 (citing *California School of Culinary Arts v. Luyjan* (2003) 112 Cal.App.4th 16, 22). This Court, however, clearly instructs that this rule applies *only if* no "triable issue of facts exists … and the sole remaining issue is one of law." *Id*. The AG never met its initial burden of proof that no triable issue exists (*see, e.g*., sections IIIA-B, *supra*; AOB:59-60) and thus the rule is inapplicable, but even presuming for the sake of argument that it did, there is no authority or justification of any kind permitting adjudication of the AG as the prevailing party when its intent was to dismiss the action and none of the prior orders adjudicated the issues. Indeed, in a paradoxical fashion, the AG argues that "none of [Stein's] exhibits related to issues contained in the … SAC or Appellant's answer" yet that "the only conceivable relevance Appellant's evidence may have had would have been to a finding of liability under [the SAC], which the People did not seek in

their MSA" (RB:44-45) [16] and the court "made no findings of liability" under its SAC, which it dismissed (RB:14,28).

This Court reasoned in an unpublished opinion that "evidence related to … dismissed causes of action [have] no tendency to prove or disprove any disputed fact," *Carlisi v. MacAllister* (Cal. Ct. App. Mar. 25, 2010) No. B215100, 2010 WL 1081152, at *2 (citing Evid.Code, § 210 ("'Relevant Evidence' means evidence ... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action"), highlighting the inherent logical flaw in the AG's theory. While Stein did not have an adequate "opportunity to address

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[16] It should be noted that the AG's claim that Stein's exhibits should not be considered by the Court are untimely and unfounded (RB:48). The AG also asserts that these exhibits "are properly subject to judicial notice" and purports that this Court already "took judicial notice of them" (*id*.), though the record indicates that on August 22, 2017, the Court deferred its ruling on the motion.

Stein listed the relevancy for each exhibit in his motion. For example, the AG does not dispute its transfer of the frozen funds to the DOJ. Stein does not assert these facts alone warrant reversal, but the "unrelated" forfeiture order, for example, supplements Stein's claims that (a) that no "victim" existed as to Stein and that (b) the agencies collaborated in order to cause injury to Stein, his defense and reputation. By way of further example, the order staying the *Copper* action could suggest that the AG's "prevailing party" concern relates perhaps more to Judge Breyer's holding that "if Stein prevails in state court, that victory will directly impact [Stein's former clients]" (*Stein v. Harris* (N.D. Cal., Aug. 3, 2012, No. C 12-00985 CRB) 2012 WL 3202959, at *8) than a genuine concern about Stein seeking costs. (AOB:68;10CT2213.) Stein submits, however, that he has presented sufficient arguments and evidence that the trial court abused its discretion at each stage of the proceeding absent consideration of this background information.

that theory," no interpretation could render the AG's legal theory a "correct" one. (RB:38-42; AOB:50-56,59-60; *see*, sections IIIA-B, *supra*.)

Even the AG concedes that Stein would ordinarily be entitled to a trial on the merits. (RB:41 ("typical[ly] …, the next step in litigation would have been … to proceed to trial on the merits….").) A defendant's right to a trial on the merits is never dissolved by the fact that "other … defendants had settled," that the defendant is "judgment-proof" or based on a plaintiff's or court's impermissible presumption that the plaintiff *will* prevail at a trial (RB:41,42 ("[t]he law does not compel litigation solely for theater"). The Court should admonish litigants and courts from making a mockery of a defendant's right to a trial on the merits by discounting it as "theater."

The right to due process is particularly highlighted in this case where even the Plaintiff expressed concerns about the strength or existence of the underlying evidence against Stein and its own investigator declares that he "is not done with the investigation yet." (9CT2078;6CT1236.) To this date, not one penny from the scheme can be attributed to Stein, which is not cured by the trial court's impermissible presumption that additional evidence might turn up later. (4CT873.)

Finally, the AG fails to rebut Stein's claim that the dismissal "without" prejudice was a sham (AOB:61-63 (e.g., citing *Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765, 770 (warning courts to not "adopt a rule that would encourage dishonesty and gamesmanship [by way of abusing Code Civ. Proc., §§ 581(b)(1), (c)]")).)

It is inaccurate that the AG "agreed" to dismiss its action against Stein *after* it "gained a judicial determination that [it was] the prevailing

party" (RB:52). *Prior to* filing the SAC, the AG strategized with the trial court in Stein's absence how it may dismiss its action against Stein without "call[ing] Stein the prevailing party" as even admitted in the MSA; in fact, the AG filed the SAC as a tool to dismiss the SAC (9CT2070,2078,2079,20872095;7CT1681-82;8CT1706-13;RB:27,38.)[17] In light of these repeated admissions, it was improper to allow the SAC to be filed, to allow dismissal without prejudice, and it was a manifest abuse of discretion to grant the MSA.

## IV. Related State Bar Action

The AG complains that the arguments are "intertwined" and that the State Bar is not a party to the appeal (RB:23,60-62). Stein notes that his notice of appeal also lists the related State Bar action (LS021817) (11CT2614) which was *automatically* dismissed with entry of the final judgment in favor of the AG *without* notice to Stein (*see*, Ex. A to motion for the Court to take judicial notice filed herewith). That appeal has not been dismissed. *See*, Cal. Rules of Court, Rule 8.821(a)(3) ("[f]ailure to serve the notice of appeal neither prevents its filing nor affects its validity, but the appellant may be required to remedy the failure"). Stein also notes that both the order and judgment listed on his notice of appeal mention the

[17] The AG inaccurately asserts that it "added [the fifth] cause of action to request a judicial determination of the prevailing party issue *before* determining whether to dismiss their remaining claims against Appellant" (RB:39) (emphasis added). The record clearly shows that the AG's desire to dismiss the action *preceded* the trial court's suggestion to file a SAC to add a fifth cause of action as an attempt to dismiss the action without having Stein deemed the prevailing party. (9CT2076-79,2094.)

order assuming jurisdiction over the law practice of Mitchell J. Stein (10CT2385;11CT2595) and the judgment against Stein even notes that the AG "achieved its goal" "[w]ith the aid of the State Bar and the Court-appointed Receiver in this action" (*id.*). Should the Court deem it necessary to the adjudication of this appeal to join the cases or require the State Bar to be served, Stein will follow any instructions the Court may deem fit.

The AG is well-aware of the "intertwined" nature of the actions – its pleadings and the court's orders list both case numbers including the order granting MSA (*see, e.g.*, 10CT2380;9CT1929,2016) and, contrary to the AG's statement (RB:23,n.43 (asserting "trial court inadvertently listed the [AG's] case's case number" on the assumption of jurisdiction order),[18] the record shows the State Bar submitted pleadings listing the AG's case number on all of its pleadings, at least after August 26, 2014 (*see, e.g.*, 11CT2444,2513,2515,2521,2523), and the State Bar action docket reflects that all filings and entries in Case No. LS021817 after August 26, 2014 occurred on the lower court docket of the AG's case (Ex. A to RJN filed herewith).

The State Bar's August 15, 2011 petition was filed and heard together with the AG's application, both the AG and State Bar participated at key hearings, both relied on the same underlying evidence, and the underlying evidence was ordered by the Court for its review as to both cases. The California Supreme Court held long ago that a reviewing court should consider an appeal to have been taken from a related case where

[18] It is unclear how the AG would purport to know whether the trial court or State Bar used the case number "inadvertently."

"nevertheless the cases were in some respects treated as merged by both the parties and the trial judge" and "if only for the reason that the evidence taken applied to all." *Kellett v. Marvel* (1936) 6 Cal.2d 464, 472-73.

Stein submits that the use of case numbers was not inadvertent but was part of the Plaintiffs' attempt to unlawfully freeze Stein's assets prior to his criminal trial under a wrongly applied statute, then attempt to "dole out this money" (9CT2074) and transfer it to the DOJ, in essence unlawfully robbing Peter – the People who retained Stein and later sued the AG – to pay Paul under a criminal forfeiture order.[19]

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court reverse the judgment and order granting MSA against Stein and remand with instructions to declare as null and void the August 15, 2011 orders and Preliminary Injunction against Stein, reverse the evidentiary rulings appealed herein and allow the case to proceed in the trial court.

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[19] Footnote 98 of RB does not refute Stein's claim that the agencies collaborated in an effort to disadvantage Stein in both actions against him. The AG remains silent on its transfer of the frozen funds to the DOJ in the criminal action in violation of *United States. v. Monsanto*, 491 U.S. 600, 603 (1989) (AOB:27-28).

Dated: December 20, 2017

Respectfully Submitted,

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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 8,506 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 13-point Times New Roman typeface.

This Brief complies with the Electronic Formatting Requirements and Guidelines of the Second District.

Dated: December 20, 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 14942 Gault St, Van Nuys, CA 91405.

On December 20, 2017, I served the foregoing document described as

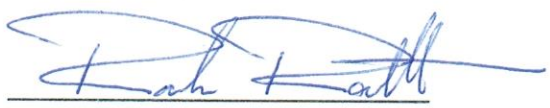
**APPELLANT'S REPLY BRIEF**

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 December 20, 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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