NO. _____

IN THE SUPREME COURT OF CALIFORNIA

MITCHELL J. STEIN,

Defendant and Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent.

After a Decision of the Court of Appeal of the State of California, Second Appellate District, Division Five, Case No. B275955

The Superior Court of Los Angeles County, Case No.: LC094571
Related Los Angeles Superior Court Case No.: LS021817
The Hon. Ann I. Jones, Presiding

PETITION FOR REVIEW

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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.

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IN THE SUPREME COURT OF CALIFORNIA

MITCHELL J. STEIN,
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Plaintiff and Respondent.

PETITION FOR REVIEW

ISSUES PRESENTED

1. Can an unlawful judgment in favor of plaintiff based on a cause of action which was found not to be authorized by law be rendered lawful for the alleged reason of lack of prejudice to the appealing party under Code Civ. Proc., § 475 and Cal. Const. art. VI, § 13 even in cases involving substantial injury to hundreds of identified third parties and where the related third-party interest was established by court order?

2. Do Code Civ. Proc., § 475 and Cal. Const. art. VI, § 13 permit an unlawful judgment in favor of plaintiff based on a cause of action found not to be authorized by law to stand based on alleged lack of prejudice to the appealing party when such an outcome disrupts the uniformity in the administration of justice?

3. Do Code Civ. Proc., § 475 and Cal. Const. art. VI, § 13 permit an unlawful judgment in favor of plaintiff based on a cause of action found not to be authorized by law to stand based on alleged lack of prejudice to the appealing party when the judgment deprives the party against which

judgment is entered of his rights under the Fifth Amendment to the United States Constitution?

WHY REVIEW SHOULD BE GRANTED

This Court admonished over a century ago that, "unless some very restricted meaning can be given to the amendment to [Code Civ. Proc.] section 475, it is plainly unconstitutional and void." *San Jose Ranch Co. v. San Jose Land & Water Co*. (1899) 126 Cal. 322, 325. Rather than restrict the meaning of § 475, the Court of Appeal interprets California's harmless-error provisions to restrict its *duty* to reverse judgments which rest on errors so severe that they violate due process and identified third-party interests. Indeed, though the protection of the interests of third parties utilizing the court system was the primary objective behind the enactment of the harmless-error rule, the court's mechanical application of Code Civ. Proc., § 475 and Cal. Const. art. VI, § 13 now precludes consideration of a third-party interest found to be directly impacted by the outcome of this action by court order as repeatedly raised by the appealing party.

This case involves a judgment in favor of Plaintiff-Respondent, the People of the State of California ("AG") on a cause of action the Court of Appeal admits is not authorized by law, for relief the AG is not legally entitled to, based on evidence immaterial to the relief, yet deemed harmless because the court found no prejudice to the appealing party. The Court of Appeal here utilized California's harmless-error provisions to cure the fiction of a judicial determination that a party prevailed on dismissed causes of action.

The fact that no like controversy exists does not render review less important – to the contrary, the possibilities for litigants to create novel controversies are endless. Unprecedented litigation tactics lead to arbitrariness and confusion among the judiciary, which can only be resolved by this Court's intervention. (*See also*, 9CT2079 (trial court: "I haven't really thought about [the AG's ability to plead a prevailing-party cause of action]").)

Failure to carve out exceptions to the harmless-error rule can lead to unjust and absurd results, as reflected by the court's reasoning at oral argument that, so long as no "cost [is] assessed against [Petitioner]" under the erroneous prevailing-party judgment, Petitioner is precluded from "say[ing] the mere existence of that cost is prejudicial." (OA recording, at 21:25-22:18.)[1] Put differently, so long as the reviewing court informally finds that respondent will refrain from exercising rights under a judgment it was not entitled to in the first place, such unlawful judgment must be deemed harmless, according to the court. The precedents of this Court and the United States Supreme Court preclude such legal gymnastics to be implemented in affirming a judgment the Court of Appeal admitted is unsupportable.

Several factors make this case a well-suited vehicle for the Court to clearly define the restrictions in interpreting California's harmless-error provisions:

[1] Petitioner will promptly provide the Court with a copy of the recording, should it so order.

First, the underlying error is blatant and undisputed. The Court of Appeal agreed with Petitioner ("Stein" or "Petitioner") that the AG's cause of action at issue is prohibited by law in holding that there exists "no basis to support a stand alone cause of action for declaratory relief as a 'prevailing party.'" (Opn., at 12.) Code. Civ. Proc. § 1021.5 also enjoins the AG from seeking costs under Code. Civ. Proc. § 1032 in an enforcement action such as this case. Guidance is equally needed if this Court agrees with Stein that the inter-relationship between structural error and harmlessness applies in the civil context, a claim the Court of Appeal rejected.[2]

Second, this case is suitable for review because the third-party interest in the outcome of this action was judicially established by court order. (*See*, the Hon. Charles Breyer's stay order finding that "if Stein prevails in state court, that victory will *directly impact* [the third parties]." *Stein v. Harris* (N.D. Cal., Aug. 3, 2012, No. C 12-00985 CRB) 2012 WL 3202959, at *8 (emphasis added). (10CT2213.) The Court of Appeal refused to take judicial notice of the matter. (Opn., at 2 n.1.) The third parties comprise 309 clients of Stein's former law firm, who filed suit against the AG and State Bar following the unlawful raid of the firm's offices and seizure of their property by the AG and State Bar in this action, which ultimately led to the dismissal of important litigation these clients were engaged in against their lenders.

Third, the AG's admitted ulterior motive behind the prevailing-party claim highlights why courts should be cautious in their application of the

[2] Appellant's court-ordered letter brief ("ALB"), at 2-5.

harmless-error rule. The AG made clear that its intention to be declared the prevailing party before dismissal of its action was a strategy to prevent Stein from being declared the prevailing party. (Opn., at 6, 8 "[T]here's a possibility that [defendant] may claim he's a prevailing party for purposes of costs [which] would be inequitable…." "This Motion for Summary Adjudication … will allow the Court to determine the prevailing party issue *so that the* [Attorney General] *may avoid uncertainty on this issue*.") (emphasis added); *see also*, 9CT2077-78 (AG conceding that "[t]he problem … with dismissing without prejudice is first [the third-party] action against the People in bringing this law enforcement action".).) Review is thus further warranted to prevent litigants from abusing the judicial system in utilizing statutes for purposes unintended by the Legislature.

This Court's review is necessary to "settle [] important question[s] of law," "to secure uniformity of decision" (Cal. Rules of Court, rule 8.500(b)(1)), to avoid injury to innocent third parties, and protect a litigant's constitutional rights within a judicial system which should permit no tolerance for gamesmanship.

STATEMENT REGARDING PETITION FOR REHEARING

Because the Court of Appeal declined to address issues which are important to a fair review of this case, and because its factual statements included minor but relevant inaccuracies, Stein filed a Petition for Rehearing on May 24, 2018, which was denied on June 4, 2018.

FACTUAL AND PROCEDURAL BACKGROUND

1. Relevant Trial Court and Related Matters

In the midst of the 2010 foreclosure crisis, homeowners across the nation facing wrongful foreclosures and other lending-related challenges struggled to fight against their powerful opponents. At the very inception of the crisis, Stein was the first attorney in the United States to have investigated and exposed improper lending practices and to file suit in 2009 against Bank of America on behalf of hundreds of homeowners in an action styled *Ronald v. Bank of America*, LASC Case No. BC409444, alleging the very misconduct later prosecuted by the state and federal governments, resulting in the second largest civil settlement in U.S. history – the National Mortgage Settlement of 2012. (2CT256-57,319-36.) No party, except for the sued lenders themselves, ever alleged that the consumers' lawsuits were not meritorious. (*See, e.g.*, 2CT285 (Judge Highberger, *Ronald v. BofA*: "[*Ronald*] plaintiffs … are presumably going to get a judgment for billions of dollars against Bank of America." "The issues presented [in *Ronald*] are part of a larger socioeconomic problem that confront our society in California and all of the other states in this union…."); 4CT939 (trial court: "I'm sure that the cases [against the lenders led by Stein] have a great deal of merit.").)

However, the prospects of these homeowner litigants were cut short overnight on August 17, 2011, when the AG on behalf of the People and the California State Bar raided Stein's law offices, seized all client files and froze all bank accounts in this action. Following the raid, almost 200 desperate clients submitted letters and declarations to the trial court under

oath objecting to this action against Stein. The trial court, however, in finding that "courts of this state have upheld preliminary injunctions … without expressly balancing the actual harms … [where] the plaintiff was a government entity…." (4CT873-74) nevertheless entered a PI and order assuming jurisdiction over Stein's practice.

The State Bar assumption proceedings were initiated without first interviewing the other two partners of the firm as required by BPC §§ 6190 and 6180.14 and proceeded under BPC § 6190 although the Bar's claims against Stein never concerned competency, which "section 6190 proceedings are designed to reach." *People v. Hinkley* (1987) 193 Cal.App.3d 383, 388.

In 2012, 309 of Stein's former clients – individually and on behalf of others similarly situated – filed suit against the AG and State Bar, alleging $1 billion in damages as a direct result of this action; N.D. Cal. Case No. 3:12-cv-00987-CRB ("*Copper* action"). The Hon. Charles Breyer denied the AG's motion to dismiss, staying the case, and deeming the outcome of the case at bar directly related to the rights of the *Copper* plaintiffs. (10CT2213.) These clients were told by the Bar to "find a new attorney." (3CT500.) However, with their retainer payments frozen and client files seized, the former clients' underlying suits against the lenders were eventually dismissed.

In this action, Stein was joined with 19 other lawyer and non-lawyer defendants. The AG and State Bar alleged a marketing and fee-sharing scheme in violation of BPC §§ 17200 and 17500, asserting that misleading statements and promises were made to consumers in connection with their home loans and litigation against lenders, and that attorneys unlawfully

shared fees with non-attorneys. (1CT43-91A.) As the AG conceded, "Stein has continuously contested the factual underpinnings of the case." (9CT2078.) Indeed, Stein presented testimonial and other evidence that certain of the co-defendants were using his name and likeness in a scheme Stein never authorized nor was involved in. (3CT500; 3CT581; 3CT570-71.) State Bar investigator, Thomas Layton, testified under oath months after the raid that he had not traced a single penny from the alleged scheme to Stein and was "not done with the investigation yet." (6CT1236, 1238.) Even years later, the AG and State Bar were unable to present any additional evidence. An often-cited witness explained under oath after the raid that her statements had been misconstrued to wrongfully implicate Stein. (3CT581 ("I made it perfectly clear").) No admissible and convincing evidence ever proved that Stein was involved in the scheme; rather, the trial court conjectured that she "simply [did] not believ[e]" Stein was uninvolved and reasoned that there "may" be evidence that has "not [yet been] identified." (4CT873.)

The AG eventually settled with all other defendants. When it became clear that Stein refused to settle but wished to proceed to trial, the AG discussed with the trial court at an April 13, 2015 status conference in Stein's absence how this case "can come to an end" without "call[ing] Stein the prevailing party." (9CT2070, 2078-79; 7CT1681-82; 8CT1718; 9CT2077 (Stein "has rejected" "our best and final settlement offer").) As the AG openly conceded, "[t]he problem … with dismissing without prejudice is first Stein's action against the People in bringing this law enforcement action" (the *Copper* action) (9CT2077-78). The court gave *sua sponte* leave to amend the complaint to add a stand-alone prevailing-party

cause of action so that the AG could bring a MSA on that cause of action before it would dismiss its original causes against Stein to "avoid uncertainty" on the very issue Judge Breyer deemed important to the rights of the *Copper* plaintiffs. (*Id.*, Opn., at 6. 8.) Stein sought additional time for an opposition to be filed and to file his own MSJ. (9CT2121-2132; 8CT1718 ("[Stein] will shortly be moving for summary judgment").) The trial court denied the request for continuance, granted the AG's MSA, entered final judgment in favor of the AG on the prevailing-party cause of action, and dismissed the remaining suit.

In support of the MSA, the trial court relied in large part on an unrelated indictment against Stein in *US v. Stein*, S.D. Fla. Case No. 11-cr-80205-KAM, which was filed four months after the initiation of this action. (10CT2382-84,2386.) The indictment revolved around 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 in 2013 based on evidence which was later proven to

be false,[3] and sentenced to 17 years imprisonment. Based on this factor, the AG argued Stein was unavailable and "judgment-proof," and that "continuing this action against … Stein" under these circumstances would place a "drain on state and judicial resources." (8CT1712 (fifth AG's cause of action); 9CT2087.) Stein's sentence and restitution order were later vacated by the Eleventh Circuit Court of Appeals. *See, United States v. Stein*, 846 F.3d 1135, 1154 (11th Cir. 2017) (finding that "the district court 'engage[d] in the kind of speculation forbidden by the Sentencing Guidelines.'"). Stein remains incarcerated pending the resolution of the Eleventh Circuit's remand order and U.S. Supreme Court proceedings.

Stein presented evidence below that the AG was collaborating with the prosecution in *US v. Stein* before it initiated this action (10CT2178) and alleged that the agencies' goal was to disadvantage Stein in both actions, including bolstering the bias that would result against Stein. The AG later

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[3] Specifically, Stein demonstrated that two key government witnesses falsely testified that 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. The Eleventh Circuit held that these lies do not warrant a new trial because the evidence was among two million files produced to Stein by the government and because the false testimony was not the "centerpiece" of closing argument. *Stein*, 846 F.3d at 1143, 1150 & n. 13 ("[i]n the absence of government suppression of the evidence, … there can be no Giglio violation"). In the U.S. Supreme Court, the Solicitor General argued on behalf of the United States in response to Paul D. Clement's and Jeffrey L. Fisher's certiorari petition on behalf of Stein that the U.S. Supreme Court should deter consideration of Stein's petition until after re-sentencing set for July 19 and 20, 2018. *Stein v. United States of America*, 2017 WL 5158038 (U.S.), ** 23, 24. Stein will present his false-evidence claim in a renewed petition.

transferred the funds it had frozen in this action to the United States Department of Justice under an unrelated forfeiture order which might still be vacated under *Honeycutt v. United States*, 137 S. Ct. 1626 (2017) (*see* S.D. Fla. Case No. 11-cr-80205, DEs 471-1:4; 471-2:2; 524).

2. Court of Appeal Opinion

The Court of Appeal concluded that, despite the admittedly unlawful nature of the AG's stand-alone prevailing-party cause of action at issue, the unlawful judgment should be affirmed because Stein "has not shown any injustice or prejudice to him arising from the grant of summary adjudication[,] … [n]or could he." (Opn., at 13 (citing Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 527-528).) Notably, the AG never argued that Stein failed to show prejudice or injustice until the Court of Appeal instructed the parties to submit letter briefs on the topic.

The court declined to address Stein's other claims under the judgment, such as the substantial third-party injury, structural-error claim or the unavailability of the prevailing-party statute to a public entity in an enforcement action. As discussed below, each of the Court of Appeal's suggestion as to why Stein "could" not possibly have shown prejudice or injustice (Opn., at 13 & n. 7; ALB:2-5) is misguided, and affirmance on that basis violates due process and uniformity principles.

Finally, the court dismissed the appeal from the TRO and PI for lack of jurisdiction without discussing why it believes that the orders do not fall within the well-recognized "significant exception to [the mootness] rule"

(*see, e.g., Hebert v. Los Angeles Raiders, Ltd*. (1991) 23 Cal.App.4th 414, 421). Stein argued in his appellate briefs that, in large part because harm was caused to hundreds of identified non-parties to this action, the orders are a matter of broad public interest, capable of evading appellate review and likely to recur, and that appellate review was warranted to avoid injury to defendants and third-parties in future like enforcement proceedings. The claimed errors leading to the third-party jury were extensively discussed by the parties.

LEGAL DISCUSSION

I. Related Third-Party Interests Should Be Considered Under California's Harmless-Error Provisions

As this case demonstrates, potential prejudice to identified third parties should be considered under California's harmlessness provisions. Code Civ. Proc., § 475 instructs that an erroneous order or judgment is reversible if the error

> was prejudicial, *and also* that by reason of such error, ruling, instruction, or defect, the said *party complaining or appealing* sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed.

Id. (emphasis added). Cal. Const., art. VI, § 13 more generally instructs that an erroneous judgment is reversible if "the error complained of has resulted in a miscarriage of justice." Because § 475 is more specific, however, reliance on § 475 could narrow the focus of a reviewing court and exclude consideration of third-party interests, as was the case here.

Third-party interests are generally taken into account by a reviewing state or federal court deciding the impact of reversal despite a respondent's failure to raise a harmless-error claim. *See,* e.g., generally, *United States v. Ford*, 683 F.3d 761, 768–69 (7th Cir. 2012) ("we are authorized, for the sake of protecting third-party interests … to disregard a harmless error even though … harmlessness is not argued to us … [i]f it is certain that the error did not affect the outcome"); *State v. McKinney*, 279 Neb. 297, 302–03, 777 N.W.2d 555, 561 (2010) (same). Indeed, the harmless-error rule was drafted for the very protection of third-party interests. (*Id*.) It follows that reviewing courts should reverse an unlawful judgment if failure to do so could unjustly impact an identified third-party interest.

Importantly, the third-party interest at issue has been judicially determined by way of court order, of which the Court of Appeal refused take judicial notice, deeming it "moot." (Opn., at 2 n.1.) *See*, the Hon. Charles Breyer's ruling that "if Stein prevails in state court, that victory will directly impact [third parties]." *Stein v. Harris* (N.D. Cal., Aug. 3, 2012, No. C 12-00985 CRB) 2012 WL 3202959, at *8. (10CT2213.) The stay order occurred nearly one year after the trial court entered PI in this case, which suggests that Judge Breyer did not view the TRO and PI as an adjudication on the merits. Indeed, "[f]or decades now, [this] 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.

Courts often recognize that "[i]f a nonparty to the underlying action is unable to seek review of a[potentially] adverse decision, that nonparty is

denied adequate procedural protections from potentially erroneous decisions." *Pac. Estates, Inc. v. Superior Court* (1993) 13 Cal. App. 4th 1561, 1573. Requiring a nonparty victim, whose injury impacts its ability to retain counsel, to timely file an extraordinary writ or otherwise intervene in the related action would place an unfair burden on the third-party. The potentially unattainable burden of explaining the erroneous nature of a final judgment cannot be placed on third-party victims litigating in a different forum.

The AG does not deny – nor can it deny – that substantial harm was caused to hundreds of homeowners and litigants across California and the United States because its action immediately hamstrung the representation of these consumers in connection with critical foreclosure proceedings and pending litigation. This action eventually caused the consumers' pending matters against lenders to be dismissed. Instead of caring for the former clients as required by BPC § 6180.5, the People were simply advised by the Bar "to find a new attorney." (3CT500.) How could these former clients "find a new attorney" in a timely fashion if their retainer payments had been unlawfully frozen and later transferred to the Department of Justice in an unrelated matter? Was it adequate of the AG to require consumers already struggling as victims of the foreclosure crisis to attempt to cough up additional retainer funds to find qualified counsel when these consumers had already paid for the representation of their choice and wished to be represented by Stein even after the publication of the AG's claims? In short, the third-party interest is not a matter the lower courts here should have ignored.

The judgment should be reversed.

II. The Court Should, As Other Courts Have, Carve Out Exceptions To The Harmless-Error Rule, Where Uniformity Principles So Require

As recognized by other courts of appeal, where faulting an appellant for failure to show prejudice would be inequitable, such as where well-established authorities create alarming logical conflicts with the erroneous result, an exception to the harmless-error rule should be defined.

It is settled, for example, that a plaintiff cannot be found to be the prevailing party if it intends to dismiss (and later dismisses) its causes of action. *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"); *General of America Ins. Co. v. Lilly* (1968) 258 Cal.App.2d 465, 470 ("[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 Court of Appeal now reasons, however, that California's harmless-error provisions cures the allusion of a judicial declaration that a party prevailed on an *inexistent* cause of action – a proposition that poses great danger to the integrity of our judicial system.

Other courts of appeal have adopted the reasoning that reviewing courts are sufficiently authorized and equipped to reverse such judgments without laying blame on the aggrieved party for purportedly failing to demonstrate prejudice. *See, e.g., I.A. v. H.H.*, 710 So.2d 162, 165 (Fla. Dist. Ct. App. 1998) ("where the trial court has granted relief that is not authorized by law, or pursuant to a cause of action that either does not exist or is not available to the plaintiff[,]" it is the reviewing court's "*duty* to notice and correct [such] jurisdictional defects or fundamental

errors *even when they have not been identified by the parties*") (emphasis added). California courts should enforce this ingrained duty instead of permitting mechanical application of the harmless-error rule. Failure to do so would create an imbalance of harms between the party impacted by the error in comparison to the litigating public for which the harmless-error rule was drafted in presuming prejudice to the latter party.

The Court's guidance is necessary to narrow the gap between the principles applied in affirming a clearly properly dismissed action on one hand and the standard applied in affirming a clearly improperly awarded judgment on the other. California courts concede that unlawful causes of action are "so clearly erroneous as to merit no further attention" in affirming an order dismissing such causes, *Muller v. Coastside County Water Dist*. (1961) 191 Cal.App.2d 511, 513, yet with the new law made by the court below, a judgment that is equally so clearly erroneous must be affirmed where appellant "has not shown any injustice or prejudice to him arising from the [erroneous judgment]." (Opn., at 12.) Put differently, if Stein had been given the extension of time he sought, he may have been able to more thoroughly research the unprecedented claim and bring a motion to strike or dismiss, which should have been granted without further attention, yet because he was denied the opportunity, the Court of Appeal reasons that the erroneous judgment must be affirmed under the perceived restrictions of harmless-error law in this state. The proposition that prejudice to the defendant is automatic in such cases absent dismissal is entrenched within the principles applied in dismissing such unlawful actions, but because reviewing courts feel bound to the narrowing language of § 475, an exception to the harmless-error rule must be expressly carved

out to assure like principles apply in deciding whether an erroneous judgment should be reversed. The Court did not instruct shortly after the amendment to § 475 that § 475 must unreasonably restrict the courts' ability to reverse erroneous judgments; to the contrary, it instructed that the *meaning* of § 475 must be restricted (*San Jose Ranch Co. v. San Jose Land & Water Co*. (1899) 126 Cal. 322, 325).

Suitable guidance in crafting an exception would be this Court's own precedent, that, to maintain "[u]niformity in the administration of justice … every litigant may demand that his case shall be tried, so far as practicable, by the same established rules of procedure and evidence, as well as upon the same principles, which are applied to other like controversies." *San Jose Ranch Co,* 126 Cal. at 326. It follows that where there can be no "same principles, which are applied to other like controversies," reversal to correct the error should be mandated irrespective of appellant's arguments.

This case is the ideal vehicle to define an exception to the harmless-error rule because the AG openly conceded on the record that its fifth cause of action is a sham. (9CT2106 (AG's MSA) ("the People is the prevailing party because … the context clearly requires that the Court not determine Stein to be the prevailing party if the People dismisses [its original causes of action]"); Opn., at 6, 8 (quoting AG, at 9CT2094, 2104).)

And though the law is settled that "[t]he public has the right to expect its officers . . . to make adjudications on the basis of merit," *People v. Ramirez*, (1979) 25 Cal. 3d 260, 267 (citing *Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964)), the MSA does not rest on facts material to a prevailing-party determination; to the contrary, the trial and appellate courts

precluded Stein from introducing evidence on the merits because "the only conceivable relevance [Stein's] evidence may have had would have been to a finding of liability under [original complaint], which the People did not seek." (RB:44-45.) The AG further reasoned that "[w]hile proceeding to trial … would make it impossible for the People to receive an award of penalties, costs, and/or restitution" (because Stein was "judgment-proof"), it sought, as a resolution to its predicament, declaratory relief for "prevailing party cost." (9CT2105,2093.) The Court of Appeal then deemed the judgment harmless on the express basis that no costs were assessed. (OA recording, at 21:25-22:18; *see*, n. 1 *supra*.) "[S]ection 1032 defines prevailing party only for 'costs,'" *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1142, a relief not available to the AG pursuant to Code. Civ. Proc. § 1021.5, and was implemented for the admitted ulterior motive of avoiding "uncertainty" as to the *Copper* action. In essence, the AG's admission that its prevailing-party cause of action was a complete sham served, in the court's view, as the final proof of the error's alleged harmlessness. Such dizzying inconsistencies cannot actually be harmless to any litigant.

In order to explain that Stein *could not* show prejudice, the Court of Appeal quoted fragments of Stein's structural-error claim. (Opn., at 12-13.) However, the refusal to evaluate the *nature* of the error leads to the absurd results as demonstrated at 13, n. 7 of the Opinion, which proposed how Stein could have shown prejudice:

The court first suggests Stein would have had to show "that, but for the trial court's purported errors, it was reasonably probable that he would have filed a cost bill and successfully argued that he was the prevailing party for purposes of a cost award under

1032." However, an appellant challenging error cannot be required to show that he would have prevailed in seeking relief he did not seek. Next, the court suggests that Stein should have shown that "it was reasonably probable the Attorney General would have refused to voluntarily dismiss its claims against defendant anyway and proceeded to a determination of those claims on the merits…" The test does not require a litigant to predict his opponent's moves in a different scenario. Here, however, the AG plainly sought to and did voluntarily dismiss its causes of action. Finally, the court proposes Stein should have demonstrated "that it was reasonably probably (sic) defendant would have obtained a favorable merits determination." But requiring the party challenging an erroneous judgment to show on appeal that he would have likely prevailed on the merits when that party was precluded from introducing evidence on the merits squarely conflicts with due process guarantees.

III. The Court of Appeal's Ruling Violates Constitutional Due Process Guarantees

Where no "same principles" could be "applied to other like controversies" (*San Jose Ranch Co., supra,* 126 Cal. at 326), due process cannot be served. Indeed, if a judgment, as this one, rests on facts not material to the relief at issue, and when the relief at issue is not even authorized by law, no lack of showing of prejudice could outweigh the need to correct a judgment which was clearly not adequately adjudicated. Not only was the prevailing-party determination improperly and arbitrarily adjudicated – none of the AG's uncontroverted facts are material to a prevailing-party determination – Stein was expressly precluded from

introducing evidence which would be material to the merits or a prevailing-party determination. (RB:44-45 (asking appellate court, consistent with the trial court's ruling, to reject Stein's evidence because "the only conceivable relevance [Stein's] evidence may have had would have been to a finding of liability under [original complaint], which the People did not seek.").)

Procedural due process requires that affected parties be provided with the right to be heard at a meaningful time in a meaningful manner. *See, e.g.*, *Litwin v. iRenew Bio Energy Solutions, LLC* (2014) 226 Cal.App.4th 877, 883. As the U.S. Supreme Court cautioned in *Chapman v. California*, 386 U.S. 18 (1967), if California's harmless-error provision is not applied in a manner consistent with the guarantees of due process, the rule could "work very unfair and mischievous results." *Id.*, at 22.

This Court clarified that the "California due process protections derive primarily from the individual's right to be free from arbitrary adjudicative procedures in and of themselves, *regardless of the precise nature of the interest at stake*." *420 Caregivers, LLC v. City of Los Angeles* (2012) 219 Cal.App.4th 1316, 1342 (emphasis added). Though it has been said that the California Constitution has thus been "more inclusive" and protective of "a broader range of interests than under the federal Constitution," *Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1069, the Court of Appeal's affirmance now improperly narrows the range of interests protected in California beyond prior precedent as established by the United States Constitution.

As footnote 7 of the Opinion clearly shows, the Court of Appeal's application of the harmless-error rule is so distorted that it creates an

illusory standard which breaks sharply with principles of due process and sound judgment (*see*, p. 25, *supra*). Unable to find examples of how Stein may have shown prejudice, the court's conclusion that, had costs been assessed against Stein, he might have been able to point to prejudice (OA recording, at 21:25-22:18; *see*, n. 1 *supra*) is equally misguided. This case is an ideal vehicle to explain why the precise nature of the interest is not relevant under the analysis. *420 Caregivers, supra* 219 Cal.App.4th at 1342.

This Court has repeatedly intervened to determine "the requirements of due process under the particular circumstances of [a] case." *Skelly v. State Pers. Bd.* (1975) 15 Cal. 3d 194, 211. "Only by providing that the social enforcement mechanism must function strictly within the[] bounds [established by the United States Constitution] can we hope to maintain an ordered society that is also just." *California Teachers Ass'n v. State of California* (1999) 20 Cal. 4th 327, 334 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971) (citing Fifth and Fourteenth Amendments to U.S. Constitution)).

As the AG conceded on appeal, "typical[ly] …, the next step in litigation would have been … to proceed to trial on the merits," however, though Stein was ready to attack the AG's allegations on the merits, the AG discounted Stein's due process rights under its reasoning that further litigation would be "solely for theater." (RB:41-42.) Under longstanding 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") (*id*., 792–93); *Payne v. Superior Court* (1976) 17 Cal.3d 908, 927, 933 (discussing prisoner's due process rights).

The Court of Appeal agreed, however, the AG's goal was not to seek cost – the purpose of the prevailing-party statute (*see*, p. 24, *supra*) – but was to "avoid uncertainty" on the issue of whether Stein would be adjudicated the prevailing party following voluntary dismissal of its action (Opn., at 8). Specifically, counsel for the AG admitted on the record that "[t]he problem from [its] perspective … with dismissing without prejudice is *first* Stein's action against the People in bringing this law enforcement action" (the *Copper* action). (9CT2077-78 (emphasis added).) While the AG asserted its concern was that Stein "could *technically* be declared the prevailing party" (RB:24,13) (emphasis added), nothing in the precedents of this Court or the United States Supreme Court authorizes due process to be ignored by transforming the AG's concern that Stein could be determined the prevailing party into an automatic judgment declaring Stein's opponent the prevailing party in the case. The prevailing-party determination is not susceptible to such "a rigid interpretation," *Gilbert v. National Enquirer, Inc*. (1997) 55 Cal.App.4th 1273, 1277, and the AG's concern here was obviously not one about technicalities but rather about substance. Absent the AG's true concern, the unlawful fifth cause of action would never have been added, and the request for costs without actually seeking costs would never have been made.

A litigant's "uncertainty" of the outcome of a matter cannot be resolved by pleading claims which are not authorized by law. Uncertainty is inherent in every litigation, and due process requires a full and fair

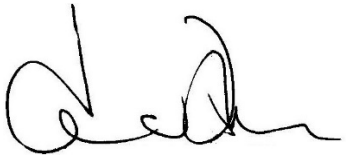
adjudication on every matter resulting in a judgment. In the interest of protecting the rights of those parties for which the harmless-error rule was established – the litigants within this court system – the Court of Appeal should be reminded that the rule does not restrict its authority, rather, its authority should restrict the rule. As the Supreme Court cautioned, some "constitutional error [is] of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis v. Alaska*, 415 U.S. 308, 318 (1974).

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant review.

Dated: June 22, 2018

Respectfully Submitted,



James N. Fiedler (SBN 36643)
Law Offices of James N. Fiedler

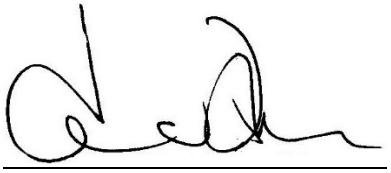
Attorney for Defendant and Petitioner
Mitchell J. Stein

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court 8.204 and 8.504(d) that this Petition for Review is proportionally spaced, has a typeface of 13 points, contains 6,005 words as counted by the word count feature of the Microsoft Word program used to prepare this brief, not including the cover, the tables, the signature block, verification, and this certificate.

Dated: June 22, 2018

Respectfully Submitted,



James N. Fiedler

EXHIBIT A

(Opinion of the Court of Appeal)

Filed 5/15/18

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COURT OF APPEAL – SECOND DIST.
FILED
May 15, 2018
JOSEPH A. LANE, Clerk
kstpierre Deputy Clerk

THE PEOPLE,

Plaintiff and Respondent,

v.

MITCHELL J. STEIN,

Defendant and Appellant.

B275955

(Los Angeles County
Super. Ct. No. LCO94571)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Ann I. Jones, Judge. Dismissed, in part, and affirmed.

Law Offices of David S. Harris, David S. Harris, and Law Offices of James N. Fiedler, James N. Fiedler, for Defendant and Appellant.

Xavier Becerra, Attorney General, Nicklas A. Akers, Senior Assistant Attorney General, Daniel A. Olivas, Supervising Deputy Attorney General, and David A. Jones and Timothy D. Lundgren, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The California Attorney General filed a civil action against then-attorney and defendant Mitchell Stein (defendant), as well as others, for engaging in unfair business and advertising practices and obtained a temporary restraining order (TRO) and preliminary injunction against defendant. After settling with and obtaining final judgments against all of the other defendants, the Attorney General moved for summary adjudication of a declaratory relief claim seeking a declaration that the Attorney General was the prevailing party in the action against defendant. The trial court granted the motion and entered a judgment against defendant declaring the Attorney General the prevailing party and dismissing without prejudice all remaining claims against defendant.

On appeal, defendant challenges the summary adjudication order as legally erroneous, as well as the orders granting the TRO and preliminary injunction. In addition, defendant challenges an order entered in a separate but related action filed by the State Bar of California, pursuant to which the trial court in that action assumed jurisdiction over defendant's law practice.

We affirm the summary adjudication order and judgment based thereon, as defendant has failed to demonstrate prejudicial error warranting reversal. We dismiss the appeals from the other orders as untimely or beyond our jurisdiction.[1]

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[1] Defendant's requests for judicial notice filed January 2 and July 27, 2017, are denied as moot.

FACTUAL AND PROCEDURAL BACKGROUND

I. Commencement of the Instant Action

On August 15, 2011, the Attorney General filed this civil action (case number LC094571) in the Northwest District of the Los Angeles County Superior Court, alleging violations of Business and Professions Code sections 17200 and 17500 against a number of nonattorney and attorney defendants, including defendant. The Attorney General summarized in the operative second amended complaint the facts giving rise to the action as follows:

"Defendants prey on desperate consumer homeowners facing foreclosure and the loss of their homes by selling participation in so-called 'mass joinder' lawsuits against their mortgage lenders. Veterans of the loan modification industry, [d]efendants use deceptive advertising and telemarketing to recruit consumers to join these lawsuits, at a cost of thousands of dollars each. Consumers are led to believe that joining these lawsuits will stay foreclosures, reduce their loan balances, entitle them to monetary benefits and potentially get them their homes free and clear of their mortgage. [¶] . . . [¶] Homeowners are told that a settlement could happen at any moment and only those who have joined the lawsuit will receive the promised benefits. Defendants repeatedly make false or misleading statements to homeowners to get them to sign a retainer agreement and pay them thousands of dollars. Once homeowners sign a contract to join a 'mass joinder' lawsuit and [d]efendants take their money, as much as $10,000, from their bank accounts, homeowners find they are unable to speak with an attorney with knowledge of the lawsuit. Basic questions such as whether the homeowner has been added to the lawsuit go unanswered. Some

homeowners pay [d]efendants thousands of dollars only to lose their homes shortly thereafter to foreclosure. [¶] Thousands of Californian homeowners have fallen for [d]efendants' scam, and [d]efendants have exported their mass joinder scheme nationwide."

The same day the original complaint was filed, the Attorney General applied ex parte, without notice, for a TRO. The trial court granted the TRO, which restrained defendant from "[m]aking or causing to be made . . . any untrue or misleading statements to consumers, in connection with any proposed or actual lawsuit or settlement with their home mortgage lender . . . ." The TRO further restrained defendant from engaging in "'running and capping,' the practice of a non-attorney acting for consideration . . . as an agent for an attorney or law firm, in the solicitation or procurement of business for the attorney or law firm, or [] soliciting non-attorneys to commit or join in running and capping."

On November 8, 2011, the trial court issued a preliminary injunction enjoining defendant from engaging in the acts or practices previously restrained under the TRO.[2]

II. The Federal Criminal Case and SEC Civil Action

On December 13, 2011, a federal grand jury in the Southern District of Florida returned an indictment, charging defendant with fourteen counts of conspiracy to commit mail and wire fraud, mail fraud, wire fraud, securities fraud, money laundering, and conspiracy to obstruct justice—all arising from conduct unrelated to the instant case. On May 20, 2013, a jury

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[2] The trial court had issued preliminary injunctions against the other defendants on September 6, 2011.

found defendant guilty as charged on all 14 counts of the indictment. On December 8, 2014, the Florida district court sentenced defendant to, among other things, 17 years in federal prison. On April 8, 2015, the Florida district court entered an amended judgment ordering defendant to pay restitution to the victims of his crimes in the amount of $13,186,025.[3]

The Securities and Exchange Commission (SEC) also brought a parallel civil action against defendant for the conduct underlying the Florida criminal case. On March 3, 2015, the U.S. District Court for the Central District of California entered judgment against defendant in the SEC's action. That judgment ordered, inter alia, that defendant disgorge $5,378,581 and pay a civil penalty in the same amount, for an aggregate judgment, including prejudgment interest, of $11,454,997.

III. Declaratory Relief in the Instant Case

During 2013, each of the other defendants in this action entered into settlement agreements with the Attorney General's Office, and final judgments were entered against them. Defendant, however, was unable to settle the claims against him.

During an April 13, 2015, status conference in this case, the trial court and the Deputy Attorney General engaged in the following discussion about bringing the action against defendant to a close: "[Deputy Attorney General]: [G]iven the reality of this case and given the fact that you can't squeeze blood from a stone, the [the Attorney General has] considered dismissal without

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[3] The Court takes judicial notice that the U.S. Court of Appeals for the Eleventh Circuit affirmed defendant's convictions on January 18, 2017, and that the U.S. Supreme Court denied defendant's petition for a writ of certiorari on December 11, 2017.

prejudice against [defendant]. This would be, of course, solely in the interest of the court's resources, as well as the state's resources. [¶] The problem from [the Attorney General's] perspective with dismissing without prejudice is first [defendant's separate civil] action against the [P]eople [for] bringing this law enforcement action [against him]. But also, the fact that under the prevailing party statute, there's a possibility that [defendant] may claim he's a prevailing party for purposes of costs. . . . [I]t's the [Attorney General's] stance that [such a result] would be inequitable and stretch[] the very definition of what a prevailing party is. [¶] So we were wondering if the court could give us any guidance on what your honor is thinking as to the prevailing party in this action. . . . [¶] . . . [¶] . . . The Court: . . . Do you have some suggestions? [¶] [Deputy Attorney General]: I was hoping the court may be willing to give some additional guidance on your thoughts as to the prevailing party in the event the [P]eople did dismiss without prejudice, if the court would be inclined to call [defendant] the prevailing party, if he did bring a motion for costs. . . . [¶] The Court: Well, one thing you might want to do . . . instead of just filing a request for dismissal[, is initiate a] summary [proceeding] . . . [¶] . . . [¶] . . . which requires court approval and in which there are certain recitations as to what has been accomplished in the suit and the findings of the court . . . and the benefits that the [Attorney General has] obtained as a result of bringing this [action]. . . . This is very new. This case is unlike any other case I've had - - [¶] . . . [¶] The Court: - - [W]ith respect to prevailing . . . in essence, [the Attorney General] did prevail. And I think [the Attorney General] did a wonderful job. [¶] . . . [¶] The Court: . . . Some people . . . turned over money for representation . . . they didn't

receive, and [the Attorney General] made sure that didn't happen again. So that might be one way of doing it. [¶] [Deputy Attorney General]: Thank you, your honor. That's very helpful guidance. [¶] . . . [¶] . . . The Court: . . . [T]he other thing I could do is . . . have a prove-up mini trial and [defendant] can submit whatever evidence he wants in writing since he can't appear by himself. . . . [¶] [Deputy Attorney General]: I'm thrilled to take both of these options back to my office."

In an April 28, 2015, minute order, the trial court directed the Attorney General to "explore the idea of adding a cause of action for declaratory relief re injunction which has already been issued." Thereafter, at a July 17, 2015, status conference, the trial court "questioned whether [the Attorney General] anticipate[d] amending its complaint against [defendant] to seek declaratory relief on the issue of costs. After [the Attorney General] confirmed that [it] plan[ned] to seek declaratory relief against [defendant], the [c]ourt sua sponte granted leave for the [Attorney General] to amend its complaint."

On July 21, 2015, the Attorney General filed a second amended complaint, which included a fifth cause of action seeking a declaration that the Attorney General was the prevailing party in the action. The newly added fifth cause of action alleged that "[w]ith the strong injunctive and monetary results obtained against the other defendants in this case, the [Attorney General] has prevailed in this action by putting an end to the Mass Joinder scheme and obtaining restitution for harmed consumers." The second amended complaint added the following prayer for relief: "That the Court provide declaratory relief that, as defined by Code of Civil Procedure section 1032 or any other relevant law, [the Attorney General] is the prevailing party as to

[defendant] for all purposes including for purposes of fees and costs, regardless of whether the [Attorney General] in the interests of conserving state and judicial resources, dismisses without prejudice its First, Second, and Third Causes of Action against [defendants]."

On September 15, 2015, the Attorney General moved for summary adjudication of the fifth cause of action only. The Attorney General summarized the grounds for the motion as follows: "[W]ith the Temporary Restraining Order and Preliminary Injunction obtained against all defendants, including [defendant], along with the strong injunctive and monetary results obtained against the other defendants in this case, the [Attorney General] has prevailed in this action by putting an end to the Mass Joinder scheme and obtaining restitution for harmed consumers. Moreover, [defendant] not only has federal law enforcement judgments exceeding $20 million against him, he is currently serving a 17-year federal prison term and is no longer eligible to practice law. In other words, [defendant] is judgment-proof. Thus, [the Attorney General] believes that dismissing the remaining [claims] against [defendant] is appropriate in order to preserve taxpayer and judicial resources. However, [defendant] should not be able to claim that he is the prevailing party for any purposes, including costs. Such a result would be unjust. This Motion for Summary Adjudication will allow the Court to determine the prevailing party issue so that the [Attorney General] may avoid uncertainty on this issue."[4]

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[4] On September 6, 2013, the State Bar issued an order suspending defendant from the practice of law effective October 1, 2013, due to defendant's criminal convictions in the federal case in Florida.

On October 5, 2015, the parties stipulated to continue the hearing on the summary adjudication motion from December 11, 2015, to February 5, 2016. On January 7, 2016—one day before his opposition to the summary adjudication motion was due—defendant applied ex parte for a continuance of the hearing date on that motion. The application was supported by defendant's declaration and several exhibits. The trial court heard and denied defendant's application that day, but granted his alternative request to treat his application as his opposition to the motion for summary adjudication.

On February 5, 2016, the trial court held a hearing on the summary adjudication motion and thereafter granted it.

On April 4, 2016, the Attorney General made a motion for entry of judgment, which defendant opposed. On May 9, 2016, the trial court entered a judgment against defendant on the fifth cause of action, declaring defendant the prevailing party in the action for all purposes. Based on the Attorney General's request, the judgment also dismissed without prejudice the remaining second, third, and fourth causes of action against defendant.

IV. The Related State Bar Action

On August 15, 2011, the same day the Attorney General brought the instant action, the State Bar filed in the Northwest District of the Los Angeles County Superior Court a verified petition and application for assumption of jurisdiction over defendant's law practice under Business and Professions Code section 6190 et seq., in case number LS021817.

On September 2, 2011, the trial court found that the instant action by the Attorney General (case number LC094571) was related to the State Bar action and designated this action as

the "lead case." That ruling was made without prejudice to the parties making a motion to consolidate both matters. On September 7, 2011, the managing judge of the complex litigation program for the Los Angeles County Superior Court determined that the related cases should be designated as complex, transferred them to the complex litigation program, and assigned them to a judge in that program in the Civil Central West District. The two separate actions were never consolidated, however, and no party to either action ever sought to do so.

On October 13, 2011, the trial court in the State Bar action issued permanent orders authorizing the State Bar to assume jurisdiction over defendant's law practice. On April 1, 2016, the trial court granted the State Bar's request to terminate its jurisdiction over defendant's law practice, thereby effectively concluding the State Bar action (case number LS021817) against defendant.

V. The Instant Appeal

On June 30, 2016, defendant filed a notice of appeal from the judgment entered after the order granting summary adjudication in the instant case. The notice expressly referenced and attached a copy of the May 9, 2016, judgment and also referred to the order granting summary adjudication. It did not, however, mention the TRO, preliminary injunction, or order terminating jurisdiction over defendant's law practice in the State Bar action (case number LS021817).

DISCUSSION

I. Appeal from Order Assuming Jurisdiction Over Defendant's Law Practice (Case No. LS021817)

Defendant challenges the trial court's order in case number LS021817, pursuant to which the trial court assumed jurisdiction over defendant's law practice and appointed the plaintiff in that action—the State Bar—to oversee that law practice pursuant to Business and Professions Code section 6190.[5] Defendant's notice of appeal in this action, however, does not mention the October 26, 2011, order assuming jurisdiction he now challenges or the April 1, 2016, presumably final order terminating the trial court's jurisdiction over defendant's law practice. Nor does the notice mention the State Bar as a party to the appeal. Indeed, the notice of appeal was served only on the plaintiff in this action—the Attorney General—and not on the State Bar, which was the plaintiff in the other action (case number LS021817).

We agree with the Attorney General that we do not have jurisdiction to address an order entered in a separate but related action in favor of a party that is not a party to this action. Furthermore, we note any such order would have been separately appealable either as a directly appealable order when made in 2011 or after the entry of the April 1, 2016, presumably final, appealable order. Defendant did not file a timely notice of appeal

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[5] Section 6190 provides: "The 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 . . . 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."

from either of those orders in case number LS021817. We therefore must dismiss in this action his attempt to appeal from the order assuming jurisdiction in the State Bar action. (*See Colony Hill v. Ghamaty* (2006) 143 Cal.App.4th 1156, 1171 [where orders and judgments are separately appealable "each appealable judgment and order must be expressly specified . . . in order to be reviewable on appeal"]; *Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 693 ["'If a judgment or order is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review'"].)

II. Appeal from TRO and Preliminary Injunction

Defendant attempts to appeal from the August 15, 2011, TRO and the November 8, 2011, preliminary injunction entered in this action. Those orders, however, were immediately and separately appealable under Code of Civil Procedure section 904.1, subdivision (a)(6). Because defendant did not appeal from those orders within the time provided in California Rules of Court, rule 8.104(a), we conclude his challenge to those orders in this appeal filed after entry of the final judgment in May 2016 is untimely and cannot be addressed. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 110.)

III. Appeal from Order Granting Summary Adjudication

Defendant contends that the trial court erred by granting summary adjudication of the Attorney General's declaratory relief claim. Although we have found no basis to support a stand alone cause of action for declaratory relief as a "prevailing party," we, nonetheless, affirm the trial court's order because defendant has not shown any injustice or prejudice to him arising from the

grant of summary adjudication.[6] "A judgment is reversible only if any error or irregularity in the underlying proceeding was prejudicial. . . . There is no presumption of prejudice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) Instead, the burden to demonstrate prejudice is on the appellant." (*Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 527-528.)

Here, defendant was obligated to demonstrate prejudice in his opening brief (*Sanchez v. State of California* (2009) 179 Cal.App.4th 467, 489), but he did not. Nor could he.[7] Indeed, defendant concedes as much in his response to this Court's letter to the parties, pursuant to Government Code section 68081, requesting briefing on whether the Court should affirm based on defendant's failure to demonstrate prejudice warranting reversal. In his response, defendant again points to no prejudice or injustice resulting from the grant of summary adjudication.

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[6] We therefore do not reach defendant's other claims that the trial court erred by declining to continue the hearing on the summary adjudication motion, by making evidentiary rulings in connection with the motion, and by ultimately granting the motion.

[7] For example, defendant did not even attempt to show that, but for the trial court's purported errors, it was reasonably probable that he would have filed a cost bill and successfully argued that he was the prevailing party for purposes of a cost award under Code of Civil Procedure section 1032. Similarly, he does not attempt to show that, but for the prevailing party determination, it was reasonably probable the Attorney General would have refused to voluntarily dismiss its claims against defendant anyway and proceeded to a determination of those claims on the merits, much less that it was reasonably probably defendant would have obtained a favorable merits determination.

Instead, defendant merely argues "the improperly adjudicated judgment *itself*" constitutes prejudice and that "requir[ing] a showing of *an additional* prejudice besides the unlawful judgment" would "create an elusive standard." The standard, however, is clear—"[n]o judgment shall be set aside" unless "the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; *see also* Code Civ. Proc., § 475.) We therefore conclude the summary adjudication order from which defendant appeals must be affirmed based on his failure to satisfy his affirmative duty on appeal of demonstrating prejudice warranting reversal.

DISPOSITION

The appeal from the order assuming jurisdiction in the separate but related case filed by the State Bar—case number LS021817—is dismissed for lack of jurisdiction. The appeals in this case from the TRO and preliminary injunction are dismissed as untimely. The summary adjudication order and judgment based thereon are affirmed.

Plaintiff is awarded costs on appeal.

KIN, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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* Judge of the Superior Court of the County of Los Angeles appointed by the Chief Justice pursuant to Article VI, section 6, of the California Constitution.

EXHIBIT B

(Order Denying Petition for Rehearing)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 5

June 4, 2018

THE PEOPLE,
Plaintiff and Respondent,
v.
MITCHELL J. STEIN,
Defendant and Appellant.

B275955
Los Angeles County No. LC094571

THE COURT:

Appellant's May 24, 2018, petition for rehearing is denied.

CERTIFICATE OF SERVICE

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 June 22, 2018 I served the foregoing document described as

PETITION FOR REVIEW

on counsel for Respondent, the People of the State of California, via the TrueFiling e-service system as follows:

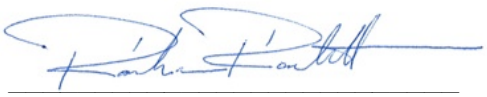
Timothy Lundgren
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, California 90013
Timothy.Lundgren@doj.ca.gov

and 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.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this certificate is executed on June 22, 2018.



Rasika Reichardt

Service List

Mitchell Stein v. The People of the State of California
Supreme Court of California Case No. _____

Name/Address	Party(ies) Represented
Timothy Lundgren Office of the Attorney General 300 South Spring Street, Suite 1702 Los Angeles, California 90013	*Counsel for Plaintiff and Respondent, The People of the State of California*
Office of the Attorney General Consumer Law Section 455 Golden Gate Avenue Suite 11000 San Francisco, CA 94102	*Service required by Bus. & Prof. Code § 17209.*
Los Angeles County District Attorney's Office Consumer Protection Division 211 West Temple Street, Suite 1000 Los Angeles, CA 90012	*Service required by Bus. & Prof. Code § 17209.*
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	*Service required by Bus. & Prof. Code § 17209.*

Service List (Cont'd.)

Mitchell Stein v. The People of the State of California
Supreme Court of California Case No. _____

Name/Address	Party(ies) Represented
The Honorable Ann I. Jones Los Angeles County Superior Court Central Civil West Courthouse Department 308 600 South Commonwealth Ave. Los Angeles, CA 90005	*Trial Judge* *(L.A.S.C. Case No. LC094571; Related L.A.S.C. Case No. LS021817.)*
Clerk of the Court California Court of Appeal Second Appellate District, Div. 5 300 S. Spring Street Second Floor, North Tower Los Angeles, California 90013-1213	*Case No. B275955*