

No. S232582

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

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STEVE RYAN

*Plaintiff and Appellant,*

v.

MITCHELL ROSENFELD, *et al.*

*Defendants and Respondents.*

SUPREME COURT  
**FILED**

AUG - 8 2016

Frank A. McGuire Clerk

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Deputy

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On Petition for Review from the Court of Appeal  
First Appellate District, Division Four  
Court of Appeal Case No. A145465

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**MOTION TO DISMISS REVIEW**

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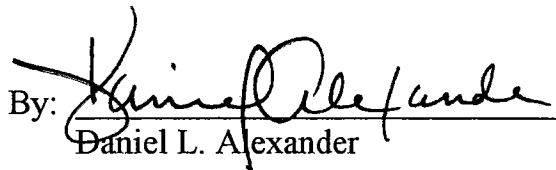
Attorneys for Defendants and Respondents  
MITCHELL ROSENFELD, SACHIKO ROSENFELD,  
MICHAEL SORANTINO, and MOEJOE PROPERTIES, LLC

## MOTION TO DISMISS

PLEASE TAKE NOTICE THAT DEFENDANTS AND RESPONDENTS MITCHELL ROSENFELD, SACHIKO ROSENFELD, MICHAEL SORANTINO, and MOEJOE PROPERTIES, LLC hereby move this Court for an order dismissing review in this case. The motion is based on this motion, the attached supporting memorandum of points and authorities, the appellate record and any other files and papers on file in this action, and, should the Court deem it necessary and/or appropriate, on any oral argument that the Court may require regarding this motion.

Dated: August 5, 2016

COLEMAN FROST LLP

By:   
Daniel L. Alexander

Attorneys for Defendants and Respondents  
MITCHELL ROSENFELD, SACHIKO  
ROSENFELD, MICHAEL SORANTINO,  
and MOEJOE PROPERTIES, LLC

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. Introduction

When it granted the Petition for Review in this action, the Court limited review to this question: “Is the denial of a motion to vacate the judgment under Code of Civil Procedure section 663 separately appealable?” If the Court issues an opinion about *that* issue in *this* case, the Court will be issuing an advisory opinion.

Although the Plaintiff and Appellant in this case, Mr. Ryan, filed a notice of motion and motion that cited Code of Civil Procedure section 663 (“Section 663”) in its caption, Section 663 was never actually at issue in the trial court or in the court of appeal. Section 663 applies only in instances where a party is entitled to the entry of a judgment *different* than the one that was entered. Mr. Ryan never sought the only relief Section 663 provides and there is no set of circumstances in the record upon which Mr. Ryan would have been entitled to the only relief that Section 663 provides – entry of a “*different judgment*” in place of the one vacated. Instead, Mr. Ryan’s papers in the trial court (included in the Clerk’s Transcript on Appeal<sup>1</sup>) confirm that in spite of the reference to Section 663 in the caption of his moving papers, Mr. Ryan’s motion sought vacation of the judgment and a *trial* – not the entry of a *different judgment*.

Because this case does not present a “case or controversy” to the Court involving relief available pursuant to Section 663, any opinion the Court releases on the very narrow issue before the Court will be advisory. And the Court has consistently held that “[t]he rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court.” *See, e.g., People v. Super. Ct.* (1970) 1 Cal.3d 910, 912.

The Court should avoid issuing an advisory opinion in this case by dismissing review and allowing the important question the Court wants to decide to present itself in a case where it is at issue.

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<sup>1</sup> All further references and citations to the Clerk’s Transcript on Appeal are denoted by the abbreviation “CT.”

## II. Discussion

On October 24, 2014, the San Francisco Superior Court entered an order finding that Mr. Ryan had abandoned his case and dismissing the action on Mr. Rosenfeld's motion based on Code of Civil Procedure sections 583.410(a) and 583.420(a)(2)(A). CT 086-89. Mr. Ryan filed various motions asking the trial court to reconsider its order dismissing the case, including on November 4, 2014 a Notice of Motion and Motion for Reconsideration of the order dismissing the case and on November 19, 2014 an Amended Notice of Motion and Motion for Reconsideration of the order dismissing the case. CT 090, 118. On December 22, 2104, Mr. Ryan filed the motion upon which this appeal is presumably based: "NOTICE OF MOTION AND MOTION TO VACATE JUDGMENT, MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF PLAINTIFF IN SUPPORT. CCP 663 & CCP 473[.]" CT 161-180.

In his Motion, Mr. Ryan quoted from Section 663, but did not brief that provision. CT 165. Defendants' brief opposing the motion is not in the Clerk's Transcript, but in Mr. Ryan's Reply, he confirmed that he was never seeking relief under Section 663:

- "My motion is not a motion to entertain a new judgment as opposing parties argue. It is a motion to dismiss a current order of dismissal that was obtained improperly for multiple reasons and allow my matter to go to trial so that I can obtain a judgment based upon the merit of my case, and not procedural issues." CT 177 (Reply to Objection to Motion to Vacate at 2:13-16).
- "The request to vacate the current order of dismissal is based upon the law as stated in CRC 3.1342.(a), not CCP 663. The current motion is made pursuant to CCP 473, and was

timely made.” CT 178 (Reply to Objection to Motion to Vacate at 3:18-20).

Section 663 was never at issue in this case. Code of Civil Procedure section 663 provides:

A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and *different* judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a *different* judgment:

1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected.
2. A judgment or decree not consistent with or not supported by the special verdict.

(Civ. Proc. Code § 663 (emphasis added).)

Mr. Ryan never asked for “another and different judgment” to be entered. Mr. Ryan was never “entitl[ed]” to a “different” judgment. The procedural posture of this case – pretrial dismissal based on the trial court’s assessment that Mr. Ryan had abandoned his case – does not supply any set of circumstances upon which Mr. Ryan *could* have been entitled to any other or different judgment – the only relief Section 663 could have provided. The most Mr. Ryan could have hoped for is a trial on the merits

in the first instance; there was no *different* judgment to be had. Section 663 is inapplicable on its face.<sup>2</sup>

“The nature of a motion is determined by the nature of the relief sought, not by the label attached to it. The law is not a mere game of words.” *California Correctional Peace Officers Ass’n v. Virga* (2010) 181 Cal.App.4th 30, 43 (quoting *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193) (internal quotation marks omitted); *see also Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1577 (“The name of a motion is not controlling, and, regardless of the name, a motion asking the trial court to decide the same matter previously ruled on is a motion for reconsideration under Code of Civil Procedure section 1008.”). Whatever it was called, whatever it said in the title, Mr. Ryan’s motion was not a motion to vacate the judgment under Section 663.

Because Section 663 was never at issue in this case, the appealability of an order denying a motion to vacate under Section 663 is not at issue in this case. If the Court issues an opinion in this matter on the narrow question it has chosen to review, the opinion will be advisory. This Court and the courts of appeal have traditionally declined to issue advisory opinions. *People v. Super. Ct.* (1970) 1 Cal.3d 910, 912; *see also Hill v. Hill* (1947) 79 Cal.App.2d 368, 370 (“We have not been cited to any case and we know of none that authorizes an appellate court to inform the litigants what the opinion of the court is upon a question that has not been

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<sup>2</sup> The trial court did not rule on the merits of any Section 663 argument in its order denying Mr. Ryan’s motion to vacate the order dismissing the case, but rather noted that a motion under Section 663 was untimely. CT 186. The trial court, therefore, never determined whether Mr. Ryan had substantively invoked Section 663.

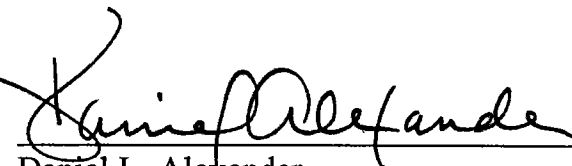
raised in the action, or what its decision would be if the question should be presented.”).

### III. Conclusion

Defendants and Respondents respectfully request that the Court dismiss its review of this case. The Court was very specific about the question it wanted to reach when it granted review in this case. But this case does not present that question. The Plaintiff’s motion to vacate the judgment in this case was not based on Code of Civil Procedure section 663 and could not have been based on Section 663; that section is facially inapplicable to this case because the only relief available under that code section is not relief that Mr. Ryan could have requested or that the trial court could have granted even if Mr. Ryan had requested it. Mr. Ryan’s confirmation that he never sought relief under Section 663 should inform this Court that any decision it makes about the one issue it wanted to reach in this case would constitute an advisory opinion. The Court should dismiss review in this case and let the question await a case that actually presents that question for review.

Dated: August 5, 2016

COLEMAN FROST LLP

By:   
Daniel L. Alexander

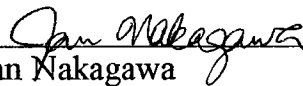
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and MOEJOE PROPERTIES, LLC

**CERTIFICATION OF WORD COUNT**  
**(California Rules of Court, Rule 8.204(c)(1))**

The foregoing brief contains 2,056 words (including footnotes, but excluding the table of contents, table of authorities, certificate of service, and this certificate of word count), as counted by the Microsoft Word version of MS Word 2010 word processing program used to generate the brief.

Dated: August 5, 2016

Coleman Frost LLP

  
\_\_\_\_\_  
Jan Nakagawa



## PROOF OF SERVICE

I am a citizen of the United States and employed in the County of Los Angeles, City of El Segundo, California. I am over the age of eighteen years and not a party to the within action. My business address is Coleman Frost, LLP, 201 Nevada Street, El Segundo, CA 90245.

On August 5, 2015, I served a true copy of the following document(s):

Motion To Dismiss Review

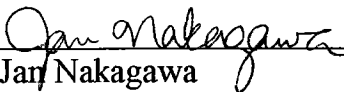
on the following party(ies) in said action:

SEE ATTACHED SERVICE LIST

- (X) **BY UNITED STATES MAIL:** By enclosing the document(s) in a sealed envelope or package addressed to the person(s) at the address above and
  - (X) depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.
  - ( ) placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the Coleman Frost LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, located in El Segundo, California, in a sealed envelope with postage fully prepaid.
- ( ) **BY OVERNIGHT DELIVERY:** By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- ( ) **BY MESSENGER SERVICE:** By placing the document(s) in an envelope or package addressed to the persons at the addresses listed and providing them to a professional messenger service for service.

- ( ) **BY FACSIMILE TRANSMISSION:** By faxing the document(s) to the persons at the fax numbers listed based on an agreement of the parties to accept service by fax transmission. No error was reported by the fax machine used. A copy of the fax transmission is maintained in our files.
- ( ) **BY E-MAIL TRANSMISSION:** By e-mailing the document(s) to the persons at the e-mail addresses listed based on a court order or an agreement of the parties to accept service by e-mail. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

I declare, under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on August 5, 2016, in El Segundo, California.

  
Jan Nakagawa

**SERVICE LIST**

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