S225398

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROY ALLAN SLURRY SEAL, INC., *et al.*

Plaintiffs and Appellants,

v.

AMERICAN ASPHALT SOUTH, INC.,

Defendant and Respondent.

ANSWER BRIEF ON THE MERITS

After a Decision by the Court of Appeal,
Second Appellate District, Division Eight
No. B255558

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ISSUES PRESENTED FOR REVIEW

Appellants note respondent has presented two issues for review which do not accurately encapsulate the allegations of the operative Complaint. For instance, contrary to the representation stated in respondent's Issue No. 1, appellants' alleged respondent's illegal and/or unfair conduct started *prior to and contemporaneously with* the moment respondent submitted its bids, not merely *after* the bid was awarded. As to respondent's Issue No. 2, appellants similarly dispute this characterization of the issues because respondent uses the term "preexisting relationship" in a manner inconsistent with this Court's description of the nature of the required relationship between a plaintiff and a third party in the context of the tort for intentional interference with prospective economic advantage.

Appellants' suggestions for the salient issues are:

1. Is it reasonably foreseeable the lowest bidder on a public works project who obtains the award by illegal and/or unfair methods will cause economic injury to the second lowest bidder who would have otherwise obtained the award but for the lowest bidder's illegal conduct?

2. If so, do California public policy, California Public Contracts Code and *Korea Supply* jointly and severally protect the lowest bidder from tort liability to the second lowest bidder for the lost profits caused by its foreseeable conduct?

To answer the two issues framed above both sides of this case navigate in the same waters flowing from *Korea Supply Co. v Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134. Appellants' legal argument effortlessly sails downstream from this Court's

prior opinions on the tort of intentional interference with prospective economic advantage. However, respondent's legal arguments vainly push upstream trying to reach a destination which this Court's prior decisions, from *Buckaloo* to *Korea Supply*, will not flow towards without convoluted analysis of case law logic and damming public policy.

I. STATEMENT OF THE CASE

The instant case arises out of various public works contracts for the paving of streets in which both appellants Roy Allan Slurry Seal, Inc. ("RASS") and Doug Martin Contracting, Inc. ("DMC"), separately not jointly, were at different times the second lowest bidder behind respondent, American Asphalt South, Inc. ("SOUTH"). Appellants allege respondent SOUTH violated the Labor Code by not paying its employees the proper amount of prevailing wages, and violated other laws, including Labor Codes and Public Contract Codes, in order to gain an unfair advantage in the bidding process. SOUTH's conduct resulted in SOUTH being awarded certain public works contracts for street paving Appellants alleged they would have received but for SOUTH's wrongful interference. In its demurrer, respondent argued the tort of intentional interference with prospective economic advantage requires appellants to already have had a pre-existing relationship with the public entity awarding the public contract ***prior*** to the time appellants submitted their respective bids. However, Appellants maintain the common sense interpretation of *Korea Supply*, and its ancestral lineage, do not require a pre-existing or existing economic relationship *to the extent argued by respondent*. Appellants' argument is simply that the

contemporaneous act of appellants submitting what would have been the lowest bid but for South's wrongful interference of submitting an illegally deflated bid creates a sufficient "pre-existing economic relationship with the probability of a future economic benefit" as described by this Court in *Korea Supply*.

II. LEGAL ARGUMENT

A. The Complaint Clearly Sets Forth a Cause of Action for Intentional Interference with Prospective Economic Advantage

The first element of a cause of action for intentional interference with prospective business advantage is (1) the existence of a prospective business relationship containing the probability of future economic rewards for plaintiff;..." *PMC, Inc. v. Saban* (1996) 45 Cal.App. 4th 579, 594.

Appellants allege wrongful conduct on SOUTH's part, including submitting wrongfully, fraudulently and/or illegally deflated bids...which South knew it could achieve by its failure to pay all of its employees the 'prevailing wage' rate for work performed in execution of the aforementioned 'public works' contracts. Complaint, ¶ 41.

Respondent SOUTH argued in its demurrer this cause of action fails because it is based entirely on a speculative expectation that a potentially beneficial relationship will arise. Ironically, for support on this point, SOUTH cites *Korea Supply Company v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1164 (this cause of action "protects the expectation that [a] relationship eventually will yield the desired benefit, not necessarily the mere speculative expectation that a potentially beneficial relationship will arise")".

Appellants also alleged Respondent intended to disrupt the relationship between Appellants and the respective governmental entities that awarded the contracts for the various "public works" projects at issue, and that Respondent engaged in the intentionally wrongful act of deflating bids based on its plan of not paying all of its employees legally mandated "prevailing wages." Complaint ¶ 41. Thus, the pleading sufficiently alleges when submitting its allegedly unlawfully deflated bid, Respondent acted with the knowledge its wrongful acts were substantially certain to disrupt Appellants' reasonable business expectations as the rightful lowest bidder. *Korea Supply, supra,* 29 Cal.4th at 1153.

III. RESPONDENT OWED A DUTY TO APPELLANTS TO ENSURE RESPONDENT'S BIDS INCLUDED THE PROPER AMOUNT OF PREVAILING WAGES

The last paragraph on page 39 of the Opening Brief states:

> "In this case, Plaintiffs cannot establish that American owed a duty to prepare its bids in a particular fashion, to ensure that its bid price included prevailing wages, or to refrain from underbidding its competitors for the contracts." However, Appellants have never argued this Court should refrain an honest bidder from honestly underbidding its competitors and respondent's inclusion of this phrase in its argument is either mockery or wishful thinking.

From the outset, it is important to note despite respondent's references to plaintiffs/appellants as "disappointed bidders", this case is not simply about a "disappointed bidder" suing the winning bidder for honestly "underbidding its competitors for contracts" as respondent blithely states. Appellants are not "disappointed bidders" just as a motorist whose car is hit by a drunk driver is not a "disappointed motorist". Respondent argues it did not have "to ensure it bid price included prevailing wages" even though paying prevailing wages is a California

mandated requirement on the public works projects alleged in the Complaint. Respondent's argument clearly refutes the notion of imposing a duty based on foreseeability. Certainly, it was reasonably foreseeable to respondent if it did ***not*** ensure its bids on public works projects included *all* of the proper prevailing wages, respondent would probably cause economic injury to the second lowest bidder who did ensure its bid included all of the proper prevailing wages. The requisite foundation for respondent's foreseeability is properly alleged in the operative Complaint by alleging appellants and respondent were paying about the same price for the raw materials and equipment but it was the illegal savings in labor costs a.k.a. wage theft, which allowed respondent to submit the lowest bids and be awarded the contracts for the public works projects at issue in the Complaint.

Respondent argues it did not know appellants (separately not jointly) would be the second lowest bidder is irrelevant. This argument is similar to a drunk driver arguing he did not know he was going to run into a bicyclist named Joe. Both respondent and the hypothetical drunk driver made the same intentional choice to disregard the law before coming into contact with their reasonably foreseeable victim. It is this intentional choice by respondent to disregard the law which leads to a reasonably foreseeable consequence even though the exact victim may not be known. This element of the tort does not require the respondent be able to predict plaintiff by name. However, it is enough the respondent was aware its actions would frustrate the legitimate expectations of a specific, albeit unnamed party. *Ramona*

Manor Convalescent Hospital v. Care Enterprises, (1986) 177 Cal. App. 3d1120,1132-1133, 225 Cal. Rptr. 120.

Appellants contend the reasonably foreseeable consequence of a deliberate act to disregard the inclusion of all of the legally mandated and necessary prevailing wages in respondent's bids leads to the imposition of a duty upon respondent under the first cause of action for intentional interference with prospective economic advantage. This issue of whether or not to impose a duty on respondent based on the allegations of the Complaint highlights appellants' and respondent's diametrically opposed interpretations of the exact same case law. For example, respondent cites *J'Aire Corp. v Gregory* (1979) 24 Cal.3d 799 and *Dillon v. Legg* (1968) 68 Cal.2d 728 to support its argument against imposing a duty for not ensuring it (respondent) included prevailing wages in its bids for public works projects. Opening Brief, respectively at p. 39 and p. 40. However, *Dillon* at pp. 730-731, clearly explained this Court's rationale for imposing a duty under the fact pattern it was presented:

> "We have concluded that neither of the feared dangers excuses the frustration of the natural justice upon which the mother's claim rests. We shall point out that in the past we have rejected the argument that we should deny recovery upon a legitimate claim because other fraudulent ones may be urged. We shall further explain that the alleged inability to fix definitions for recovery on the different facts of future cases does not justify the denial of recovery on the specific facts of the instant case; in any event, proper guidelines can indicate the extent of liability for such future cases."

This Court in *Dillon* also discussed the history of "duty" and applied its analysis of duty to the facts before it.

> "The assertion that liability must nevertheless be denied because defendant bears no "duty" to plaintiff "begs the essential question--whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. ... It

> [duty] is a shorthand statement of a conclusion, rather than an aid to analysis in itself. ... But it should be recognized that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, Law of Torts, supra, at pp. 332-333.) *Dillon* at pp. 733-734.

This Court in *J'Aire Corp. supra,* subsequently expounded on the concept of "duty" and duty's relationship to foreseeablity and tort liability:

> "Rather than traditional notions of duty, this court has focused on foreseeability as the key component necessary to establish liability: "While the question whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. ... [F]oreseeability of the risk is a primary consideration in establishing the element of duty." (Weirum v. RKO General, Inc. (1975) 15 Cal. 3d 40, 46 [123 Cal. Rptr. 468, 539 P.2d 36], fn. omitted.) Similarly, respondent is liable if his lack of ordinary care caused foreseeable injury to the economic interests of appellant."
>
> "In addition, this holding is consistent with the Legislature's declaration of the basic principle of tort liability, embodied in Civil Code section 1714, that every person is responsible for injuries caused by his or her lack of ordinary care. fn. 3 (See Rowland v. Christian, supra, 69 Cal.2d at p. 119.) That section does not distinguish among injuries to one's person, one's property or one's financial interests. Damages for loss of profits or earnings are recoverable where they result from an injury to one's person or property caused by another's negligence. Recovery for injury to one's economic interests, where it is the foreseeable result of another's want of ordinary care, should not be foreclosed simply because it is the only injury that occurs." *J'Aire, id.* at p. 806.

In light of this Court's aforementioned illustrative explanations of the concept of duty and duty's relationship to foreseeability, and how duty and foreseeability work together to impose liability on a tortfeasor, respondent's reliance on these two cases is awkwardly misplaced. Further, respondent's argument against this Court imposing a duty upon respondent for intentionally ***not*** ensuring its bids included the legally mandated prevailing wages is as hard to digest as a chunk of asphalt.

IV. APPELLANTS PROPERLY ALLEGED THE EXISTENCE OF AN ECONOMIC RELATIONSHIP WITH A THIRD PARTY THAT CONTAINED THE PROBABILITY OF FUTURE ECONOMIC BENEFIT TO APPELLANTS

A. Existing- To Be Or Not To Be

The instant case raises the question of what constitutes an "existing relationship with the prospective of economic advantage" in the context of the tort of intentional interference with prospective economic advantage.

Appellants' act of submitting bids on the various public works projects alleged in the complaint did, in and itself, constitute the existence of an economic relationship with a third party that contained the probability of future economic benefit to appellants. Certainly, appellants' relationship with the third party was "in existence" because appellants' (separately) relationship with the third party was occurring contemporaneously with respondent's alleged interference with the same third party. Appellants' relationship can also be described in terms of what it was not. Specifically, appellants' conduct was not conduct that was going to take place in the future. The case law is not uniform in describing the scope of the "economic relationship" between plaintiff and some third party. Some cases omit the word "economic" and instead use the phrase, "existing relationship" usually followed by the phrase, "with the probability of a future economic benefit". This court in *Della Pena v. Toyota* (1995) 11 Cal.4th 376 noted this discrepancy in the first page of its opinion.

Therefore, defining the scope of an "existing relationship" between the appellants and the third party who was the object of respondent's interference is

critical. Simply stated, does the act of submitting a bid constitute, as *Korea Supply* requires, the "existence of an economic relationship with some third party that contains the probability of economic benefit to appellants", or as the threshold requirement was similarly stated in *Settimo Associates v. Environ Systems* (1993) 14 Cal.App.4th 842, "the existence of a prospective business relationship containing the probability of future economic rewards"?

The most accurate way to determine the scope of an existing prospective relationship by analyzing the facts of the cases in which this term was first used by this Court. This Court's description of the evolution of this tort stated in *Buckaloo v Johnson*, (1975) 14 Cal.3d 815, 822, helps define the parameters of an "existing relationship".

> "This is a tort theory of recovery rather than contract, and is based on interference with a "relationship" between parties irrespective of the enforceability of the underlying agreement. As stated in the leading California case of *Zimmerman v. Bank of America* (1961) 191 Cal. App.2d 55, 57 [12 Cal. Rptr. 319]: "The tort of interference with an advantageous relationship, or with a contract, does not, however, disintegrate because it relates to a contract not written or an advantageous relation not articulated into a contract. *The nature of the tort does not vary with the legal strength, or enforceability, of the relation disrupted. The actionable wrong lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted*, whether it is written or oral, enforceable or not enforceable." (Italics added.)

If, as stated by this Court in *Buckaloo*, the actionable wrong lies in the inducement to sever the relationship and not in the kind of relationship so disrupted, respondent's argument against applying this tort to the competitive bidding process

for public works projects runs contrary to this Court's rationale. Furthermore, this Court also stated in *Buckaloo*, id:

> "This tort, although infrequently invoked, is not new to the law. Interference with contractual relations was recognized as an actionable wrong over a century ago in the celebrated English case of Lumley v. Gye (Q.B. 1853) 118 Eng.Rep. 749. With respect to the related tort of interference with prospective advantage, Prosser teaches that "The real source of the modern law ... may be said to be the case of Temperton v. Russell [1893], in which the Court of Queen's Bench declared that the principles of liability for interference with contract extended beyond existing contractual relations, and that a *similar action would lie for interference with relations which are merely prospective or potential."* (Fn. omitted.) (Prosser, Torts (4th ed. 1971) p. 949.)" (Italics added)

This Court's quotes from Prosser on Torts and *Lumley v. Gye* that a "...similar action would lie for interference with relations which are merely prospective or potential." is a good starting point for determining the scope of an "existing relationship". Appellants' existing relationship with the awarding governmental bodies alleged in the Complaint was, at the very least, "merely prospective or potential" because appellants were in a contemporaneously existing relationship as bidders in a competitive bidding process with the awarding governmental body as the third party.

Also, instructive for defining the scope of an "existing relationship" is *Buckaloo*, footnote 6, wherein this Court gives guidance to the scope of the required relationship:

> "[6] As said in the case of Builders Corporation of America v. United States (N.D.Cal. 1957) 148 F. Supp. 482, 484, footnote 1: "Both the tort of interference with contract relations and the tort of interference with prospective contract or business relations involve basically the same conduct on the part of the tortfeasor. In one case the interference takes place when a contract is already in existence, in the other, when a contract would, with

certainty, have been consummated but for the conduct of the tortfeasor.... Rather than characterizing the two as separate torts, the more rational approach seems to be that the basic tort of interference with economic relations can be established by showing, inter alia, an interference with an existing contract or a contract which is certain to be consummated, with broader grounds for justification of the interference where the latter situation is presented."

This Court in *Buckaloo id.* gave additional indication an ongoing existing economic relationship was not required,

"(7) Secondly, as the *Zimmerman* line of cases teaches, the mere fact a prospective economic relationship has not attained the dignity of a legally enforceable agreement does not permit third parties to interfere with performance. ...***Where fraud is involved, as in Golden, the actionable wrong stands out in bold relief.*** Less obvious perhaps, but nonetheless actionable, are the circumstances in which the purchaser, with full knowledge of the economic relationship between broker and seller, intentionally induces the latter to violate the terms of the relationship and seek refuge in the unenforceability of the contract. As the New Jersey court noted, however, in order to successfully maintain this cause of action it must be shown that the interloper received pecuniary benefit in the way of a reduced selling price resulting from the exclusion of the broker's commission. (McCann v. Biss (1974) supra, 322 A.2d 161, 164.)" emphasis added

"Thus as Prosser states: "So long as the plaintiff's contractual relations are merely contemplated or potential, it is considered to be in the interest of the public that any competitor should be free to divert them to himself by *all fair and reasonable means*." (Prosser, Torts (4th ed. 1971) p. 954.)" (emphasis added).

"But entirely different considerations prevail where the buyer, after taking advantage of the broker's efforts and stock in trade, induces the seller to accept the "low net price" through the expedient of excluding the broker's commission. There is no public policy to be served by encouraging such devious dealings; on the contrary, such an intrusion into a protected economic relationship is precisely the conduct condemned by the traditional tort of interference with contract. As has been amply demonstrated, the mere fact that the relationship has not yet ripened into a contract is of no moment when the cause of action is based on the actor's subversion of a prospective contractual relationship."

As to the legal strength of their argument, Appellants take a more than a modicum amount of comfort in this Court's definition of the required relationship as a "prospective contractual relationship." Therefore, if this Court's underlying rationale from *Buckaloo* is taken in context with the holdings cited by respondent, respondent can not credibly argue there is a significant difference between a buyer inducing a seller to avoid the broker's commission in order to receive the pecuniary benefit of purchasing the house at a lower price and respondent's conduct of intentionally deciding not to include the proper amount of prevailing wages on public works projects in order to receive the pecuniary benefit of being awarding the contract for a public works project. Consequently, under *Buckaloo's* analysis, appellants respectfully submit they have sufficiently alleged their respective contracts with the awarding governmental bodies would have been consummated but for the independently illegal conduct of respondent.

B. The Complaint Sufficiently Alleges The Existence Of A Pre-Existing Economic Relationship Between Appellants And The Third Party Public Entities Based On A Reasonable Probability Of Future Economic Benefit To Appellants

The tort of intentional interference with prospective economic advantage "protects the ***expectation*** of an advantageous business relation even in the absence of an existing, legally binding agreement." *Westside Center Associates v. Safeway Stores 23, Inc.*, 42 Cal.App.4th 507, 520-21 (1996) (emphasis in original). With respect to the element of an economic relationship having the probability of future economic benefit, "the cases generally agree it must be reasonably probable that the prospective economic advantage would have been realized but for defendant's

interference." *Id.* at p. 522 (quoting *Youst v. Longo*, 43 Cal.3d 64, 71 (1987) *See also Shamblin v. Berge,* 166 Cal.App.3d 118, 123 (1985) (tort "protects against intentional acts designed to harm an economic relationship which is ***likely*** to produce economic benefit" (emphasis in original).

Appellants alleged they were bidders for the same public works projects in which Respondent bids were based on wrongful conduct. Those simple allegations are sufficient to allege an existing prospective economic relationship with the probability of future economic benefit to appellants who would have been the lowest bidder but for respondent's wrongful conduct occurring prior to and at the time respondent's bid was submitted. For example, both *Korea Supply Company v. Lockheed Martin Corporation* (2003) 29 Cal.4th 1134 and *Settimo Associates v. Environ Systems* (1993) 14 Cal.App.4th 842 involved claims related to unsuccessful bidders. While the Court in *Settimio* found that the cause of action for unlawful interference with prospective business advantage could not be maintained, that conclusion was *not* based on failure to show the existence of an economic relationship. In fact, the *Settimo* court stated the requirement as "the existence of a *prospective* business relationship containing the probability of future economic rewards." *Settimo, id.* at page 845 (emphasis added).

Appellants' properly alleged that their relationship with the governmental entity contained the reasonable probability of future economic benefit to appellants because appellants were the second lowest bidder and would have been awarded the contract but for the fraudulent and/or illegal conduct of respondent. Complaint ¶ 38.

Respondent attempts to distinguish the plaintiff in *Korea Supply Co. v Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134; 131 Cal.Rptr.2d 29, by arguing the business relationship of plaintiff Korea Supply Company was somehow more "existing" than plaintiffs' position in the instant case. Respondent argues Korea Supply Company's relationship with MacDonald Dettwiler, the party whose bid was intentionally interfered with by the defendant, was more solidified than plaintiffs' position in the instant case. However, this Court in *Korea Supply*, id., at page 1153, specifically noted plaintiff, Korea Supply Company, did not plead it had a contract with MacDonald but only "an expectancy".

> "...In the present case, KSC's claim was appropriately stated as one for interference with prospective economic advantage. KSC did not allege in its complaint that it had a contractual agreement with MacDonald Dettwiler. KSC merely alleged that it had an economic expectancy in that it was acting as MacDonald Dettwiler's broker and it expected a commission if the contract was awarded to MacDonald Dettwiler. KSC nowhere pleads that this expectancy amounted to an enforceable contract."

Therefore, the plaintiff in *Korea Supply* alleged in its Complaint a more tenuous business relationship than appellants have alleged in the instant case because Korea Supply Company was once removed from the bidding process and its stake in the matter was completely dependent upon the fortunes of MacDonald Dettwiler. Yet, respondent argues Korea Supply Company had legally enforceable business expectations *that were greater* than the enforceable business expectations of appellants in the instant case as the second lowest bidders. Respondent's argument on this point creates a "windfall without risk" scenario because the only party with standing to sue does not have the risk exposure of the party making the bid. In effect,

respondent's argument on standing would create a cottage industry of agents who would execute a contract with a bidder in order to have standing to sue under the facts of the instant case.

Korea Supply's ancestral case lineage, analyzed from a comprehensive perspective, establish an inverse sliding scale analysis for this tort. Specifically, the more tenuous the economic relationship is between the plaintiff and the third party, the more egregious defendant's interfering conduct must be. *Korea Supply, id.* at pages 1153-1156. Since Appellants have alleged extraordinarily egregious conduct on the part of respondent in the instant case, the competitive bidding economic relationship should not the death knell of this cause of action on the facts as alleged in the operative Complaint.

In light of detailed description by this Court, appellants content they have alleged the requisite existing economic relationship by alleging they submitted bids for various public works contracts which respondent intentionally interfered with by engaging in a systemic pattern of illegal conduct that appellants accurately alleged was independently wrongful conduct. If Appellants' Complaint had instead alleged appellants were *going to submit bids* for the public works contracts at issue, and would have been the lowest bidder if they had submitted their bids, Respondent's argument on this point would have merit.

Respondent's reliance on *Blank v. Kirwan* (1985) 39 Cal. 3d 311, is misplaced under the facts of the instant case because Appellants have alleged facts stating they, respectively, were the second lowest bidder for each of the bids Respondent was

awarded. This Court in *Blank* dealt with a distinctively different set of facts as described,

> "Second, even if the relationship between plaintiff and the city could be so characterized, it would make little difference. The tort has traditionally protected the expectancies involved in ordinary commercial dealings — not the "expectancies," whatever they may be, involved in the governmental licensing process. (See Prosser & Keeton, The Law of Torts (5th ed. 1984) § 130, p. 1006.) Plaintiff does not attempt to justify such an expansion of the tort. Nor would he likely have been successful if he had. Under Ordinance No. 806 the city council's discretion to grant or deny an application for a poker club license is so broad as to negate the existence of the requisite "expectancy" as a matter of law. Thus, "no facts are alleged ... showing that the plaintiff had any reasonable expectation of economic advantage which would otherwise have accrued to him...." (Campbell v. Rayburn (1954) 129 Cal. App.2d 232, 234 [276 P.2d 671].)" *id* at page 331.

The awarding body in the instant case, unlike in *Blank,* was not issuing license to create an economic benefit between appellants and unknown third parties. Also, the awarding bodies in the instant case did not reject all the bids, but, in fact, awarded the contracts to the lowest bidder in each instance alleged in the Complaint. This critical element of a "reasonable expectation" is exactly what this Court found that Mr. Blank did *not* properly allege. Surely, respondent and appellants can agree the competitive bidding process is not nearly as capricious or discretionary as the process of applying for a license to operate a poker club. Further, appellants have alleged the awarding body in each instance, did, in fact, award the bid to the lowest bidder. In the instant case, appellants have supplied the requisite critical element which was not present in *Blank, id.*

Therefore, appellants have properly alleged they had a reasonable expectation which would have otherwise accrued to them, but for respondent's illegal and unfair conduct.

C. Appellants Properly Alleged a Probable Expectancy Interest in Being Awarded Public Works Contracts But For Respondent's Illegal and Unfair Intentional Interference

Respondent's reliance on *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal. App. 4th 507,524 is misplaced. Respondent uses this case in support of its legal argument that the mere submission of a bid at best suggests an "economic relationship which has yet to arise" and thus is "patently insufficient to state a claim for intentional interference with prospective advantage. However, the *Westside* court was referring to a "lost opportunity" scenario and cited this Court's ruling in *Blank v. Kirwan* (1985) 39 Cal.3d 311.

> "These two decisions, *Blank* and *Youst,* support the view that the interference tort applies to interference with existing noncontractual relations which hold the promise of future economic advantage. In other words, it protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will eventually arise".

Ironically, it is this exact same citation that respondent argues applies to appellants as the rightful lowest bidders in a competitive bidding process to *prevent* the creation of an existing relationship with the probability of economic benefit. A bidder submitting a bid in the competitive bidding process of a public works project does have a "prospective economic relationship" with the awarding body if the awarding body. Although, only the rightful lowest bidder *also* has the probable expectation that a potentially beneficial relationship will arise. The rationale for this

position in the context of alleging a cause of action for intentional interference with prospective economic advantage is a pragmatic and easily defined. Stated simply, the cause of action only arises when the awarding body actually awards the contract to the lowest bidder. If the awarding body exercises its right to reject the bids, all of the bids have to be rejected. Therefore, the question of who is the rightful lowest bidder becomes moot.

Appellants' do *not* contend the "mere submission of a bid" to a public entity, in and of itself, is sufficient to support the first element of the first cause of action. However, Appellants' *do* contend the actual submission of a bid to a public agency created the contemporaneous (existing) relationship, which, coupled with the fact appellants' bids were second lowest to Respondent's bid satisfies the subordinate dependent clause "probability of future economic benefit" aspect of the first element of this tort. In a nutshell, Appellants alleged they would have been the lowest bidder but for Respondent's independently wrongful conduct designed to interfere with Appellants' existing relationship created by the actual submission of their bids, that had the probability of a *prospective* (compared to an existing or past) economic benefit to Appellants since the awarding body did not exercise its right to reject all of the bids, and Respondent was actually awarded each contract at issue.

Respondent cites *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1291, as authority for requiring appellants to show they had an "economic relationship" with the public agencies. However, the case law clearly demonstrates, as detailed below, appellants are not required to prove their "economic relationship" with the public agencies in the

context of their *past or continuing* relationship with those agencies, but instead, only that they had a contemporaneous (existing) relationship with those agencies that contained the probability of future economic benefit to appellants. *Salma* held, "Plaintiff did not show that he had *existing* relationships with *potential* purchasers or lenders that were disrupted by Capon's conduct. A plaintiff must establish an existing relationship to establish a claim for intentional interference with prospective economic advantage." (emphasis added). Therefore, *Salma's* holding requires appellants to prove they had an existing relationship with a potential purchaser (public agency) of their goods and services. Appellants submit that the "existing relationship" is satisfied by appellants' allegations that they actually submitted bids on the public works contract and would have probably been awarded the contract but for respondent's illegal conduct.

The term "existing relationship" as used by in *Salma,* was not stated by this Court in the holding of *Korea Supply,* and to the extent respondent interprets the term "existing relationship" in a manner that contradicts, or is inconsistent with, this Court's holding in *Korea Supply,* respondent's interpretation of the requirements of an "existing relationship" are inaccurate. This Court in *Korea Supply* expressly did not change the elements of the tort as set forth in either *Buckaloo* or *Della Penna*, except with regards to the third element of the intent of the defendant. *Della Penna*, supra, 11 Cal.4th at p. 393, fn. 5. *Korea Supply* specifically endorsed the elements of the tort of intentional interference with prospective economic advantage, as understood by the majority of the Courts of Appeal after *Della Penna*, except for the third element.

The majority of the cases from the Courts of Appeal, including the cases cited by appellants and respondent in their respective briefs, such as *Settimo* and *PMC, Inc. v. Saban (*1996) 45 Cal.App. 4th 579, 594, describe the first element as "... (1) the existence of a prospective business relationship containing the probability of future economic rewards for plaintiff;..."

Since *Korea Supply* expressly endorses the understanding of the Courts of Appeal on this tort it makes no sense to read *Korea Supply* in a manner that contradicts the holdings of those cases- which is exactly what occurs by interpreting *Korea Supply* in a manner that adds a requirement to the first element that previously did not exist, i.e. an existing economic relationship of the type argued by respondent. Therefore, appellants' respectfully suggest that it is the *contemporaneous aspect* of the term "existing" relationship which is the most logical interpretation that makes sense of the two descriptions of the required economic or business relationship as stated in *Settimo* and *Korea Supply*.

Settimo described the necessary first element as, "the existence of a prospective business relationship containing the probability of future economic rewards. 14 Cal.App. 4th 842, 845. *Korea Supply* described the first element of this tort as, "the existence of an economic relationship with some third party that contains the probability of future economic benefit to the plaintiff. *Korea Supply* at page 1164. However, both *Settimo* and *Korea Supply* expressly and specifically focused only on the future, or prospective, economic benefit to plaintiff arising out of the existing

relationship, i.e. bidder and awarding body. One needs look no further than a dictionary for additional support to correctly interpret the holding of *Korea Supply*.

The word "relationship" is defined as "the way in which two or more people or things are connected". Certainly, a bidder and the awarding body who solicited the bid have an existing relationship. Assuming arguendo appellants had *not* actually submitted their respective bids, *then* respondent could successfully argue the lack of an "existing relationship" between appellants and the third party. Moreover, there is no legal authority supporting respondent's argument that the situation created by appellants bidding on a contract is not an "existing relationship" with a third party. For respondent to argue this point is to disavow the plain meaning of the words "existing" and "relationship". This type of "existing relationship" does not mean there is collusion or favoritism as respondent argues, but it accurately serves to define and describe a contemporaneous event that occurred between appellants who actually submitted bids and the third party awarding body who solicited appellants' bids.

The narrow characterization of "existence of an economic relationship" argued by respondent simply does not exist in the business world because it is impossible to have an "economic relationship" with a third party customer or client that has produced neither current, nor past, economic benefit. Moreover, neither *Settimo* nor *Korea Supply* require any past, or, existing, economic benefit to plaintiff from the relationship between plaintiff and the third party. Therefore, the most congruous interpretation is that courts do not require an existing economic relationship between plaintiff and the third party that is producing an economic

benefit to plaintiff, or did so in the past. The type of "economic relationship" respondent's arguments requires is not expressly stated by any court, and is, in fact contradicted by the rationale supporting the holdings stated in *Settimo* and *Korea Supply*. Furthermore, neither *Settimo* nor *Korea Supply* describe the required relationship as an "existing economic relationship" or confine it so narrowly. Neither *Settimo* nor *Korea Supply* require any past, or existing (i.e., contemporaneous), economic benefit from the relationship between plaintiff and the third party. The common denominators between *Settimo* and *Korea Supply* are an "existing relationship" that is "economic" in nature and has prospective benefit to plaintiff. When the first element of the cause of action for intentional interference with prospective economic advantage as stated in Settimo and by this Court in Korea Supply are compared, "the existence of a prospective business relationship containing the probability of future economic rewards"(*Settimo* at p. 845), and "the existence of an economic relationship with some third party that contains the probability of future economic benefit to the plaintiff" (*Korea Supply* at p. 1164), it is apparent the type of relationship that needs to be in "existence" is a prospective economic relationship containing the probability of future economic benefit. Thus, no current or past economic relationship, or economic benefit, between the plaintiff and the third party is required.

The subordinate clause, "that contains the possibility of future economic benefit to the plaintiff" defines the parameters of, "the existence of an economic relationship with some third party..." and those parameters do ***not*** require any past or

present economic benefit to plaintiff from the relationship. The only aspect of the relationship that needs to be in "existence" is the relationship itself, i.e. something opposite of a relationship that has not yet ripened into an actual historical event. To interpret the required economic relationship as anything other than that, i.e. requiring past or present economic benefit from the relationship just because the adjective "economic" is used in front of "relationship", would be contradictory to the express language of *Settimo* and *Korea Supply.* Also, interpreting these holdings to require either a previous or ongoing business relationship with the third party, without the requirement of any past or present economic benefit to plaintiff, would describe a business relationship that simply does not exist in the real world of business interactions.

The definition of "existing economic relationship" argued by respondent is more akin to an ongoing business relationship than the more expansive, and less congealed relationship which appellate courts, such as *Settimo*, have described, and which *Korea Supply* describes and endorsed in footnote 6. Therefore, appellants' submit the most logical interpretation of *Korea Supply* based on the holdings in *Settimo* and the majority of opinions from the Courts of Appeal, which *Korea Supply* expressly endorses, is to define "the existence of an economic relationship" with a third party using the plain meaning definitions of the words as fashioned in this phrase by this Court, (i.e. "existence" to simply mean that it exists contemporaneously, as opposed to something that is merely being contemplated; "economic" to mean related to the process by which goods or services are bought or

sold; and interpret "relationship" to mean the relative position of two things to each other). Then, when this phrase is viewed through the lens of its subordinate clause, "with some third party that contains the probability of future economic benefit to the plaintiff." its plain meaning correlates with *Settimo* and the holdings of the majority of the Courts of Appeal. More importantly, from appellants' perspective, when the holding of *Korea Supply* is interpreted according to the plain meaning of each of its words, the holding clearly applies to the facts of the instant case because appellants' relationship with the awarding body was in existence due to the submission of their bids, the relationship was economic in nature and the relationship had the probability of economic benefit to appellants because appellants were the rightful lowest bidders on each contract alleged in the operative Complaint.

Respondent's attempt to extinguish this cause of action at the demurrer stage is premature. "[I]t is a question of fact whether the business relationship between the plaintiff and third party is sufficient to support the tort" of interference with prospective economic advantage. *Tri-Growth Centre City, Ltd. V. Silldorf, Burdman, Duignan & Eisenberg*, 216 Cal.App.3d 1139, 1153 (1989). *See also Buckaloo, supra* at p. 830 n.7. ("The protected area of activity is not a contractual relationship but an economic relationship with the potential to ripen into contract. Whether the relationship is of sufficient depth to support the tort is a factual question which plaintiff will be put to the burden of proving at trial.") Respondent's argument also fails because instead of using the objective perspective of "probability of future economic benefit" it uses the subjective perspective. Specifically, respondent argues

appellants could not have had a probable economic benefit because appellants could not have known at the time they submitted their bid that their bid would be the rightful lowest bid. However, respondent's argument is based entirely on a subjective perspective. When viewed from an objective perspective, at the moment all of the bids are submitted only one bid would be objectively known to be the lowest bid. Therefore, the fact appellants did not subjectively "know" their bid was the rightful lowest bid at the time they submitted their bid is irrelevant.

D. The Awarding Governmental Body is Statutorily Required to Award the Contract to the Lowest Responsible Bidder Unless All Bids are Rejected

The awarding governmental body was statutorily required under the circumstances of this case to award the contracts alleged in the Complaint to the lowest responsible bidder. Public Utilities Code, § 130232, subd. (a) [contracts in excess of $25,000 required to be awarded to the "lowest responsible bidder"]. Appellants have alleged they, respectively, would have been the lowest responsible bidder but for respondent's fraudulent, illegal and/or unfair conduct in obtaining the award. Complaint, ¶¶11-16.

V. RESPONDENT'S ARGUMENTS EXTEND BEYOND THE FOUR CORNERS OF THE COMPLAINT

In reviewing the merits of a general demurrer, "the allegations of the complaint are assumed to be true." *Ramsden v. Western Union*, 71 Cal.App.3d 873, 879 (1977). A demurrer is not "the appropriate procedure for determining the truth of disputed facts or what inferences should be drawn where competing inferences are possible." *CrossTalk Productions, Inc. v Jacobson*, 65 Cal.App.4th 631, 635 (1998).

Respondent raises issues contradicting the express allegations of the Complaint by citing *Great West Contractors, Inc. v. Irvine Unified School District* (2010) 187 Cal.App.4th 1425, 1448, for the proposition that certain cities agencies are authorized to exercise their discretion and may award contracts to the bidders who are not the lowest bidder but are "superior" to other bidders. There is no allegation supporting respondent's argument which, in any event, is better suited for a motion for summary judgment. Further, there is no support for respondent's premise that appellants would not have been deemed the lowest responsible bidders but for respondent's independently wrongful interfering conduct.

Similarly, Respondent's statement in footnote 3 on page 5, extends beyond the allegations of the Complaint. Appellants have not alleged a court or public agency concluded respondent violated prevailing wage laws. However, appellants did allege five of respondent's former employees filed lawsuits against respondent for not paying prevailing wages and other violations of employee related statutes. Appellants, if permitted, are able to add allegations from the depositions of respondent's former employees describing how supervisors employed by respondent instructed employees to take hours off of their timecards so respondent did not have to pay proper prevailing wages and that some workers used multiple social security numbers and multiple names they obtained from other employees. In any event, Respondent's footnote is more appropriate for a motion for summary judgment argument than a demurrer because it extends beyond the allegations of the complaint. If permitted, appellants will venture down this extraneous rabbit hole opened by respondent when issues of fact are decided

later in this litigation, except to note now that none of the awarding bodies alleged in the Complaint awarded the contract based on any factor other than respondent submitting the lowest bid amount.

VI. APPELLANTS ARE NOT MERELY "DISAPPOINTED BIDDERS" BUT ARE THE FORESEABLE TARGETS OF RESPONDENT'S PATTERN OF WRONGFUL CONDUCT

The use of the term "losing bidder" throughout the Opening Brief does not accurately reflect appellants' status caused by defendant's illegal conduct as alleged in the operative Complaint. A more accurate term would be "deprived bidder" as noted in the Georgia Supreme Court case cited by respondent, *City of Atlanta v. J.A. Jones Construction Co.* (Ga. 1990) 260 Ga. 658, 662.

VII. APPELLANTS ONLY HAVE TO PROVE A PROBABILITY OF BENEFICIAL ECONOMIC EXPECTANCY NOT A GUARANTEE

Respondent's argument that Appellants, as the second lowest bidder, can not allege they would have obtained the various public works contracts referenced in the Complaint because the awarding city or county did not have to award the contract to the lowest bidder as per Public Contracts Code section 10122 ignores critical factual and legal points. Factually, the city or county in each bid referenced in the Complaint *did award* the contract to the lowest bidder. Legally, Appellants are not required to prove a guaranteed expectancy, only the probability that a beneficial economic relationship would arise. *Korea Supply, id.* at page 1155.

Further, the Public Contracts Code does require the contract be awarded to the lowest responsible bidder. Public Contracts Code section 10122. Since the awarding agencies' discretion under Public Contracts Code section 20166,10122(d) and 10185,

is essentially limited to awarding the contract to the lowest responsible bidder or rejecting all of the bids, respondent's argument on this point is moot. Pragmatically, if the awarding agency did exercise its discretion to reject all of the bids, then both appellants' bids and respondent's bids would have been rejected, respondent would not have breached a duty and appellants would not have incurred any damages. Thus, this scenario renders this aspect of respondent's discretion argument entirely moot.

Also, moot is respondent's "lowest responsible bidder" argument. First, this argument goes beyond the allegations of the complaint. To presume otherwise would suggest that the awarding body would deem respondent a "responsible bidder" even if the awarding body deemed as true the allegations in the Complaint- which a demurrer must do- and knew respondent engaged in wage theft on public works projects. Also, there is no allegation appellants would not have been "the lowest responsible bidder" but for respondent's illegal and unfair intentional interference of not including the proper amount of prevailing wages in its bids. Respondent conveniently omits these points in its legal argument.

VIII. APPELLANTS PROPERLY ALLEGED THEIR ECONOMIC HARM WAS PROXIMATELY CAUSED BY RESPONDENT

Respondent's argument on this issue is more suitable for its probable future Motion for Summary Judgment then the instant Demurrer because they do not test the sufficiency of plaintiff's allegations but rather Defendant argues the factual content thereof.

Further, the proximate cause analysis has to include respondent's independently wrongful conduct as alleged in the complaint, ¶¶ 29, 30, 41, not just

respondent's conduct *after* respondent submitted its bid as respondent argues. Respondent argues that its act of submitting the bid does not show proximate cause because it is not an inherently wrongful act. However, respondent selectively interprets the allegations of the operative Complaint. Respondent ignores ¶ 41 of the Complaint in its analysis of the proximate cause link between respondent's submission of its bid based on its illegal pattern of past conduct and intended illegal future conduct and its bid's effect of causing appellants' lost profits. Under this more inclusive analysis of respondent's conduct as alleged in the Complaint, the proximate cause element is properly supported. This proximate causation link between the submission of a bid based on anticipated future illegal conduct is the same as link as alleged in *Alameda County Joint Apprenticeship Training Committee, et al. v. Roadway Electrical Works, et al. (2010) 186 Cal App. 4th 185.* (discussed herein below in Section IX)

IX. THE PUBLIC CONTRACTS CODE AND LABOR CODE DO NOT EVINCE A COMPREHENSIVE REGULATORY SCHEME TO PREEMPT THE FIELD OF BIDDING PUBLIC WORKS CONTRACTS

It defies common sense to presume the Legislature intended the Public Contracts Code to support Respondent's argument. Fortunately for appellants, the express language of legislative intent of the Public Contracts Code does not support Respondent's argument. Public Contract Code § 100 states the Legislature's intent is to achieve the four objectives listed therein including, "...(c) To provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices. (d) To eliminate

favoritism, fraud, and corruption in the awarding of public contracts." This court's fundamental task in construing a statute is to ascertain the legislative intent so as to effectuate the purpose of the law. *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715. Because the statutory language ordinarily is the most reliable indicator of legislative intent, examining the words of the statute is the starting point. *id.* The words of the statute are given their ordinary and usual meaning and construed in the context of the statute as a whole and the entire scheme of law of which it is a part. *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043. If the language is clear and a literal construction would not result in absurd consequences that the Legislature did not intend, it is presumed the Legislature meant what it said and the plain meaning governs. *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737. The absurd result of Respondent's argument, i.e. allowing the low bidder to gain the award through illegal, tortious and competitively unfair conduct is antithetical to the Legislature's stated objectives. Also, if this Court interprets *Salma, supra,* to require Appellants prove their "existing economic relationship" in the context of the *past* economic benefit to appellants from the public agency, then a first time qualified bidder would not have a fair opportunity to enter the bidding process, because the new bidder would not have standing to assert a cause of action for intentional interference with prospective economic advantage as Appellants have alleged against Respondent.

Further, Respondent's arguments on some points are contradictory. First, Respondent argues that in a public works setting the public agency is required by law

to award the contract to the lowest responsible bidder yet even the lowest bidder has no reasonable expectancy it will be awarded the contract because the public agency may award the contract to another entity." This contradiction is brought into sharper focus because the *Swinerton* case cited by Respondent contradicts Respondent's own argument. *Swinerton* ruled the mis-award of the public works contract did not give the lowest responsible bidder a cause of action in tort for monetary damages against the public entities; but that advertisement for bids constituted a promise to award to lowest responsible bidder so that the lowest responsible bidder did have a cause of action based on promissory estoppel; and that lowest responsible bidder, which alleged conspiracy between second lowest bidder and public authorities, presented a cause of action for declaratory relief.

Since *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority* (1974) 40 Cal.App.3d 98, 101, held that the public agency's solicitation for bids constitutes a promise to award to the lowest bidder, Respondent can not argue appellants' position as the second lowest bidder is speculative as to damages, especially since appellants also alleged they would have been the lowest bidder but for respondent's independently wrongful conduct. Moreover, respondent's contradictory argument misses the point of appellants' argument which is simply that its damages are not speculative because the public agencies alleged in the Complaint *did in fact award* the bid to the lowest bidder each time, and each time that lowest bidder was Respondent. Therefore, Respondent's reliance on *Pacific Architects Collaborative v. State of California* (1979) 100 Cal.App.3d 110 is misplaced.

Respondent's reliance on *Pacific Architects Collaborative v. State of California* (1979) 100 Cal.App.3d 110, 121-122 (*Pacific Architects*), *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority* (1974) 40 Cal.App.3d 98, 101 (*Swinerton*), *Rubino v. Lolli* (1970) 10 Cal.App.3d 1059, 1062 (*Rubino*), and *Charles L. Harney, Inc. v. Durkee* (1951) 107 Cal.App.2d 570, 580 (*Harney*) is misplaced because each of these cases in some measure rests on government immunity principles arising from an agency's discretion to reject or accept all of the submitted bids.

Further, the public contract laws' purposes referenced by Respondent, i.e. "to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public" would **not** be offended by allowing Appellants' first cause of action to proceed. In fact, the last purpose referenced by Respondent, "to stimulate advantageous market place competition" would, in fact, **be fostered** by preventing Respondent from engaging in its competitively unfair, illegal conduct. Respondent can not argue, in good faith, that the purpose of "stimulating advantageous market place competition" includes promoting conduct that would constitute illegal and Unfair Competition in the non-public works arena, i.e, not properly paying prevailing wages to employees.

Respondent's related argument that it did not know appellants (separately not jointly) would be the winning bidder is similarly flawed when all of pragmatic facts are considered. Respondent knew when it submitted its bid that only the lowest bid

would be awarded the contract. (Respondent's arguments about the lowest responsible bidder and the discretion of the awarding body is dealt with above). Therefore, respondent knew, or reasonably should have known, that it if intentionally did not include ***all*** of the reasonably anticipated, and legally mandated prevailing wages to complete the job, it was going to harm the next lowest bidder who was following the law by including all of the prevailing wages.

The independently wrongful acts appellants allege respondent committed are primarily violations of the Labor Code. (Complaint,¶¶. 29, 30 and 41) It is irrelevant whether the statutes appellants allege respondent violated were specifically designed to protect respondent's own employees or regulate the bidding process or protect the public, as these issues are not requirements of the tort. Moreover, appellants are not alleging the governmental entities mis-awarded the public works contracts at issue.

A Public Contract Code Section 19102 Does Not Provide Exclusive Remedies Against The Lowest Bidder Who Obtained The Contract By Not Paying Its Employees The Proper Amount of Prevailing Wages

Respondent misconstrues this Court's holding in *Kajima/Ray Wilson v. M.T.A.* (2000) 23 Cal.4th 305, 316-317 and its quote from the case of *City of Atlanta v. J.A. Jones Construction Co.* (Ga. 1990) 260 Ga. 658,398 S.E. 2d 369. When *Kajima* and *City of Atlanta* are read in context, the stated rationale of the California and Georgia Supreme Court rulings, respectively, are to prevent the public coffers from being drained due to the illegal actions of a public official. The primary significant factual difference in the instant case is that Appellants' causes of action

are not alleged against the governmental entity which awarded the public works contracts referenced in the Complaint but rather against a private party.

In California, competitive bidding is largely governed by statute. None of these provisions, however, including the Public Contract Code, address whether the lowest responsible bidder that is wrongfully denied a contract has a cause of action for monetary damages. This could mean the Legislature has chosen not to provide such a remedy. Or it may reflect a legislative assumption that a statutory remedy would be redundant because recovery is available under a promissory estoppel theory. In similar circumstances, this Court has authorized a disappointed bidder to seek a writ of mandate to have a contract set aside but the Legislature has never codified this limited relief. *Kajima/Ray Wilson v. M.T.A.* (2000) 23 Cal.4th 305, 313-314.

Although Public Contracts Code 19102, provides a remedy to an aggrieved second lowest bidder in a very limited situation, there is no indication in either the Legislative History or case law these two statutes were intended to be the exclusive remedy of an aggrieved second lowest bidder on a public works project. This Court concluded bid preparation costs but not lost profits were available under a theory of promissory estoppel. *Kajima/Ray Wilson v. M.T.A.* (2000) 23 Cal.4th 305.

California's Prevailing Wage Law (§§ 1720–1861) traces back to 1931. The Legislature has declared that it is the policy of California "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not

secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a).) *Building and Construction Trades Council v Duncan* (2008) 162 Cal.App.4th 289, 295-296.

> "This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees." *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987.

This Court in *Lusardi, id.,* 1 Cal.4th at pages 986-988, held that the obligation of a contractor to pay the prevailing wage on a public works project arises separately from statute and from contract and that the Legislature recognized individuals who are owed unpaid wages by employers have "valid and enforceable" claims against those employers that they may pursue independently, or that the DLSE may pursue on their behalf. (Lab. Code, § 98.3, subd. (a). *Lusardi*'s synopsis of the legislative history of the prevailing wage law shows the Legislature intended remedies against the contractor for violation of the prevailing wage law to be cumulative and nonexclusive. *Lusardi, id.,* 1 Cal.4th at p. 988, fn. 3. *Aubry v Tri City Hospital District* (1992) 2 Cal.4th 962, 975.

Contrary to respondent's argument, the Court of Appeals decision does not nullify *Kajima,* supra, because the instant case does not involve the "mis-award" of a public works contract. First, appellants are not suing the governmental entity which

awarding the contract. Second, the alleged wrongful conduct was done by the lowest bidder not by a governmental employee.

Rules of **statutory construction** require courts to construe a statute to promote its purpose, render it reasonable, and avoid absurd consequences. *Janet O. v. Superior Court* (App. 2 Dist. 1996) 42 Cal.App.4th 1058, review denied.

Respondent's legal argument would allow competitive bidders on a public works contract to engage in any type of illegal, unfair or tortious conduct against other bidders on the same contract without fear of consequences. The winning bidder could act with impunity, and to the detriment of the other bidders who followed the law by properly paying prevailing wages to their employees but were not awarded the contract because their bids was not as low as the winning bidder who include nor pay all of the prevailing wages required to complete the project. There is no indication in the legislative history of either Labor Code 1750 or Public Contracts Code 19102 that this Catch 22 situation was intended by the Legislature. Respondent is asking this Court to interpret these statutes in an absurd manner contrary to the public policies these statutes were intended to protect. Respondent seeks to create a Catch 22 scenario which would insulate the winning bidder from civil liability in the competitive bidding process for public works contract.

B. The Purpose of the Public Contracting Law to Protect the Public is Not Mutually Exclusive With Preventing Wage Theft on Public Works

Ironically, respondent uses phrases such as "the very foundation underlying our competitive bidding system is that all bidders must be treated equally" and, "In order for the bid award to be fair..." Opening Brief, p.13, yet then argues it

(respondent) did not have a duty to other bidders to ensure its bids on public works projects included prevailing wages. Opening Brief, p.39. Essentially, respondent is arguing that the awarding body must treat its illegally prepared bid the same as appellants' legally prepared bids which did include the proper amount of prevailing wages-thereby giving respondent a distinctly unfair advantage over its competitors. Respondent then argues the awarding body must award the contract to respondent as the lowest "responsible" bidder even though respondent's bid did *not* include the proper amount of prevailing wages. Therefore, according to respondent's argument, the Public Contracting Code's purpose of "protecting the public" requires the awarding body to award the contract to a bidder whose illegal and unfair bid does not include the proper amount of prevailing wages. Notwithstanding the obvious fact that members of the public would be the victims of respondent's wage theft, the logical consequences of respondent's "protect the public" argument is absurd.

Respondent's "protect the public" argument also ignores the fact that appellants' causes of action are *not directed at the awarding governmental body*- as in every case cited by respondent in support of its legal argument on this point.

X. THE COURT OF APPEALS DID NOT USE A TEMPORALLY BACKWARD ANALYSIS

Respondent's "temporally backward" argument also fails because it ignores the express allegations stated in ¶ 30 of the Complaint. Appellants therein alleged respondent's conduct was not, as respondent argues, merely isolated instances of not paying prevailing wages ***after*** respondent was awarded a public works contract. Rather appellants expressly alleged respondent engaged in a systemic pattern of

submitting illegally unfairly deflated bids on many jobs and then when respondent was awarded a contract failed to properly pay prevailing wages and engaged in other illegal unfair conduct in the performance of the public works projects which enabled Respondent to amass a pool of illegally and unfairly obtained profits. It was these illegally obtained profits that also allowed respondent to take the risk of submitting artificially low bids on the public works projects alleged in the Complaint because respondent knew that if its artificially low bid did win the public works contract, respondent had an extra cushion of funds to pay its bills so it would not continually hemorrhage money after it was awarded a public works contract at an artificially low amount and go out of business.

As respondent correctly points out on page 22 of it Opening Brief, the majority opinion in the Court of Appeals decision in the instant case explained that it "saw no reason to cut off any legal effect form the winning bidder's misconduct simple because it precedes the completion of the bidding process. Assuming that the timing had some legal significance, the defendant's wrongful conduct persists throughout the bidding process, well past the time when it is wrongly awarded the public works contract. In short, by continuing its unlawful conduct after wrongfully winning the contract, the defendant interferes with an expectancy that would have other materialized. Maj.Opn. 184 Cal.Rptr.3d at pp.288-289".

In its argument, respondent focuses only on its conduct after it was awarded the contract but fails to address the majority opinion's finding that "*defendant's wrongful conduct persists throughout the bidding process*", and "*continued after*

wrongfully winning the contract". (emphasis added). The majority opinion correctly and expressly stated the wrongful conduct occurred before respondent was awarded the contract and continued afterwards.

Respondent also omits a critically important element of the process of competitive bidding from its "temporally backward analysis" argument. Prior to submitting a bid, every bidder has to evaluate the scope of the project and prepare an estimate of the cost of performing all of the work outlined in the solicitation for bids. A great deal of forethought and analysis is put into the bid before the bid is submitted because the bid has to include all of the labor, materials, equipment, insurances, worker's compensation premiums, wages and benefits required under the prevailing wage laws to do the proposed asphalt job from start to finish. Once awarded the contract the winning bidder has to perform the job for the bid amount and is not allowed to submit additional invoices if unanticipated costs arise- (as compared to a military defense contract where huge overruns are commonplace). The winning bid has to be low enough to win the contract but not so low that if the contract is awarded the "winning" bidder would actually lose money on the job. Obviously, losing money on a job after being awarded the contract does happen on occasion, but losing money on every contract "won" is not a good business model for continued success in any industry where sales are obtained from the competitive bidding process. Further, when respondent submitted its bid, it made a written promise to perform the entire contract for a certain dollar amount and not a penny more.

Significantly, the competitive bidding process is not similar to a lottery where each bidder has an equally random opportunity to win the contract. Nor, as respondent implies, is it a process where the winning bidder casually submits a guesstimate number and hopes their number is the lowest bid. Rather, it is a careful evaluation of the total amount of money required to do a particular public works project according to the terms of the project as described in the solicitation by the governmental body. Simply stated, bidders who do not approach the competitive bidding process with a great amount of analysis, evaluation and planning do not survive in the industry. The careless bidder is never awarded contracts if their bids are too high. Or, if the careless bidder's bids are too low, this causes the careless bidder to go out of business quickly because they end up losing money on each contract they "won". Therefore, even though respondent subsequently failed to pay prevailing wages on the public works projects *after* respondent starting performing the contract, respondent's bid amount, which was a promise to perform the public works project for a certain dollar amount and submitted under declaration of perjury, was a written representation that included its implied promise to not pay all of the proper amount of prevailing wages on that particular public works project.

The case of *Alameda County Joint Apprenticeship Training Committee, et al. v. Roadway Electrical Works, et al. (2010) 186 Cal App. 4th 185,* included a cause of action for intentional interference with prospective economic advantage wherein plaintiffs alleged defendants had used unlicensed electricians to win the bid on a public works project. *Alameda County, id.* also refutes respondent's argument

asserting Labor Code section 1750 and Public Contracts Code section 19102 are the exclusive remedy available to the second lowest bidder on a public works project.

Moreover, the plaintiffs in *Alameda County, id.,* alleged, as appellants do in the instant case, that *prior* to submitting their bid, defendants had implemented a scheme to pay their employees less than the prevailing wages due for the public works project defendants were bidding on, and, therefore, defendants were able to underbid plaintiffs. Therefore, respondent's temporal argument asserting their alleged wrongful conduct did not occur until *after* their bid was submitted is also refuted by *Alameda County, id.* Respondent's temporal argument is boldly refuted by the express allegations of appellants' complaint, including ¶30:

> 30. Based on information and belief, Plaintiffs allege that SOUTH's conduct in failing to pay all of its employees all of the prevailing wages due to SOUTH's employees on a significant number of the public works projects SOUTH was awarded during the years within the statute of limitations applicable to the causes of action stated herein, resulted in SOUTH illegally obtaining profits on public works projects SOUTH would not have obtained if SOUTH was paying all its employees the proper amount of prevailing wages due to its employees. SOUTH then used the extra profits it had illegally obtained on many of its public works projects to underbid plaintiffs on the aforementioned public works projects which resulted in SOUTH being awarded the contracts for the aforementioned "public works" projects instead of the respective plaintiff who would have been the lowest bidder if SOUTH had not used its illegally obtained profits to underbid plaintiffs.

Appellants' allegations clearly do *not* allege respondent's independently wrongful conduct occurred only *after* respondent submitted its bids for the public works projects referenced in the complaint. Appellants' complaint expressly alleges an ongoing and illegal course of independently wrongful conduct by respondent

resulting in respondent underbidding plaintiffs for the purpose of gaining an unfair business advantage to win the contract for public works as alleged in the Complaint.

XI. THIS CASE IS NOT ABOUT EXTENDING TORT LIABILITY TO SUCCESSFUL HONEST BIDDERS ON PUBLIC WORKS CONTRACTS BUT IS ABOUT ALLOWING A COMMON LAW REMEDY FOR INDEPENDENTLY WRONGFUL CONDUCT INTENTIONALLY USED TO INTERFERE WITH APPELLANTS' REASONABLE AND PROBABLE ECONOMIC EXPECTATIONS

Respondent essentially argues the ends justify the means. Respondent euphemistically portrays itself as a "successful bidder" and ignores the express allegations of the operative complaint detailing respondent's independent wrongful conduct by referring to appellants as "disappointed bidders". Appellants are not alleging Respondent owed them a duty under the prevailing wage laws or the labor laws or any of the other distracting arguments respondent asserts. Appellants are simply basing the "independently wrongful conduct" element of this tort on respondent's violations of particular statutes, just as the plaintiff in *Korea Supply* based its cause of action for intentional interference with prospective economic advantage on Lockheed's violations of the Foreign Corrupt Practices Act.

XII THE FEDERAL AND OUT OF STATE CASES CITED BY RESPONDENT SUPPORT APPELLANTS' POSITION OF PROBABLE ECONOMIC EXPECTANCY

Respondent's citation to *Mobile Shelter Systems v. Grate Pallet Solutions, LLC* (M.D. Fla. 2012) 845 F. Supp.2d 1241, 1259, is misplaced. Respondent copies the holding but fails to address the court's rationale for its holding (stated subsequently on the same page cited by respondent) wherein the court explained,

"Since there was no existing contract, Plaintiff must advance some evidence that, in all probability, the U.S. military would have entered into a contract with Plaintiff but for Defendants' protest... [citations omitted, emphasis added] Given that the solicitation itself encourages parties other than Plaintiff to submit offers in response, it cannot serve this purpose. Further, since Defendants' protest was submitted to DLA in accordance with the terms of the solicitation and the applicable regulations, such action was not "an intentional and unjustified interference" under Florida law."

Appellants meet this extra burden stated by the *Mobile Shelter, id.* court. Appellants alleged evidence they would have entered into a contract with the third party governmental bodies awarding the contracts because appellants alleged they were the second lowest bidder on each of the contracts awarded to respondent and that appellants would have been the lowest bidder but for respondent's illegal and unfair conduct. Appellants' allegations prove the awarding governmental bodies alleged in the Complaint did not exercise their discretion to reject all of the bids, but, actually awarded the contract to the lowest bidder. Therefore, respondent's reliance on *Charles L. Harney, Inc. v. Durkee*, (1951) 107 Cal.App.2d 570 is also misplaced because appellants are not seeking to have their low bid accepted after all of the bids were rejected. Moreover, appellants are not merely "disappointed bidders" as respondent assert. Additionally, the *Harney* court was not presented with allegations of illegal conduct by the lowest bidder. Therefore, in each bid award alleged in the Complaint, appellants did *advance some evidence that, in all probability, the*

governmental awarding body would have entered into a contract with Plaintiff but for Defendants' illegal and or unfair, and certainly unprivileged conduct.

Another highly significant factual difference is appellants' allegations that respondent's conduct was *not* part of the legitimate bidding process, as was the defendant's conduct in *Mobile Shelter*. Further, appellants' allegations describing respondent's interfering conduct are even more egregious than the "intentional and unjustified interference" standard required under Florida law.

Similarly, the other federal case from Florida cited by respondent also supports appellants' legal argument proving appellants **did** properly allege they had a probably economic expectancy. *Duty Free Americas, Inc. v. Estee Lauder Companies, Inc.* (S.D. Fla. 2013) 946 F. Supp. 2d 1321, is in accord with Appellants' position when the rationale for the snippet cited by respondent is read in full context. *Duty Free* also cited *Mobile Shelter* and explained its rationale at ftns, 17 and 18:

> Ftn. 17 "So to establish a protected business relationship within a bidding process, a plaintiff must allege additional facts indicating that the relationship went beyond the bidding process and into negotiations which in all probability would have been completed. See id.; Walters v. Blankenship, 931 So.2d 137, 139–140 (Fla. 5th DCA 2006) (finding the existence of a business relationship between the plaintiffs and successful bidders in an auction for the plaintiffs' condominium units because the auction was without reserve, the plaintiffs were obligated to accept the lowest offers on their units no matter how little the bid was, and because more than 20 bidders posted a substantial bond and attended the auction). Significantly, the plaintiffs in Walters were the solicitors auctioning off their condominium units, and the court found that they had a protectable business relationship with the lowest bidders when the terms of the auction required them to accept the lowest bids. Walters, 931 So.2d at 139–40. Unlike the plaintiffs in Walters, DFA is a bidder for the duty-free concessions and DFA does not allege that the airports must accept the lowest bids. The very concept of there being a definite lowest bid seems foreign to the RFP process for duty-free concessions because the bidders typically offer airports a percentage of their sales. (See DE 1 at 15, 18.) For

> airports to maximize revenue, they must consider not only the percentage cut offered by each bidder, but the expected amount of sales of each bidder. An airport therefore cannot determine with complete accuracy which bidder will actually yield more revenue for the airport.
>
> Ftn. 18- In light of these principles, DFA's factual allegations do not state a valid tortious-interference claim, even when construed in the light most favorable to DFA. DFA fails to allege that the agreements between DFA and the airports in all probability would have been completed if ELC had not interfered, and therefore fails to allege a protected business relationship.

The *DFA* Court's explanation of its rationale clearly suggests it would have reached a different result if plaintiff DFA had alleged the airports must accept the lowest bid. Therefore, since California's competitive bidding process requires the awarding body to accept the lowest responsive bid or reject all of the bids, (no bids were rejected so this is a moot issue) respondent's reliance on *Duty Free Americas* and *Mobile Shelter* is misplaced.

Respondent's reliance on *Powercorp Alaska, LLC v Alaska Energy Authority* (Alaska 2012) 290 P.3d 1173, 1187 is similarly misplaced because plaintiff Powercorp did not submit a bid. Thus, plaintiff Powercorp could not claim the "pre-existing" aspect of its relationship with a third party.

Cedroni Associates, Inc. Tomblinson, Harburn Asssoicate, Architects & Planners, Inc. (Mich.2012) 492 Mich. 42-46, is also misplaced because in its request for proposals, the school district expressly retained authority to *reject any or all bids*, stated that it might *not* necessarily award the contract to the lowest bidder, and made it clear that the architect would play a role in determining whether a bidder was

"responsible" under the applicable statutes. (Id. at pp. 4-5.) The public agency also found that the plaintiff was *not* a responsible contractor. (Id. at p. 7.)

One common theme throughout respondent's Opening Brief is respondent cites cases that do not deal with allegations of independently wrongful conduct by the lowest bidder. In other words, the bidders in the cases cited by respondent were on equal footing- which is the diametrical opposite of appellants' allegations in the operative Complaint.

XIII. PUBLIC POLICY CONSIDERATIONS REQUIRE IMPOSING LIABILITY ON RESPONDENT FOR ITS INDEPENDENTLY WRONGFUL CONDUCT USED TO INTERFERE WITH APPELLANTS' PROSPECTIVE ECONOMIC ADVANTAGE

Respondent's perception that appellants' are asking this court to recognize a new "legal wrong" is additional evidence of respondent's selective interpretation, and or steadfast denial, of the express allegations in the complaint. Appellants are not seeking to open the "floodgate" of litigation for all "disappointed bidders" against "successful bidders". Appellants only seek the imposition of their common law remedies as clearly outlined in *Korea Supply* and its ancestors. Certainly, public policy would encourage prevention of public works projects being awarded to contractors who intentionally thwart the fairness of the bidding process by covertly not paying their employees the same amounts as their competitors who are adhering to the law. Complaint, ¶¶ 29, 30, 41.

The majority opinion in the Court of Appeals succinctly stated several salient public policies fostered by imposing liability on respondent under the facts alleged in the operative Complaint. Maj. Opn. 234 Cal.App.4th 748,761-762.

> "American contends that recognizing the intentional interference tort in this case is bad public policy because it will open the floodgates to actions by disappointed bidders and will lead to the release of a defendant's confidential and proprietary trade information through pretrial discovery. This argument was expressly rejected by the court in *Korea Supply* when it said, "We do not share the concern of Lockheed Martin and the concurring and dissenting opinion that our ruling today will expose defendants to an unlimited number of potential plaintiffs." (*Korea Supply, supra,* 29 Cal.4th at p. 1163.)
> "In any event, we limit our holding to losing bidders who can show they were the actual and lawful lowest bidders on a public works project."
> "We believe that sound policy reasons support our recognition that the intentional interference tort applies here. The central purpose of the prevailing wage law is to protect and benefit employees on public works projects. (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765, 776.) It also: serves to protect employees from substandard wages that might be paid by contractors who recruit labor from distant cheap-labor areas; lets union contractors compete with non-union contractors; benefits the public through the superior efficiency of well-paid workers; and compensates private sector workers with higher wages to make up for the absence of job security and employment benefits enjoyed by public employees. (*Ibid.*) Even though violators who are caught may face civil penalties and assessments (Lab. Code, § 1741), and may be sued by *employees* who did not receive the prevailing wage (*Road Sprinklers, supra,* at p. 777), allowing actions like plaintiffs' to proceed will further promote these goals by adding an extra disincentive to discourage unscrupulous contractors from violating the prevailing wage laws. It also provides an additional level of scrutiny to bidding practices by unsuccessful bidders. Taxpayers are not at risk from damage awards in such cases. Whether a plaintiff was in fact the second lowest bidder and would have been awarded a contract had the winning bidder complied with the prevailing wage law is a factual issue susceptible to standard civil discovery practices and is amenable to proof at trial.
>
> "Most important, a contrary decision would not be limited to actions against contractors who obtain public agency contracts by violating the prevailing wage laws. If we affirm, we would effectively hold that no losing bidder could ever sue a competitor for interfering with the bidding process no matter how egregious the misconduct because no economic relationship exists until

> and unless its bid is accepted. It does not require much imagination to envision a contractor who obtains a public works contract by bribery, extortion, or familial connections. (See *Korea Supply*, *supra,* 29 Cal.4th 1134, 1140 [bribes and sexual favors].)"

Expounding on the public policies promoted by the Court of Appeals majority decision in the instant case takes no more effort than looking at the California Department of Industrial Relations web site. Wage theft has become a problem of epidemic proportions and the DIR recently commenced its "Wage Theft is a Crime" campaign. Moreover, the victims of wage theft are often, as the majority opinion noted, recruited from "distant cheap-labor areas". The stark economic relationship in existence for these workers from distant cheap-labor areas is that they are often willing trade their right to complain about being cheated by their employer for a steady paycheck that, even with many hours taken off their timecards, is still vastly more money than what they were able to earn prior to coming to California.

XIV THIS COURT HAS THE DISCRETION TO HEAR ISSUES RELATED TO THE INSTANT PETITION FOR JUDICIAL EFFICIENCY AND JUSTICE

Appellants respectfully request this Court address an issue that has arisen in the underlying litigation between appellants and respondent since this granted respondent's petition for review which de-published the Court of Appeals opinion. The Court of Appeals affirmed the trial court ruling sustaining the demurrer to the third cause of action because appellants did not address the requirement to show irreparable harm required for injunctive relief. Subsequently, Respondent's counsel in the coordinated trial court action has argued the Court of Appeals opinion should still be deemed controlling on this issue such that appellants should not be allowed to seek injunctive

relief. However, the trial judge for the coordinated actions is allowing appellants to file a motion seeking injunctive relief. Therefore, to avoid a fourth Writ Petition by respondent, albeit the first on this particular issue, appellants respectfully request this Court's clarification on this issue.

XV. CONCLUSION

Appellants have adequately pled a basis for a common law cause of action for intentional interference with prospective economic advantage. Appellants' position is firmly rooted in the history of this cause of action from *Buckaloo,* to *Settimo,* to *Korea Supply.* Appellants are not seeking any new relief but are merely pursuing their common law remedies. Appellants are not "disappointed bidders" and respondent is not an innocent "successful bidder" on the public works contracts at issue. Appellants have clearly alleged respondent's independently wrongful conduct and its proximal link to appellants' detriment. Allowing a common law remedy will not open the floodgates of litigation against honest "successful bidders" because those who honestly achieve their status as "successful bidders" will not risk civil liability. Instead, allowing appellants to pursue their existing common law remedy would support well founded public policies by preventing illegal conduct towards not only innocent third parties such as appellants, but would also workers from being exploited by unscrupulous employers who ignore the law, and then with no admission of liability, settle the lawsuits filed by their former employees to avoid an adverse judgment which would prevent them from bidding on future public works

contracts. Allowing appellant's common law remedy against respondent would also discourage other contractors from adopting the "ends justify the means" business model.

Respondent's conduct is sufficient ly alleged and specific enough to be enjoined such that an Injunction under Bus. & Prof. Code section 17200 is a properly available remedy for Appellants.

Appellants' respectfully submit they should be granted leave to amend their complaint if this Court's refinement of an undisputed legal issue of first impression brings to light any defect in the allegations of the Complaint. Appellants have shown a reasonable probability they can cure the pleading defect by amending their Complaint. *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44.

Appellants, Roy Allan Slurry Seal, Inc. and Doug Martin Contracting, Inc., respectfully request the judgment of the Riverside trial court be reversed as to the first and third causes of action.

Dated: September 29, 2015

Respectfully Submitted,

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By: _____

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WORD COUNT CERTIFICATION

I, David Klehm, counsel for Appellants, hereby certify, that the word count, as counted by Microsoft Word Version 7 used to generate Appellants' Answer Brief on the Merits, is 13,987.

Dated: September 29, 2015

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PROOF OF SERVICE
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STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is: 100 Spectrum Center Drive, Suite 520, Irvine, CA, 92618.

On 9-29-15, I served the foregoing document described as ANSWER BRIEF ON THE MERITS on the interested parties in this action:

XXX by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

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XXX (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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