S224476

In the Supreme Court of California

Williams & Fickett,

Plaintiff and Appellant,

v.

County of Fresno,

Defendant and Respondent.

Respondent's Opening Brief on the Merits

From the Opinion of the Court of Appeal,
Fifth Appellate District (Case No. F068652)

Appeal from Order of the Superior Court,
State of California, County of Fresno (Case No. 13CECG00461)
Hon. Donald S. Black

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1. Is a taxpayer required to exhaust the remedy of applying to the county board of equalization if the issue does not involve valuation of property?

2. May a taxpayer who files an application for a changed assessment with a county board of equalization wait until longer than the period under Revenue and Taxation Code § 5097(a)(3), after the conclusion of that proceeding, before paying the property taxes and seeking a refund?

Introduction

Everything has limits, including the right to challenge property taxes. The legal issues in this case are about the strict procedural rules for taxpayers that dispute their property taxes. Those issues arise from a story of many long, unjustified delays by Appellant. But on a deeper level, this case is about keeping an orderly system of tax collection, to prevent needless uncertainty in the operations of local government. Appellant asks to be excused from the settled rule that requires taxpayers to exhaust administrative remedies, to disregard the time limits established by the Legislature, and to challenge taxes well over a decade old.

From 1997 to 2001, the County's Assessor ("Assessor") assessed personal property to Appellant for tax years[1] 1994 through 2001, and the County charged property taxes to Appellant based on those assessments. Appellant alleges that some of the property assessed to it by the Assessor—certain farm equipment—did not belong to it, or "did not exist as to it," on the

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[1] Tax years, like fiscal years, fall across two calendar years (e.g., 2015–2016), but are based on a lien date of January 1 in the first of those two years (e.g., January 1, 2015). (Rev. & Tax. Code, § 2192.) In this brief, tax years are identified by the year in which the lien date occurs.

relevant dates for those tax years. Because of that, Appellant says, the County charged it $86,852 in property taxes that should not have been charged for those tax years.

Appellant failed to challenge those assessments with timely applications to the County's Assessment Appeals Board ("AAB"). Instead, for nearly a decade, from 1997 to 2006, Appellant slept on its rights. Only in 2007—a full decade after the first disputed assessment—did Appellant finally seek relief at the AAB.

Appellant waited even longer to pay the taxes—until 2011 and 2012, when the amount it owed had grown to $353,078.77 because of delinquency penalties. Appellant now seeks a refund of that amount, based on refund claims that it filed in 2012, which were also untimely.

Today, the most recent disputed assessment was 14 years ago. The earliest one was 18 years ago. And if Appellant's allegations are true, the relevant events occurred more than 20 years ago.[2]

Appellant should not be excused for its failure to timely exhaust its administrative remedies. Its allegations that it did

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[2] 2 AA 185 (November 7, 2012 refund claim, page 4, footnote 3); pp. 28–29, below.

not own some of the property, or that the property "did not exist as to it," are just an attempt to plead around the exhaustion requirement and into the so-called "nullity" exception. The AAB could have decided the issues at stake here—all the way back in 1997.

Appellant also failed to pay the disputed taxes and seek a refund within the time allowed by Revenue and Taxation Code section 5097, subdivision (a)(3)(A)(ii). Appellant put its challenge of these taxes in motion when it filed applications with the AAB in 2007. But then it failed to follow through with a timely claim for refund.

This Court should reverse the Court of Appeal and affirm the Judgment of the Superior Court.

Facts & Procedural History

1. The 1997 Audit

In 1997, an Auditor-Appraiser from the Assessor's office audited Appellant's business records under Revenue and Taxation Code[3] section 469. (2 AA 208.) (That section requires

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[3] All further statutory references are to the Revenue and Taxation Code unless otherwise noted.

county assessors to conduct periodic audits of "taxpayers engaged in a profession, trade, or business who own, claim, possess, or control locally assessable trade fixtures and business tangible personal property in the county to encourage accurate and proper reporting of property."[4]) The audit resulted in escape assessments[5] on farm equipment, plus penalty assessments, charged to Appellant as assessee, for the 1994 through 1997 tax years. (2 AA 170–171, 209–214.)

The Assessor's office reported the results of that audit and gave notice of the proposed escape assessments by a November 12, 1997 letter to Appellant. (2 AA 208.) That letter cited sections 531.4 and 463 of the Revenue and Taxation Code, which provide for escape assessments and penalties for failing to file personal property statements, and for filing inaccurate statements. (2 AA 171, 208.) In the Audit Report enclosed with the letter, next to the words "Records Adequate for Audit," there is a check for "No," with the statement: "Insufficient information." (2 AA 209.)

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[4] § 469, subd. (a).

[5] "The phrase 'escape assessment' is simply tax jargon for putting property on the rolls not enrolled earlier." (*Cardinal Health 301, Inc.* v. *County of Orange* (2008) 167 Cal.App.4th 219, 223.)

"You have the right to appeal these assessments," the November 12, 1997 letter said, "and may do so by filing an application for reduction with the Clerk to the Board of Supervisors no later than sixty (60) calendar days from the date of this notice." (2 AA 208.)

Appellant did not file an application for reduction within 60 days after that letter. (2 AA 171.)

About 10 months later, on September 16, 1998, the County Auditor-Controller/Treasurer-Tax Collector ("Auditor") recorded Certificates of Delinquency of Personal Property Tax for the 1994–1997 escape assessments. (2 AA 171–172, 340, 344, 348, 352.) Recording those certificates caused the amount of tax and penalties stated in each certificate to become a lien on all of Appellant's real and personal property in Fresno County. (See, e.g., 2 AA 340, 325.)

For the tax years 1996 through 2001, the Assessor also enrolled regular personal property assessments, charged to Appellant as assessee, and the Auditor filed Certificates of Delinquency for those assessments, too. (2 AA 172, 356, 360, 364, 368, 372.)

Appellant now alleges that the 1997 escape assessments for tax years 1994 through 1997 and the regular assessments for tax years 1996 through 2001 resulted in $86,852 in taxes that "should not have been assessed" because some of the farm equipment "was not owned by [Appellant] and therefore did not exist relative to [Appellant]." (2 AA 173.)

Appellant did not file timely applications with the AAB for any of the regular assessments in the 1996 through 2001 tax years. (2 AA 177.)

2. The 2003 Audit

In 2003, another Auditor-Appraiser from the Assessor's office audited Appellant's personal property declaration for 2001 and found "an apparent overassessment" for that year. (2 AA 173, 220.) A September 23, 2003 letter from the Assessor's office to report the results of that audit said the overassessment information would be sent to the Auditor, to issue a refund. (2 AA 220.) The amount of that refund is not in the record.

On the first page of the Audit Report enclosed with the September 23, 2003 letter, next to the words "Records Adequate for Audit," the box for "No" was checked, with the explanation:

"[Taxpayer] does not keep formal accounting records." Further down the page: "Taxpayer did not have sufficient and/or competent records to review and evaluate." (2 AA 221.)

The narrative on the second page of the 2003 Audit Report continues: "Taxpayer does not have a formal accounting program. Mary Fickett keeps copies of invoices showing new purchases and trade ins. Taxpayer does file tax returns but had no depreciation schedule attached to any of the tax returns. . . . Used the prior audit list of assets and added the new additions to the list. . . . In my correspondence with taxpayer, it took several attempts to get information from taxpayer and at times even this information was incomplete or inadequate. Example[:] taxpayer had indicated and produced documentation that an asset had been sold but then declared this asset on the 2002 [Business Property Statement]." (2 AA 222.)

The Assessor, citing "Rule 193,"[6] declined to audit the previous three years (2000, 1999, and 1998), so there was only an "overassessment" for the 2001 tax year. (2 AA 173, 221, 225–226.) Appellant alleges that was an "arbitrary decision" (2 AA 173), but

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[6] 18 C.C.R. § 193.

does not allege that it timely sought relief to compel the Assessor to audit the earlier years.[7]

3. The 2006 Audit

By letter on February 28, 2006, the Assessor's office notified Appellant of another audit for the tax years 2002 through 2006. That audit resulted in relatively small escape assessments, offset by much larger overassessments.[8] The letter stated that the overassessment information would be sent to the Auditor, to issue a refund. (2 AA 174, 334.) The amount of that refund is not in the record.

Unlike the two earlier audits, the record does not contain the Audit Report or work papers for the 2006 audit.

4. The 2006 Correspondence

A few months later, on July 10, 2006, Appellant's counsel at that time sent a letter to the Auditor, apparently in connection with an escrow demand by the County for unpaid personal property taxes. (2 AA 174, 328.) Appellant was refinancing real

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[7] See, e.g., *Apple Computer, Inc.* v. *County of Santa Clara Assessment Appeals Board* (2003) 105 Cal.App.4th 1355, 1366–1367 (decided January 31, 2003).

[8] § 533.

property that was encumbered by the liens for delinquent taxes, and the title company had asked for the County's payment demand to clear those liens. (2 AA 328.)

In the July 10 letter, Appellant asked the Auditor to reduce its escrow demand based on the overassessment finding in the 2006 audit, and raised another issue that it characterized as "significantly more complex." (2 AA 325.) Appellant alleged that, "[f]rom 1996 to the current date [July 10, 2006], Fresno County has erroneously assessed personal property taxes against [Appellant]." (2 AA 325.) Specifically, Appellant asserted that the Auditor-Appraiser in 2006 accepted "proof" that "a substantial portion" of Appellant's personal property "was seized as a result of their bankruptcy filings in 1997," but "prior auditors" had "rejected" that proof. (2 AA 325.) Appellant then asked the Auditor to cancel a portion of personal property taxes for all the tax years going back to 1996 as "erroneous or illegal" under section 4986, to apply reductions like those that were applied for tax years 2002 through 2005 after the 2006 audit, and to release the liens for 1996 due to Appellant's 1997 bankruptcy. (2 AA 174, 325–326.)

The Auditor made an "initial response" by letter on July 28, 2006, "so that your clients [Appellant] and you can determine whether [sufficient] proof can be provided to our satisfaction." (2 AA 174–175, 328.) After informing Appellant that the escrow demand would be revised to reflect reduced assessments for tax years 2001 through 2005, the Auditor explained that "the information presented thus far" was too general to support a cancellation of taxes for earlier years. (2 AA 328–329.)

In a footnote to the July 28, 2006 letter, the Auditor disputed the Appellant's contention, apparently presented separately from its July 10 letter, that it was not required to exhaust its remedies with the Assessment Appeals Board ("AAB"): "[W]e understand that the case cited [by Appellant] (*Westinghouse Electric Corp.* v. *County of Los Angeles* (1974) 42 Cal.App.3d 32) . . . state[s] that there must be undisputed facts and that one of certain specific grounds must be established (e.g., property is non-existent, or outside the jurisdiction). In this case, the Assessor and [Appellant] do not agree on the facts, and it is unclear whether your clients are claiming that the property meets the second part of that test." (2 AA 329.)

Appellant does not allege that it presented any additional information to the Auditor in support of its cancellation request.

5. The 2007 Applications for Reduced Assessments

Almost a year later, on June 13, 2007, the Appellant filed nine applications to the AAB for reduced assessments, one for each of the regular assessments for tax years 1996 through 2000 (five applications), and one for each of the escape assessments for tax years 1994 through 1997 (four applications). (2 AA 175, 339–374.) Appellant alleged the value of its equipment for those tax years should be reduced because "the [Assessor's] auditor ignored the evidence and assessed the taxpayer for non-existent equipment. During the most recent audit, the same information was presented, and accepted, by the auditor who was unable to correct the taxes which were more than 4 years old." (2 AA 339–374; see, e.g., 2 AA 341.) The applications do not identify the "non-existent equipment" alleged to have been assessed.

A week later, on June 20, 2007, the Clerk to the Assessment Appeals Board returned those applications with a cover letter: "The enclosed Application(s) for Changed Assessment that you filed are being returned for the following

reason(s): The Applications were not timely filed." The Clerk cited the November 12, 1997 letter reporting the results of the 1997 audit of Appellant's business records, as well as "Property Tax Rule 305.3(d)"[9]. (2 AA 175, 332.)

6. The 2010 Declaratory Relief Action

More than three years after Appellant's applications to the AAB, on November 24, 2010, Appellant filed a complaint for declaratory relief against the County, the AAB, and the Assessor. (2 AA 175, 3 AA 392–395.) Appellant prayed for a judgment requiring the defendants in that action to "review" personal property taxes for tax years 1994 through 2000 and give "credits" for those years "pursuant to the 2006 audit." (3 AA 395.) That is, Appellant sought a determination that the Assessor should have applied the results of the 2006 audit to years before 2002. (3 AA 394.) (As noted above, the 2006 audit covered only the 2002 through 2006 tax years.)

The Superior Court sustained the County's demurrer in that action, without giving Appellant leave to amend, because

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[9] 18 C.C.R. § 305.3(d).

Appellant failed to comply with Article XIII, section 32, of the State Constitution, and Revenue and Taxation Code section 4807, both of which require taxpayers to pay the tax before litigating. (3 AA 399–400, 403–406; 2 AA 175.) That case is final, and not part of this one.

7. Payment of the Disputed Taxes and Claims for Refund

By a series of checks over the period from May 12, 2011, to June 27, 2012, more than a decade after the taxes were assessed, Appellant paid a total of $353,078.77 in personal property taxes and delinquency penalties for tax years 1994 through 2001. (2 AA 175.)

On May 30, 2012, and November 7, 2012, Appellant filed claims for refund. (2 AA 175–176.) The claims covered eight tax years—1994 through 2001—and were based on the results of the 1997 and 2003 audits. (2 AA 182–183.) The claims do not mention the 2006 audit. In its claims, Appellant requested a refund of $333,078.71 for tax years 1994 through 2001. (2 AA 184.)

The Auditor rejected the claims in writing on November 27, 2012. (2 AA 176.)

8. This Action

About two and a half months later, on February 13, 2013, Appellant commenced this action, based on its 2012 refund claims relating to tax years 1994 through 2001. (1 AA 1.) Its "Verified First Amended Complaint for Refund of Personal Property Taxes," filed on April 18, 2013, is the operative pleading. In that complaint, Appellant alleges that it is entitled to a refund of personal property taxes because certain farm equipment assessed by the County "was not owned by [Appellant on the relevant lien dates for tax years 1994 through 2001] and therefore did not exist relative to the [Appellant]." (2 AA 173.)

Appellant alleged that it "failed to file any application for reduced assessment for the assessments set forth herein within the time limits set forth in Revenue & Taxation Code Section 1603(b)," but that it did file a timely claim for tax refund under subdivision (a)(2) of section 5097. (2 AA 177.)

The Superior Court sustained the County's demurrer to that complaint, without leave to amend, ruling that Appellant failed to exhaust its administrative remedies because it failed to file timely applications to the AAB for reduced assessments. (3

AA 443.) The court entered a judgment of dismissal in favor of the County. (3 AA 445–446.)

The Court of Appeal reversed. The court held that Appellant was not required to seek relief from the AAB because Appellant claims it does not own the property so the assessment is void. The court also held, based on its determination, which it did not clearly explain, that Appellant never filed applications with the AAB, that Appellant's refund claims were timely because they were made within four years after payment of the disputed taxes. (Opinion of the Fifth District Court of Appeal, F068652, filed Jan. 9, 2015 [previously published at 232 Cal.App.4th 1250] ("5th DCA Opn.").)

This Court granted review on April 22, 2015.

Standard of Review

Because this case arises from a judgment of dismissal on a sustained demurrer without leave to amend, the Court must assume the truth of Appellant's properly pleaded or implied allegations in its verified first amended complaint (2 AA 170ff), reading that complaint in context and giving it a reasonable

interpretation. (*Schifando* v. *City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Facts pleaded by Appellant include evidentiary facts in exhibits attached to its complaint. (*Satten* v. *Webb* (2002) 99 Cal.App.4th 365.) If allegations in the complaint conflict with the exhibits, the Court must "rely on and accept as true the contents of the exhibits." (*SC Manufactured Homes, Inc.* v. *Liebert* (2008) 162 Cal.App.4th 68, 83.) But if the exhibits are ambiguous and can be construed in a manner suggested by Appellant, the Court must accept Appellant's construction. (*Ibid.*)

The Court may also consider allegations in Appellant's initial verified complaint (1 AA 1ff) because Appellant "may not discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading." (*People ex rel. Gallegos* v. *Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957.)

Because the trial court sustained the County's demurrer without leave to amend, the Court must decide whether there is a reasonable possibility that Appellant can cure the defect in its verified first amended complaint by further amendment.

(*Schifando, supra,* 31 Cal.4th at 1081.) Appellant has the burden of proving that an amendment could cure the defect. (*Ibid.*)

Argument

1. Appellant was required to exhaust administrative remedies, but failed to do so, and cannot amend its pleadings to allege that it did, or that an exception applies.

The general rule in California is that a taxpayer seeking judicial relief from an erroneous assessment must exhaust its remedies before the administrative body empowered initially to correct the error. (*Steinhart* v. *County of Los Angeles* (2010) 47 Cal.4th 1298, 1308.) "A taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct assessment of a tax, cannot thereafter be heard by a judicial tribunal to assert its invalidity." (*Abelleira* v. *District Court of Appeal, Third District* (1941) 17 Cal.2d 280, 294, quoting *Gorham Manufacturing Company* v. *State Tax Commission* (1924) 266 U.S. 265, 269–270.) Stated more generally, "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira, supra,* 17 Cal.2d at 292.

And see *Plaza Hollister Ltd. Partnership* v. *County of San Benito* (1999) 72 Cal.App.4th 1, 29 ("*Plaza Hollister*"), citing *Abelleira*.)

"The rule itself is settled with scarcely any conflict. It is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts." (*Abelleira, supra*, 17 Cal.2d at 293.) In fact, "exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts." (*Abelleira, supra*, 17 Cal.2d at 293.) "This is so even though the administrative remedy is couched in permissive language; an aggrieved party is not required to file a grievance or protest if he does not wish to do so, but if he does wish to seek relief, he must first pursue an available administrative remedy before he may resort to the judicial process." (*Yamaha Motor Corp.* v. *Superior Court* (1986) 185 Cal.App.3d 1232, 1240.)

The exhaustion doctrine serves several purposes. It "relieve[s] overburdened courts from the need to deal with cases where effective administrative remedies are available," and "prevents interference with the subject matter jurisdiction of another tribunal where an administrative tribunal was created

by law to adjudicate the issue sought to be presented to the court and [the] claim is within the special jurisdiction of the administrative tribunal." (*Plaza Hollister*, *supra*, 72 Cal.App.4th at 29, internal citations omitted.)

The exhaustion doctrine "lightens the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief." (*Yamaha Motor Corp.*, *supra*, 185 Cal.App.3d at 1240.) As this Court put it in *Abelleira*, "a curtailment of administrative jurisdiction usually means an enlargement of the duties of the courts." (*Abelleira*, *supra*, 17 Cal.2d at 286.)

As well, the exhaustion doctrine "facilitates the development of a complete record that draws on administrative expertise," and serves "as a preliminary administrative sifting process, unearthing the relevant evidence and providing a record which the court may review." (*Yamaha Motor Corp.*, *supra*, 185 Cal.App.3d at 1240, internal citations omitted.)

Appellant had an administrative remedy here, at the AAB. Under the exhaustion doctrine, Appellant was required to apply timely to the AAB for a reduced assessment, or to assert that the

assessment should not have included certain property, before resorting to the courts. The issues Appellant raises now in litigation filed in 2013 would have been well within the competence of the AAB on a timely application for reduced assessment back in 1997. But Appellant never filed a timely application, and instead waited 10 years, until 2007, to file its applications. Appellant should not be excused now from the requirements of the exhaustion doctrine.

A. A remedy was available at the AAB, which is a constitutional, quasi-judicial, fact-finding body empowered to review and adjust assessments of property by deciding factual questions.

Article XIII of the State Constitution provides that a county board of equalization or AAB "shall equalize the values of all property on the local assessment roll by adjusting individual assessments." (Cal. Const., art. XIII, § 16.) That means the AAB is the "fact-finding body designated by law to remedy excessive assessments" (*Universal Consolidated Oil Co.* v. *Byram* (1944) 25 Cal.2d 353, 362) and "a constitutional agency exercising quasi-judicial powers" (*Steinhart, supra,* 47 Cal.4th at 1307).

(1) *The decisions of this Court treat "equalization"—the task of the AAB—as more than just valuation.*

Some lower courts have defined "equalization" narrowly as "adjusting the value of property assessed to conform to its real value" (see, e.g., *County of Sacramento* v. *Assessment Appeals Board No. 2* (1973) 32 Cal.App.3d 654, 663), but the decisions of this Court disclose a broader understanding.

In *Security-First National Bank* v. *Los Angeles County* (1950) 35 Cal.2d 319 ("*Security-First*"), this Court held that a county board of equalization could have granted relief by a "means of equalization" that had no effect on the value of the taxpayer's property. The assessor in that case classified the taxpayer's bank vault doors and counterlines as real property, while "similar property of others had been systematically misclassified as personalty." (*Id.* at 321.) The taxpayer made no application to the county board of equalization, but claimed that these items were exempt from taxation. This Court held that the property was taxable, and that "the board of equalization could have eliminated the discrimination by directing the assessor to enter the misclassified fixtures *owned by others* as real property

upon the assessment roll." (*Id.* at 322, italics added.) That is, "equalization" was not just a question of value. As a result, the taxpayer's "failure to make timely application for relief before the board precluded the adoption of that means of equalization," and this Court did not allow the taxpayer to maintain its refund action. (*Ibid.*)

A few months later, in *City and County of San Francisco* v. *San Mateo County* (1950) 36 Cal. 196 ("*San Francisco*"), San Francisco contended that its work to raise "large tracts of marsh, tide and submerged lands in San Mateo county," for San Francisco's airport, was exempt from taxation as an "improvement" to the underlying real property (taxation of which was not disputed). San Mateo demurred, in part because San Francisco failed to allege exhaustion of its remedies before the State Board of Equalization, and former Article XIII, section 1,[10] made San Mateo's assessment "subject to review, equalization and adjustment" by that board. (*Id.* at 201.) The trial court sustained the demurrer without leave to amend (*id.* at 197), and this Court affirmed (*id.* at 201). That case presented "a problem

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[10] See current Article XIII, section 11, subdivision (g), of the State Constitution.

of 'equalization and adjustment' confided by the constitution to the state board of equalization," the Court held. "It is the province of the board to 'adjust' the assessment so that the exempt and the nonexempt portions of the property be properly segregated." (*Ibid.*)

Security-First and *San Francisco* both arise from factual disputes over the *classification* of property by a county assessor, rather than the *value* of that property. And they demonstrate that a board of equalization, whether state or local, is empowered as a quasi-judicial body to receive evidence, develop a record, decide factual issues, and adjust the assessments of taxpayer applicants without reaching questions of value.

(2) *The Legislature also recognizes that the AAB may decide factual "nonvaluation" issues.*

Factual disputes entailed by equalization but not connected with valuation are within the competency of the AAB under section 5141, subdivision (b). That section allows that an application for reduced assessment might involve "only nonvaluation issues":

> When the person affected or his or her agent and the assessor stipulate that an application involves only

> nonvaluation issues, they *may* file a stipulation with the county board of equalization stating that issues in dispute do not involve valuation questions. . . . The board shall accept *or reject* the stipulation, with or without conducting a hearing on the stipulation.

(§ 5142, subd. (b), italics added.) That is, even when the assessor and the party affected agree that there are no valuation issues, the AAB still has the power to hear the application. To make that even clearer, the Legislature provides that those rules shall not be "construed to deprive the [AAB] of jurisdiction over nonvaluation issues in the absence of a contrary stipulation." (§ 5142, subd. (c); *Steinhart, supra*, 47 Cal.4th at 1312, fn. 8.)

The Legislature also provides that the AAB "shall hear applications for a reduction in an assessment in cases in which the issue is whether or not [real] property has been subject to a change in ownership . . . or has been newly constructed . . . ." (§ 1605.5, subd. (a)(1).) That is, the Legislature has "expressly vest[ed] county boards with 'jurisdiction . . . to adjudicate'" those issues—which are not valuation issues—and "'contemplates' that such disputes will 'be resolved by the local appeals board before

resort is made to the courts.'" (*Steinhart, supra*, 47 Cal.4th at 1311.)

This case relates to personal property, so the mandatory language in section 1605.5 does not apply directly here. But the express provision of AAB jurisdiction to factual questions that bear on whether property should have been freshly assessed, and not just to value, is yet another legislative acknowledgment of the AAB's competence to decide an array of factual issues, and the need for it to do so.

(3) *Revenue and Taxation Code § 1605, subdivision (e), specifically provides an appeal to the AAB for escape assessments of business personal property.*

Even if section 1605.5 does not apply, another section of the Revenue and Taxation Code does apply here, at least to the disputed escape assessments. Subdivision (e) of section 1605 provides for an administrative appeal to the AAB for escape assessments of business personal property that result from an audit of business records:

> If an audit of the books and records of any profession, trade, or business pursuant to Section 469 [providing for such audits] discloses property subject to an escaped

> assessment for any year, then the original assessment of all property of the assessee at the location of the profession, trade, or business for that year shall be subject to review, equalization and adjustment by the county board of equalization or assessment appeals board . . . , except in those instances when that property had previously been equalized for the year in question . . . .

(And see *Heavenly Valley Ski Resort* v. *El Dorado County Board of Equalization* (2000) 84 Cal.App.4th 1323, 1334.)

To the extent Appellant seeks refunds based on the Assessor's 1997 audit, section 1605, subdivision (e), expressly provides an administrative remedy. Under that subdivision, the AAB was empowered to review, equalize and adjust the assessments for all of the years in which the Auditor found business personal property that was subject to escape assessment.

(4) *Appellant alleges factual questions that the AAB was competent to decide, and a remedy was available at the AAB that could have obviated this litigation.*

Appellant alleges that it was the property tax assessee of certain personal property that "was not owned by [Appellant] and therefore did not exist relative to [Appellant] and should not have

been assessed." As a result, Appellant alleges, it was "assessed approximately $86,852.00 in additional taxes [for tax years 1997 through 2001] that should not have been assessed." (2 AA 173.)

That allegation presents a factual question that the AAB, as a quasi-judicial body, could have heard and decided. If Appellant had timely applied to the AAB back in 1997, under section 1605, subdivision (e), and presented sufficiently persuasive evidence, then the AAB could have granted an administrative remedy. Similar to the way this Court held in *Security-First* that the county board of equalization could have remedied the taxpayer's complaint by directing the Assessor to classify *other* taxpayers' property differently, the AAB here could have directed the Assessor not to include certain personal property in the assessments charged to Appellant. Then the Assessor would have had to determine the appropriate assessee for each disallowed item, to the extent provided by law. (§ 531.)

Assuming the truth of Appellant's assertion that "[a] finding of the nonexistence of the property in question for 1994 will be the basis of the non-existence for all subsequent years" (2 AA 185 [November 7, 2012 refund claim, page 4, footnote 3]),

review and adjustment by the AAB on a timely application by Appellant in 1997 could have obviated *two* lawsuits: this one *and* the one Appellant filed in 2010.

Appellant cannot amend its pleadings to cure this defect. It has already alleged that it did not timely seek relief at the AAB and cannot plead around those allegations now. This Court should reverse the Court of Appeal and affirm the judgment of the Superior Court.

B. The so-called "nullity" exception does not apply here because Appellant has not alleged a pure question of law where the facts are undisputed.

On rare occasions where the facts are not disputed, Courts have not required taxpayers to seek relief at the AAB or a county board of equalization before coming to court with their property tax matters.

(1) *Early cases applied a mechanical distinction between valuation and nonvaluation issues when deciding whether to excuse taxpayers from the exhaustion requirement.*

Some of this Court's early cases on disputes over this exception to the exhaustion doctrine followed a mechanical distinction on the question of value. To determine whether a

taxpayer was required to exhaust its administrative remedies with the county board, they distinguished between the "overvaluation of property" and the "assessment of property not taxable at all." (*Brenner* v. *City of Los Angeles* (1911) 160 Cal. 72, 76 [not requiring exhaustion]. See also *Luce* v. *City of San Diego* (1926) 198 Cal. 405 [requiring exhaustion] and *Parr-Richmond Industrial Corp.* v. Boyd (1954) 43 Cal.2d 157, 165 [not requiring exhaustion].)

Likewise, in *Associated Oil Co.* v. *Orange County* (1935) 4 Cal.App.2d 5, where the taxpayer mistakenly reported the wrong number of barrels of oil produced on its property, the Fourth District Court of Appeal held that it was "a case of erroneous assessment . . . and not one of mere overvaluation of property," so that the taxpayer was not required to exhaust administrative remedies at the county board of equalization.

(2) *More recent cases only excuse taxpayers from exhaustion when the facts are undisputed and the only issue is a pure question of law.*

This Court interpreted those earlier cases in *Star-Kist Foods, Inc.* v. *Quinn* (1960) 54 Cal.2d 507: "Prior application to the local board of equalization has not been required . . . in

certain cases where the facts were undisputed and the property assessed was tax exempt, outside the jurisdiction, or non-existent." (*Id.* at 510, internal citations omitted.) To decide the case before it, however, the Court concluded that the "only substantive issue" in that case was the constitutionality of a statute, so that there was "no question of valuation that the local board of equalization had special competence to decide," "no dispute as to the facts," and thus "no possibility that action by the board might avoid the necessity of deciding the constitutional issue[.]" (*Id.* at 511.) That is, the case presented only a pure question of law. The taxpayer was not required to seek relief at the county board.

Ten years later, this Court refashioned the rule from *Star-Kist*: "An exception [to the exhaustion doctrine] is made when the assessment is a nullity as a matter of law because, for example, the property is tax exempt, non-existent or outside the jurisdiction, and no factual questions exist regarding the valuation of the property which, upon review by the board of equalization, might be resolved in the taxpayer's favor, thereby making further litigation unnecessary." (*Stenocord Corp.* v. *City*

and County of San Francisco (1970) 2 Cal.3d 984, 987, internal citations omitted.) But in that case the Court found that the matter "involved a question of valuation which, if submitted to the board of equalization, might have obviated plaintiff's action"—that is, "a remedy was available before the board of equalization." (*Stenocord, supra,* 2 Cal.3d at 988.)

In the few cases where Courts of Appeal have excused taxpayers from the exhaustion doctrine since then, the facts were stipulated or undisputed and there was only a question of law for the court. (See *Exchange Bank* v. *County of Sonoma* (1976) 59 Cal.App.3d 608, 610, *Yttrup Homes* v. *County of Sacramento* (1977) 73 Cal.App.3d 279, 282, fn. 1, *Oates* v. *County of Sacramento* (1978) 78 Cal.App3d 745, 757, fn. 1, and *TRW Space and Defense Sector* v. *County of Los Angeles* (1996) 50 Cal.App.4th 1703, 1710, fn. 2.)

In *Steinhart,* this Court recited its holdings in *Star-Kist* and *Stenocord,* but ultimately decided that no exception to the exhaustion doctrine applied in that case. (*Steinhart, supra,* 47 Cal.4th at 1312.)

(3) *Declining to excuses taxpayers from the exhaustion doctrine except on pure questions of law with undisputed facts advances the purposes of the doctrine.*

What Appellant refers to as "the nullity exception" to the exhaustion doctrine, based on citations to *Star-Kist*, *Stenocord*, and *Steinhart* (Answer to Petition for Review, 7–10), does not work the way Appellant suggests. The application of the exception turns not on whether the taxpayer alleges some legal conclusion about the assessment—for example, that it is a "nullity"—but whether the taxpayer alleges that its challenge is purely a question of law with undisputed facts.

The common thread in *Star-Kist*, *Stenocord*, *Steinhart*, and their successors is that taxpayers are excused from the exhaustion doctrine only when the facts are undisputed and the relief they seek depends entirely on a pure question of law. Indeed, this Court in *Steinhart*, after discussing *Star-Kist* and *Stenocord*, already appears to treat the exception as one applying where a "challenge presents a pure question of law involving undisputed facts" (see *Steinhart*, *supra*, 47 Cal.4th at 1312)—except in that case section 1605.5 controlled the issue.

Applying the exception only to pure questions of law with undisputed facts advances the purposes for having the exhaustion doctrine in the first place. As discussed above, requiring taxpayers to exhaust administrative remedies before coming to court yields several important benefits. For one, it gives the administrative agency an opportunity to grant relief where it is warranted. As well, it facilitates the development of a complete record for judicial review if the agency declines to grant relief. (*Yamaha Motor Corp.*, *supra*, 185 Cal.App.3d at 1240.) But those benefits only obtain "in cases where administrative remedies are available and *as likely as the judicial remedy to provide the wanted relief.*" (*Ibid.*) Pure questions of law with undisputed facts are not within the "special competence" of an AAB (see *Star-Kist*, *supra*, 54 Cal.2d at 511), which decides factual questions to accomplish "equalization." But it is undoubtedly within the special competence of the judiciary to decide pure questions of law. (*McClung* v. *Employment Development Department* (2004) 34 Cal.4th 467, 469.) Requiring a taxpayer to present to the AAB a pure question of law with

undisputed facts would yield none of the benefits the exhaustion doctrine was designed to produce.

In the same vein, this Court in *Stenocord* described the exception as applying only where there are factual issues "which, upon review by the board of equalization, might be resolved in the taxpayer's favor, *thereby making further litigation unnecessary*." (*Stenocord, supra*, 2 Cal.3d at 987, italics added.) A pure question of law with undisputed facts presented to the AAB for determination is likely just to yield an advisory opinion that will dissatisfy either the assessor or the taxpayer and result in litigation anyway. For those cases, an exception to the exhaustion doctrine makes sense.

This is not one of those cases.

(4) *Appellant does not and cannot allege a pure question of law with undisputed facts here.*

The exception to the exhaustion doctrine that is described in *Star-Kist*, *Stenocord*, and *Steinhart* applies only to pure questions of law where the facts are undisputed. And that exception does not apply here because Appellant does not allege a

pure question of law with undisputed facts, either now or when its applications to the AAB would have been timely.

Moreover, there is no way for Appellant to amend its pleadings and cure that defect. Appellant has already pleaded a case whose whole point is that it did not own particular property on particular lien dates (or that particular property "did not exist as to Appellant" on those dates), contrary to determinations by the Assessor. Whether Appellant owned particular property, or whether particular property existed, is a question of fact, not law. Appellant cannot now plead around these factual issues to present a pure question of law with undisputed facts.

This Court should reverse the Court of Appeal and affirm the judgment of the Superior Court.

2. Appellant was required to pay the disputed taxes and seek a refund within the time limit in Revenue and Taxation Code § 5097(a)(3), but failed to do so.

After applying to the AAB for a reduced assessment, the next step in the administrative process is a claim for refund under section 5097. (*Steinhart, supra*, 47 Cal.4th at 1307.) That section puts time limits on those claims:

An order for a refund . . . shall not be made, except on a claim:

. . .

(2) Except as provided in paragraph (3) or (4), filed within four years after making the payment sought to be refunded, or within [periods not relevant here], whichever is later.

(3)(A) Filed within one year, if an application for a reduction in an assessment or an application for equalization of an assessment has been filed pursuant to Section 1603 and the applicant does not state in the application that the application is intended to constitute a claim for refund, of either of the following events, whichever occurs first:

(i) After the county assessment appeals board makes a final determination . . . and mails written notice of its determination to the applicant and the notice of its determination to the applicant . . . .

(ii) After the expiration of the time period specified in subdivision (c) of section 1604 if the county assessment appeals board fails to hear evidence and fails to make a final determination on the application for reduction in assessment or on the application for equalization of an escape assessment of the property.

(§ 5097, subd. (a)(2)–(a)(3)(A) [subdivisions (a)(3)(B) and (a)(4) are not applicable here].)

A. The time limit in Revenue and Taxation Code §5097, subdivision (a)(3)(A)(ii), applies because Appellant applied to the AAB for a reduced assessment.

The time limits in subdivision (a)(3) of section 5097 apply only when "an application for a reduction in an assessment or an application for equalization of an assessment has been filed pursuant to Section 1603 and the applicant does not state in the application that the application is intended to constitute a claim for refund."

When there is no final determination by the AAB for purposes of subdivision (a)(3)(A)(i) of section 5097, the one-year period under subdivision (a)(3)(A)(ii) of section 5097 applies. That one-year period runs from "the expiration of the time period specified in subdivision (c) of section 1604 if the county assessment appeals board fails to hear evidence and fails to make a final determination on the application." The time period specified in subdivision (c) of section 1604 is two years from filing the application.

Appellant filed nine "Applications for Changed Assessment" with the AAB on June 13, 2007, for tax years 1994 through 2000. Those applications were rejected as untimely, so the AAB heard no evidence and made no determination on them. That means the time limit in subdivision (a)(3)(A)(ii) of section 5097 applies: two years from filing, the period specified in subdivision (c) of section 1604, was June 13, 2009; and one year after that, June 13, 2010, was the date by which Appellant should have filed its claims for refund. As discussed below, however, Appellant failed to file claims for refund until 2012, two years after the deadline.

B. Appellant had standing to apply to the AAB for reduced assessments because it had a direct economic interest in payment of the taxes.

The Court of Appeal held that Appellant could not have filed "a valid application for reduction" with the AAB:

> An application for a reduction in an assessment requires the applicant to declare or certify, under penalty of perjury, that the applicant is the owner of the property or has a direct economic interest in the payment of the taxes on the property. (§ 1603, subd. (f).) Appellant, not being the owner of the subject property, cannot make such a declaration.

Therefore, appellant cannot file a valid application for reduction.

(5th DCA Opn., p. 7.)

Contrary to what the Court of Appeal held, however, a person does not have to be the owner of property to apply to the AAB for a reduced assessment, or even to be taxed for that property. A person only needs to have a direct economic interest in the payment of the taxes in order to apply to the AAB, and any person that claims, possesses, or controls property on the lien date can be the lawful assessee.

Subdivision (a) of section 1603 provides that "[a] reduction in an assessment on the local roll shall not be made unless the *party affected* or his or her agent makes and files with the county board a verified, written application[.]" (Italics added.) Appropriately, then, subdivision (f) of that section requires the applicant to certify under penalty of perjury that it is "the owner of the property *or* the person affected (*i.e., a person having a direct economic interest in the payment of the taxes on that property*)." (Italics added.)

The disjunctive "or" in subdivision (f) means that the person making the certification does not need to be "the owner of the property," but only needs to have "a direct economic interest in the payment of the taxes" as the "person affected."

The State Board of Equalization, in its regulations applicable to local equalization has also defined "person affected" and "party affected":

> "Person affected" or "party affected" is any person or entity having a direct economic interest in the payment of property taxes on the property for the valuation date that is the subject of [local equalization] proceedings, including the property owner, a lessee required by the property lease to pay the property taxes, and a property owner who acquires an ownership interest after the lien date if the new owner is also responsible for payment of property taxes for the lien date that is the subject of the application."

(18 C.C.R. § 301(g).)

Allowing any "party affected" to apply to the AAB for a reduced assessment is also consistent with section 405, which requires the Assessor to "assess all the taxable property in his county, except state-assessed property, to the persons owning, *claiming*, *possessing*, or *controlling* it on the lien date." (Italics

added.) That is, a person can still be a lawful assessee of property even if he or she does not own it.

As the assessee, Appellant undoubtedly had a "direct economic interest in the payment of the taxes" whether it owned the property or not. Appellant had an economic interest when it contacted the Auditor in 2006 to have the liens for delinquent taxes reduced or removed, and it had an economic interest when it sought declaratory relief in 2010. Surely Appellant had an economic interest in 2007 when it filed its applications with the AAB, and was a "party affected."

C. Article XIII, section 32, of the State Constitution and Revenue and Taxation Code § 5097 establish a time limit to pay disputed taxes after applying to the AAB, and Appellant failed to pay within that time.

Article XIII, section 32, of the State Constitution sets the basic limits for actions to challenge taxes:

> No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

The purpose of that constitutional "pay first, litigate later" rule is to "allow revenue collection to continue during litigation so that essential public services dependent on the funds are not unnecessarily interrupted." (*State Board of Equalization* v. *Superior Court* (1985) 39 Cal.3d 633, 638 ("*State Board*").) "The fear that persistent interference with the collection of public revenues, for whatever reason, will destroy the effectiveness of government has been expressed in many judicial opinions. As was said by Mr. Justice Field . . . , 'Any delay in the proceedings of the officer, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public." (*Id.* at 639, internal citations omitted.) "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason." (*Ibid.*)

That is, the "pay first, litigate later" rule does not exist so that taxpayers may delay payment until a more convenient time and then litigate; it exists to require diligence by taxpayers that wish to dispute taxes, so that governments are not left in

uncertainty about revenues. Nothing in Article XIII, section 32, suggests that "payment of a tax claimed to be illegal" can be delayed indefinitely (or even for a decade, as here), with no effect on the right "to recover the tax paid."

To the contrary, by limiting tax refund actions to "such manner as may be provided by the Legislature," the Constitution provides for "strict legislative control over the manner in which tax refunds may be sought." (*Woosley* v. *State of California* (1992) 3 Cal.4th 758, 789.) The Legislature exercised that power by enacting "a specific statutory refund procedure for taxpayers whose property has been improperly assessed." (*IBM Personal Pension Plan* v. *City and County of San Francisco* (2005) 131 Cal.App.4th 1291, 1299.) And because the Legislature has constitutional "plenary control over the manner in which tax refunds may be obtained," a taxpayer seeking a refund "must show strict, rather than substantial, compliance with the administrative procedures established by the Legislature." (*Ibid.*)

In *Steinhart* this Court described the refund procedure established by the Legislature as "a three-step process": the first step is review by the AAB, discussed in detail above; the second

step is an administrative claim for refund; and the third step is an action for refund. (*Steinhart, supra*, 47 Cal.4th at 1307–1308.)

The Legislature did not just establish three steps in isolation; it knitted them together by a series of time limits. First there are several time limits for filing an application with the AAB, depending on the circumstances of the assessment. (§§ 1603, subds. (b)–(d), 1605, subds. (b)–(c).) Then, assuming the application to the AAB was not designated as a claim for refund, and depending on what the AAB does, there are two alternative time limits for filing a claim for refund. (§ 5097, subd. (a).) Finally, there is a time limit for filing a refund action, starting from a date that depends on what the local government does. (§ 5141.) Strict compliance with this chain of time limits requires attentiveness and diligence by taxpayers if they wish to protect their interests.

Under the "pay first, litigate later" rule, part of taxpayers' required diligence in challenging taxes is paying those taxes. And the Legislature's exercise of "plenary control" over the refund process should be construed in a way that (a) complies with the Constitution, (b) recognizes the plain meaning of the statute, and

(c) promotes the policy of diligence by taxpayers. Specifically, section 5097 should be construed to establish the time limit for payment when the taxpayer has applied to the AAB: if there is no payment within the time limit described in subdivision (a)(3) of section 5097, then a taxpayer subject to that time limit is barred from seeking a refund.

In other words, when a taxpayer files an application with the AAB and puts a county on notice that it disputes certain property taxes, that taxpayer must follow through diligently with timely payment and a timely claim for refund, if it hopes to preserve its right to maintain the dispute.

Because Appellant filed its applications with the AAB on June 12, 2007, and the AAB heard no evidence and made no determination on those claims, Appellant had until June 12, 2010, to pay the disputed taxes and file a claim for refund. But Appellant did not begin to pay the taxes until 2011, and did not file its claims for refund until 2012. Appellant's lack of diligence and failure to strictly comply with the procedural rules established by the Legislature bars it from the courthouse.

D. This Court should reject the Court of Appeal's construction of Revenue and Taxation Code § 5097.

The Court of Appeal held not only that Appellant "did not file an application for assessment reduction under section 1603," but that it "could not have filed its refund claims in June 2010" because "those claims were not viable until the taxes were paid in 2011 and 2012." The court cited *JPMorgan Chase Bank, N.A.* v. *City and County of San Francisco* (2009) 174 Cal.App.4th 1201 ("*JPMorgan Chase*") to support that holding. For those reasons, the Court of Appeal held that Appellant's claims for refund were timely. (5th DCA Opn., p. 8.) That holding was in error.

(1) JPMorgan Chase *is not applicable here.*

The Court of Appeal relied on *JPMorgan Chase* to hold that Appellant's claims for refund were timely. But there was no dispute in *JPMorgan Chase* that a four-year limitation period applied: "The parties do not assert that any period other than the four-year period of section 5097, subdivision (a)(2) has any bearing on this case." (*JPMorgan Chase, supra,* 174 Cal.App.4th at 1210, fn. 4.) Instead the question there was whether filing a

complaint in federal district court was "tantamount to a refund claim under section 5097." (*Id.* at 1210.)

The dispute here is about which time limit applies; there is no dispute about whether Appellant actually filed refund claims. And *JPMorgan Chase* offers no guidance on that point. A decision cannot stand for a proposition not considered by the court. (*Agnew* v. *State Board of Equalization* (1999) 21 Cal.4th 310, 332.)

(2) *The Court of Appeal's construction would give taxpayers unilateral power to avoid a statutory time limit simply by delaying payment of disputed taxes.*

The Court of Appeal construed section 5097 in a way that would give taxpayers unilateral power to avoid the time limits in subdivision (a)(3) of that section simply by delaying payment. Under that construction, a taxpayer could—as Appellant did here—file an application with the AAB, and then wait an indefinite period before paying the disputed tax and filing a claim for refund. The affected county would be unable to rely on the time limits in subdivision (a)(3) to know when the risk of a claim had passed. Instead, it would have to wait for an indefinite period

until the taxes are paid before setting its four-year clock to wait for the final date when a refund claim would be timely.

This Court should reject the Court of Appeal's construction of section 5097, reverse that court, and affirm the judgment of the Superior Court.

Conclusion

Appellant failed to exhaust its administrative remedies, and should not be excused from that failure. There is no applicable exception to the exhaustion doctrine here. Appellant had a question of fact that the AAB could have heard and decided, namely whether the farm equipment was assessable to Appellant on the relevant lien dates. But Appellant failed to apply timely to the AAB, which means it failed to exhaust that remedy. That failure is fatal to Appellant's action.

Appellant also failed to pay the taxes and seek a refund within the period required by subdivision (a)(3)(A)(ii) of section 5097. When Appellant filed its applications with the AAB in 2007, and the AAB rejected them as untimely, a statutory clock started to run. Appellant had three years to file its claims for refund. And because the State Constitution requires taxpayers to

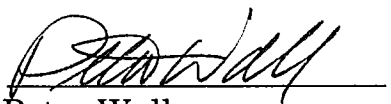
"pay first, litigate later," Appellant had the same three years to pay the taxes. Appellant failed to do both.

From the most recent assessment that Appellant disputes, it was six years before Appellant applied to the AAB for relief, more than a decade before Appellant paid the taxes and requested a refund, and 12 years before Appellant filed this case. Excusing those delays would harm the public interest in orderly tax collection, and burden local government with uncertainty, by leaving the facts underlying those taxes subject to litigation for a decade or more.

For those reasons, and for all of the reasons argued above, this Court should reverse the Court of Appeal and affirm the judgment of the Superior Court.

Dated: May 20, 2015 Respectfully submitted,

Daniel C. Cederborg
Fresno County Counsel

By: 
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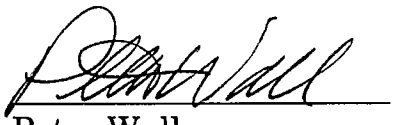
Certificate Regarding Length of Brief
(Rule 8.204(c)(1))

I, Peter Wall, Deputy County Counsel, certify under penalty of perjury that, according to the computer program on which this brief was produced, this brief contains approximately 9,315 words.

Executed on **May 20, 2015**, at Fresno, California.



Peter Wall

Proof of Service

I, Rachel Morales, declare that I am a citizen of the United States of America and a resident of the County of Fresno, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 2220 Tulare Street, Suite 500, Fresno, California 93721-2128.

On May 20, 2015, I served a copy of the attached

Respondent's Opening Brief on the Merits

by first-class mail on the following interested parties in said action:

Lynne Thaxter Brown, Esq.
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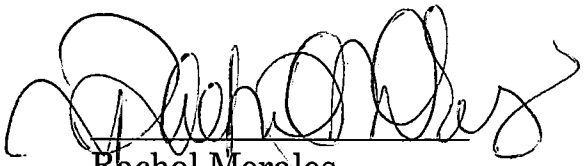
by placing the document listed above for mailing in the United States mail at Fresno, California in accordance with my employer's ordinary practice for collection and processing of mail, and addressed as set forth above.

I hereby certify under penalty of perjury under the law of the State of California that the above is a true and correct statement.

Executed at Fresno, California on May 20, 2015.



Rachel Morales