No: S243247

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

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CITY OF OROVILLE, *Petitioner*

*v.*

SUPERIOR COURT OF BUTTE COUNTY, *Respondent*

CALIFORNIA JOINT POWERS RISK MANAGEMENT AUTHORITY et al., *Real Parties in Interest*

SUPREME COURT
FILED
NOV 28 2017
Jorge Navarrete Clerk
Deputy

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# ANSWER BRIEF ON THE MERITS BY CJPRMA

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After an Unpublished Decision of the Court of Appeal
Third District Court of Appeal, Case No. C077181
Arising from Butte County Superior Court, Case No. 152036
The Honorable Sandra L. McLean, Judge

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A. BYRNE CONLEY
(112715)
abcjr@gibbons-conley.com
*PETER URHAUSEN
(160392)
pau@gibbons-conley.com
**GIBBONS & CONLEY**
Hookston Square
3480 Buskirk Ave.
Suite 200
Pleasant Hill, CA 94523
Telephone: (925) 932-3600
Facsimile: (925) 932-1623

*Attorneys for Plaintiff in Intervention/Third-Party Assignee, CJPRMA*

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Telephone: (925) 932-3600
Facsimile: (925) 932-1623

*Attorneys for Plaintiff in Intervention/Third-Party Assignee, CJPRMA*

**CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

I know of no interested entities or persons as defined in California Rules of Court, Rule, 8.208, other than parties to this proceeding, that have a financial or other kind of interest in the outcome of this proceeding.

Dated: November 21, 2017

By: _____
A. BYRNE CONLEY
PETER URHAUSEN

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## LEGAL ISSUES PRESENTED FOR REVIEW

1. Whether inverse condemnation liability against a public entity for sewage backup into real property should be applied where the design and operation of the sewer system is defeated by plaintiffs' violations of state and local building code ordinances requiring the installation and maintenance of functioning backwater valves on private property sewer laterals to prevent sewage backups onto private property.

2. Whether strict liability can be applied against a public entity when sewage intrudes on private property without evidence of a design or construction defect in the sewer system, without evidence of a deficient or unreasonable plan of maintenance by the public entity, and where a backwater valve is not installed and maintained on private property by owners as legally required by state and local building codes.

3. Whether a public entity is strictly liable in inverse condemnation whether its properly designed and constructed public improvements function as intended, or fail to function as intended.

## I.
## INTRODUCTION

Development of inverse condemnation law should be based on "prior case law, public policy and common sense."[1] Common sense dictates that property owners should not recover under inverse condemnation when the very damage to their property was caused by their own illegal connection to a

[1] *Belair v. Riverside County Flood Control District.* (1988) 47 Cal.3d 550, 565.

city's sewer system. Here, Plaintiffs' failure to have a backwater valve ("BWV") is undisputed. That such failure violated Petitioner City of Oroville ("City") ordinances and the Uniform Plumbing Code is undisputed. That the BWV required was a "necessary part of the sewer design and plan" is undisputed. That the presence of a properly functioning BWV would have prevented the sewage overflow into Plaintiffs' building is undisputed. Consequently, it should also be undisputed that the City is not liable to Plaintiffs for inverse condemnation.

Yet, the trial court felt compelled by a faulty analysis in *CSAA*[2] to find the City liable for inverse condemnation. The analysis in *CSAA* is incorrect because the fundamental basis for inverse condemnation is the deliberate taking or damaging of private property for public use. Accidents and negligence do not constitute inverse condemnation. The failure to prevent all clogs in a sewer main, even if negligent, does not constitute inverse condemnation, unless the City has a deliberately deficient plan of maintenance —such as no maintenance, and simply "fix it when it breaks."[3] Maintenance of a public improvement "constitutes the constitutionally required public use" if it is the entity's "deliberate act to undertake the particular plan or manner of maintenance."[4] The "deliberate design, construction, or maintenance of the public improvement" must be the cause of the damage.[5] Here, the trial court found no deficient plan or manner of maintenance.

*CSAA* misinterpreted *Belair* to have eliminated the inverse

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[2] *California State Auto Assn. Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal. App.4th 474.
[3] E.g., see *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 607.
[4] *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 742, citing *Bauer v. County of Ventura* (1955) 45 Cal.2nd 276, 284-285.
[5] *Arreola* at 742.

condemnation requirement that damage be caused by the deliberate act of the public entity, and to instead replace it with a "failed to function as intended" test. *CSAA* overlooked that the deliberateness requirement was already satisfied in *Belair* (the levee's specific design angled incoming water to the base of the levee, causing "deep scouring" that lead to the levee's failure). *Belair's* discussion of the damage being caused by the levee's failing to function as intended was in addition to the deliberateness requirement, not in lieu of it. Deliberateness having already been established, *Belair* added the "failed to function as intended" test to the proximate cause analysis to counter the defendant's argument that the levee failure there did not cause plaintiff's damages because plaintiff's property would have flooded if the levee did not exist.

*CSAA's* "failed to function as intended" rule of inverse condemnation liability, borrowed from flood control caselaw, cannot apply to sewage backup cases. It makes no sense in this context. The unique circumstances of flood control cases – including the proximate cause issue that flooding would have occurred in the absence of the flood control project – do not exist in sewer cases.

Public entities are already liable for inverse condemnation when a public improvement functioning as intended causes damage. The public entity cannot also be liable in inverse condemnation whenever damage is caused by the public improvement failing to function as intended. If that were the law – as *CSAA* indicates – public entities would **always** be liable for inverse condemnation when their public improvements cause damage. And if that were truly the law, then cases such as *Pacific Bell* and *Arreola* did not need to analyze the public entities' maintenance plans – they could have simply said failure of a water pipe or a channel to function as intended results

in inverse condemnation liability. Indeed, much of this Court's development of inverse condemnation law would be antiquated – the test would simply be "was the public improvement a substantial cause of damage." Obviously, that is not and cannot be the law.

Moreover, even in flood control cases, the "failed to function as intended" test does not apply unless an **independent** force, such as a rainstorm, overwhelms the system and the system poses "an unreasonable risk of harm to the Plaintiffs, and such unreasonable design, construction, or maintenance constitutes a substantial cause of the damages."[6] If the "failed to function as intended" test is grafted onto sewer backup cases, then these additional requirements should be included as well. Here, the Plaintiffs' failure to have a legally required BWV is hardly an "independent force" and Plaintiffs failed to establish that the sewer system's design, construction, or maintenance was unreasonable.

Additionally, in the inverse condemnation analysis, "the decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking."[7] Here, Plaintiffs are not disproportionally impacted because their property damage was caused by their own failure to have a legally required BWV. Indeed, Plaintiffs are seeking to have their neighbors and other fellow citizens pay for the consequences of Plaintiffs' own unlawful conduct.

Furthermore, public policy weighs against imposition of inverse condemnation liability. Property owners' incentive to obey City ordinances and the Uniform Plumbing Code would be negated if they could recover in

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[6] *Belair v. Riverside County Flood Control District, supra*, 47 Cal.3d 550, 559-560, 565.
[7] *Belair* at 558.

full (including attorney fees and expert costs) for damage caused by their own unlawful failure to install and maintain a BWV. Moreover, insurance coverage is available to property owners for such damage, but inverse condemnation liability is generally not covered by insurance for public entities. Indeed, in this case, Plaintiffs were reimbursed by their insurer for well over $1,000,000, and Respondent CJPRMA (see below) does not provide pooled self-insurance to the City of Oroville for inverse condemnation liability, although it does cover the related nuisance claim.

## II.

## PARTIES

Petitioner City of Oroville (hereinafter "City" or "Oroville") is a public agency within the meaning of Government Code §6252, subdivision (d), and a defendant in this action pending before Respondent Butte County Superior Court.

Plaintiffs Timothy Wall, DDS, Sims W. Lowry, DMD, and William A. Gilbert, DDS, individually and doing business as WGS Dental Complex (hereinafter collectively "WGS"), and California Joint Powers Risk Management Authority ("CJPRMA"), are named herein as real parties in interest. CJPRMA purchased an assignment of the rights of the WGS first party property insurer, The Dentists Insurance Company ("TDIC"). TDIC insured the WGS plaintiffs and paid out well over $1 million for this claim. All of TDIC's rights to recover its payments (and costs and fees) now belong to CJPRMA.

CJPRMA is a public entity risk-sharing pool providing coverage to the City of Oroville. CJPRMA, as is typical, does not provide coverage for inverse condemnation liability, and thus could financially benefit from a

ruling adverse to the City that preserves the TDIC-assigned inverse condemnation subrogation claim against the City. Nonetheless, CJPRMA's position is that any potential recovery it may have against the City is far outweighed by the benefit to its member and the membership as a whole (in addition to California public entities generally) of a holding that missing BWV sewage overflow cases, such as this one, do not create inverse condemnation liability. Consequently, CJPRMA supports the City's position that the opinion of the court of appeal should be reversed.

## III.

## FACTS OF THE CASE

The facts of the case are set forth in City of Oroville's Brief, which CJPRMA adopts by reference pursuant to California Rules of Court, rule 8.200(a)(5). Briefly, Plaintiffs built their office building without a legally required BWV.[8] About 25 years later, a clog in the City's sewer main caused sewage to back up in the main.[9] Instead of overflowing at the nearest uphill manhole, per design of the sewer system, the sewage overflowed into Plaintiffs' building due to Plaintiffs' missing BWV.[10] Plaintiffs' insurer paid them well over $1,000,000 for property damage and lost income.[11] Plaintiff and its insurer sued the City.

## IV.

## PROCEDURAL HISTORY AND COURT OF APPEAL OPINION

The procedural history is set forth in City of Oroville's Brief, which

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[8] Vol. 2, Ex. 5, pp. 213-215, 227-229, 234-235, 237, 287-293; 347-349.
[9] Vol. 4, Ex. 32, p. 1004; Vol. 7, Ex. 57, p. 1935.
[10] Vol. 4, Ex. 32, p. 1007, 1010-1011.
[11] Vol. 4, Ex. 34, p.1044.

CJPRMA adopts by reference pursuant to California Rules of Court, rule 8.200(a)(5).

## V.
## STANDARD OF REVIEW

The primary issues here are legal questions and thus subject to de novo review.

> Our standard of review is mixed. The question of whether to apply a standard of reasonableness (under *Belair* and *Locklin*) or a strict liability standard (under *Albers*) is a legal issue we review de novo. (See *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 601 [96 Cal.Rptr.2d 897].) When the reasonableness standard applies, the question of whether a public agency acted reasonably is a fact-based inquiry. (*Belair, supra,* 47 Cal.3d at p. 566, 253 Cal.Rptr. 693, 764 P.2d 1070; *Skoumbas v. City of Orinda* (2008) 165 Cal.App.4th 783, 796 [81 Cal.Rptr.3d 242].) We review the court's factual findings under the substantial evidence standard. (Cf. *Akins v. State of California* (1998) 61 Cal.App.4th 1, 36 [71 Cal.Rptr.2d 314].) The application of the appropriate legal standard to the facts properly found by the trial court is a legal question. (See *Paterno v. State of California* (2003) 113 Cal.App.4th 998, 1023 [6 Cal.Rptr.3d 854]; *Ali v. City of Los Angeles* (1999) 77 Cal.App.4th 246, 250 [91 Cal.Rptr.2d 458].)

(*Gutierrez v. County of San Bernardino* (2011) 198 Cal.App.4th 831, 844.)

## VI.

## POTENTIAL THEORIES OF RECOVERY IN SEWER BACKUP CASES

Before discussing inverse condemnation liability, it is important to note that sewer backup claims can be litigated under "dangerous condition" and nuisance theories. When damage is accidental, recovery should be limited to these tort causes of action. As with the exercise of police powers,

> the government's potential liability for this type of conduct properly should be evaluated, as it always has been in the past, under the provisions of the Tort Claims Act. (Gov. Code, §810, et seq.) In enacting the elaborate and detailed provisions of that act, the Legislature carefully considered the competing considerations that arise from the imposition of liability upon the government in various tort settings, and deliberately fashioned immunity provisions designed to avoid deterring the government from proceeding with the enforcement of important public policies. As noted above, to allow Customer to bring an action for inverse condemnation would "trump" all of the immunity provisions set forth in the Tort Claims Act.

(*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 391.)

Conversely, inverse condemnation liability should only be available when the taking or damage is for a "public use," i.e., a result of a deliberate

design, construction, or plan of maintenance. Because the damage to the WGS Plaintiffs was not caused by any of those, inverse condemnation liability should not be available.

**A. Negligence**

Generally, cities cannot be sued for negligence under Civil Code section 1714 for conditions of public property, since the dangerous condition statutes (Government Code §§ 830, et seq.) occupy the field. (*Zelig v. County of Los Angeles (*2002) 27 Cal.4th 1112, 1132.)

**B. Dangerous Condition of Public Property**

For dangerous condition of public property liability to attach, a claimant must prove that the property created a substantial risk of injury when used with due care, and that the public entity either (1) had actual or constructive notice of the dangerous condition, or (2) created the dangerous condition through a negligent or wrongful act. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1132; Gov. Code § 835.) Design immunity under Government Code section 830.6 provides a potential defense.

**C. Nuisance**

Nuisance liability is often asserted in sewer backup claims. Nuisance liability attaches to conduct that obstructs "the free use of property, so as to interfere with the comfortable enjoyment of life or property...." (Cal. Civil Code § 3479.) Public entities may be subject to nuisance liability. (*Nestle v. County of Santa Monica* (1972) 6 Cal.3d 920 [airport noise].)

Nuisance liability requires "some sort of conduct, i.e., intentional and unreasonable, reckless, negligent, or ultrahazardous, that unreasonably interferes with another's use and enjoyment of ... property." (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 102 [timber, debris and water washed from District's land onto adjacent property; no liability

found because district was not negligent].) Thus, to prevail on a nuisance theory for a sewer backup claim, the claimant generally must show negligence or some affirmative act of the entity that led to the backup.

Defenses such as design immunity apply. (*Mikkelsen v. State* (1976) 59 Cal.App.3d 621, 630.)

**D. Inverse Condemnation**

Inverse condemnation liability is based on the California Constitution rather than the Government Claims Act. Unlike dangerous condition and nuisance actions, no Government Code claim need be filed. (See Government Code § 905.1.)

In 2006, *California State Auto Assn. Inter-Insurance Bureau v. City of Palo Alto, supra,* 138 Cal.App.4th 474, greatly expanded liability for public entities in sewer backup cases, holding that inverse condemnation liability can be applied to such claims when the sewer system fails to function as intended.[12] As set forth in this brief, *CSAA*'s analysis was erroneous, and inverse condemnation liability should not be available in sewer backup cases

[12] A sewage overflow constituted inverse condemnation in *Ambrosini v. Alisal Sanitary District* (1957) 154 Cal.App.2d 720, but that finding of liability was based on damage caused by the design of the system transporting treated water from a sewage disposal plant to the Salinas River. Unusually heavy rains had raised the level of the Salinas River to 47 feet, higher than a non-pressure manhole's elevation of 43 feet adjacent to Plaintiff's celery field. (*Id.* at 722, 731.) The system design allowed a backup to overflow that non-pressure manhole adjacent to the Plaintiff's celery field, inundating and destroying the celery crop. (*Id.* at 723.) The court relied on *Bauer*, rejecting a claim of mere negligence, and finding that the damage was caused by the project "functioning as deliberately conceived, for a river flood level of 47 feet." (*Id.* at 731.) [The District ended up suing its engineer for not contemplating a rise in the Salinas River in the design of the piping system – see *Alisal Sanitary District v. Kennedy* (1960) 180 Cal.App.2d 69, 72.]

unless the property damage is caused by the public entity's deliberate design, construction, or plan of maintenance.

## VII.

## DELIBERATE DESIGN, CONSTRUCTION, OR PLAN OF MAINTENANCE IS REQUIRED FOR INVERSE CONDEMNATION LIABILITY

In this section, we set forth authorities demonstrating that —for at least six decades — inverse condemnation liability has required an element of deliberateness. In the next section, we explain that *CSAA* misread *Belair* to eliminate that requirement.

The State Constitution provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." (Cal. Const., art. I, § 19.) On the basis of this one sentence, an entire area of case law rests.

With two exceptions not relevant here, inverse condemnation liability is established where physical injury to real property is proximately caused by a public improvement "as deliberately designed and constructed." (*Albers v. Los Angeles County, supra*, 62 Cal.2d 250, 263-264; *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 304; *Belair v. Riverside County Flood Control Dist., supra*, 47 Cal.3d 550, 556; *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 440.) In *Bauer v. Ventura County* (1955) 45 Cal. 2d 276, 286 (abrogated by *Belair* on other grounds), this Court recognized that the line between construction and maintenance is sometimes blurred and that a plan of maintenance can be sufficient to meet the deliberateness needed to satisfy the public use requirement for inverse condemnation. In *Bauer*, the plaintiffs

alleged:

> that the collection of debris and stumps in the ditch raised an obstruction which caused the water to back up on their land. If this was due to the mere negligent operation of the ditch system, it is not within the scope of liability as a taking or damaging for a public use under section 14 [now article 1, section 19]. If, on the other hand, the obstruction of the ditch was in some way part of the plan of maintenance or construction, then liability would attach ...
>
> .

(*Id.* at 286.)

Thus, the cause of the damage under inverse condemnation must be the public improvement functioning as deliberately designed and constructed, including consideration of the plan of maintenance deliberately adopted. In contrast, simple negligence or negligent failure to follow the maintenance plan is not sufficient to give rise to inverse condemnation liability. (*Bauer, supra,* 45 Cal.2d at p. 286.) A number of appellate courts, before and after *Belair*, have employed these rules in analyzing liabilities alleged to arise from maintenance of public improvements.

In *Hayashi v. Alameda County Flood Control and Water Conservation Dist.* (1959) 167 Cal.App.2d 584, plaintiffs suffered substantial damage when the levee maintained by the defendant flood control district suffered a 60–foot break. The court allowed a negligence claim (the case predates the Government Claims Act), but held that the district had no liability for inverse condemnation:

> The most recent cases have made a distinction between negligence which occurs when a public agency is carrying out a deliberate plan with regard to the construction of public works, and negligence resulting in damage growing out of the operation and maintenance of public works. These cases hold that the damage resulting from the former type of negligence is compensable under article I, section 14, whereas damages resulting from the second type of negligence are not recoverable in an inverse condemnation proceeding, but are recoverable, if at all, only in a negligence action. [Citing *Bauer* and other cases.] It has been definitely held that a property owner may not recover in an inverse condemnation proceeding for damages caused by acts of carelessness or neglect on the part of a public agency. [Citation.]

(*Id.* at pp. 591–592.)

A year later, citing both *Bauer* and *Hayashi,* the court of appeal in *Kambish v. Santa Clara Val. Water Conservation Dist. of San Jose*(1960) 185 Cal.App.2d 107, 111, held: "Damage resulting from negligence in routine operation having no relation to the function of the project as conceived is not a taking for public use and thus not a basis for inverse condemnation." The case involved overflow of a creek after heavy rains caused a reservoir to overtop.

Next, *Sheffet v. County of Los Angeles* (1970) 3 Cal.App.3d 720, involving damage from water overflowing from city streets, held that "[i]nverse condemnation does not involve ordinary acts of carelessness in the carrying out of the public entity's program. [Citations.] Property is only

deemed taken or damaged for a public use if the injury is a necessary consequence of the public project. (*Albers v. County of Los Angeles*, *supra*, pp. 263-264.)" (*Id.* at pp. 733-734.)

*McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683 [disapproved on other grounds by *Bunch v. Coachella Valley Water Dist., supra,* 15 Cal.4th 432] concluded that a property owner could recover for inverse condemnation based on the city's plan of maintenance for its system of deteriorating water delivery pipes. *McMahan's* recognized inverse condemnation lies only for an injury to private property caused by a deliberate act for the purpose of fulfilling one of the public objects of the project as a whole, and that negligence committed during the routine day-to-day operation of the public improvement does not establish inverse condemnation. (*Id.* at p. 694.) Relying on *Bauer v. County of Ventura, supra,* 45 Cal.2d 276, 285, the court concluded that the city's construction of the system without monitoring capabilities, and a maintenance plan of simply waiting for a section of the deteriorating pipe to burst before replacing it, amounted to the deliberate act needed to impose inverse condemnation liability. *McMahan's* recognized that, under *Bauer,* the concept of "maintenance" and "construction" can be synonymous for purposes of article I, section 19. "[W]hether the City's program of water main installation and replacement is characterized as 'construction' or 'maintenance,' the fact remains that it was inadequate and contributed to the break due to corrosion of the [water main]. The City's knowledge of the limited life of such mains and failure to adequately guard against such breaks caused by corrosion is as much a 'deliberate' act as existed in *Albers*, *supra,* 62 Cal.2d 250." (*Id.* at 696.)

> "The governmental decision to proceed with the project without incorporating the essential precautionary modifications in the plan thus represents ... a deliberate policy decision to shift the risk of future loss to private property owners rather than to absorb such risk as a part of the cost of the improvement paid for by the community at large. In effect, that decision treats private damage costs, anticipated or anticipatable, but uncertain in timing or amount or both, as a deferred risk of the project. If and when they materialize, however, the present analysis suggests that those costs should be recognized as planned costs inflicted in the interest of fulfilling the public purpose of the project and thus subject to a duty to pay just compensation."

(*Id.* at p. 697, quoting Van Alstyne, *Inverse Condemnation: Unintended Physical Damage* (1969) 20 Hastings L.J. 431, 491–492.)

> In the instant appeal, the City was taking a calculated risk by adopting a plan of pipe replacement and maintenance that it knew was inadequate. The City's plan of replacement of the water mains reflected the deferred risks of the project both foreseeable and unforeseeable, and it is proper to require the City to bear the loss when the damage occurs.

(*McMahan's* at 698.)

After this Court decided *Belair* in 1988, the courts of appeal continue to apply these rules.

Consistent with the principles set forth in *Bauer*, *Hayashi, Kambish*, *Sheffet,* and *McMahan's — Paterno v. State of California* (1999) 74 Cal.App.4th 68, 79 (another levee flood control case) reversed the trial court's finding of inverse condemnation, in part because "the trial court conflated negligent maintenance with a negligent **plan** of maintenance. Takings liability attaches, if at all, only to the latter." (Emphasis original.) To establish inverse condemnation liability, plaintiff "must prove that an unreasonable **plan** caused the failure." (*Id.* at 86, emphasis original.) "In the case of alleged shoddy maintenance, as here, it is the **plan** of maintenance which must be unreasonable to establish a taking. Poor **execution** of a maintenance plan does not result in a taking." (*Id.* at p. 87, citing *Bauer* and *McMahan's*, emphasis original.)

> Paterno points to the phrase (from *Bauer*, *supra*, 45 Cal.2d at p. 286) "negligence in the routine operation having no relation to the function of the project as conceived," and construes it to mean that if there is negligence in the routine operation which **is** related to the function of the project, takings liability attaches. Paterno asserts that "case law merely uses the word 'plan' ... in the context of a broader inquiry as to whether a defendant inflicted injury through deliberate conduct which ostensibly attempted to further a public project's purpose." **Any act**, he claims, "in direct or indirect furtherance of a project's public purpose" is a "plan" such that an inverse taking results if the act causes damage and is found to be unreasonable, and the "pivotal

> requirement under *Bauer* and its progeny thus is whether the defendants' action related to the purpose of a public project, not whether the action constituted a 'plan.' " He also points to a snippet of discussion about exhibits in the trial court, stating the District conceded that "what they do every year, ... is a plan," **but this is not the law**.
>
> To repeat, "deliberate" action invokes takings liability, **where, and only where,** the deliberation is **by a public entity**, not by an employee: "Damage resulting from negligence in the routine operation having no relation to the function of the project as conceived is not within the scope of the rule applied in the present case." (*Bauer, supra*, 45 Cal.2d at p. 286, quoted in *Customer Co., supra*, 10 Cal.4th at p. 382.)

(*Paterno* at 87–88, emphasis original and added.)

Next came *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 608 with facts substantively identical to *McMahan's. Pacific Bell*, labelling the maintenance plan a "replace it when it breaks" program, whole-heartedly endorsed *McMahan's*. (*Id.* at pp. 607, 610.) In *Pacific Bell*, as in *McMahan's,* the city's water delivery system was deliberately designed, constructed, and maintained without any method or program for monitoring the inevitable deterioration of cast-iron pipes, other than waiting for a pipe to break. As in *McMahan's*, the city knew that its pipes were badly deteriorated and that its replacement program would take more than a decade. (*Id.* at pp. 599-600, 608-609.) The city had a program, motivated by cost savings, to "replace it when it breaks" as the method of maintenance,

turning down numerous rate increases necessary to fund a more proactive approach to replacing deteriorating pipes. (*Ibid.*) The deliberateness element was met by showing that the city made a decision to install a system without monitoring capabilities and to use a "wait until it breaks" plan to detect deterioration. (*Id.* at p. 608.)

*Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722 [liability for flooding from channel obstructed by overgrown vegetation] states:

> A public entity's maintenance of a public improvement constitutes the constitutionally required public use so long as it is the entity's deliberate act to undertake the particular plan or manner of maintenance. (*Bauer v. County of Ventura* (1955) 45 Cal.2d 276, 284–285, 289 P.2d 1 (*Bauer*).) [¶] The necessary finding is that the wrongful act be part of the deliberate design, construction, or maintenance of the public improvement.
>
> ....
>
> In sum, the record demonstrates the Counties' policy makers made explicit and deliberate decisions with unfortunate but inevitable results. Knowing that failure to properly maintain the Project channel posed a significant risk of flooding, Counties nevertheless permitted the channel to deteriorate over a long period of years by failing to take effective action to overcome the fiscal, regulatory, and environmental impediments to keeping the Project channel clear. This is sufficient evidence to support the trial

> court's finding of a deliberate and unreasonable plan of maintenance.

(*Id.* at pp. 742, 747.)

As *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 857 later explained, "simple negligence cannot support the constitutional claim."

> [A]lthough there may be liability in inverse condemnation where levee failures are integrally connected with a flawed plan for those levees and/or flawed construction, there is no such liability where similar failures are the result of negligent or inadequate operation and maintenance.
>
> ....
>
> These allegations do not meet the test we derive from the precedents just discussed, i.e., that garden variety inadequate maintenance, as distinguished from a faulty plan involving the design, construction and maintenance of a levee, is not an adequate basis for an inverse condemnation claim.

(*Id.* at pp. 858-859 [distinguishing *Arreola,* no liability for levee failure].)

Similarly, in the recent case of *Mercury Casualty Co. v. City of Pasadena* (2017) 14 Cal.App.5th 917, 931, relating to a tree fall, the court reiterated the rule: "To establish an inverse condemnation claim based on a government entity's maintenance of one of its improvements, the property

owner must show that the plan of maintenance was deficient in light of a known risk inherent in the improvement." "Inverse condemnation liability does not arise out of ... negligent acts in the day-to-day maintenance or operation of a public improvement." (*Id.* at p. 925.)

Thus, both before and after *Belair*, inverse condemnation liability has required a deliberate act. However, as discussed next, *CSAA* fundamentally misinterpreted *Belair* to mean that the deliberateness requirement was unnecessary if the public improvement failed to function as intended. If *CSAA* were correct, the analysis of the maintenance in the above-discussed cases would have been superfluous — the courts could have simply found liability because the public improvements failed to function as intended. And, *Paterno* and *Tilton* would be wrong in their results.

## VIII.

## *CSAA* MISREAD *BELAIR* TO ELIMINATE THE REQUIREMENT A PUBLIC IMPROVEMENT BE OPERATING AS DESIGNED AND CONSTRUCTED WHEN HARM OCCURS

### A. *Belair* Did Not Remove the Deliberateness Requirement

*Belair* did not eliminate the inverse condemnation requirement that a public improvement be operating as designed when it causes damage. In *Belair,* the trial court specifically found that "At the time of the breach, the flow in the river channel was approximately 25,000 CFS and the project levee was **operating as designed and constructed**." (*Belair, supra,* 47 Cal.3d at p. 556, emphasis added.) Plaintiffs' damages were caused by "a failure in a portion of the project levee, by reason of a breach at a particular point in the levee." (*Ibid.*)

After reciting these facts, *Belair* then explained that inverse condemnation liability is based on physical injury to property "proximately caused by [a public] improvement as deliberately designed and constructed." (*Belair, supra,* 47 Cal.3d. at p. 558.) This Court then emphasized the limitation in slightly different language: damage proximately caused by the "improvement as deliberately constructed and planned." (*Ibid.*)

*Belair* then discussed proximate cause, without diminishing the predicate requirement that damage be caused by the public improvement operating as designed. *Belair* concluded that proximate cause can be established despite concurrent causes, as long as the public improvement was a substantial cause.

Importantly, the deliberateness requirement was not at issue in *Belair* — no one challenged the trial court's finding that: "At the time of the breach [the] levee was operating as designed and constructed." (*Belair, supra,* 47 Cal.3d at p. 556.) After all, the levee was built such that it combined with two pre-existing levees so that "the configuration of the three levees created a 'flow impingement' which forced the channel waters to flow against the [subject] levee at a 25-degree angle. The flow impingement caused deep scouring which undermined the levee toe and resulted in the failure." (*Id.* at pp. 555-556.) So there was no question there that the deliberateness requirement was satisfied — the levee was operating as designed. (See, also, Justice Mosk's dissent at page 568 ["I agree with the majority that Plaintiffs in their inverse condemnation claim established they suffered actual physical damage to their real property that was directly or substantially caused by flood control improvements operating as deliberately planned and built."].)

Instead, the causation issue in *Belair* arose out of the trial court's finding that the levee breach was not the proximate cause of Plaintiffs'

damages because the Plaintiffs' property would have flooded in the absence of the levee (i.e., the property was historically subject to flooding) and the levee did not increase the risk of damage. (*Belair, supra,* 47 Cal.3d at p. 556.) The court of appeal reasoned that these findings meant "the levee had not proximately caused Plaintiff's damages, i.e., had [not] caused more flooding on Plaintiffs' property than there would have been without the levee...'." (*Id.* at 557.)

It was within this framework that *Belair* acknowledged the long-standing requirement that damage be caused by a public improvement "as deliberately designed and constructed." (*Belair, supra,* 47 Cal.3d at p. 558.)

*Belair* then addressed Professor Van Alstyne's discussion in his seminal law review article *Inverse Condemnation Unintended Physical Damage* (1969) 20 Hastings L.J. 431, 435-438, regarding the confusion created by *Albers'* use[13] of "proximate cause" terminology while eliminating foreseeability as a requirement for inverse condemnation. (*Belair, supra,* 47 Cal.3d at p. 559.) *Belair* accepted Professor Van Alstyne's suggested measure of proximate cause as a "'substantial' cause-and-effect relationship...." (*Ibid.*)

*Belair* then explained that in the situation "where independently generated forces not induced by the public flood control improvement — such as a rain storm — contribute to the injury, proximate cause is established where the public improvement constitutes a **substantial concurring cause** of the injury, i.e. where the injury occurred in substantial part because the improvement failed to function as it was intended." (*Belair, supra,* 47 Cal.3d at pp. 559-560, emphasis original.)

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[13] *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250.

But this statement is in the context of the deliberateness requirement already having been established. *Belair's* holding does not eliminate the requirement that damage be caused by a public improvement operating as designed. The "failed to function as intended" test applies to the issue of proximate cause, but does not supplant or alter the deliberateness requirement.

**B. *CSAA* Misinterpreted *Belair***

*CSAA* misinterpreted *Belair*. *CSAA* acknowledged the requirement that damage be caused by a public work as "deliberately designed and constructed," but concluded that *Belair* had eliminated this requirement where "the injury occurred in substantial part because the improvement failed to function as intended." (*CSAA, supra,* 138 Cal.App.4th at pp. 480-481 ["After *Belair*,"....].)

*CSAA*'s analysis was wrong. *Belair* refined the determination of proximate cause after the deliberateness requirement is met. But *CSAA* simply dispensed with the deliberateness requirement.

*CSAA* failed to acknowledge the issue in *Belair*: determination of proximate cause when a flood control project is operating as designed but fails to protect property that would have flooded in the absence of the project. *CSAA*'s erroneous analysis is illustrated by its substantial attention to *Belair's* discussion of Professor Van Alstyne's substantial cause/proximate cause analysis in concurrent-cause cases. That discussion was relevant to *Belair* — a concurrent cause case. *CSAA* was not such a case and therefore had no need to discuss concurrent cause analysis. In *CSAA*, the only cause of the damage was the backup in the city's sewer main. No one argued another force was at play. *CSAA* should have simply analyzed (as the defendant City of Palo Alto urged there) whether the damage was caused by the sewer main

operating as deliberately designed.

However, *CSAA* simply dispensed with the deliberateness requirement and determined that liability was established merely because the public improvement did not function as intended, i.e., failed to carry sewage away from the plaintiff's home. (*CSAA, supra,* 138 Cal.App.4th at p. 483.) This erroneous statement of law was then relied upon by the lower courts in the case at bar.

## C. Where *CSAA* Went Wrong

*CSAA* starts out with a reasonable summary of the law:

> Under the California Constitution, article I, section 19, property may not be taken or damaged for public use without just compensation to the owner. This provision is the authority for both proceedings initiated by the public entity to "take[ ]" property—otherwise known as "eminent domain" — and those initiated by the property owner for just compensation as a result of a taking — otherwise known as "inverse condemnation." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* 73 Cal.App.4th 517, 529, 86 Cal.Rptr.2d 473.)
>
> A property owner may recover just compensation from a public entity for "any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed ... whether foreseeable or not." (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 263–264, 42 Cal.Rptr. 89, 398 P.2d 129 (*Albers* ); *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303, 90 Cal.Rptr. 345,

475 P.2d 441.) Inverse condemnation lies where damages are caused by the deliberate design or construction of the public work; but the cause of action is distinguished from, and cannot be predicated on, general tort liability or a claim of negligence in the maintenance of a public improvement. *(Hayashi v. Alameda County Flood Control* (1959) 167 Cal.App.2d 584, 591–592, 334 P.2d 1048; *Yox v. City of Whittier* (1986) 182 Cal.App.3d 347, 352, 227 Cal.Rptr. 311 (*Yox* ); see, e.g. *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 382, 41 Cal.Rptr.2d 658, 895 P.2d 900 [a public entity cannot be subject to " 'general tort liability under theory of eminent domain'"].) But damage caused by the public improvement as deliberately conceived, altered, or maintained may be recovered. (*Barham v. Southern Cal. Edison Co.* (1999) 74 Cal.App.4th 744, 754, 88 Cal.Rptr.2d 424.)

To be compensable, the taking must be for a public use. (Cal. Const., art. 1, § 19; *Yox*, *supra*, 182 Cal.App.3d at p. 352, 227 Cal.Rptr. 311.) Indeed, the policy basis for the payment of just compensation is a consideration of "'whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.'" (*Albers, supra,* 62 Cal.2d at p. 262, 42 Cal.Rptr. 89, 398 P.2d 129.)

(*CSAA, supra*, 138 Cal.App.4th at pp. 479-480.)

So far, so good. But then the court takes a wrong turn. *CSAA* identifies only four elements of inverse condemnation, omitting the requirement of

deliberateness. (*CSAA, supra*, 138 Cal.App.4th at p. 480.) The court had just set forth the rule that "actual physical injury to real property [must be] proximately caused by [a public] improvement as deliberately designed and constructed," but then lists proximate cause — but not deliberateness — as an element of the cause of action. *CSAA* then discusses substantial cause and foreseeability, stating that *Belair* had held that, when an independent force is involved, failure of a flood control project can be a concurring substantial cause.[14]

*CSAA* states that it was not imposing strict liability because the Plaintiff still had to prove causation. (*CSAA, supra*, 138 Cal.App.4th at p. 484 ["duty to demonstrate the actual cause of the damage"].) Yet, causation is always required, even in strict liability cases. (E.g., *O'Neil v. Crane Co.* (2012) 83 Cal.4th 335, 349 ["It is fundamental that the imposition of [strict] liability requires a showing that the Plaintiff's injuries were caused by an act of the Defendant or an instrumentality under the Defendant's control"].)

*CSAA* also states that the sewer main was "strictly under the control of the City." (*CSAA, supra*, 138 Cal.App.4th at p. 484.) Not so. The City cannot prevent disposal of improper items into the sewer system, whether it be restaurant grease, diapers, feminine hygiene products, soiled clothing, to name a few.[15] Virtually every property is connected to the sewer and every

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[14] *CSAA* incorrectly says "even if an independent force is involved" rather than *Belair's* limitation of the requirement of an independent force.

[15] In *CSAA*, the trial court had found no inadequacy in the plan of maintenance, but the court of appeal ignored this missing element of the claim, reasoning instead that "[h]ow or why the blockage occurred is irrelevant." (*Id.* at pp. 482-483.) The court of appeal shifted the burden of proof on the erroneous notion that the main was "strictly under the control of the City" (at p. 484) when the court's own recital of facts indicates the homeowners' plumber connected the lateral to the main, at a "wye" joint through which tree roots entered. (*Id.* at p. 477.) In the case at bar, the trial court found that "the City's evidence shows a plan of maintenance was in

person in society can discharge to the sewer. No sewer agency can control the condition of every sewer lateral (so as to preclude tree roots) or the behavior of every member of society (to bar other sources of blockages). By misunderstanding the abilities of defendant sewer agencies, *CSAA* has crafted an inappropriate rule of strict liability.

*CSAA* fails to acknowledge the flood control context in which *Belair* was decided, and improperly conflates analysis of proximate cause with that of deliberateness. Its misreading of *Belair* changed fundamental principles developed by decades of inverse condemnation law — an error this Court can now correct.

## IX.

## THE LOWER COURTS HERE MISAPPLIED *CSAA* AND *BELAIR*

First, *Belair* gave no indication that the "failed to function as intended test" applied in any scenario other than the failure of a flood control project to protect land historically subject to flooding. The test addresses the argument that failure of the project did not proximately cause the land to be flooded because the land would have flooded had the project never been built. *Belair* certainly did not hold that inverse condemnation liability lies every time a public improvement fails to function as intended.

Second, there is no argument here that the overflow that damaged the WGS Plaintiffs would have occurred in the absence of the City's sewer main. The *Belair* "failed to function as intended" test cannot logically apply to sewage overflow cases, let alone an overflow caused by the Plaintiff's illegal connection to the sewer main.

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effect and being followed," but, believing itself to be constrained by *CSAA,* nevertheless found liability. (Vol. 4, Ex. 32, p. 1011.)

Third, the sewer main in the present case could not operate as designed because the design depended upon the WGS Plaintiffs' compliance with the law, including City ordinances and the Uniform Plumbing Code.

Fourth, this is not a case involving an independent force as required by *Belair*.

Fifth, even though *CSAA's* reliance on *Belair* was misguided, *CSAA* conditioned liability on the fact the plaintiff insurer there had done "everything in its power" to protect the property "from sewage backup." (*CSAA, supra*, 138 Cal.App.4th at p. 484.) Here, the WGS Plaintiffs did just the opposite — they built without the legally required BWV, intended and required to prevent the very damage that occurred.

Even if *CSAA's* statement of the law were correct, the WGS Plaintiffs' unlawful failure to install and maintain a required BWV so distinguishes this case from *CSAA* as to compel the opposite result: a finding of no inverse condemnation liability against City.

## X.

## *CSAA* RISKS STRICT PUBLIC LIABILITY IN A WIDE RANGE OF CIRCUMSTANCES

Nothing in *CSAA* limits to sewer cases its broad holding that inverse condemnation liability is established by a public improvement failing to function as intended. Under *CSAA*, **any** damage caused by the failure of a public improvement to function as intended generates inverse condemnation liability. This would apply to water lines, gas lines, electrical lines, etc. Indeed, *CSAA* is flatly in conflict with *McMahan's v. Santa Monica* and *Pacific Bell v. San Diego*, the water main cases, and, frankly, all cases that require a deliberate act for inverse condemnation liability.

*CSAA* has caused confusion for a decade, threatening and/or imposing inverse condemnation liability and inappropriate settlements against hundreds of California public entities that own thousands and thousands of miles of public sewer systems. The problem will be worse if *CSAA* is extended to public improvements other than sewer systems. This Court can and should disapprove *CSAA* before its errant holding is applied more broadly.

## XI.

## PUBLIC POLICY MILITATES AGAINST INVERSE CONDEMNATION LIABILITY IN MISSNG BACKWATER VALVE CASES

As a general matter, barring some very unusual circumstances not present here, a plaintiff should not be able to recover at all when the damage is caused by his own unlawful failure to install and maintain a required backwater valve. But beyond that, such claimants certainly should not be able to recover for inverse condemnation. First, it simply is not inverse condemnation, as explained in detail in this brief.

Second, the hammer of the potential recovery of attorney fees and expert costs encourages plaintiffs' counsel to over-litigate, run up damages, and as a corollary to those, extort settlements far above the reasonable value of cases. These incentives are not necessary to incentivize good management of public sanitary sewers and simply over-compensate claimants — at public expense.

Third, insurance coverage for public entities is generally unavailable for inverse condemnation liability.[16] Even public entity risk-sharing pools

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[16] See, e.g., *City of Laguna Beach v. Mead Reinsurance Corp.* (1990) 226 Cal.App.3d 822, and *Stonewall Ins. Co. v. City of Palos Verdes Estates*

(like CJPRMA here) generally do not cover inverse condemnation. The reason is fairly obvious — members do not want to pay for each other's public improvements. Furthermore, the intentional nature of inverse condemnation is problematic for risk sharing. Inverse condemnation liability absent a deliberate act — as here — can deprive a public entity of coverage for what is essentially an insurable accident. Here, real party in interest CJPRMA does not cover inverse condemnation liability but does cover liability for nuisance or dangerous condition of public property. Although CJPRMA does not concede that any liability against the City can arise on this record, the limitation on inverse liability for which it argues would allow the City to rely on risk-pooling for the remaining claims.

Fourth, property owners generally have property insurance, which was the case here and made CJPRMA a party by assignment from the WGS Plaintiffs' insurer, TDIC. Why should society generally bear a burden those private insurers took premiums to cover? The bottom line is that the WGS Plaintiffs failed to follow the law, and to the extent they were prudent enough to have insurance to cover their mistakes, they have received well over $1,000,000 for property damage and lost income. That is where plaintiffs' recovery should stop —as a matter of law and of public policy.

## XII.

## THE BURDEN IS PROPERLY ON THE PROPERTY OWNER TO DETERMINE WHETHER A BACKWATER VALVE IS NEEDED

To require the City to survey every building that seeks connection to the City's sewer main would vastly increase the cost of permits and

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(1996) 46 Cal.App.4th 1810.

dramatically delay permit issuance. The City of Oroville, like most cities, is not staffed or equipped to perform elevation surveys of private property for every new construction job or connection to the City's sewer main. That burden properly rests on the property owner seeking to connect to the City's sewer main.

This point is necessary given a passing comment in the court of appeal's decision below: "City states, as did the trial court, that the valve was a necessary part of the sewer design. Then perhaps City should assure compliance before issuing certificates of occupancy." (2017 WL2554447, p.10.)

The court of appeal's position would require the City survey the elevation of every private property seeking connection to the City sewer main, as well as analyzing the construction plans to determine the elevation of the proposed plumbing fixtures, compare those to the elevation of the nearest uphill manhole, to ensure the property owner includes on his or her construction plans any necessary BWV, and then ensure that the BWV is properly installed. The WGS Plaintiffs did not even urge this ambitious proposition below. Not only does the City lack the resources for such tasks, but private land owners are in a far better position to include such analysis in their construction plans. Rational inverse condemnation law would give property owners incentive to do so and their insurers cause to confirm it.

Of necessity, compliance with ordinances and the Building Code must always be the responsibility of the property owner, for society cannot fund the management of every private property. Moreover, that is best for the owner. Negligent construction work — whether it be a negligent elevation survey or (non)installation of a backwater valve, negligent selection or installation of an electric panel, a natural gas connection, etc. — would give

the property owner recourse against the contractor and its insurer. In contrast, the City is immune from liability for negligently inspecting private property and issuing permits, precisely to avoid socializing these risks. (Gov. Code, §§ 818.4 and 818.6.) Inverse condemnation liability against the City for Building Code violations would make the City an insurer of all privately-owned buildings for which it issues permits, i.e., virtually every building in the City. As this Court explained in *Customer*, inverse condemnation liability should not supplant the legislative judgments as to the proper scope of public entity liability under the Government Claims Act. (*Customer Co. v. City of Sacramento, supra*, 10 Cal.4th 368, 391.)

## XIII.

## CONCLUSION

We urge this Court to reverse the court of appeal, to direct the trial court to enter judgment for the City on the inverse condemnation claims, and to disapprove *CSAA*'s holding that the failure of a public improvement to function as intended supplants the deliberateness requirement for inverse condemnation liability. It may then remand for further proceedings on the remaining claims consistent with its ruling.

Dated: November 27, 2017

Respectfully Submitted,

By A. Byrne Conley (SBN 112715)
Peter Urhausen (SBN 160392)
GIBBONS & CONLEY
*Attorneys for Plaintiff in Intervention/Third-Party Assignee,* CJPRMA

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520(c)(1) of the California Rule of Courts, I hereby certify that this Opening Brief contains 7694 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: _____
A. BYRNE CONLEY
PETER URHAUSEN

**PROOF OF SERVICE BY MAIL**

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 811 Wilshire Boulevard, Suite 900, Los Angeles, California 90017. On November 28, 2017, I served **ANSWER BRIEF ON THE MERITS BY CJPRMA** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Randolph M. Paul
BERDING & WEIL LLP
2175 North California Blvd., Suite 500
Walnut Creek, CA 94596
Ph: (925) 838-2090
Fax: (925) 820-5592
E-Mail: rpaul@berding-weil.com

Scott Huber
COTA COLE & HUBER LLP
2261 Lava Ridge Court
Roseville, CA 95661
Ph: (916) 780.9009
Fax: (916) 780.9050
E-Mail:
shuber@cotalawfirm.com

Mark A. Habib
Lia M. Juhl-Rhodes
PETERS, HABIB, MCKENNA
& JUHL-RHODES, LLP
414 Salem St., P.O. Box 3509
Chico, CA 95927-3509
Ph: (530) 342-3593
Fax: (530) 342-4742
E-Mail: mhabib@peterslawchico.com
ljuhl@peterslawchico.com

Michael G. Colantuono
Jennifer Pancake
COLANTUONO HIGHSMITH
& WHATLEY, PC
420 Sierra College Dr., Ste. 140
Grass Valley, CA 95945
Ph: (530) 432-7357
Fax: (530) 432-7356
E-Mail:
mcolantuono@chwlaw.us
jpancake@chwlaw.us

Clerk of the Court of Appeal
Third Appellate District Court
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Honorable Sandra L. McLean,
Judge
Butte County Superior Court
One Court Street
Oroville, CA 95965

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 28, 2017, at Los Angeles, California.

Fernando Mercado
PRINT NAME


SIGNATURE