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SUPREME COURT
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In the Supreme Court of the State of California

Brian Reid,
Plaintiff and Appellant,

vs.

Google, Inc.,
Defendant and Respondent.

ANSWER TO GOOGLE'S PETITION FOR REVIEW

After a Decision by the Court of Appeal,
Sixth Appellate District, Case No. H029602
Superior Court for the County of Santa Clara
Case Nos. CV023646

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I. Summary Of Argument And Reasons Why Review Should Be Denied.

Other than the fact this case involves evidence of age discrimination by, among others, the young multi-billionaire Google founders, Sergey Brin and Larry Page, this case presents a routine reversal of summary judgment based on triable issues of fact. As the Court of Appeal held, Plaintiff Dr. Brian Reid established triable fact issues as to whether his termination from Google at age 54 was a pretext for age discrimination based on a combination of proof: age discriminatory statements directed at Reid by Google managers, supervisors and co-workers, statistically significant expert findings of age discriminatory practices at Google, conflicting reasons from Google for Reid's termination, a "job elimination" angle created after the fact, and a company youth culture that evinces a disdain for older workers. Nonetheless, Google seeks review based on two issues. Neither warrants the attention of this Court

As its first issue, Google contends that some of the discriminatory comments made by Google supervisors and co-workers were simply "stray remarks" that allegedly "bear[] no actual or analytic connection to the decision-maker, the decision in question or the motives behind it." (Google's Petition for Review ("Pet.") at 2.) On that basis, Google repeats its unsuccessful arguments asserted below that the discriminatory age-related comments were irrelevant and insufficient to create a triable issue of fact for purposes of defeating summary judgment. (*Id.* at 7-15.) Review of Google's first issue is not warranted for several reasons.

First, the age-related derogatory comments by supervisors Wayne Rosing and Urs Hoelzle on which Google's Petition focuses are not "stray remarks." Both men were decision-makers and supervisors of Reid, and the age-derogatory comments were made at or around the time of Reid's termination. They were also made repeatedly and were not simply "stray

remarks." They are probative evidence of discriminatory intent for the trier of fact to consider.

Second, Google significantly exaggerates the "stray remarks" caselaw, relying almost entirely on federal cases decided before the United States Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133. *Reeves* made clear it is impermissible a court to substitute its judgment for the jury's as to the weight given to discriminatory comments. (*Id.* at 150-53.) Subsequent federal courts addressing the issue have stated that "pre-*Reeves* 'stray remarks' jurisprudence must be viewed cautiously." (*Russell v. McKinney Hosp. Venture* (5th Cir. 2000) 235 F.3d 219, 229; *see also* footnote 8 below.) When the pre-*Reeves* cases relied upon by Google are properly discounted, the "conflict" Google attempts to create between the Court of Appeal's decision and Google's "stray remarks" cases disappears.[1]

Third, the comments made by decision-makers Hoelzle and Rosing were not the only evidence of discrimination Reid presented in opposition to Google's summary judgment motion. He also established triable issues of fact relating to the discriminatory employment decisions through statistical evidence, Reid's demotion to a nonviable position before Google terminated him, and Google's changing rationales for his termination. In other words, even if Google were correct that the comments by Hoelzle and Rosing were merely "stray remarks," the summary judgment remained

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[1] The pre-*Reeves* federal cases relied on by Google include: *Nesbit v. Pepsico, Inc.*, (9th Cir. 1993) 994 F.2d 703, 705; *Nidds v. Schindler Elevator Corp.* (9th Cir. 1996) 113 F.3d 912, 915, 919; *Standard v. A.B.E.L. Serv., Inc.*(11th Cir. 1998) 161 F.3d 1318, 1329; *Fortier v. Ameritech Mobile Comm., Inc.* (7th Cir. 1998) 161 F.3d 1106, 1113; *Bickerstaff v. Vassar College* (2d Cir. 1999) 196 F.3d 435, 456; *Cone v. Longmont United Hosp. Assoc.* (10th Cir. 1994) 14 F.3d 526, 531. (*See* Pet. at 9, fn. 1.)

reversible based on the presence of triable issues of fact created by this other evidence. Review of Google's first issue is unwarranted.

As to Google's second issue for review—the "*Biljac* issue" — Google lacks standing to complain. Here, the trial court did not rule on the parties' evidentiary objections, and instead stated that it was only considering admissible evidence, following *Biljac Associates v. First Interstate Bank of Oregon* (1990) 218 Cal.App.3d 1410, 1419-20. On appeal, Google advocated in its Respondents Brief that the Sixth District follow the *Biljac* approach and Google expressly renewed all its objections to Reid's evidence, particularly as to Reid's statistical evidence, inviting the Court of Appeal to consider them anew. (*See* Google's Respondent's Brief ("RB") filed in Court of Appeal at 28, n.4, and 29, n.5.) And that is exactly the approach the Court of Appeal took. (*See Reid v. Google, Inc.* (2007) 155 Cal.App.4th 1342, 1355-59 ("*Reid*").)[2]

Thus, instead of holding that Google's failure to obtain evidentiary rulings from the trial court constituted a *waiver* of Google's objections, which this Court has twice stated is the correct approach[3], the Court of Appeal considered Google's objections on the merits, consistent with *Biljac*. (*Reid* at 1358 ("[W]e may consider the issue of the admissibility of the statistical evidence on appeal because we do not find the lack of a ruling creates waiver.") Consequently, the court's reliance on *Biljac benefited* Google because its objections were considered—though ultimately (and correctly) rejected.

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[2] Rather than attach the Court of Appeal's actual slip opinion to its Petition, Google attaches a Westlaw version of the case. It is unclear whether that complies with Cal. Rule of Court 8.504(b)(4). In any event, because the slip opinion is not attached, references are to the reported decision Google attaches.

[3] *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670 n.1; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186 n.1.

In short, because the *Biljac* analysis *favored* Google by not deeming Google's objections waived, Google lacks standing to appeal its *Biljac* issue. (*See People v. Webb* (1986) 186 Cal.App.3d 401, 411 ("[A] fundamental rule of appellate procedure. . . precludes an appellant from raising issues favorable to himself.") To the extent Google's Petition simply seeks review of the merits of its evidentiary objections, that issue is not framed in Google's Petition nor is it a topic worthy of this Court's attention.

Google's Petition for Review should be denied.

II. Background

A. Brief Statement of Facts

In June 2002, Google hired Brian Reid, then age 52, to become its Director of Operations and Engineering. Dr. Reid held a Ph.D. in computer science, was a former associate professor in electrical engineering at Stanford University, and had a distinguished 30-year career in computer science at the time he was hired. (*Reid* at 1346.) After Google's CEO Eric Schmidt instructed that Reid be "pursue[d]" for employment and after a number of executives interviewed him, Vice President of Engineering Wayne Rosing made the decision to hire Reid. (*See Reid* at 1346; Appellant's Appendix ("APP") 6APP 01461, 7APP 01771.) Reid reported to Rosing and his co-Vice President of Engineering, Urs Hoelzle, both of whom supervised Reid. (*Reid* at 1346-48.)

Age derogatory comments were made to Reid by Hoelzle, fifteen years junior to Reid, "every few weeks" throughout Reid's employment at Google. (*Reid* at 1347.) According to deposition testimony, Hoelzle repeatedly referred to him as "sluggish," "lethargic," "slow," and lacking "a sense of urgency." (*Id.*) Further, Hoelzle told Reid his opinions and ideas were "obsolete" and "too old to matter." (*Id.*; *see* Pet. at 9.) In October 2003, Reid was removed from Operations and demoted to run an in-house

graduate degree program. (*Reid* at 1347; 6APP 01547.) Hoelzle had instigated the demotion and immediately took Reid's position as Director of Operations. (*Reid* at 1347.)[4]

As Rosing noted in Reid's otherwise-positive performance evaluation: "Adapting to the Google culture is the primary task for the first year here. ...[¶] ... [¶] Right or wrong, Google is simply different: Younger contributors, inexperienced first line managers, and the super fast pace are just a few examples of the environment." (*Id.*) Evidencing the prominence of youth culture at Google, Reid's co-workers referred to him as an "old man," an "old guy," and "old fuddy-duddy". (*Id.*)

On February 13, 2004, a few months before Google's August 2004 initial public stock offering, Rosing met with Reid, told him he was not a "cultural fit," that he was no longer welcome in the Engineering Department and that he was terminated. (*Reid* at 1348.) Not "a cultural fit" was Google-speak for being "too old." (APP 1422, 1789-90.) Although Reid was invited by Rosing to apply for other positions at Google, internal emails indicated that Google's managers conspired to make sure no one offered him another position in their departments. (*Reid* at 1348.) When Reid met with Shona Brown, Vice President of Business Operations and 17 years younger than Reid, she told him there were no openings for him anywhere at Google because he was not a "cultural fit." (*Id.*; 6APP 01526.) Reid's last day at Google was February 27, 2004 and he continued to

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[4] Internal emails indicated the decision to demote Reid was motivated by his age and accompanying high salary. For example, one month before Reid's demotion, Google co-founder Sergey Brin sent an e-mail to all executives warning them to "avoid the tendency toward bloat here particularly with highly paid individuals." (6APP 01417, 12APP 03127-129.) Rosing responded within hours that he wanted to replace Reid with a "senior Director (note I did not capitalize Sr.) or VP level person . . .." (12APP 03127.)

receive benefits until April 2004. (*Reid* at 1348.) As the result of the wrongful termination, Reid lost millions of dollars in unvested stock options.

B. Procedural History

1. Reid's Claims Based on Age Discrimination And Google's Summary Judgment Motion.

Reid filed suit against Google in July 2004. (*Reid* at 1348.) Reid's complaint asserts causes of action based, in main part, on age discrimination under the Federal Housing and Employment Act ("FEHA"), as well as violations of California's Unfair Competition Law ("UCL") (Bus. & Prof. Code, § 17200 et seq.) relating to Google's practices of discriminating against older workers.[5]

In response to the complaint, Google demurred and brought motions to strike as to several causes of action, which the trial court sustained in large part. (*Reid* at 1349.) Google then attacked Plaintiff's remaining claims on motion for summary judgment. The trial court granted the motion and entered judgment for Google. (*Id.*) Reid appealed.

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[5] Reid's first amended complaint asserted the following causes of action: (1) UCL violations; (2) age discrimination under FEHA, including claims of both disparate treatment and disparate impact; (3) disability discrimination under the FEHA; (4) wrongful termination in violation of public policy; (5) failure to prevent discrimination; (6) negligent infliction of emotional distress; (7) intentional infliction of emotional distress; (8) fraud in the inducement; (9) violation of Cal. Labor Code Section 201; (10) violation of Cal. Labor Code Section 203; (11) breach of an implied contract for long term employment and payment of a guaranteed bonus amount; and (12) breach of the implied covenant of good faith and fair dealing. (*Reid* at 1348-1349.) Reid's claimed damages included injunctive relief, disgorgement of ill-gained profits, and attorneys' fees and costs. (*Reid* at 1348-49.)

2. The Court of Appeal's Decision

On appeal, the Sixth District reversed. (*Reid* at 1364-65.) In the unanimous decision authored by Justice Rushing, with Justices Premo and Elia concurring, the Court concluded that "Reid produced sufficient evidence that Google's reasons for terminating him were untrue or pretextual, and that Google acted with a discriminatory motive such that a factfinder could conclude Google engaged in age discrimination." (*Id.* at 1365.)

In reaching its decision, the Court of Appeal carefully considered and rejected each of Google's arguments supporting summary judgment. The Court first dismissed Google's challenges to the methodology and sample sizes used by Reid's expert, Dr. Norman Matloff, in his statistical analyses. (*Id.* at 1358-59.) The Court noted that Google offered no conflicting expert testimony to dispute Dr. Matloff's findings. (*Id.*)

The Court of Appeal also rejected Google's "length[y]" argument that the ageist comments made by Reid's coworkers and decision-makers were "stray" remarks and therefore application of the "so-called 'stray remarks' rule" would allow the trial court to deem them insufficient to support denial of summary judgment. (*Reid* at 1360.) The Court explained that judgments regarding such discriminatory comments "must be made on a *case-by-case basis in light of the entire record.*" (*Id.* at 1360-61(emphasis added).) The "weight" of these comments as evidence cannot be considered on summary judgment, in which "the sole question is whether they support an inference that the employer's action was motivated by discriminatory animus." (*Id.*) The Court emphasized the importance of considering such remarks "in the context of the evidence as a whole." (*Id.*)

The Court also held that Google was not entitled to an inference of "no discrimination." (*Id.* at 1363-64.) Google had argued that Rosing made the decision to both hire and fire Reid, and because Rosing was over

50 at the time, Google was entitled to an inference against discrimination. But the Court correctly found that Reid had presented evidence regarding the roles of Page, Hoelzle and Schmidt in the termination decision that directly disputed Google's claim that Rosing was the sole decision-maker. (*Reid* at 1363-64.)

Finally, the Court found that Reid's termination only four months after being demoted to Google's graduate program, when "coupled with" the other evidence described above and Google's disputed reasons for Reid's termination, served further to raise a triable issue of fact as to pretext. (*Id.* at 1362-63.) As the Court concluded, the evidence and inferences of discrimination presented by Reid were the "purview of the jury, and not the decision of the trial court on summary judgment." (*Reid* at 1362.)

In November 2007, the Court of Appeal modified its judgment to award Reid costs on appeal, and the Court's opinion later became final.

III. Review of Google's First Issue Is Unwarranted; The Discriminatory Statements Made By Google's Decision-Makers Were Not "Stray Remarks."

Google attacks the Court of Appeal's decision as "alarming" and "radical" because it took into account discriminatory statements by supervisors and co-workers as part of Reid's proof of discrimination. (Pet. at 8.) Google claims the remarks were by non decision-makers, were ambiguous and were unrelated to the adverse employment decisions against Reid and should be disregarded. (Pet. at 8.) But Google's inappropriately one-sided presentation misstates the significance of the statements and their speakers, misdescribes the caselaw surrounding the so-called "stray remarks doctrine," and ignores the Court of Appeal's holding that Reid established triable issues of facts based on much more evidence than simply the statements Google focuses upon in its Petition.

A. Hoelzle and Rosing Were Decision-Makers and Supervisors of Reid; Their Discriminatory Comments Made At or Around The Time of Reid's Termination Do Not Constitute "Stray Remarks."

Google's Petition centers on statements made by managers Hoelzle and Rosing, including that Reid was "slow," "fuzzy," "sluggish," "lethargic," "obsolete," "too old to matter," and that he was not a "cultural fit." (Pet. at 8-9.) As to Hoelzle, Google continues to claim he was "a co-worker who did not participate in the termination decision," arguing that Rosing alone made the decision to both hire and fire Reid. (Pet. at 4, 8.) The Sixth District explicitly found, however, that Reid presented evidence showing that Rosing was not the sole decision-maker in Reid's termination in 2004. (*Reid* at 1364.) As the Court of Appeal noted, Reid offered evidence that Hoelzle acted as Reid's direct supervisor and participated, along with Larry Page, Google's 28-year-old co-founder, in the decision to treat Reid differently "from all similarly situated performers" and to deny him a bonus in February 2004. (*Id.* at 1347.)[6] Reid's evidence also showed that Page made the termination decision. (*Id.* at 1348.) In addition, Reid presented evidence that CEO Schmidt directed Rosing to put together "a proposal ... on getting [Reid] out." (*Id.* at 1347.)

Despite the Sixth District's clear ruling that the evidence created a triable fact as to whether other "players" such as Page, Hoelzle and Schmidt accompanied Rosing in the decision to terminate Reid (*Reid* at 1364-65), Google continues to argue that Rosing was the sole decision-maker who hired and terminated Reid. (Pet. at 4, 8.) Google's continuing dispute as to the facts surrounding Hoelzle's and Rosing's role in Reid's termination highlights the very triable issue of fact that Google claims does not exist.

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[6] Reid's proposed $0 bonus was later changed to a nominal sum ($11,300) to avoid "a judge concluding we acted harshly." (*Reid* at 1347-48; APP03135-36.).

Similarly, by suggesting that Hoelzle's and Rosing's remarks are "[a]mbiguous" and "open to interpretation" (Pet. at 9), Google again highlights the triable issues of fact that preclude summary judgment. Placed in the context of Hoelzle's other verbal comments that Reid's ideas were "obsolete" and "too old to matter," and about hiring "cheaper" younger workers, it is clear that Hoelzle's and Rosing's comments are age-related. (*See Reid* at 1347; 6APP 01415, 01549-50, 01553-54.) Other courts have reached similar conclusions as to similar kinds of statements. (*See, e.g., Kelly v. Stamps.com* (2005) 135 Cal.App.4th 1088, 1101 (comment that plaintiff was "checked out" was probative of discrimination where plaintiff presented evidence that person making remark participated in termination decision and where comment, in context, revealed it was connected with plaintiff's pregnancy); *Ezell v. Potter* (7th Cir. 2005) 400 F.3d 1041, 1050-51 (holding that plaintiff's age, sex and race claims were sufficiently supported to survive summary judgment where official made comments about workers' slowness and stated that the official's supervisor and she "had a plan to get rid of older workers and replace them with faster, younger workers"); *see also Strauch v. American College of Surgeons* (N.D. Ill. 2004) 301 F.Supp.2d 839, 846 ("ambiguously age oriented" comments are probative; "the task of disambiguating ambiguous utterances is for trial, not for summary judgment").)

Finally, Google's contention that the statements were "unrelated" to the adverse employment actions against Reid simply frames the central triable issue of fact in the case. (Pet. at 1.) Google ignores that both Rosing and Hoelzle were Reid's supervisors. (*Reid* at 1364.) And that Hoelzle's comments were made repeatedly to Reid while Reid was at Google. (*Reid* at 1347.) And that Reid's evidence indicated, as even Google admits, that Rosing made statements "on two occasions *at or around the time of his termination* that he was not a 'cultural fit.'" (Pet. at

9 (emphasis added); *Reid* at 1347-1348.) The comments were not "stray remarks."

B. Google Misapplies The So-called "Stray Remarks Doctrine" And Relies on Questionable Case Authority Decided Before the U.S. Supreme Court's *Reeves* Decision.

Google also significantly misstates the reach of the so-called "stray remarks doctrine." Under both federal and California law, the "stray remarks" analysis provides no basis for a trial court or appellate court to impermissibly weigh evidence of discrimination on summary judgment. (*See Reeves v. Sanderson Plumbing Prods, Inc.* (2000) 530 U.S. 133, 150-53; *Russell v. McKinney Hosp. Venture* (5th Cir. 2000) 235 F.3d 219, 229; *Chuang v. Univ. of Cal. Davis, Bd. of Trustees* (9th Cir. 2000) 225 F.3d 1115, 1127 (summary judgment denied where a decision-maker laughed after co-worker made discriminatory remark even though remark referred to someone other than plaintiff and did not pertain to the particular employment decision at issue); *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal. App. 4th 832, 840 (trial court may not grant summary judgment "based on the court's evaluation of credibility," nor "weigh the evidence in the manner of a fact finder to determine whose version is more likely true."); *McCabe v. American Honda Motor Co., Inc.* (2002) 100 Cal. App. 4th 1111, 1119 (appellate court does not engage in a weighing of the evidence or credibility determinations).)

The idea that some employment-related discriminatory comments can be dismissed as mere "stray remarks" developed in response to evidence of discrimination that consisted entirely of ambiguous comments made by non decision-makers removed in time from the adverse employment decisions. (*See, e.g., Walton v. McDonnell Douglas Corp.* (8th Cir. 1999) 167 F.3d 423, 426, 428 (supervisor's comment made two years prior to plaintiff's termination, remarking that he would "take care of

his kids" in case of reduction in force, was not contemporaneous with decision-making and not evidence of age discrimination as the term "kids" was not age derogatory); *McMillan v. Massachusetts SPCA* (1st Cir. 1998) 140 F.3d 288, 300-01 (explaining that while "stray remarks may properly constitute evidence of discriminatory intent for the jury to consider in combination with other evidence," comments made by company president several years before plaintiff's termination were too remote). *See generally* L. Reinsmith, *Proving an Employer's Intent: Disparate Treatment Discrimination and The Stray Remarks Doctrine After Reeves v. Sanderson Plumbing Products*, 55 Vand. L. Rev. 219 (2002) (providing history of the so-called "stray remarks doctrine".)[7]

In 2000, the United States Supreme Court issued an important employment law decision making clear that a court may not substitute its own judgment for the jury's as to the weight given discriminatory comments. In *Reeves v. Sanderson Plumbing Products*, *supra*, 530 U.S. at 137-138, a 57 year-old sued his former employer for age discrimination after he was fired for allegedly failing to maintain accurate attendance records for the employees he supervised. At trial, plaintiff demonstrated the employer's reason for termination was pretext for age discrimination by introducing evidence that he had kept accurate records, and that his manager had demonstrated age-based discriminatory *animus* in his dealings with him (e.g., by stating that plaintiff "was so old [he] must have come

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[7] Google attacks the Court of Appeal for "disdainfully" referring to the "so-called stray remarks rule." (Pet. at 7.) In fact, while Google calls the "doctrine" "well-established" (Pet at 6), no California case recognizes a "stray remarks doctrine" or "rule," as such. Moreover, at least one commentator has called for abolishment of the term "stray remarks doctrine" altogether to the extent it encourages trial courts to improperly weigh circumstantial evidence of discrimination. (*See* Reinsmith, 55 Vand. L. Rev. at 254 ("In fact, the name 'Stray Remarks Doctrine' should perhaps be eliminated altogether from the legal lexicon.")

over on the Mayflower" and that he "was too damn old to do [his] job."). (*Id.* at 151.) The jury found in the plaintiff's favor and the trial court denied the defendant's motion for judgment as a matter of law. (*Id.* at 139.) On appeal, however, the Fifth Circuit reversed after it re-weighed the evidence and concluded the comments were unrelated to the termination as a matter of law. (*Id.* at 139-40.)

The Supreme Court reversed the Court of Appeals. In a unanimous opinion delivered by Justice O'Connor, who first articulated the "stray remarks" analysis eleven years earlier in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 277 (J. O'Connor concurring), the *Reeves* Court held "the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's." (*Reeves*, 530 U.S. at 153.) The *Reeves* Court explained that in assessing a motion for judgment as a matter of law, like a motion for summary judgment, the record must be "taken as a whole" and the court "may not make credibility determinations or weigh the evidence." (*Id.* at 150-51.)

Subsequent federal decisions have warned that pre-*Reeves* jurisprudence on "stray remarks" "must be viewed cautiously." (*Russell v. McKinney Hosp. Venture* (5th Cir. 2000) 235 F.3d 219, 229.) As the *Russell* court explained: "*Reeves* is the authoritative statement regarding the standard for judgment as a matter of law in discrimination cases." (*Id.* at 223 fn. 4.)[8] Most of the cases Google relies upon in its Petition predate *Reeves*. (*See* footnote 1 above.)

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[8] In *Russell*, the Fifth Circuit held that "[a]ge related remarks are appropriately taken into account when analyzing the evidence supporting the jury's verdict (even if not in the direct context of the decision and even if uttered by one other than the formal decisionmaker, provided that the individual is in a position to influence the decision)." (*Id.* at 229 (internal citations omitted).) The *Russell* court reversed the district court's judgment because the case, in part, was "based upon the accumulation of

The California Supreme Court followed *Reeves* in *Guz v. Bechtel Nat'l. Inc.* (2000) 24 Cal.4th 317, 362-363 (finding *Reeves* analysis "sound for purposes of our similar law.") In *Guz*, this Court explained that "the great weight of federal and California authority holds that an employer is entitled to summary judgment if, ... the evidence *as a whole* is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz,* 24 Cal.4th at 362 (emphasis added).) The Court further explained: "Whether a judgment as a matter of law is appropriate in any particular case will depend on a number of factors." (*Id.*) This Court then went on to analyze the specific facts in the case. (*Id.* at fn. 25.)

Contrary to Google's suggestion (Pet. at 10-12), the Sixth District's *Reid* decision is entirely consistent with *Reeves* and *Guz* and does not create a conflict with California or federal decisions. Like *Reeves* and *Guz*, the Sixth District rejected Google's assertion that the Court should apply the "stray remarks doctrine" to discount the weight given discriminatory comments by Hoelzle and Rosing. (*Reid* at 1360-62.) Instead, the Court of Appeal correctly evaluated the discriminatory remarks on a "case-by-case basis in light of the entire record." (*Reid* at 1360-62, 1363.)

C. Reid Presented More Evidence of Discrimination Than Simply the Discriminatory Statements Google Focuses Upon In Its Petition.

Although Reid's Petition focuses on discriminatory remarks by Hoelzle and Rosing, the Court of Appeal considered the "combination of evidence" Reid presented to demonstrate discriminatory *animus*, not simply the Hoelzle and Rosing statements. (*Reid.* at 1354.) This combination of

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circumstantial evidence" and "'reasonable men could differ' about the presence of age discrimination." (*Id.*) *See also Palasota v. Haggar Clothing Co.* (5th Cir. 2003) 342 F.3d 569, 573-74, 578 (reversing judgment as a matter of law where trial court incorrectly relied on pre-*Reeves* caselaw.)

evidence included: (1) the statistical evidence of discrimination at Google which Reid presented through a declaration from expert statistician Dr. Matloff (*Id.*. at 1355-59); (2) evidence of derogatory and ageist comments about Reid made by decision-makers, such as Rosing and Hoelzle, which contributed to the discriminatory atmosphere at Google (*Id.* at1360-61); (3) Reid's demotion to a nonviable position before Google terminated him (*Id.* at 1361-62); and (4) Google's changing rationales for Reid's termination (*Id.* at 1362-64).

The Court thoroughly analyzed the role of this evidence in evaluating summary judgment, as well as Google's arguments disputing it. (*Id.*) Thus, when combined with Reid's other evidence, Hoelzle's and Rosing's comments provide only part of the evidence submitted which raised a triable issue of fact as to pretext. (*Cf., e.g., Fisher v. Pharmacia & Upjohn* (8th Cir. 2000) 225 F.3d 915, 923 (reversing summary judgment because "even assuming that the comments made by [plaintiff's supervisor, the vice president of the employer-company, and a company director] were nothing more than stray remarks, we conclude that these statements, when considered in conjunction with [plaintiff's] prima facie case and showing of pretext, give rise to an inference of intentional discrimination"); *Hayes v. Compass Group USA* (D. Conn. 2004) 343 F.Supp.2d 112, 120 (even though plaintiff's statistical evidence and evidence of discriminatory comments alone would not defeat summary judgment, when coupled together, the evidence raised a triable issue of fact sufficient to permit the case to proceed to a jury); *Ercegovich v. Goodyear Tire & Rubber Co.* (6th Cir. 1998) 154 F.3d 344, 355-356 (reversing summary judgment on plaintiff's age-discrimination claim, explaining "we do not view each discriminatory remark in isolation, but are mindful that the remarks buttress one another as well as any other pretextual evidence supporting an inference of discriminatory animus.").)

In sum, the Court of Appeal correctly applied the applicable law to all the evidence in the record in reaching its holding that Reid demonstrated the existence of triable issues of fact defeating summary judgment.

Review of Google's first issue is unwarranted.

IV. Review of Google's Second Issue Is Unwarranted; Google Has No Standing To Raise The *Biljac* Issue Because The Court Never Held Google Had Waived Its Objections And Instead Considered Google's Objections On The Merits.

It is unclear what Google is advocating in its second issue. The Court of Appeal did *not* hold that Google's failure to obtain a ruling from the trial court on its evidentiary objections constituted a waiver of the objections, although such an approach would have been well-supported under California law, including two decisions by this Court.[9] Instead, the Court of Appeal addressed Google's evidentiary objections on the merits, consistent with the approach taken in *Biljac Associates v. First Interstate Bank of Oregon* (1990) 218 Cal.App.3d 1410, 1419-20 and other cases.[10]

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[9] *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670 n.1; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186 n.1; *see also Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 579 (objections deemed waived for lack of trial court ruling); *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 140-41 (same); *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 623-24 (same) *overruled in part on other grounds, Zamos v. Stroud* (2004) 32 Cal. 4th 958, 973; *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 736 (same).

[10] *See also Tilley v. CZ Mater Assn.* (2005) 131 Cal.App.4th 464, 479 (merits of objections considered despite lack of trial court ruling); *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 238 (same); *Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 864 (same); *City of Long Beach v. Farmers and Merchants Bank* (2000) 81 Cal.App.4th 780, 784-85 (same); *Lincoln Fountain Villas v. State Farm* (2006) 136 Cal.App.4th 999, 1010, n.4; *Chevoit Vista Homeowners Ass'n* (2206) 143 Cal.App.4th 1486, 1500, n.9 (same).

Moreover, the *Biljac* approach is *exactly* the approach advocated by Google in its Respondent's Brief below. (*See* RB at 28, n.4.)

Reid assumes Google is not now advocating that the Court of Appeal should have followed the analysis set forth in *Sharon P.* and *Ann M.* and held that Google's objections had been waived. In fact, Google spends five pages of its Petition (Pet. at 24-28) attacking the waiver approach as "unjust" and criticizing California courts for following what Google characterizes as "*dicta* in mere footnotes" from this Court's *Ann M.* and *Sharon P.* decisions. (Pet. at 24.) In any event, the Court of Appeal did not simply hold that Google's objections had been waived. Instead, as Google had urged in its Respondent's Brief, the Court of Appeal addressed the objections on the merits. (*Reid* at 1357-59.)

While Google contends the Court of Appeal "simply ignore[d]" its objections (Pet. at 32), the criticism is neither accurate nor fair. In truth, the Court of Appeal specifically addressed Google's objections and rejected them. (*Reid* at 1357-59.) In fact, Google's Petition actually quotes part of the Court of Appeal's analysis. (Pet. at 33, *quoting Reid* at 1359 ("Google does little more than lob attacks at the evidence with nothing to substantiate its assertions.")

To the extent Google is seeking review of the Court of Appeal's ruling on the merits of Google's evidentiary objections, that issue is not set forth in its Petition. Nor is it an issue worthy of this Court's attention. The Court of Appeal's analysis follows long-settled California rules of evidence. As the Court of Appeal held, Reid's expert declaration by Dr. Matloff was "clearly admissible." (*Reid* at 1358.) A mathematics and computer science professor at the University of California, Davis with thirty years of experience in the field of statistics, Dr. Matloff is one of the foremost authorities in the nation on statistical analysis of age discrimination in the computer industry. (APP01793.) His report concluded

there was a statistically significant negative correlation between age and performance ratings at Google, such that for every 10 year increase in age there was a corresponding decrease in performance rating. (*Reid* at 1355.) And when only director-level employees (like Reid) were considered, the negative correlation was *highly* statistically significant. (*Id.*)

Google had no expert of its own to rebut these findings or to challenge Dr. Matloff's methodology. (*Id.* at 1359.) The admissibility of Dr. Matloff's declaration was thoroughly briefed by the parties below and clearly addressed by the Sixth District in its decision. (*See* Reid's Opening Brief filed in the Court of Appeal ("AOB") at 28-36; RB at 16-21; Reid's Reply Brief in Court of Appeal ("ARB") at 10-21; *Reid* at 1355-59.) The Court of Appeal correctly found that Google's arguments against the Matloff declaration went only to the weight of the evidence, not to its admissibility. (*Reid* at 1359.)

At several points in its Petition, Google also suggests that the Court of Appeal should have remanded the evidentiary objections to the trial court for express rulings. (*See* Pet. at 17, 34-35.) If this is Google's issue for review, it also is neither framed in its Petition nor appropriate for review for two reasons.

First, Google *invited* the Court of Appeal to address its objections in its Respondent's Brief and never advocated that they be remanded to the trial court. (RB at 29, n.5 ("Google hereby renews *all* of its objections to Appellant's evidence.") (emphasis in original).) Apparently, Google would have been pleased to have had the Court of Appeal consider its objections had they been sustained. Of course, Google cannot have it both ways.

Second, the decision as to which issues to remand and which to address is within the sound discretion of the court of appeal. (Code of Civil Proc. sec. 43 ("The Supreme Court, and the courts of appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the

proper judgment or order to be entered, or direct a new trial or further proceedings to be had"); *see also Griset v. Fair Political Practices Commission* (2001) 25 Cal.4th 688, 701.) In fact, Google cites only one case in which the court of appeal, when faced with a trial court's failure to rule on evidentiary objections on summary judgment, remanded the case back to the trial court for rulings on the objections. (*See Vineyard Springs Estates, LLC v. Superior Court* (2004) 120 Cal.App.4th 633, 643.)[11] Most appellate courts facing this issue proceed to address the merits of the evidentiary objections.[12] There was nothing incorrect in the Sixth District's approach.

But to the extent Google is suggesting it is inappropriate for courts of appeal to address the merits of evidentiary objections, the contention is clearly without support. The courts of appeal address the merits of evidentiary objections all the time. (*See, e.g., Lincoln Fountain Villas*, 136 Cal.App.4th at 1010, n.4 (appellate court considered merits of objections to expert declaration); *see also* cases cited at footnote 10 above.)

Google's related contention that the court improperly considered the evidence to which Google objected is also clearly wrong and misperceives the standard of review on appeal from a summary judgment. (*See Lincoln Fountain Villas,* 136 Cal.App.4th at 1010, n.4 ("[I]t is our responsibility in reviewing an order granting summary judgment to independently determine the effect of the evidence submitted.") Contrary to Google's Petition, the Court of Appeal never "presumed" admissibility. (Pet. at 16, 30.) Instead,

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[11] Notably, the *Vineyard Springs* case arose on a writ petition from an order *denying* summary judgment. Google cites no cases in which the Court of Appeal remanded for further evidentiary rulings after summary judgment was *granted.*

[12] *See* cases cited in footnote 10 above.

it simply applied the correct standard of review to the issue.[13] If anything, it is Google that appears to *presume* inadmissibility. But that approach has been rejected repeatedly as contrary to Section 437c(c) of the Code of Civil Procedure, which requires the trial court to consider all evidence except that to which objections "have been made *and* sustained." (*E.g. Alexander*, 104 Cal.App.4th at 140; *Laird*, 68 Cal.App.4th at 736.)

In sum, regardless whether the "*Biljac* issue" has created a "procedural morass" and "complete lack of uniformity among the appellate districts" as Google claims (Pet. at 16, n.3, and 21), this case is not the vehicle to resolve the issue.[14] By following *Biljac,* instead of a strict waiver approach, the Court of Appeal's decision *benefited* Google because Google's objections were considered on the merits. While Google is unhappy with the Court of Appeal's ultimate decision as to its objections, that is a different issue not raised by its Petition (nor worthy of review.) As

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[13] *See Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (on summary judgment, all evidence and inferences are viewed in light most favorable to opposing party); *Everett v. Superior Court* (2002) 104 Cal.App.4th 388, 392 ("doubts about the propriety of granting the motion should be resolved in favor of the opposing party;" summary adjudication of plaintiff's discrimination claim reversed where trial court disregarded plaintiff's statistical evidence.)

[14] It is questionable whether such a lack of uniformity in fact exists. Most courts follow this Court's waiver analysis set forth in *Ann M.* and *Sharon P.* (*See* cases cited in footnote 9 above.) And those decisions that do not impose waiver turn on the extent to which the objecting party preserved and pursued its objections in the trial court. (*See, e.g., City of Long Beach*, 81 Cal.App.4th at 784-85 (merits of objections addressed where defense counsel twice raised objections orally); *Sambrano*, 94 Cal.App.4th at 234, 237-38 (merits of objections addressed where preserved in detailed written submissions); *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710 (merits of objections not preserved where defendant did not pursue them at hearing); *Tilley*, 131 Cal.App.4th at 479 (objections not addressed due to "nature and volume".)

to the "*Biljac* issue" that Google attempts to frame in its Petition, Google simply lacks standing to complain. (*See Cal. Const.*, art. VI, sec. 13; *In re Marriage of Moore* (1980) 28 Cal.3d 366, 373; *Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App. 4th 415, 431 (appellant lacks standing to challenge ruling favorable to itself.)

Review of Google's second issue is unwarranted.

V. Conclusion

Google's Petition for Review should be denied.

Dated: January 4, 2008

Respectfully submitted,

DUANE MORRIS LLP

By: _____

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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 14(c), I certify that this Answer Brief contains approximately 6,309 words, not including the Tables of Contents and Authorities, the caption page, signature blocks, attachments or this certification page.

Dated: January 4, 2008

Paul J. Killion

DECLARATION OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My business address is One Market, Spear Tower, Suite 2000, San Francisco, California 94105. I am a citizen of the United States and am employed in the City and County of San Francisco. On January 4, 2008, I caused to be served the following documents:

ANSWER TO GOOGLE'S PETITION FOR REVIEW

Upon the parties as listed on the most recent service list in this action by placing true and correct copies thereof in sealed envelopes as follows:

FOR COLLECTION VIA HAND DELIVERY:

Clerk of the Court California Supreme Court 350 McAllister Street, Room 1295 San Francisco, CA 94102	Original + 14 Copies -Appellant's Answer Brief

FOR COLLECTION VIA FEDERAL EXPRESS:

Marvin Dunson III, Esq. Marina C. Tsatalis, Esq. Gary M. Gansle, Esq. Fred W. Alvarez, Esq. Wilson Sonsini Goodrich & Rosati 650 Page Mill Road Palo Alto, CA 94304-1050	*Attorneys for Plaintiff and Appellant* Google, Inc. 1 Copy Appellant's Answer Brief

FOR COLLECTION VIA U.S. MAIL:

Clerk of the Court California Court of Appeal Sixth Appellate District 333 West Santa Clara Street, #1060 San Jose, CA 95113	1 Copy Appellant's Answer Brief

Hon. William J. Elfving
Santa Clara Superior Court
Department 2
191 North First Street
San Jose, CA 95113

1 Courtesy Copy
Appellant's Answer Brief

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 4, 2008, at San Francisco, California.

Vikki Domantay