ORIGINAL

Civil

S158965

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIAN REID,

Plaintiff and Appellant,

vs.

GOOGLE INC.,

Defendant and Respondent.

AFTER A DECISION OF THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT
CIVIL NO. H029602

SANTA CLARA COUNTY SUPERIOR COURT CASE NO. CV 023646
HONORABLE WILLIAM J. ELFVING, JUDGE

SUPPLEMENTAL BRIEF OF GOOGLE INC. PURSUANT TO THIS COURT'S APRIL 9, 2010, ORDER

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I. EVIDENTIARY OBJECTIONS MADE IN WRITING ARE MADE "AT THE HEARING" AS SECTION 437c REQUIRES

As this Court noted in requesting briefing, Code of Civil Procedure section 437c(d) states that evidentiary objections should be made "at the hearing." Written objections, such as those filed by Google Inc. here, satisfy that requirement.

A. The California Rules Of Court Specifically Permit Objections To Evidence To Be Made In Writing.

California Rule of Court 3.1352 explains how — and when — summary judgment objections are made. That rule provides that "[a] party desiring to make objections to evidence . . . on a motion for summary judgment must *either*: (1) Submit objections in writing under rule 3.1354; *or* (2) Make arrangements for a court reporter to be present at the hearing." (Emphasis added.) Rule 3.1354(a) states that "written objections . . . must be served and filed at the same time as the objecting party's opposition or reply papers are served and filed." Rule 3.1354(b) proceeds to set forth a detailed format for written objections; Rule 3.1354(c) requires (and sets forth a specific format for) a Proposed Order on the objections.

Thus, the Rules of Court give the objecting party a choice. The party can file written objections in advance, in the form prescribed. *Or* the party may ensure that a court reporter is present to take down verbal objections articulated at the hearing. Here, Google filed written objections in the form prescribed.

Rule 3.1352 accurately states the law. Written objections made *before* the hearing are deemed made "*at* the hearing." One "makes" at the hearing all of the arguments in the papers for that hearing — including previously filed written objections. *See* CAL. CIV. CODE § 1010 (requiring that a party give notice of when a hearing on a motion is to take place, and service of papers setting forth the grounds upon which the motion "will be made" at the hearing).

B. The Legislature Should Be Deemed To Have Ratified The Rules Of Court Because The Rules Of Court Have Permitted Written Objections For More Than 25 Years.

The evolution over time of the Rules of Court and section 437c demonstrate that there is no contradiction between those provisions.

The Legislature in 1990 crafted the current "at the hearing" language. Stats. 1990, c. 1561 (S.B. 2594), § 2. Both before and after that

amendment, the Rules of Court expressly allowed parties to choose how to record their objections. Specifically, effective January 1, 1984, the Judicial Council promulgated California Rule of Court 343, the predecessor to current Rule 3.1352. Rule 343 gave litigants the same choice — to file written objections in advance, "*or*" to make "arrangements for a court reporter to be present at the hearing" — that Rule 3.1352 offers today. (Emphasis added.) That rule remained in effect until 2002. The Judicial Council that year changed the wording of the Rule on a minor point not here relevant (the phrase "shall . . . submit" was changed to "must . . . submit"). Rule 343 remained in effect until 2007. The rule then was renumbered as 3.1352, but left substantively unchanged. Thus, the substance of the Rule has not changed for more than 25 years.

The evolution of section 437c over that time period reveals that there is no inconsistency between the statute and Rule. During the quarter-century that the Rules have given litigants a choice between written and verbal objections, the Legislature amended section 437c some 10 times. The Legislature must be presumed to know what the Rules provide. If the Rule were inconsistent with the statute, it is logical to assume that, in the Legislature's 10 revisions of section 437c, it would have amended the statute expressly to correct the Rule. That the Legislature for more than 25 years has allowed Rule 3.1352 (and its predecessor) to coexist with section 437c is

telling evidence that the Legislature perceives no inconsistency. *See, e.g.*, *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 178 (1999) (declining to overrule a prior interpretation after decades of legislative inaction); *People v. Ledesma*, 16 Cal. 4th 90, 100-101 (1997) (failure to change the statute raised the presumption of the Legislature's acquiescence); *Cole v. Rush*, 45 Cal. 2d 345, 355 (1955) ("The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended.").

C. The Courts Of Appeal Have Found No Inconsistency Between The Statute And The Rule.

The lower-court cases treat compliance with Rule 3.1352 as compliance with the statute. *See, e.g.*, *Superior Dispatch, Inc. v. Superior Court*, 181 Cal. App. 4th 175, 192 (2010) ("A party objecting to evidence presented on a summary judgment motion must either object orally at the hearing *or* timely file separate, written evidentiary objections."; here, "by failing to timely object *in the manner required by the California Rules of Court*, Superior waived its objections") (emphasis added); *Vineyard Springs Estates, LLC v. Superior Court*, 120 Cal. App. 4th 633, 638 & n.3, 643 (2004) (citing former Rule 343 and treating as valid both "written evidentiary

objections" to opposing counsel's declaration and an "oral[] [objection] to [a different declaration at the hearing"; it is "a bitter pill for a party who has tendered valid objections" when the trial court fails to rule on them); *City of Long Beach v. Farmers & Merchants Bank*, 81 Cal. App. 4th 780, 783 (2000) (citing both section 437c(d) and Rule 343 and holding that evidentiary objections were preserved; "rule 343 of the California Rules of Court sets forth the procedure for ensuring the existence of a proper record").

D. The Drafting History Of Section 437c Supports Google's Position That Written Objections Suffice.

The drafting history of the 1990 amendment supports Google's position. The 1990 amendment addressed several significant summary judgment issues. The most important was to redefine exactly what could, and what could not, be resolved on a motion for summary adjudication of issues. The amendment also dealt with evidentiary objections. Section 437c(d) previously had stated that evidentiary objections were waived if not raised "in writing or orally at the hearing." The 1990 amendment deleted the words "in writing or orally," so that the statute thereafter simply required evidentiary objections to be made "at the hearing."

Reid may attempt to attach significance to the deletion of the words "in writing." To do so overlooks that the word "orally" also was removed. The 1990 statutory change simply was agnostic on the manner in which objections had to be presented; the statute simply required objection to be presented to the trial court, not stockpiled and sprung for the first time on appeal.

The 1990 bill on its face reveals the purpose of the statutory change. The Legislature sought to overrule two 1986 court of appeal decisions. In *Witchell v. De Korne*, 179 Cal. App. 3d 965 (1986), the court of appeal reversed a summary judgment even though plaintiff had not opposed it in writing; plaintiff's counsel simply appeared at the hearing, offered to file opposition papers, and requested a continuance. The trial judge deemed that too little, too late, and granted the motion as substantively unopposed. Plaintiff appealed, contending that the evidence supporting the motion was defective in both substance and form, and that summary judgment should not have been granted. The court of appeal agreed. It noted that "the 1980 amendment to section 437c . . . added a provision for waiver of evidentiary objections not asserted in a timely manner." *Id.* at 974. The court held, however, that it would be "inappropriate" to conclude that plaintiff's appeal therefore was barred.

"[T]here can be no waiver of the right to object to matters inadmissible by virtue of incompetency." *Id.*

Later that year, a different court of appeal panel cited *Witchell* for that proposition. In *Zuckerman v. Pacific Savings Bank*, 187 Cal. App. 3d 1394 (1986), plaintiffs appealed from a summary judgment against them in a loan-default dispute. Plaintiffs opposed the summary judgment in the trial court. They objected to some, but not all, of the evidence presented by the moving party. Later, on appeal, they shifted course, attacking as inadmissible certain documents to which they previously had not objected. The court of appeal declined to find waiver and entertained their argument on the merits, repeating what *Witchell* had said: "[T]here can be no waiver of the right to object to matters inadmissible by virtue of incompetency." *Id.* at 1404.

Those cases triggered the 1990 amendment to section 437c. The enacted bill, c. 1561, provides on its face, in Section 1: "It is the intent of this legislation to provide that all objections to the form and substance of the moving and opposing papers shall be first made in the trial court and not on appeal . . . and to expressly overrule the rules stated in *Witchell v. De Korne*, 179 Cal. App. 3d 965 and *Zuckerman v. Pacific Savings Bank*, 187 Cal. App. 3d 1394." Thus, the bill by its terms required objections be made

to the trial court. See CALIFORNIA POINTS & AUTHORITIES § 221.22[2][b] (Matthew Bender 2010) ("In connection with these amendments, the Legislature expressly noted its intent that all objections to the form and substance of the moving and opposing papers must first be made *in the trial court* and not on appeal . . . .") (emphasis added). The 1990 amendment took no position on *how* those objections needed to be presented — leaving that to the Rules of Court previously discussed. *See Mann v. Cracchiolo*, 38 Cal. 3d 18, 29 (1985) (courts may adopt "rules with the force of law" with respect to summary judgment motions; section 437c did not preclude "reasonable . . . rules limiting the time to file opposition to the summary judgment motion").

If the Legislature had intended to change more than those two cases — that is, if it had intended to change the longstanding Rules of Court governing how objections are made — one would think that there would have been some mention of that intent. But there is none. The statute and legislative history are silent as to any intent to change the established practice of how evidentiary objections might be made at or before the hearing.

II. ANY CONTRARY READING OF THE STATUTE WOULD WASTE COURT TIME AND PRODUCE ABSURD RESULTS

It makes no sense to consume scarce hearing time by repeating written objections earlier filed. No lawyer recites the objections again at the hearing (other than, perhaps, one or two especially key objections). No trial judge allows, let alone insists on, repetition of the objections.

If this Court construes section 437c to require such repetition, scarce court time will be consumed repeating to the trial judge that which the well-prepared judge already knows. The specter would call to mind a scene from "Mr. Smith Goes To Washington," in which the protagonist drones on to a near-empty chamber in a filibuster — except that, here, the chamber is our courtrooms, filled with busy litigants, lawyers and judges in an era of court closures and staff furloughs. Reading written evidentiary objections into the record is a waste of time that the Legislature cannot have intended. *Cf. Mediterranean Construction Co. v. State Farm Fire & Casualty Co.*, 66 Cal. App. 4th 257, 264 (1998) ("Any experienced lawyer who has doggedly waited through a tedious law-and-motion calendar understands the need, when his or her turn finally comes, to get to the point. There is no time . . . ; it is necessary to speak out about what is important . . . .").

Perhaps, however, Reid will contend that the objecting party need not recite the objections *in haec verba*, but must say something like, "I renew my written objections." There are two responses. First, while that would consume little time, it also would be a trap for the unwary. And it would be a trap that produces no benefit; the trial judge already knows that objections were filed, and what they are.

At the summary judgment hearing, it is common practice for a trial judge to say, "Counsel, do you have anything to add to your papers?" If counsel says "no," that should be treated as a reaffirmation of what previously had been written — including any objections — not as a withdrawal or waiver of them. Consider two scenarios, when a trial court asks counsel whether he or she has anything to add:

In Scenario #1, counsel responds, "No."

In Scenario #2, counsel responds, "No, except that I incorporate by reference my written evidentiary objections."

There simply cannot be any substantive difference between these two scenarios. The mantra in Scenario #2 is pointless. The procedure set forth in Rule 3.1354 requires presentation of written objections in the most detailed

form possible, *id.* 3.1354(b), accompanied by a user-friendly proposed order for the trial judge to memorialize his or her rulings, *id.* 3.1354(c). No verbal presentation of objections could possibly be as orderly. *See* Robert I. Weil & Ira A. Brown, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 10:210.1a (Rutter Group 2009) ("It is *strongly recommended* that you serve and file written objections . . . . Judges who have reviewed the motion and opposition papers and may have reached a tentative decision may be unreceptive to oral objections not considered in preparation for the hearing.") (emphasis in original).

Second, in this case Google at the hearing *did* renew its objections. Counsel argued: "[T]he majority of [the evidence plaintiff relies upon] is also inadmissible. . . . We ask you to please review the evidence very carefully in this case and our objections to their evidence." (RT 48-49.) Counsel then proceeded to discuss several specific pieces of disputed evidence, including:

- "the Becky LaBelle declaration, a woman that was never a Google employee and signed a declaration expressly full of her opinions and impressions[,] [should] not be admissible." (RT 49.)

- a declaration from opposing counsel, who should "not be permitted to testify about internet articles" he had read. (*Id.*)

- incompetent statistical evidence. (RT 51-53, 87.)

- a purported transcript of an interview on garage.com, which was "unauthenticated and . . . clearly not competent or admissible evidence." (RT 85.)

Google made written objections, just as the law allows. That suffices without more, but out of an abundance of caution Google at the hearing incorporated all by reference, and repeated some with specificity. The law requires no more.

III. THE QUESTIONS POSED IN THIS COURT'S APRIL 9 ORDER NEED NOT BE RESOLVED TO DECIDE THIS CASE; EVEN ASSUMING *ARGUENDO* THAT GOOGLE'S EVIDENTIARY OBJECTIONS WERE NOT PRESERVED, THE DISPUTED EVIDENCE WAS SUBSTANTIVELY INSUFFICIENT TO RAISE A TRIABLE QUESTION OF DISCRIMINATION

In the end this case does not turn on evidentiary objections. Even if (for whatever reason) plaintiff's evidentiary proffer was *admissible*, it was not *sufficiently probative* to raise a triable question of discrimination. That issue is beyond the scope of this Court's April 9 order requesting supplemental briefing, but Google at oral argument will develop the argument to this effect made in its earlier briefs.

Respectfully submitted,

DATED: April 30, 2010

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.504(d)(1), counsel for Respondent hereby certifies that the **SUPPLEMENTAL BRIEF OF GOOGLE INC. PURSUANT TO THIS COURT'S APRIL 9, 2010, ORDER** is proportionally spaced, uses Times New Roman 13-point typeface, and contains 2,528 words, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, as determined by our firm's word processing system used to prepare this brief.

Respectfully submitted,

DATED: April 30, 2010

PAUL, HASTINGS, JANOFSKY & WALKER LLP

WILSON SONSINI GOODRICH & ROSATI

By: Paul W Cane

Paul W. Cane, Jr.

Attorneys for Defendant and Respondent
GOOGLE INC.

CERTIFICATE OF SERVICE

CASE NAME: *Brian Reid v. Google, Inc.*

CASE NO.: Supreme Court No.: S158964
Sixth Appellate District, Court of Appeal No. H029602
Santa Clara County Superior Court No.: CV023646

I hereby declare that I am a citizen of the United States and employed in San Francisco County, California. I am over the age of 18 years and not a party to the within-entitled action. My business address is 55 Second Street, Twenty-Fourth Floor, San Francisco, California 94105-3441. On April 30, 2010, I served a copy of the attached document(s) described as:

SUPPLEMENTAL BRIEF OF GOOGLE INC.
PURSUANT TO THIS COURT'S APRIL 9, 2010, ORDER

on the parties as follows:

☒ ***VIA U.S. MAIL***: I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice such sealed envelope(s) would be deposited with the U.S. Postal Service on April 30, 2010 with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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Court of Appeal:

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Sixth Appellate District
333 West Santa Clara Street, #1060
San Jose, CA 95113
(Case No. H029602)
(1 Copy)

Trial Court:

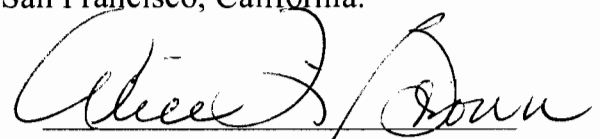
The Honorable William J. Elfving
Judge of the Superior Court
Santa Clara County Superior Court
191 North First Street
San Jose, CA 95113
(Case No. CV023646)
(1 Copy)

In addition, I caused to be served by *JoshCo. Attorney Services* an original and thirteen (13) copies of the aforementioned document, addressed as follows:

Supreme Court of California
Office of the Clerk, First Floor
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. I further declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 30, 2010, at San Francisco, California.



Alice F. Brown